

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR  
THE PROVINCE OF BRITISH COLUMBIA)

BETWEEN:

WEYERHAEUSER COMPANY LIMITED

Appellant (Respondent)

and

COUNCIL OF THE HAIDA NATION and GUUJAAW, on their own behalf and on behalf of  
all members of the Haida Nation

Respondents (Appellants)

AND BETWEEN:

THE MINISTER OF FORESTS and THE ATTORNEY GENERAL OF BRITISH  
COLUMBIA on behalf of Her Majesty the Queen in right of the Province of British Columbia

Appellants (Respondents)

and

COUNCIL OF THE HAIDA NATION and GUUJAAW, on their own behalf and on behalf of  
all members of the Haida Nation

Respondents (Appellants)

and

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WEYERHAEUSER COMPANY LIMITED  
(Rule 42, Supreme Court Rules)**

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## **PART I – STATEMENT OF FACTS**

1. This is an appeal from a judgment of the British Columbia Court of Appeal holding, among other things, that the Appellant Weyerhaeuser Company Limited (“Weyerhaeuser”) has legally enforceable duties to the Haida people to consult with them and to seek workable accommodations of their interests.
2. The Court’s judgment arose in a judicial review proceeding in which the Haida challenged the decision of the Minister of Forests to replace Weyerhaeuser’s tree farm licence, part of which affects land claimed by the Haida.
3. This appeal raises the issues of whether a private individual or corporation operating on Crown land claimed by an aboriginal group is under a legal obligation to consult with that group and make reasonable efforts to accommodate their asserted interests and, if so, whether this is an independent obligation arising from the general law or is an obligation that arises only upon default by the Crown of the Government’s obligations to the aboriginal group.

### **Regulation of Forestry Activities on Crown land in British Columbia**

4. In British Columbia, forestry activities on Crown land are regulated primarily pursuant to the *Forest Act*, which was first enacted in 1912, the *Forest Practices Code Act*, which was enacted in 1995, and regulations passed pursuant to these statutes. Under the *Forest Act*, the Legislature has conferred upon the Minister of Forests the authority to grant various forms of tenure that permit third parties to conduct timber harvesting activities on Crown land, subject to the terms and conditions set out in the tenure documents and governing legislation. Some of the more common forms of tenure include the forest licence, timber sale licence, timber licence, and tree farm licence. The case at bar concerns a tree farm licence.

*Forest Act*, R.S.B.C. 1996, s. 12

5. The terms of a tree farm licence are derived from several sources. The *Forest Act* sets out a number of terms which are required to be included in the licence document. The

licence contains more detailed terms and conditions, one of which is a requirement for the licensee to prepare a management plan for the licence area.

*Forest Act*, R.S.B.C. 1996, s. 35

6. The grant of a tree farm licence confers the exclusive right to harvest timber from the tree farm licence area during the term of the tree farm licence, but does not carry with it the immediate right to cut trees. In order to cut any timber, the licensee must obtain a cutting permit from a district manager of the Ministry of Forests. The amount of timber that can be cut each year is determined by the allowable annual cut, which is the annual harvest approved by the Chief Forester of British Columbia for each licence area.

*Forest Act*, R.S.B.C. 1996, s. 35

Chief Forester’s Rationale for Allowable Annual Cut (AAC) Determination for TFL 39, First Duckworth Affidavit, Ex. C, Appellants’ Record, Vol. 4, pp. 624-687

7. Tree farm licences are granted for terms of twenty-five years. The statute provides for a replacement of these licences before the expiry of their terms, so that the licence holder has some expectation of longer-term tenure in order to provide some level of assurance in making capital and other long-range decisions. In 2000, when this proceeding commenced, the *Forest Act* provided for a replacement of the licence after the first five years of its twenty-five year term<sup>1</sup>. Specifically, the statute provided that the Minister “must” offer a replacement licence within a designated period of time, after which the licensee has a period of time to decide whether to accept the offer of replacement. If the offer is not accepted, the original licence continues in place for the remaining twenty years, after which it expires. There are no provisions for renewal of licences. If the offer is accepted, a replacement licence is entered into, with a new twenty-five year term.

*Forest Act*, R.S.B.C. 1996, s. 36

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<sup>1</sup> Since this proceeding was commenced, the *Forest Act* has been amended to change the timeframe for the replacement of tree farm licences, but the replacement is still mandatory under the Act, and the amendments do not appear to affect the issues raised by this appeal: Bill 45, the *Forest (Revitalization) Amendment Act (No.2)*, 2003, SBC 2003, c. 31, sections 23-24.

### **Weyerhaeuser’s Licence**

8. Weyerhaeuser and its predecessor MacMillan Bloedel Limited have engaged in logging activities on the Queen Charlotte Islands in British Columbia since around the time of World War I. MacMillan Bloedel acquired Tree Farm Licence 39 (“TFL 39”), which covers areas both on and off the Queen Charlotte Islands, in 1961. A portion of TFL 39 known as Block 6 is located on the Queen Charlotte Islands. Some of the land covered by Block 6 of TFL 39 is private land owned by Weyerhaeuser in fee simple; the majority is Crown land. MacMillan Bloedel conducted logging operations pursuant to TFL 39 until the transfer of its rights under TFL 39 to Weyerhaeuser in November 1999. Since then, Weyerhaeuser has carried out these operations.

Trial Reasons for Judgment, para. 6(c), Appellants’ Record, Vol. 1, p.8

9. TFL 39 was replaced in 1981 in accordance with the *Forest Act* of the day, and again in 1995. The Council of the Haida Nation objected to the 1995 replacement and commenced judicial review proceedings in respect of it. A preliminary issue argued concerning the interpretation of a provision of the *Forest Act* was heard by the Court of Appeal, but the Haida elected at that time not to pursue the judicial review proceeding to judgment.

Trial Reasons for Judgment, para. 6(f), Appellants’ Record, Vol. 1, p.8

10. In 1999, Weyerhaeuser acquired TFL 39 as part of its acquisition of the shares of MacMillan Bloedel. By this time, MacMillan Bloedel had developed a number of policies that it applied to its operations on the Queen Charlotte Islands in an attempt to address the stated concerns of the Haida, policies that Weyerhaeuser has continued and expanded. These include:

- (a) protecting culturally modified trees located on Block 6 from logging;

Trial Reasons for Judgment, para. 38(a), Appellants’ Record, Vol. 1, p. 32  
Affidavit of Joseph Duckworth (the “First Duckworth Affidavit”), paras. 17-38, Appellants’ Record, Vol. 4, pp. 580-586

- (b) supplying large cedar logs to the Haida for cultural and other uses under Weyerhaeuser’s “cedar policy”;  
  
Trial Reasons for Judgment, para. 38(b); Appellants’ Record, Vol. 1, p. 32  
First Duckworth Affidavit, paras. 17-38, Appellants’ Record, Vol. 4, pp. 580-586
- (c) protecting cedar seedlings from damage or destruction by deer browsing;  
  
Trial Reasons for Judgment, para. 38(c); Appellants’ Record, Vol. 1, p. 32  
Affidavit of Ken Sparkes, paras. 9 and 11, Appellants’ Record, Vol. 6, pp. 1011-1012
- (d) voluntarily deferring applications for cutting permits in the fourteen “Haida Protected Areas” on Block 6; and  
  
Trial Reasons for Judgment, para. 38(d); Appellants’ Record, Vol. 1, p. 32  
First Duckworth Affidavit, paras. 5-16, Appellants’ Record, Vol. 4, pp. 576-579
- (e) instituting variable retention logging methods, which reduce environmental damage and promote natural reforestation.  
  
Trial Reasons for Judgment, para. 38; Appellants’ Record, Vol. 1, p. 32  
Affidavit of William Beese, paras. 7-20, Appellants’ Record, Vol. 4, pp. 567-573

11. In 1999, the Minister of Forests offered MacMillan Bloedel a replacement licence for the 1995 licence in accordance with the provisions of the statute. Weyerhaeuser following its acquisition of MacMillan Bloedel accepted this offer and the Minister issued replacement Tree Farm Licence 39, effective March 1, 2000. The decision to offer a replacement licence to Weyerhaeuser is the decision challenged in these proceedings.

Trial Reasons for Judgment, para. 6(g), Appellants’ Record, Vol. 1, p. 9

12. The 2000 licence contains a number of terms that impose requirements on Weyerhaeuser relating to aboriginal people, including the following:

- (a) The land that Weyerhaeuser may harvest is to be selected having regard to, among other things, the use of the area by aboriginal people claiming an aboriginal interest in or to the area

Paragraphs 1.02(a) and 1.12(g)(ii), Appellants' Record, Vol. 3, pp. 465 and 467

- (b) Weyerhaeuser has the obligation to submit to the Regional Manager a draft management plan that inventories the cultural heritage resources of the Licence Area and proposes management objectives regarding the integration of harvesting activities in the Licence Area with the use of the Licence Area by aboriginal people claiming aboriginal interest in or to the area

Paragraphs 2.08, 2.09(c)(ii) and 2.09(e)(iii)(B), Appellants' Record, Vol. 3, pp. 472-473

- (c) Weyerhaeuser also has the obligation, with respect to its draft management plan, to specify measures it will take to identify and consult with aboriginal people claiming an aboriginal interest in or to the area

Paragraph 2.09(g)(ii), Appellants' Record, Vol. 3, pp. 473-474

- (d) Weyerhaeuser has an obligation to provide stakeholders, expressly including aboriginal people, with a public review of its draft management plan.

Paragraph 2.12, Appellants' Record, Vol. 3, p. 475

- (e) Weyerhaeuser has similar obligations to the above in respect of a proposed management plan

Paragraphs 2.27(d)(ii), 2.27(f)(iii)(B) and 2.27(h)(ii), Appellants' Record, Vol. 3, pp. 478-480

- (f) If the Chief Forester considers that interference with an aboriginal right has rendered Weyerhaeuser's management plan inadequate, the Chief Forester may require that Weyerhaeuser amend that management plan

Paragraph 2.38, Appellants' Record, Vol. 3, p. 484

- (g) All of the provisions of the Licence are subject to Part 10, entitled "Aboriginal Rights and/or Title", which provides that the Ministry of Forests can vary any permit granted to Weyerhaeuser so as to be consistent with a court's determination of aboriginal rights or title

Part 10, TFL 39, Appellants' Record, Vol. 3, pp. 492-494

Tree Farm Licence No. 39 dated March 1, 2000 between The Minister of Forests and Weyerhaeuser Company Limited; Affidavit of Brad Harris, Exhibit "E", Appellants' Record, Vol. 3, pp. 463-534

### **Course of Proceedings**

13. The Council of the Haida Nation filed the original Petition challenging the intended replacement of TFL 39 on January 13, 2000. After TFL 39 was replaced, the Haida filed a Further Amended Petition in May of 2000. In this Further Amended Petition, the Haida sought a declaration of invalidity of TFL 39 for a number of reasons, including the failure of the Crown to consult adequately with them before replacing the licence in 2000.

Further Amended Petition, Appellants' Record, Vol. 2, pp. 195-202

14. Underlying the position of the Haida throughout has been their claim that the Haida Nation has unextinguished aboriginal title to the whole of Queen Charlotte Islands including Crown and private lands. By agreement, the issue of whether the Haida have such aboriginal title or rights was referred to the trial list. No steps have been taken with respect to this issue in these proceedings, but since these proceedings were commenced, the Haida have commenced a separate action in the British Columbia Supreme Court claiming aboriginal title to the whole of the Queen Charlotte Islands. That action has not progressed beyond the pleadings stage. For several years, the Haida engaged in treaty negotiations with the B.C. and Canadian governments pursuant to the B.C. Treaty Process, but those negotiations have not resulted in any agreement.

Order of Edwards J., Appellants' Record, Vol. 2, pp. 205-206  
Haida writ, March 2002, Appellants' Record, Vol. 2, pp. 211-224

15. The Province of British Columbia defended the Petition on the ground that asserted, as opposed to proven, aboriginal rights or title did not give rise to a constitutional or fiduciary duty of consultation owed to aboriginal people on the part of the Province. No issue arose with respect to Weyerhaeuser's obligations, as no suggestion was made by the Haida that Weyerhaeuser had any obligation to consult them with respect to the replacement of the licence, or otherwise and accordingly no evidence was led or arguments made on this point.

### **B.C. Supreme Court**

16. The trial judge, Mr. Justice Halfyard, dismissed the Petition, primarily on the basis that “the scope of the Crown’s fiduciary duty to the Haida cannot be determined without a trial. Whether the duty requires that priority be given to Aboriginal title, and if so, whether the measures taken by the Crown are consistent with the principle of priority, are issues that depend on the nature and extent of the Aboriginal right or title at issue.”

Trial Reasons for Judgment, para. 28-29, Appellants’ Record, Vol. 1, p. 28

17. Justice Halfyard went on to conclude on similar reasoning that the Crown did not have an obligation to consult with the Haida before the nature and scope of any rights they had had been determined at trial. There was no claim, argument or evidence that there was any duty on the part of Weyerhaeuser.

Trial Reasons for Judgment, para. 30-34, Appellants’ Record, Vol. 1, pp. 28-31

### **B.C. Court of Appeal**

18. The appeal of this decision was heard February 8, 2002, one week after the B.C. Court of Appeal had released its decision in *Norm Ringstad et al. v. The Taku River Tlingit First Nation et al.* (“*Taku River*”).

19. It was not suggested or argued in the B.C. Court of Appeal that Weyerhaeuser owed the Haida a duty of consultation. The arguments focused on the question at the court below and in *Taku River* – namely, whether the Crown had a duty of consultation with aboriginal people in respect of asserted, as opposed to proven, rights.

### ***Haida I***

20. The B.C. Court of Appeal released its first set of reasons (“*Haida I*”) on February 27, 2002. In these reasons, the Court held that the Crown owed a fiduciary duty to the Haida to

consult with them and make reasonable efforts to accommodate the Haida’s asserted interests in the land. This judgment is the primary focus of the appeal to this Court by the Province of British Columbia.

Appeal Reasons for Judgment, *Haida I*, Appellants’ Record, Vol. 1, pp. 48-88

21. The Court also held that Weyerhaeuser had the same duty to consult the Haida and make reasonable efforts to accommodate their interests. Because that question had never been claimed or argued, Weyerhaeuser sought and was given the opportunity to make submissions with respect to it.

Reasons for Directions, Appellants’ Record, Vol. 1, pp. 89-97

### *Haida II*

22. In its supplementary reasons (“*Haida II*”), a majority of the Court of Appeal (Low J.A. dissenting) upheld the conclusion that there should be a declaration that Weyerhaeuser had an enforceable legal duty to consult with and make reasonable efforts to accommodate the Haida. The declaration was varied to provide that Weyerhaeuser’s duty had not arisen before the date of the judgment and that any reference to a breach by Weyerhaeuser of this duty should be expunged from the Reasons for Judgment in *Haida No. 1*.

Appeal Reasons for Judgment, *Haida II*, Appellants’ Record, Vol. 1, pp. 101-177

23. Chief Justice Finch and Justice Lambert, who formed the majority on the panel, each wrote separate judgments. Neither expressly agreed with the Reasons of the other, but they did agree on the form of order, which reads in relevant part as follows:

A declaration is made that the Crown provincial had in 2000, and the Crown and Weyerhaeuser have now, legally enforceable duties to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short-term and the long-term objectives of the Crown and Weyerhaeuser to manage T.F.L. 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.

Appeal Reasons for Judgment, *Haida II*, para. 104, Appellants' Record, Vol. 1, pp. 160-161

24. This is an appeal from that part of the order in which Weyerhaeuser was said to have legal obligations to the Haida. Weyerhaeuser also supports the Crown's appeal to the extent that the Court of Appeal has imposed obligations on the Crown to consult and accommodate unproven aboriginal interests that may be inconsistent with Weyerhaeuser's licence rights.

**PART II – POINTS IN ISSUE**

25. The questions in issue in this appeal are:

(i) Did Weyerhaeuser as a licensee operating on Crown land have an independent obligation to consult with and make reasonable efforts to accommodate the asserted but unproven aboriginal rights of the Haida?

(ii) If not, did Weyerhaeuser have such an obligation on the basis that the Provincial Crown had breached its own obligations to the Haida and that without an order against Weyerhaeuser, an order against the Crown would be ineffective?

26. The constitutional question stated in the Attorney-General's appeal, which will be addressed in this appeal is:

Is s. 36 of the *Forest Act*, R.S.B.C. 1996, c. 157, of no force and effect to the extent that the replacement of T.F.L. No. 39 violated any right of the Haida Nation, as recognized and affirmed by s. 35 of the *Constitution Act, 1982* to be consulted and to have their asserted aboriginal rights accommodated prior to the replacement?

### PART III – ARGUMENT

#### A. Introduction

27. Over the past fifteen years, in a series of cases beginning with the landmark judgment in *R. v. Sparrow*, this Court set out the law relating to aboriginal rights that are recognized and affirmed under section 35 of the *Constitution Act, 1982*. This Court has explained the content of such rights, how they must be proven, and what governments must do in order to justify infringement of such rights.

See e.g. *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533

28. The series of cases considered by this Court dealt with the validity of legislative acts of the Crown in the face of aboriginal rights that had been established at trial. In each case, the central questions for this Court were whether the right had been established; if so, whether the governmental regulation infringed that right; and if so, whether the infringement met the test of justification.

29. In 1997, this court addressed the question of land rights, and provided the same analytical framework for evaluating governmental action in relation to title claims.

*Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010

30. The parties in these cases were invariably the Crown (federal or provincial) and an aboriginal person or group claiming rights under section 35 of the *Constitution Act*. None of these cases required consideration of third party rights and obligations.

31. The two appeals before this Court are distinct from this jurisprudence in two respects. First, the issues arise before the establishment of rights the Haida may have in the Queen Charlotte islands. Second, these cases, and particularly the *Haida* appeal, raise for the first time

in this court the relationship between aboriginal title claims and third party rights and obligations.

32. The particular context of the case at bar is the conclusion of the British Columbia Court of Appeal that the Crown is under an obligation to consult with and make reasonable efforts to accommodate the asserted but unproven rights of aboriginal peoples, and that in certain circumstances Crown licensees have the same obligation. The broader issue raised by this case is the determination of what principles apply in the period before there has been a judicial determination of the rights of particular aboriginal peoples.

33. Unlike the cases that have reached this Court in the past fifteen years, both the *Taku River Tlingit* case and the case at bar began as applications under the *Judicial Review Procedure Act*, R.S.B.C. 1996 for judicial review of decisions of government officials exercising a statutory power of decision. Neither application challenged the validity of primary or subordinate legislation. The complaint in both cases was that the statutory decision-maker had erred by issuing a permit to authorize activity by a third party that would or might interfere with the asserted aboriginal title or rights of the claimants without adequately consulting the Petitioners.

34. In both cases the central question at the trial level was whether the Crown had an obligation to consult potentially affected First Nations before they had established that they had section 35 rights, i.e. before the question of justification of infringement could arise. The trial judges divided on this question. In the *Haida* case, the hearing judge concluded that the Crown was under no legal duty to consult with aboriginal people before issuing third party permits, following another decision at the B.C. Supreme Court level. The hearing judge in *Taku River Tlingit* came to the opposite conclusion, holding that the Crown was under such a duty, and had failed to comply with it.

Trial Reasons for Judgment, Appellants' Record, Vol. 1, pp. 14-31  
*Westbank First Nation v. British Columbia*, (2000), 191 D.L.R. (4th) 180,  
2000 BCSC 1139, para. 85, relying in part on *TransCanada Pipelines Limited*  
*v. Beardmore (Township)*, (2000) 186 D.L.R. (4<sup>th</sup>) 403 (Ont. C.A.) at para.  
199-120  
*Taku River Tlingit First Nation v. British Columbia* (2000), 77 B.C.L.R. (3d)  
310 (S.C.)

35. The proposition that the third party permittee was under any fiduciary consultation obligation first arose in the reasons for judgment of the Court of Appeal in *Haida I*, and was elaborated upon in *Haida II*.

36. The main thrust of *Haida I* was to reject the Provincial Crown's position that any Crown obligation to consult aboriginal people before authorizing potentially infringing actions arose only as part of the justification process after section 35 rights had been established. In the course of the Court's reasons for decision, however, the statement was made, without explanation, that Weyerhaeuser as licensee also had the obligation to consult and make reasonable efforts to accommodate that the Crown had. As this matter had not been raised or argued, Weyerhaeuser sought a supplementary hearing, which led to the reasons in *Haida II*.

37. While *Haida I* had been unanimous, the Court of Appeal was divided in *Haida II*. Lambert J.A. reiterated his view that Weyerhaeuser had a duty to consult the Haida, and provided three separate sources for such an obligation. Finch C.J.B.C. held that, in the circumstances of the case, Weyerhaeuser had such a duty, and provided one source for such an obligation. Since neither justice expressly agreed with the reasoning of the other, so it is difficult to extract a ratio from the judgment. Low J.A. dissented, expressing the view that the Court had been in error in *Haida I* in dealing with Weyerhaeuser's obligations in a judicial review proceeding.

## **B. Consultation as a Crown Obligation**

38. The central thesis of this submission is that, whatever rights aboriginal people have with respect to consultation and accommodation of their interests, and whenever such rights may arise, they reflect obligations of the Crown, not of third parties operating on Crown land.

39. The concept of an obligation of consultation with First Nations originates with this Court's decision in *Sparrow*, the judgment that first explained the justification analysis in relation to aboriginal rights. This Court explained that aboriginal rights are not absolute; they may lawfully be infringed by the Crown so long as the infringing act meets the Court's test of justification. One of the elements of justification is whether the aboriginal people who possess

the rights have been adequately consulted. Thus, consultation in the *Sparrow* sense is part of the justification analysis, which presupposes that the aboriginal right has been established (as it had in fact been established in *Sparrow*):

***Within the analysis of justification***, there are further questions to be answered, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether in a situation of expropriation, fair compensation is available; and ***whether the aboriginal group in question has been consulted*** with respect to the conservation measures being implemented.

*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119 at (f)-(g) (emphasis added).

40. This explanation of the role of consultation as part of the justification analysis was reiterated in other judgments that dealt with the validity of Crown primary or subordinate legislation, and in the landmark case of *Delgamuukw v. The Queen*, which applied the justification analysis to aboriginal title.

*Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010.

41. For example, in *Nikal*, this Court reiterated the *Sparrow* test for the second stage of the justification process in this way:

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, ***the honour of the Crown is at stake*** in dealings with aboriginal peoples. ***The special trust relationship and the responsibility of the government*** vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

*R. v. Nikal*, [1996] 1 S.C.R. 1013, at para. 109 (emphasis added)

42. In *Gladstone*, this Court was equally clear that the requirement to establish justification (once an aboriginal right had been established and a *prima facie* infringement made out) was on the Government:

In *Sparrow*, Dickson C.J. and La Forest J. articulated a two-part test for ***determining whether government actions infringing aboriginal rights can***

*be justified*. First, *the government must demonstrate* that it was acting pursuant to a valid legislative objective ... Second, *the government must demonstrate* that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples.... 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 aboriginal rights holders in the fishery.

*R. v. Gladstone*, [1996] 2 S.C.R. 723, para. 54, 62 (emphasis added)

43. More recently, this Court has again spoken of “the importance **in the justification context** of consultations with aboriginal people.” Once again, the context for the discussion was the validity of Crown legislation.

*R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, at para. 43(d) (emphasis added)

44. None of this Court’s jurisprudence suggests that the obligation of consultation may be imposed on third party licensees. The foundation for consultation and accommodation duties in the context of claims of aboriginal rights and title are the honour of the Crown and, where applicable, the Crown’s fiduciary relationship with aboriginal people. These sources do not support an extension of duties to third parties.

*Delgamuukw, supra.* at para. 162

45. This view of consultation as an element of public law applying to the Crown or public authorities is consistent with recent jurisprudence from this court in other areas of the law. For instance, in a recent labour case involving a claim of inadequate consultation, this Court held that if established, “such circumstances might well give rise to a claim of breach of ... the duty of procedural fairness lying on every public authority making an administrative decision ... which affects the rights, privileges or interests of an individual...”

*Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, at para. 127-1288, citing *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643

46. Before the *Haida* judgments, there does not appear to have been any suggestion in lower court jurisprudence or academic writings that private companies would bear the burden of the Crown's obligations of consultation and accommodation of aboriginal interests. Illustrative of the unanimous view of commentators is this statement:

It is government, not resource industries exercising rights to extract or develop resources on traditional Aboriginal lands, that has an obligation to consult with potentially affected Aboriginal peoples.

C. Sharvit, M. Robinson & M. Ross, "Resource developments on Traditional Lands: The Duty to Consult" (Calgary: Canadian Institute of Resources Law, 1999), at pp. 8-9

47. A third party is unable either to weigh or measure aboriginal claims that come to its attention, or to lead evidence of justification of its actions. The problem is particularly acute in British Columbia, where virtually the entire province and its resources are subject to claims of aboriginal title. This Court has said that the Crown may infringe aboriginal title where the infringement is justified, and that the test for justification has two parts. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. Second, the infringement must be consistent with the special fiduciary relationship between the Crown and aboriginal peoples. Neither test can apply to third parties.

*Delgamuukw, supra.*, paras. 161-162

### **C. Aboriginal Title Claims and Third Parties**

48. The relationship between aboriginal people and third parties is governed by private not public law. Where one party alleges that another party is interfering with its asserted but unproven rights, the courts have traditionally applied the equitable principles relating to interlocutory injunctions to determine the rights and obligations of the parties pending resolution of the asserted claim. That is the appropriate interim remedy to invoke when unproven claims are advanced to challenge licence rights.

49. To obtain an interlocutory injunction, an applicant must establish that it has a serious issue to be tried, that it will suffer irreparable harm if the injunction is not granted, and that the balance of convenience favours the grant of the injunction. As well, to protect the party that is being enjoined without a determination of the merits, the applicant is normally required to give an undertaking to the Court to pay all the damages of the party being enjoined if the applicant is not successful in establishing its case.

*RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311  
Rule 45(6), Supreme Court Rules

50. In *Haida I*, Lambert J.A. recognized that the interlocutory injunction was “a valuable interim process for balancing competing interests while litigation is pending” but held that “the interlocutory injunction process is not necessarily suitable for balancing competing interests in every case.” He then went on to propose what he described as 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.” This alternative framework was the (apparently interim) declaration that both the Crown and the Licensees had an obligation to consult with *and make reasonable efforts to accommodate* asserted but unproven aboriginal claims. No reference is made to the equitable principle of balancing interests before imposing interim remedies or to the other safeguards that govern the granting of injunctions.

Appeal Reasons for Judgment, *Haida I*, paras. 11-14, Appellants’ Record, pp. 53-55

51. The premise for this new obligation, which has both procedural (consultation) and substantive (accommodation) elements, appears to be the assertion that “the interlocutory injunction process is not necessarily suitable for balancing competing interests in every case.” There is however no analysis to support this conclusion, and the conclusion is surprising since the equitable principles applying to injunction applications require a balancing of competing interests through the assessment of the balance of convenience. By contrast, the obligations imposed by the Court of Appeal’s alternative framework appear to rest solely on the assessment by a government official and a licensee of the strength of the aboriginal title claim. Few if any

licensees will have the ability or resources to review or assess the strength or scope of such claims and it can be few First Nations who will want licensees to have such authority.

52. In *Haida I*, the Court of Appeal stated that the Haida had a “good *prima facie* case to a claim for aboriginal title and aboriginal rights.” The court went on to hold that the “strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation.”

Appeal Reasons for Judgment, *Haida I*, paras. 50-51, Appellants’ Record, pp. 81-82

53. An illustration of the practical difficulty that arises from this merits-based analysis to what is intended to be an interim remedy can be found in a judgment of the B.C. Supreme Court that attempted to follow these principles and assess the strength of the title claim in order to assess the adequacy of the Crown’s efforts to consult and accommodate. To follow the Court’s direction, Justice Tysoe ended up equating reasonable possibility of success to a *prima facie* case, reasonable *probability* of success to a good *prima facie* case, and *substantial* probability of success to a strong *prima facie* case. Under the Court of Appeal’s theory, this is an analysis that a licensee is to perform in order to determine whether consultation and accommodation is necessary and if so, to what extent.

*Gitksan and other First Nations v. British Columbia (Minister of Forests)*,  
2002 BCSC 1701, at para. 75

54. It was at one time thought that strength of the case was an important factor in determining entitlement to an interlocutory injunction. The merits test was characterized as a *prima facie* right, or a strong *prima facie* claim, or some similar standard requiring an evaluation of the strength of the claim. In 1975, the House of Lords deprecated this approach in language that could be applied directly to the case at bar:

The use of such expression as “a probability,” “a *prima facie* case” or “a strong *prima facie* case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. ... It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend

nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

*American Cyanamid v. Ethicon Ltd.*, [1975] A.C. 396, at 407

See also *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 335

55. In *RJR—MacDonald v. Canada*, this Court adopted the modern view of *American Cyanamid* that the merits test for an interlocutory injunction is whether there is a serious issue to be tried, and stated that the reasons for not assessing the merits of a constitutional case in more detail “included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.” All of these considerations apply to the merits assessment of an aboriginal title claim, particularly in a judicial review proceeding where there are no pleadings.

*RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 335

56. In placing emphasis on the strength of an unproven case, the Court of Appeal has failed to give effect to the evolution of equitable principles that apply to interim relief. The Court of Appeal’s alternative framework does not balance competing interests more effectively than the injunction process, because the availability of the remedy depends on an assessment of the claim, not on the balance of convenience.

#### **D. The Court of Appeal’s Remedial Order against Weyerhaeuser**

##### **(a) Reasons for Judgment of Lambert J.A..**

57. Lambert J.A. (speaking only for himself in *Haida II*) provided three sources for an obligation on Weyerhaeuser to consult with and make reasonable efforts to accommodate the interests of the Haida:

- (i) the provisions of the *Forest Act* and TFL 39 (para. 99);

(ii) the conclusion of the trial judge that there is a reasonable probability that the Haida people will be able to establish aboriginal title to at least some parts of Block 6, and what Justice Lambert characterized as Weyerhaeuser’s “knowing receipt” of trust property (para. 100); and

(iii) the opportunity said to be available to Weyerhaeuser to put up a defence of justification to any claim against it for violation of aboriginal title or aboriginal rights (para. 101).

58. None of these sources support the obligation expressed by Lambert J.A.

**(i) *The provisions of the Forest Act and TFL 39***

59. There are no provisions in the *Forest Act* that require a licensee to consult with First Nations before undertaking operations pursuant to Crown authority. It appears that the provision referred to by Lambert J.A. as having this effect is section 35(1)(d)(vi) of the *Forest Act*, which requires that every tree farm licence require its holder to submit for the approval of the chief forester a management plan that specifies measures to be taken by the licensee “to identify and consult with persons using the tree farm licence area for purposes other than timber production.”

Reasons for Judgment of Lambert J.A., *Haida II*, para. 39 and 52

60. These provisions do not impose a duty to aboriginal peoples who claim title to the operating area, but rather require that licensees identify to the satisfaction of a government official plans to consult other users of the licence area. In some cases there may be no requirement to consult anyone, depending on the view of the chief forester. Claims to title are irrelevant to this process.

61. In addition, there has never been any suggestion or evidence of dissatisfaction with the management plan proposed by the licensee, and no issue between the Crown and the licensee that would give rise to a *lis* requiring a declaration of obligation on the part of third parties.

62. The provisions of the licence document that bear on the subject are obligations of the licensee to the Crown, not to the First Nation. These provisions permit Crown officials to

require the licensee to engage in consultation and they permit Crown officials to withhold permits if the Crown officials believe granting the authority would infringe aboriginal rights. None of these licence obligations relate to the replacement of the licence, which was the issue at bar; they are operational matters. Presumably the Crown has imposed these licence conditions in order to minimize the possibility that the Crown will unjustifiably infringe section 35 rights.

TFL 39, March 1, 2000, paras. 2.09(e)(B); 2.11; 2.12(iii); 2.27(d)(ii); 2.27(f)(iii)(B); 2.27(h)(ii); 2.33(c); 2.38(d); 8.09; and Part 10.00; Appellants' Record, Vol. 3, pp. 463-534

63. After reviewing these licence obligations, Lambert J.A. makes two statements without providing the basis for them. Neither of these statements is supportable on an analysis of the licence. Lambert J.A. stated (again speaking only for himself):

And every obligation of consultation must carry with it an obligation to seek accommodation. Those obligations must be regarded as owed by Weyerhaeuser to the Haida people.

Reasons for Judgment of Lambert J.A., para. 60

64. There is nothing in the licence or the governing statute that suggests that the obligation of consultation must carry with it the substantial obligation of accommodation. More importantly, there is no basis for the assertion that Weyerhaeuser owes licence obligations to any party other than the Provincial Crown. It is the Provincial Crown that has conferred the licence upon Weyerhaeuser, and it is the Provincial Crown that has the powers to deal with failure to meet licence obligations.

See provisions of licence referenced at paragraph 12 of this factum.

65. There was no suggestion, evidence or argument that a declaration was necessary to ensure that Weyerhaeuser met its licence obligations. No one suggested that the management plan did not comply with the statutory requirements, and in fact, the record was replete with examples of the ways in which Weyerhaeuser has, through its management practices, sought to address Haida concerns over the years. The declaration ordered by the Court was unnecessary if

it was intended to relate to the Company’s licence obligations, and unsupported by the Act or licence if it was intended to go beyond these contractual requirements.

**(ii) “Knowing Receipt”**

66. Lambert J.A. also finds that Weyerhaeuser has a fiduciary duty to the Haida to consult them and make reasonable efforts to accommodate their interests. The source of this duty is said to be the trust principle of “knowing receipt”.

Appeal Reasons for Judgment of Lambert J.A., *Haida II*, para. 61-73

67. The equitable doctrine of “knowing receipt” provides that a third party who receives trust property with knowledge that the property was transferred to the third party in breach of trust may be affixed with liability for breach of trust. This doctrine is restitutionary and fundamentally proprietary in nature. It finds its inception and continued application in the traditional trust law context and is rooted in long-standing equitable proprietary principles.

*Gold v. Rosenberg*, 1997] 3 S.C.R. 767 at paras 40, 45-46  
*Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805 at para 46

68. The restitutionary nature of this remedy has been emphasized by this Court:

... (T)he receipt requirement for this type of liability is best characterized in restitutionary terms.... (A) restitutionary claim, or a claim for unjust enrichment, is concerned with giving back to someone something that has been taken from them. ... The imposition of liability as a constructive trustee on the basis of "knowing receipt" is a restitutionary remedy and should not be confused with the right to trace assets at common law or in equity.

*Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805 at para 30, 57

69. There are a great many difficulties in applying these principles to the case at bar, but perhaps the most obvious is that to apply restitutionary principles “concerned with giving back to

someone something that has been taken from them” presupposes that the licence and the rights conferred under the licence belong to the Haida.

**1. *It cannot be concluded that the licence is the property of the Haida.***

70. The first requirement of the “knowing receipt” analysis is that the subject matter of the litigation is the plaintiff’s property. As this Court put it recently:

In a knowing receipt case, the plaintiff sues to recover his or her property which has come into the possession of the defendant, as a result of a breach of trust.

*Gold v. Rosenberg*, 1997] 3 S.C.R. 767 at paras 40

71. To conclude that the licence and the rights conferred under the licence are the property of the Haida would require a determination that the Haida have aboriginal title or aboriginal rights to harvest timber in the interior of the Queen Charlotte Islands, the very question sent by consent order to the trial list, and an aboriginal right to the licence that was issued to Weyerhaeuser.

72. Even if the Haida succeeded in establishing that they have section 35 rights in relation to timber harvesting, it would not be possible to simply state that the licence and the rights conferred under the licence were their property, because such an assertion ignores the principles of justification that, if they apply, validate even an infringing transfer of a licence.

**2. *The licence does not constitute trust property.***

73. Even if the Haida could overcome the prematurity of concluding that the licence is their property, it would be necessary to establish that the licence constituted *trust* property and had been allocated in breach of trust. This Court has described the Crown’s relationship with aboriginal people as “trust-like”, but not that of trust, and has specifically rejected a restitutionary characterization of that relationship:

The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. ... No property interest is transferred which could constitute the trust res, so that even if the other indicia of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.

...

Nor does surrender give rise to a constructive trust.

...

**Any similarity between a constructive trust and the Crown's fiduciary obligation to the Indians is limited to the fact that both arise by operation of law; the former is an essentially restitutionary remedy, while the latter is not.**

...

The Crown's fiduciary obligation to the Indians is therefore not a trust.

*Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 386 (emphasis added)

### ***3. The licence was not replaced in breach of trust.***

74. Then, even if the licence could be considered trust property, it would be necessary for the Haida to establish that the licence had been replaced in breach of trust. This requires consideration of the issue raised by the appeal of the Province of British Columbia – whether the Court of Appeal was correct in concluding that the Crown breached trust or trust-like obligations to the Haida when the licence was replaced.

75. The essence of the Court of Appeal's analysis in *Haida I* is that the Provincial Crown owed a fiduciary duty to the Haida to consult with them before replacing Weyerhaeuser's tree farm licence because the Haida had a strong case for aboriginal title over at least some of the licence area, that the Crown breached that fiduciary duty by failing to consult adequately with the Haida, and that this created a legal defect in Weyerhaeuser's licence.

76. In *Haida II*, Justice Lambert went on to state that the “scope of Weyerhaeuser's ‘knowing receipt’ fiduciary duty must mirror itself on the Crown's fiduciary duty.” (para. 100).

Thus the nature of the Crown's fiduciary duty, if any, is essential to the analysis of the licensee's duty, in the view of Justice Lambert.

77. It follows that, if the Crown did not have the asserted fiduciary duty, then it could not have breached it, and the doctrine of knowing receipt can have no application to Weyerhaeuser.

78. Justice Lambert speaking for the panel in *Haida I* expressed the theory behind the Crown's fiduciary consultation obligation in this way:

In my opinion, the roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the aboriginal people of Canada. ...

The trust-like relationship is now usually expressed as a fiduciary duty owed by both the federal and Provincial Crown to the aboriginal people. Whenever that fiduciary duty arises, and to the extent of its operation, it is a duty of utmost good faith. ...

**So the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and the aboriginal peoples on the other.**

Appeal Reasons for Judgment, *Haida I*, para. 33-36, Appellants' Record, Vol. 1, pp. 71-72 (emphasis added)

79. This broad view of a fiduciary duty that "permeates the whole relationship between the Crown ... and the aboriginal peoples" has been rejected by this Court. In *Wewaykum Indian Band v. Canada*, this Court unanimously held that the fiduciary duty of the Crown is not of an all-encompassing nature, but rather arises only in specific instances:

The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

*Wewaykum Indian Band v. Canada*, 2002 SCC 79, at para. 81

80. This Court went on to explain that the test for determining whether the Crown owed a fiduciary duty to aboriginal people in a particular circumstance was whether the Crown had

assumed discretionary control in relation to a particular obligation or interest sufficient to ground a fiduciary obligation:

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

*Wewaykum, supra.*, para. 83

81. Finally, this Court emphasized the need to identify a “cognizable Indian interest” in order to create a fiduciary obligation:

I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. **The latter, however, depends on identification of a cognizable Indian interest**, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below.

*Wewaykum, supra.*, para. 85

82. It is the inability to establish a “cognizable Indian interest” in the case at bar that illustrates the error of the Court of Appeal’s analysis with respect to the Crown’s obligations. This Court made it clear in *Delgamuukw* that aboriginal rights and title were not to be presumed, but required proof on a case-by-case basis according to the tests set out in that judgment. Whether the Haida have a cognizable interest will depend on whether they can establish that they have aboriginal rights or title in Weyerhaeuser’s operating area, which is for another day.

See *Delgamuukw, supra.*, “Proof of aboriginal title”, paras. 140-159

83. These principles have recently been applied in a consultation case in the Federal Court, where a similar argument was made that the Crown had breached a broad fiduciary duty to consult with aboriginal people over regulations that were said to interfere with a claimed but unproven aboriginal right. The First Nation was relying on the sentence in *Delgamuukw* that

“there is always a duty of consultation,” as did Justice Lambert in *Haida I*. Dawson J. explained the fallacy in that reasoning:

With respect, however, the submissions appear to impermissibly assert a fiduciary duty at large. Chief Justice Lamer's remark in *Delgamuukw* cannot be taken out of its context. In *Delgamuukw* there was an existing aboriginal title and one issue was the test for justification of an infringement of that title. ... The point to be made was that consultation is required where an existing aboriginal right is infringed in order to determine if such infringement was justified.

*Treaty Eight Grand Chief Halcrow v. Canada (Attorney General)*, 2003 FCT 782, at para. 62-63 (emphasis by Dawson J.)

84. In an earlier decision, the Ontario Court of Appeal took a similar approach, holding that “what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the Constitution Act, 1982.”

*TransCanada Pipelines Limited v. Beardmore (Township)*, (2000) 186 D.L.R. (4<sup>th</sup>) 403 (Ont. C.A.) at para. 199-120

85. The conclusion to be drawn from this analysis is that the Court of Appeal erred in *Haida I* when it held that the Crown was under a fiduciary duty to consult with the Haida before the Haida established that they had any aboriginal rights in Weyerhaeuser’s operating area. If the Crown did not breach a fiduciary duty to consult, the question of “knowing receipt” does not arise.

**4. The principle of “knowing receipt” does not apply to the issues at bar.**

86. Finally, even if all the other elements of knowing receipt were established, knowing receipt requires knowledge of the breach of duty. The standard of knowledge required to make out a case of knowing receipt is constructive knowledge, or “knowledge sufficient to put a reasonable person on notice or inquiry.”

*Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805 at para 48, per La Forest, J.

87. In order to make a finding of knowing receipt, this court would have to find that a reasonable person would have been placed on notice as to the existence of a fiduciary obligation on the part of the Crown and a breach of that obligation.

88. Justice Lambert appeared to take the view that this requirement was met by the trial judge's conclusions that the Haida had a reasonable probability of establishing aboriginal title to village sites and fishing stations along the coast and a reasonable possibility of establishing aboriginal title over the inland areas of Block 6.

Trial Reasons for Judgment, para. 47, Appellants' Record, Vol. 1, pp. 37-38

89. Yet one of the very issues being litigated in this case was whether such an obligation existed before the establishment of aboriginal rights or title. Indeed, at the trial level, Halfyard J found that no fiduciary obligation existed on the part of the Crown absent the establishment of aboriginal title. Even Chief Justice Finch, in his concurring judgment below, pointed out that "Weyerhaeuser did not know in 2000 that the Crown's duty to consult could rest simply upon the Haida's reasonably founded *prima facie* claim to aboriginal title, because *Taku* had not yet been decided in this Court." In light of this determination, Justice Lambert's statement that Weyerhaeuser "knew, or, on reasonable and necessary inquiry, could, and should have known, that the Crown was in breach of its fiduciary duty to the Haida people in granting, renewing and transferring TFL 39 in 1999 and 2000 without consulting the Haida people" cannot be correct.

Trial Reasons for Judgment, Halfyard J. at para. 29, Appellants' Record, p. 28  
Appeal Reasons for Judgment, *Haida II*, per Lambert J.A., para. 100,  
Appeal Reasons for Judgment, *Haida II*, per Finch, C.J.B.C., para. 122  
Appellants' Record, Vol. 1, pp. 157 and 168-169

90. For these reasons, the restitutionary model of "knowing receipt" can have no application to the licensee operating under Crown authority, and in particular, to Weyerhaeuser in the case at bar.

**(iii) The Justification “Defence”**

91. Justice Lambert’s third source of a consultation obligation is the presumed ability of a third party to rely on justification as a defence against an action for infringement. Justice Lambert reasons that because a third party would wish to rely on justification as a defence to infringement, the elements of justification, including consultation, must apply to third parties as well as the Crown.

Appeal Reasons for Judgment, *Haida II*, per Lambert J.A., para. 101, Appellants’ Record, Vol. 1, pp. 158-159

92. This analysis places a very different interpretation on the concept of justification than derives from this Court’s decisions. The jurisprudence to date indicates that justification is a public law concept that applies only to actions by the Crown. This Court explained the test in this way:

The test for justification has two parts... First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial... The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.

*Delgamuukw, supra.*, paras. 161-162

93. Each of these tests applies only to government action.

94. The judgment of Justice Lambert fails to distinguish between the public law concepts of infringement, justification and consultation on the one hand, and the private law rights and obligations of a third party relying on government authority on the other. Justice Lambert assumes that the legal concept of infringement applies equally to the Crown and to private parties who take their title through the Crown. This cannot be so.

95. For example, Justice Lambert describes Weyerhaeuser as “a party to every one of the Crown’s infringements except the passing of the *Forest Act*.” These would include the granting, transfer and replacement of the tree farm licence, the approval of the management plan and the

granting of cutting permits. He goes on to conclude that, at an operational level, a licensee may be exposed to infringement claims, and require a justification defence, which cannot be made against the Crown. He raises the spectre of punitive damages being available as against the licensee acting in accordance with a licence granted by the Crown, in circumstances where such damages would not be available against the Crown agency that had authorized the activity.

Appeal Reasons, Haida II, para. 83-87, Appellants' Record, Vol. 1, pp. 147-150

96. This entire theory is incompatible with the infringement/justification analysis that this Court has explained in numerous judgments over the past decade. Infringement is a public law concept relating solely to government action, and justification must by its very definition be advanced by the government that has authorized the action said to infringe. The inability of a licensee to weigh or assess assertions of aboriginal rights and title, and to assert justification reinforces the inappropriateness of imposing the consultation/accommodation analysis on private parties.

97. It is impossible to predict how a claim against a private party might unfold if an aboriginal group established title to land under Crown grant of tenure. It seems much more likely that an aboriginal group holding title would sue in trespass than infringement. In either case, it is reasonable to assume that the first line of defence for the licensee would be reliance on the licence, and perhaps a claim over against the licensing authority.

***(b) Reasons for Judgment of Finch, C.J.B.C.***

98. Chief Justice Finch took a somewhat different approach to support the order made against Weyerhaeuser. He appears to have accepted that Weyerhaeuser had no independent duty to consult the Haida, but concluded “that no effective remedy could be granted in this case, short of a declaration of invalidity, that did not impose an obligation on Weyerhaeuser to participate in the consultation and accommodation which were the Haida’s due.” Thus the order against Weyerhaeuser was supported not as reflecting an existing duty on the part of the company, but rather as a means of providing an effective remedy against the Crown.

Appeal Reasons for Judgment, Finch, C.J.B.C., *Haida II*, para. 121, Appeal Record, p. 168

99. Leaving aside the appropriateness of imposing obligations on a third party for the sole purpose of remedying the Crown’s defaults, it is simply wrong to suggest that without imposing this duty on Weyerhaeuser the Crown would be unable to carry out its own responsibilities. Assuming for the purpose of this analysis that the Crown was in breach of its duties, it had ample powers to engage in effective consultation and take remedial steps to rectify any deficiencies without requiring the licensee’s engagement. The licence provisions previously noted gave the Crown sufficient authority to require Weyerhaeuser to consult the Haida on operational matters, and the Crown through its officers even had the authority to withhold cutting permits if necessary to do so to avoid infringing aboriginal rights.

100. The foundation for the Chief Justice’s conclusion that imposing a new constitutional or fiduciary consultation obligation on Weyerhaeuser was necessary was his statement that that the Crown “has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser’s consent or co-operation.”

Appeal Reasons for Judgment, Finch, C.J.B.C., *Haida II*, para. 121, Appeal Record, p. 168

101. This statement is correct on a literal reading of the licence document, but gives no effect to the powers of the Provincial Government to legislate in respect of provincial resources. The fact is that as part of a general package of forestry reform in British Columbia, the Provincial Government has introduced legislation clawing back 20% of all licensees’ harvesting rights, in part to make timber land available for First Nations<sup>2</sup>. It is simply not the case that the Government was unable to carry out its responsibilities unless a legal obligation was placed on the licensee. The Government has legislative authority over provincial natural resources, which give it a powerful tool to deal with its legal responsibilities as they become known. There was no need to impose obligations on private third parties in order to devise an effective remedy against the Crown.

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<sup>2</sup> Forestry Revitalization Act, SBC 2003, C. 17

**E. Procedural Defects**

102. As Justice Low acknowledged, the Court of Appeal should never have been dealing with this issue at all. This was a judicial review proceeding, commenced by petition, not writ of summons, seeking relief against a Crown decision-maker analogous to the old prerogative remedies.

Appeal Reasons for Judgment, *Haida II*, per Low, J.A. para. 131-140,  
Appellants' Record, Vol. 1, pp. 172-177  
*Judicial Review Procedure Act*, R.S.B.C. 1996, s. 2

103. In *Haida I*, the Court of Appeal viewed the remedy it was imposing as in effect an interim remedy, designed "to protect the interests of all parties pending the final determination of the nature and scope of aboriginal title and aboriginal rights."

Appeal Reasons for Judgment, *Haida I*, para. 54, Appellants' Record, Vol. 1, p. 83

104. Quite apart from the imposition of an interim administrative remedy on a non-governmental actor, the idea of an such an interim declaration has been dismissed as "absurd" by a leading constitutional commentator:

Does the Court have the power to make a temporary declaration, before giving a final judgment, in order to hold the defendant to the status quo? Such a declaration can be described as "interlocutory", because it is granted at an interlocutory stage of the proceedings, or "interim", because it is granted only for a temporary period of time. The conventional answer is that there is no power to grant an interlocutory (or interim) injunction [sic]. A declaration is by its nature final. It is "absurd" for a Court "to declare one day in interlocutory proceedings that an applicant has certain rights and upon a later day that he has not". For this reason, Courts have nearly always refused to grant a temporary declaration before there has been a final determination of the applicable law. In other words, interlocutory (or interim) relief, which is available in the form of an injunction, is not available in the form of a declaration.

Hogg and Monahan, *Liability of the Crown*, 3d. ed, (Carswell: Scarborough), at p. 28

105. In *Haida II*, Justice Lambert appears to rely on section 10 of the *Judicial Review Procedure Act* to support an interim declaration. Section 10 does provide the authority for interim orders pending completion of the judicial review proceeding, but no order under section 10 was ever sought and its appropriateness was not argued. Even had it been sought, there is no basis for an interim declaration under section 10, which appears to be designed to deal with interim injunction applications.

Appeal Reasons for Judgment, Lambert J.A., *Haida II*, para. 23-33, Appeal Record, Vol. 1, pp. 115-121  
*Judicial Review Procedure Act*, R.S.B.C. 1996, s. 10

106. Even if the intention was been to create an interim declaration, the form of the order was of a final declaration of rights. In substance, the order appears to be a form of mandatory injunction, but the Court of Appeal has not considered any of the appropriate tests for such an order.

107. Running throughout the judgment of the Court of Appeal in *Haida I*, and Justice Lambert's judgment in *Haida II*, is the assumption that the Haida have aboriginal title in the Queen Charlotte Islands. But what if a trial judge concludes that the Haida do not have aboriginal title in the more limited area of Block 6 of TFL 39? What will be the effect of an obligation not only to consult but also to accommodate the claimed interests? The entire premise behind this analysis is inconsistent with this Court's decision in *Delgamuukw*, which requires that aboriginal title be proven on a case-by-case basis. Second, what if aboriginal title is proven? In this case, the analysis turns to accommodation and justification, which are only available to the Crown. In the meantime, the Crown continues to have jurisdiction and the Haida's interests are addressed practically in the licence provisions themselves as set out in paragraph 12 of this factum.

**F. The Constitutional Question**

108. The constitutional question stated by this Court is as follows:

Is s. 36 of the *Forest Act*, R.S.B.C. 1996, c. 157, of no force and effect to the extent that the replacement of T.F.L. No. 39 violated any right of the Haida Nation, as recognized and affirmed by s. 35 of the *Constitution Act, 1982* to be consulted and to have their asserted aboriginal rights accommodated prior to the replacement?

109. Section 36 is the statutory provision that requires the Minister of Forests to offer a replacement licence to the holder of a tree farm licence at periodic intervals. It has been present in the statute as a mandatory provision conferring security of tenure since before MacMillan Bloedel first acquired the tree farm licence in 1981.

110. Until the existence and scope of any aboriginal rights have been determined, it is premature to confer remedies based on the assumption of those rights, apart from interim remedies imposed in accordance with established equitable principles.

111. It would in addition be highly undesirable to undermine a key feature of tenure security – and the basis upon which investments are made by tenure-holders – on the basis of an assumption of rights. Tree farm licensees in British Columbia operate and make investments on the basis that they have licences that provide for replacement licences if they perform satisfactorily.

**G. Conclusion**

112. The case at bar represents the first case in which this Court has been asked to describe the legal status of historic alienations to private parties of Crown land that is claimed by aboriginal people. The decision of the B.C. Court of Appeal has exacerbated the commercial uncertainty initially created by the *Delgamuukw* decision. There is a need for caution in considering the expansion of *Delgamuukw* principles beyond the case of established aboriginal rights.

113. An illustration of the implications of the Court of Appeal’s decision can be found in a recent judgment of the British Columbia Environmental Appeal Board. In that case, the Board ruled that before approving a permit application a government official had a duty under *Haida* to consult with and accommodate the unproven claims of an aboriginal group who asserted title over the private land of a forest company, which land was not subject to a licence from the Crown. The implications for private land use, apparently including private land not subject to any government licence, are very significant. For example, this decision raises the prospect of private land zoning decisions of a municipality being subject to such obligations.

*TimberWest Forest Corporation v. Deputy Administrator, Pesticide Control Act and Cowichan Tribes*, Appeal No. 2002PES-008(a), September 4, 2003 (Environmental Appeal Board)

114. The case at bar was an application for judicial review of a decision to replace an existing tree farm licence. Out of this has come a unique legal obligation imposed on private parties to consult with and make reasonable efforts to accommodate claims of aboriginal people that have never been adjudicated, and may be without merit.

115. Just as this Court has recently commented that “this Court is not free to invent new obligations foreign to the original purpose of the provision at issue”, the Court of Appeal was not free to invent new obligations that have nothing to do with judicial review, and that presuppose the existence of a constitutional right that this Court has said must be proven on a case-by-case basis.

*R. v. Blais*, 2003 SCC 44, at para. 40

116. The operating principles that should emerge from this case are these:

- (i) If fiduciary obligations of consultation are owed to the Haida people in respect of timber harvesting on the Queen Charlotte Islands, they are owed by the Crown, not private individuals or corporations holding licence rights under Crown authority;

- (ii) The Crown has fiduciary obligations in relation to Indian land once its status as aboriginal title land has been established, but not before; and
- (iii) Licensees of the Crown owe such duties to the Crown as are appropriately imposed under the licence as a matter of contract. These rights are enforceable by the Crown, and not by aboriginal groups claiming the land the Crown has alienated.

117. For these reasons, the appeals should be allowed and the judgment of the Justice Halfyard dismissing the petition restored.

**PART IV – SUBMISSION ON COSTS**

118. Weyerhaeuser does not seek its costs in this Court or in the courts below.

119. The Appellant the Attorney General of British Columbia has agreed to pay the party and party costs of the Respondent Haida Nation of this appeal in any event of the cause. In these circumstances, Weyerhaeuser asks that costs not be ordered to be paid by Weyerhaeuser in this Court and that it be relieved of any requirement to pay the costs of the Haida in the court below.

**PART V – NATURE OF ORDER SOUGHT**

120. The Appellant Weyerhaeuser Company Limited submits that the appeal should be allowed, the judgment of the Court of Appeal be set aside and the judgment of the chambers judge dismissing the petition be restored.

121. The constitutional question:

Is s. 36 of the *Forest Act*, R.S.B.C. 1996, c. 157, of no force and effect to the extent that the replacement of T.F.L. No. 39 violated any right of the Haida Nation, as recognized and affirmed by s. 35 of the *Constitution Act, 1982* to be consulted and to have their asserted aboriginal rights accommodated prior to the replacement?

should be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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John J.L. Hunter, Q.C.

Counsel for the Appellant, Weyerhaeuser Company  
Limited

September 25, 2003  
Vancouver, British Columbia

## PART VI – TABLE OF AUTHORITIES

<u>Case Law</u>	<u>Cited at Paragraph</u>
<i>American Cyanamid v. Ethicon Ltd.</i> , [1975] A.C. 396	53
<i>Canadian Union of Public Employees v. Ontario (Minister of Labour)</i> , 2003 SCC 29	45
<i>Citadel General Assurance Co. v. Lloyds Bank of Canada</i> , [1997] 3 S.C.R. 805	66, 67, 85
<i>Delgamuukw v. The Queen</i> , [1997] 3 S.C.R. 1010	29,40,44,48, 81
<i>Gitksan and other First Nations v. British Columbia (Minister of Forests)</i> , 2002 BCSC 1701	52
<i>Gold v. Rosenberg</i> , 1997] 3 S.C.R. 767	66, 69
<i>R. v. Badger</i> , [1996] 1 S.C.R. 771	27
<i>R. v. Blais</i> , 2003 SCC 44	114
<i>R. v. Gladstone</i> , [1996] 2 S.C.R. 723	27, 42
<i>R. v. Marshall (No. 2)</i> , [1999] 3 S.C.R. 533	27, 43
<i>R. v. Nikal</i> , [1996] 1 S.C.R. 1013	27, 41
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	27, 39
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	27
<i>RJR – MacDonald Inc. v. Canada (Attorney General)</i> , [1994] 1 S.C.R. 311	48, 53, 54
<i>TimberWest Forest Corporation v. Deputy Administrator, Pesticide Control Act and Cowichan Tribes</i> , Appeal No. 2002PES-008(a), September 4, 2003 (Environmental Appeal Board)	112
<i>TransCanada Pipelines Limited v. Beardmore (Township)</i> (2000), 186 D.L.R. (4 <sup>th</sup> ) 403 (Ont. C.A.)	34, 83
<i>Treaty Eight Grand Chief Halcrow v. Canada (Attorney General)</i> , 2003 FCT 782	82

*Westbank First Nation v. British Columbia*, (2000), 191 D.L.R. (4th) 180, 2000 BCSC 1139 34

*Wewaykum Indian Band v. Canada*, 2002 SCC 79 78-80

Texts

C. Sharvit, M. Robinson & M. Ross, “Resource developments on Traditional Lands: The Duty to Consult” (Calgary: Canadian Institute of Resources Law, 1999) 46

Hogg and Monahan, *Liability of the Crown*, 3d. ed, (Carswell: Scarborough) 103

## PART VII – LEGISLATION RELIED ON

<u>Legislation</u>	<u>Cited at Paragraph</u>
<i>Forest Act</i> , R.S.B.C. 1996, s. 12, 35 & 36	4-7, 109

### Form of agreements

**12** Subject to this Act and the regulations, the *Forest Practices Code of British Columbia Act* and the regulations made under that Act, a district manager, a regional manager or the minister, on behalf of the government, may enter into an agreement granting rights to harvest Crown timber in the form of a

- (a) forest licence,
- (b) timber sale licence,
- (c) timber licence,
- (d) tree farm licence,
- (e) pulpwood agreement,
- (e.1) community forest agreement,
- (f) woodlot licence,
- (g) free use permit,
- (h) licence to cut,
- (i) road permit, and
- (j) Christmas tree permit.

...

### Content of tree farm licence

**35** (1) A tree farm licence entered into under this Act must

- (a) subject to section 36 (3) (a), be for a term of 25 years,
- (b) subject to sections 33, 34 and 39, describe a tree farm licence area composed of
  - (i) an area of Crown land, the timber on which is not otherwise encumbered, determined by the minister, and
  - (ii) the private tenures held by its holder that are determined by the minister,

(c) require its holder to pay to the government, in addition to other amounts payable under this Act and the regulations,

(i) for timber harvested under the tree farm licence from land referred to in paragraph (b) (i) and sections 37 (1) and (2) and 38 (1), stumpage under Part 7, and

(ii) for timber harvested from a timber licence included in the area described under paragraph (b) (ii), stumpage under Part 7,

(d) require its holder to submit for the approval of the chief forester, once every 5 years, or more often if the chief forester considers that special circumstances require, a management plan that meets all the following requirements:

(i) it is prepared by a professional forester in accordance with the requirements of the tree farm licence,

(ii) it includes inventories, prepared in the manner, presented in the format and meeting the specifications required under the tree farm licence, of the forest, recreation, fisheries, wildlife, range and cultural heritage resources in the tree farm licence area,

(iii) it is consistent with

(A) the tree farm licence,

(B) this Act and the regulations, the *Forest Practices Code of British Columbia Act* and the regulations and the standards made under that Act, and

(C) any objectives for resource management zones, landscape units, sensitive areas, recreation sites and trails and interpretive forest sites under the *Forest Practices Code of British Columbia Act*,

(iv) it proposes management objectives regarding

(A) management and utilization of the timber resources in the tree farm licence area, including harvesting methods and utilization specifications suitable to the types of timber and terrain specified in the tree farm licence,

(B) protection and conservation of the non-timber values and resources in the tree farm licence area, including visual quality, biological diversity, soils, water, recreation resources, cultural heritage resources, range land and wildlife and fish habitats,

(C) integration of harvesting activities in the tree farm licence area with use of the area for purposes other than timber production,

(D) forest fire prevention and suppression,

(E) forest health, including pest management,

(F) silviculture, and

(G) road construction, maintenance and deactivation,

(v) it includes proposals for meeting the proposed management objectives under subparagraph (iv), including measures to be taken, and specifications to be followed by the holder of the tree farm licence,

(vi) it specifies measures to be taken by the holder of the tree farm licence to identify and consult with persons using the tree farm licence area for purposes other than timber production,

(vii) it includes a timber supply analysis, prepared in the manner, presented in the format and meeting the specifications required under the tree farm licence, that analyzes the short term and long term availability of timber for harvesting in the tree farm licence area, including the impact of management practices on the availability of timber,

(viii) it includes an operational timber supply projection for the tree farm licence area that, in support of the timber supply analysis, indicates the availability of timber by

(A) identifying

(I) the net operable land base,

(II) harvested areas,

(III) existing and proposed road access within the net operable land base, and

(IV) areas subject to special management constraints, such as use of the tree farm licence areas for purposes other than timber production,

(B) categorizing areas within the net operable land base by

(I) the type and quality of timber, and

(II) the harvesting method suitable to the terrain, and

(C) setting out a hypothetical sequence of harvesting over a period of at least 20 years, consistent with the proposed management objectives under subparagraph (iv), and the proposals under subparagraph (v), and

(ix) it includes any other information on the development, management and use of the tree farm licence area that the chief forester requires,

(e) subject to the provisions of this Act, grant to its holder the exclusive right to harvest from the tree farm licence area during the term of the tree farm licence one or both of the following:

- (i) Crown timber of one or more types specified in the tree farm licence,
  - (ii) Crown timber from one or more types of terrain specified in the tree farm licence,
- (f) provide for cutting permits to be issued by the district manager, or a forest officer authorized by the district manager, within the limits provided in the tree farm licence and subject to this Act and the *Forest Practices Code of British Columbia Act*, to authorize its holder to harvest the portion of the allowable annual cut available to its holder from specified areas of land within the tree farm licence area,
- (g) require its holder to implement management plans approved under this section,
- (h) require that timber on the tree farm licence area, in an amount directed by the minister, having regard to reservations made by the minister for categories of small business forest enterprises, for pulpwood agreements or for woodlot licences, are to be available for disposition under Divisions 3, 6 and 7 of this Part to persons other than the holder of the tree farm licence,
- (i) make provision for its holder to use the services of one or more professional foresters to manage the tree farm licence area,
- (j) require that each year during its term a volume of timber not less than
- (i) 50% of the volume of timber harvested by or for its holder from the tree farm licence area during the year, multiplied by
  - (ii) the result obtained by the division of
    - (A) the portion of the allowable annual cut available to its holder during that year that the chief forester determines is attributable to Crown land referred to in paragraph (b) (i) and sections 37 (1) and (2) and 38 (1), by
    - (B) the allowable annual cut available to its holder during that year
- are to be harvested by persons under contract with its holder,
- (k) allow its holder to contract for the harvesting of more than the volume calculated under paragraph (j),
- (l) provide that the minister, under the regulations, may relieve the holder, in whole or in part, from the requirement under paragraph (j),
- (m) require its holder, in accordance with a proposal made in the application for the tree farm licence,
- (i) to undertake or continue the operation, construction or expansion of a timber processing facility, and
  - (ii) to undertake specified measures in order to meet the objectives of the government in respect of any of the items referred to in section 33 (5) (a) to (e),

(n) reserve to the government the right to enter into a free use permit on the tree farm licence area with a person other than the holder of the tree farm licence, and

(o) contain other terms and conditions, consistent with this Act and the regulations, the *Forest Practices Code of British Columbia Act* and the regulations and the standards made under that Act, determined by the minister.

(2) A disposition of timber under Division 3 or 7 of this Part pursuant to this section, or pursuant to a requirement referred to in subsection (1) (h), does not give rise to any right to or eligibility for compensation under this Act or otherwise.

...

### Replacement

**36** (1) Unless a tree farm licence provides that a replacement for the licence must not be offered, the minister must offer the holder of an existing licence a replacement for the licence and the offer must be made during the 6 month period following

(a) the fourth anniversary of the tree farm licence if its term commences on or after July 1, 1993, or

(b) the ninth anniversary of the tree farm licence if its term commences before July 1, 1993.

(2) Despite subsection (1), if the minister determines that

(a) rights under the existing tree farm licence are under suspension, or

(b) the holder of the existing tree farm licence has failed to

(i) pay stumpage or other money payable in respect of timber harvested under the tree farm licence or a road permit associated with the tree farm licence,

(ii) provide security or a deposit required under this Act or the regulations or the *Forest Practices Code of British Columbia Act* or the regulations made under that Act in respect of the tree farm licence or a road permit associated with the tree farm licence,

(iii) perform an obligation under the tree farm licence to be performed by the holder in respect of an area of land specified in

(A) a cutting permit previously issued under the tree farm licence, or

(B) a road permit associated with the tree farm licence, or

(iv) comply with a requirement of the *Forest Practices Code of British Columbia Act* or the regulations or the standards made under that Act in respect of an area of land referred to in subparagraph (iii),

the minister, to the extent provided in the regulations,

- (c) may decline to offer a replacement for the existing tree farm licence until
    - (i) the suspension is rescinded,
    - (ii) the suspended rights are reinstated, or
    - (iii) the holder of the existing tree farm licence
      - (A) pays the stumpage or other money payable,
      - (B) provides the required security or deposit,
      - (C) performs the obligation to be performed under the existing tree farm licence in respect of land referred to in paragraph (b) (iii), or
      - (D) complies with the requirement of the *Forest Practices Code of British Columbia Act* or the regulations or the standards made under that Act in respect of land referred to in paragraph (b) (iii), and
  - (d) may offer a replacement with special conditions.
- (3) A tree farm licence offered under this section must
- (a) be for a term equal to
    - (i) 25 years, or
    - (ii) if the minister exercises the power conferred under subsection (2) (c), a period, not exceeding 25 years, to be determined by the minister,
  - (b) have a term commencing
    - (i) on the fifth anniversary of the existing tree farm licence if its term commences on or after July 1, 1993,
    - (ii) on the 10th anniversary of the existing tree farm licence if its term commences before July 1, 1993, or
    - (iii) if the minister exercises the power conferred under subsection (2) (c), on a date to be determined by the minister,
  - (c) subject to sections 37, 38, 39, 56 (9) and 60, describe as a tree farm licence area the area subject to the existing tree farm licence, and
  - (d) include other terms and conditions, consistent with this Act and the regulations, the *Forest Practices Code of British Columbia Act* and the regulations and the standards made under that Act, set out in the offer.
- (4) A notice of an offer made under this section must be published in the prescribed manner.
- (5) An offer made under this section may

- (a) be amended, and
  - (b) be accepted by written notice of acceptance served on the minister not later than 3 months after the offer is served.
- (6) If an offer made under this section is accepted
- (a) an agreement in the form of a tree farm licence containing the terms and conditions set out in the offer, including amendments, must be entered into by the minister and the holder of the tree farm licence, and
  - (b) the existing tree farm licence expires on the commencement of the replacement licence.
- (7) If an offer made under this section is not accepted, the existing tree farm licence continues in force until its term expires, after which it has no further effect.
- (8) No tree farm licence is renewable.

*Forest (Revitalization) Amendment Act (No.2)*, 2003, SBC 2003, c. 31,  
sections 23-24.

7

***Forest Act***

...

***23 Section 36 is amended***

***(a) by repealing subsection (1) and substituting the following:***

(1) In this section, "**tree farm licence**" means a tree farm licence other than one that provides that a replacement for it must not be offered.

(1.1) During the 6 months beginning on any of the fourth to eighth anniversaries of a tree farm licence, the minister may offer the holder of the tree farm licence a replacement for it, after first giving the holder at least 6 month's notice of intent to offer the replacement.

(1.2) During the 6 months beginning on the ninth anniversary of a tree farm licence for which a replacement has not by then been offered under subsection (1.1), the minister must offer the holder of the tree farm licence a replacement for it. ,

***(b) in subsection (3) by repealing paragraph (b) and substituting the following:***

(b) have a term beginning

(i) on the earlier of

(A) the next anniversary of the tree farm licence being replaced under the offer, and

(B) the tenth anniversary of the tree farm licence, or

(ii) if the minister exercises the power conferred under subsection (2) (c), on a date to be determined by the minister, , *and*

**(c) by repealing subsection (4) and substituting the following:**

(4) A notice of an offer made under subsection (1.1) or (1.2), and a notice of intent referred to in subsection (1.1), must be published in the prescribed manner.

**24 The following section is added:**

**Transition for tree farm licence replacement**

**36.1** (1) If an offer of a replacement for a tree farm licence

(a) was required to be made under section 36 within the 18 month period immediately preceding the date on which this section comes into force, and

(b) was not made within the 18 month period,

the offer of replacement, when made, must conform to section 36 of this Act as amended by the *Forest (Revitalization) Amendment Act (No. 2), 2003*.

(2) If an offer of a replacement for a tree farm licence

(a) was required to be made under section 36 within the 18 month period immediately preceding the date on which this section comes into force, and

(b) was made within the 18 month period,

the offer may be withdrawn if the person to whom the offer was made consents to the withdrawal of the offer.

(3) If an offer is withdrawn under subsection (2), the minister or person authorized by the minister must offer a replacement for the tree farm licence which offer must conform to section 36 of this Act as amended by the *Forest (Revitalization) Amendment Act (No. 2), 2003*.

**"licence"** means a licence that is replaceable under the *Forest Act* and is a

- (a) forest licence,
- (b) tree farm licence, or
- (c) timber sale licence;

...

**Harvesting rights reduced for timber licences and certain replaceable licences**

- 2 (1) The allowable annual cut of an ungrouped licence identified in an item of the Schedule is reduced by the amount specified in Column 3 of that item.
- (2) Each area of Crown land described in a timber licence is reduced by 20%.
- (3) The total of the allowable annual cuts of the licences in a group of licences listed in an item of the Schedule is reduced by the amount specified in Column 3 of that item opposite the group name, assigned in Column 1, under which the licences are listed.

...

**Schedule**

...

27	<b>WEYERHAEUSER GROUP</b>	1 200 694
	Weyerhaeuser Company Limited A19225	
	Weyerhaeuser Company Limited A19244	
	Weyerhaeuser Company Limited A18674	
	Weyerhaeuser Company Limited A18694	
	Weyerhaeuser Company Limited A18698	
	Weyerhaeuser Company Limited A18970	
	Weyerhaeuser Company Limited TFL15	
	Weyerhaeuser Company Limited TFL35	
	Weyerhaeuser Company Limited TFL39	
	Weyerhaeuser Company Limited TFL44	

*Supreme Court of British Columbia Rules of Court, Rule 45(6)*

49

- (6) Unless the court otherwise orders, an order for an interlocutory or interim injunction shall contain the applicant's undertaking to abide by any order which the court may make as to damages.

**"statutory power of decision"** means a power or right conferred by an enactment to make a decision deciding or prescribing

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
- (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,

and includes the powers of the Provincial Court;

**"statutory power"** means a power or right conferred by an enactment

- (a) to make a regulation, rule, bylaw or order,
- (b) to exercise a statutory power of decision,
- (c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
- (d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
- (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

...

#### **Application for judicial review**

**2** (1) An application for judicial review is an originating application and must be brought by petition.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

- (a) relief in the nature of mandamus, prohibition or certiorari;
- (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

...

#### **Interim order**

**10** On an application for judicial review, the court may make an interim order it considers appropriate until the final determination of the application.