Introduction

1. By order of Iacobucci J. on November 24, 2003, the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia & Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries ("COFI"), and the Mining Association of British Columbia (collectively, the "Business Interveners") were granted leave to intervene in the within appeal. Iacobucci J. also ordered that the Business Interveners be at liberty to append to this factum the affidavits filed in support of their application to intervene, which appear at appendices "A" through "F" of this factum.

2. Each of the Business Interveners is an umbrella organization comprising individuals and corporations who carry on business in the province of British Columbia. The Business Interveners represent individuals and businesses who depend upon grants, licences and permits issued by the Province of British Columbia or whose operations are influenced by decisions concerning the use of Provincial Crown land. The Business Interveners are directly affected by the decisions under appeal in this case.

3. A similar group, styled the "Business Coalition", was granted leave to intervene in *Ringstad v. Taku River Tlingit et al.*, SCC File No. 29146. The only difference between the two groups is that the Business Interveners in this appeal do not include the British Columbia Wildlife Federation.

PART I

STATEMENT OF FACTS

Background relevant to the issues on appeal

4. The Business Interveners adopt the Statements of Facts in the factum filed by the Appellants the Minister of Forests and the Attorney General of British Columbia (collectively, the "Crown Appellants") and in the factum filed by the Appellant Weyerhaeuser Company Limited ("Weyerhaeuser").

5. The following facts are also relevant to the issues raised by the parties, including the Respondents the Haida Nation and Guujaaw, in their facta.

6. The decision under appeal imposes on private parties the obligation to consult with and seek to accommodate the interests of aboriginal groups, even when aboriginal rights are asserted but not yet proved. The appendices to this factum confirm that the judgment of the B.C. Court of Appeal has imposed an onerous burden on private parties, who are in no position to assess aboriginal claims and who, it will be submitted below, have no legal obligation to consult with or accommodate aboriginal interests.

7. Since the decisions of the Court of Appeal in this case were handed down, aboriginal groups have insisted that private parties owe them a direct duty to consult and to accommodate their asserted aboriginal rights or title. For example, Exhibit "C" to the affidavit of Marlie Beets, of COFI, attached as Appendix "C" to this factum, includes letters and notices from aboriginal groups in various areas of British Columbia. These communications challenge the grant, renewal or transfer of forest tenures, on the basis that private forest companies have enforceable legal and equitable obligations to consult with and accommodate asserted claims of aboriginal rights and title. As several of the letters state, some aboriginal groups "wish to put each company's creditors on notice that our Aboriginal Rights and Titles encumber those tenures". In other cases aboriginal groups have demanded payment of a form of "royalty" from forest companies, in addition to stumpage that is payable to the Crown. Ms. Beets has deposed that uncertainty created by demands from aboriginal groups has contributed to a perception that forest tenures are no longer secure and reliable, which in turn affects the ability of forest companies to attract investment. Moreover, the decisions of the Court of Appeal in this case leave open the possibility that tenure holders may be liable to compensate aboriginal groups in damages if the tenure holders do not adequately fulfill the obligation to consult and to accommodate the asserted aboriginal interests.

8. The affidavit of Ms. Beets includes other examples of the confusion and uncertainty resulting from the decisions under appeal. For example, following litigation arising out of the sale of Skeena Cellulose Inc., ("Skeena"), the Crown entered into an agreement with the Gitxsan Treaty Office as part of its "legal duties to consult and seek workable accommodations with

regard to the change of control" of Skeena. Now one of the aboriginal Petitioners in the original litigation is challenging the new agreement (Appendix "C", Exhibits "E" and "F"). It is impossible for private parties to address the claims asserted by different and often competing aboriginal groups.

9. Other examples are cited in the affidavit of Paul Allard of the Aggregate Producers Association (Appendix "F" to this factum). As Mr. Allard has deposed, a representative of the Sto:lo Nation cited the decisions under appeal in support of a demand that members of the Aggregate Producers Association consult with and accommodate the Sto:lo Nation regarding current or planned aggregate operations. Some aboriginal groups have cited the decisions under appeal in support of their position that no aggregate mining can take place within any territory to which they assert claims

10. Another aboriginal group, relying on the decision under appeal, has alleged that a private party operating a dry land fish farm owes a duty to consult and accommodate in respect of aboriginal rights and title asserted over the area in question (para. 11, Ex. "D" and "E" of affidavit of John Winter at Appendix "E" to this factum). In *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422, the petitioners sought to quash licences granted by the Crown to Omega Salmon Group Ltd., citing their "zero tolerance" policy regarding fish farms. In a decision released September 18, 2003, Gerow J. of the British Columbia Supreme Court held that "the duty of the Crown to consult was adequately discharged by the Crown and Omega" (at para. 118). Although Gerow J. declined to grant most of the relief sought by the Heiltsuk, she accepted that a private party may have an ongoing duty to consult and adjourned generally the application for a declaration that Omega had a duty to consult and seek accommodation with the Heiltsuk (at para. 130).

11. The other affidavits filed in support of this application confirm that the decisions under appeal have created uncertainty about the obligations of private parties and the security of their tenures. This uncertainty has significant implications for the investment and economic climate in the Province (see, e.g., the affidavits of Jerry Lampert and John Winter, Appendices "D" and "E" to this factum). Those who hold mining interests are unsure how the decision under appeal affects existing consultation and approval processes, and are concerned with the potential for

additional cost and delay for mining projects (see, e.g., the affidavits of Gary Livingstone and Dan Jepsen, Appendices "A" and "B" to this factum). These economic effects are not limited to individuals and businesses that hold Crown tenures, but extend to others whose livelihoods depend on the natural resource sector.

The Court of Appeal's decisions

12. In the decisions under appeal the British Columbia Court of Appeal held that the Provincial Crown has the obligation to consult with and seek accommodation with aboriginal groups in respect of aboriginal rights that have been asserted but not yet established by a court decision or treaty. But the Court of Appeal went on to make the unprecedented ruling that private parties who have been granted rights in respect of Crown land owe similar obligations. In its second decision, *Haida Nation v. British Columbia et al.,* 2002 BCCA 462 ("*Haida No. 2"*), the Court granted a declaration that the Crown and Weyerhaeuser both had legally enforceable duties to consult with the Haida people and to endeavour to seek workable accommodations between the asserted aboriginal interests and the short and long-term objectives of the Crown and Weyerhaeuser (per Finch C.J.B.C. at para. 129, Lambert J.A. concurring at para. 103).

13. In *Haida No. 2,* Finch C.J.B.C. held that "a declaration of Weyerhaeuser's duty to consult is a lawful, necessary and appropriate part of the remedy in this case" (at para. 108). He found that Weyerhaeuser's licence "suffered a legal defect, which cannot be remedied without its participation" (at para. 123). Lambert J.A. went even farther in his reasons, expressing the opinion that private parties have a separate, enforceable duty to consult and seek accommodation with aboriginal groups (at para. 60). Lambert J.A. also indicated that a private party that has "violated" aboriginal rights and title will be liable to pay compensation, including compensatory, aggravated and punitive damages (at para. 83). Although the infringement would be "subject to the defences provided by the principles of justification", Lambert J.A. suggested that private parties must justify an alleged infringement even before any aboriginal right or title has been established (at para. 87).

PART II

QUESTIONS IN ISSUE

14. The Business Interveners agree with the questions as stated in the factums of the Crown Appellants and the Appellant Weyerhaeuser.

PART III

ARGUMENT

Introduction

15. The Business Interveners take the position that the burdens imposed on private parties by the decision under appeal have no basis in law and are unworkable. The Court of Appeal's creation of a legally enforceable obligation requiring private parties to consult and reach accommodations with aboriginal groups who have not yet established aboriginal rights is contrary to the law expressed in this Court's decisions. More importantly, requiring private parties to engage in a consultation process in such circumstances is financially onerous and ultimately impracticable. Such an obligation is simply not feasible where no aboriginal group claiming title in the Province has established the boundaries of its territories and the courts have not yet defined the extent of aboriginal title. The decisions of the Court of Appeal in this case, if upheld, will lead to financial instability and institutional paralysis, as government agencies and private parties struggle with claims that have not yet been adjudicated.

Position of the Business Interveners on this appeal

16. The Business Interveners support the position of the Appellants that the judgment under appeal is wrong in law and should be set aside. The Business Interveners support the position of the Crown Appellants (and echoed by most of the intervening Attorneys General) that the Crown's constitutional and fiduciary obligations are not engaged before the determination of a disputed claim of aboriginal rights or title. The Business Interveners also support the position of the Crown Appellants that before an aboriginal group has established aboriginal rights or title, any duty to accommodate does not include a legal obligation to pay compensation for asserted infringements. Finally, the Business Interveners support the position of the Crown Appellants that the legal obligation to consult resides with the Crown and not with private actors.

17. The Business Interveners support the position of the Appellant Weyerhaeuser that private individuals or corporations operating on Crown land claimed by aboriginal groups are under no legal obligation to consult or to seek to accommodate asserted aboriginal interests. The Business Interveners adopt Weyerhaeuser's submissions concerning the errors made by the Court of Appeal in identifying the sources of a private duty. The Business Interveners also support the position of Weyerhaeuser (and several of the intervening Attorneys General) that the principles relating to interlocutory injunctions should apply to determine the rights and obligations of parties pending resolution of an aboriginal claim.

18. The Business Interveners agree with the Intervener the Attorney General of Canada that "there is no free-standing fiduciary, constitutional or other independent obligation to consult that is enforceable by an aboriginal group where they have claimed, but not established, aboriginal rights" (at para. 3 of his factum). The Attorney General for Canada postulates, however, that in exercising a discretionary power of decision under a statutory regime, the Crown may owe a limited "*ex ante* requirement to consult" (at para. 4). While the Business Interveners do not accept that there is an "*ex ante* requirement to consult" beyond that imposed under the principles of administrative law and statutory interpretation, the Business Interveners do agree that any "limited *ex ante* requirement to consult does not extend to private industry" (para. 85 of his factum). The Business Interveners also agree with the Attorney General of Canada's position that "there is no requirement on private industry … to consult with an aboriginal group that is enforceable by an aboriginal group at the pre-proof stage" (para. 87; see also para. 9). The Attorney General suggests, however, that "[i]t is open to the Crown to impose participatory or other obligations on private industry to consult with aboriginal groups as part of a decision-making or approval process" (at para. 89; see also para. 9). The Business Interveners take the position that if the Crown has a constitutional or fiduciary obligation to consult with or accommodate aboriginal groups in respect of unproven aboriginal rights (which the Business Interveners dispute), the Crown cannot lawfully delegate such an obligation to private parties. Even if the Crown may validly impose such obligations, they can be enforced only by the Crown (as the Attorney General of Canada recognizes at para. 89) and not by aboriginal individuals or groups. This appeal involves fiduciary and constitutional obligations, and the validity or significance of requirements imposed by government on private parties are not determinative. Moreover, this Court's decision will have implications for other private parties who are subject

to different statutory regimes and forms of tenure than those engaged in the instant case. The conduct of private parties in dealing with asserted claims may well be relevant at a later stage, when determining whether the Crown's infringement of established rights has been justified. It is submitted, however, that dealings between the Crown and private parties should not form part of the analysis when deciding whether there is a freestanding, pre-existing obligation to consult or reach accommodation with aboriginal groups who have not yet established aboriginal rights or title.

19. The Business Interveners disagree with the position of the Respondents, the Council of the Haida Nation and Guujaaw, that the Crown owes a fiduciary and constitutional obligation to consult and seek accommodation in respect of asserted rights. The Respondents' submissions operate from the incorrect assumption that the aboriginal rights and title in question have been established. That is manifestly not so in this case. The Business Interveners also disagree vehemently with the Respondents' position that this case involves purely procedural issues in respect of private parties. Contrary to the position taken by the Respondents, the decisions of the Court of Appeal in the case at bar were not merely "procedural", but purported to create legally enforceable rights that have now resulted in demands and litigation on the part of aboriginal groups.

20. The positions of the Business Interveners are developed in more detail below.

No independent constitutional or fiduciary obligation to consult and accommodate in respect of asserted rights

(a) Introduction

21. It is submitted that the provincial Crown does not owe any independent, enforceable constitutional or fiduciary obligation to aboriginal groups upon the assertion of aboriginal rights. There are even more compelling reasons for rejecting the thesis that private parties can owe such an obligation.

(b) The Crown has no obligation to consult in respect of asserted rights

22. The Business Interveners submit that there is no authority for the imposition of a fiduciary or constitutional duty to consult with and seek accommodations with aboriginal groups

who assert claims of aboriginal rights or title. The Court of Appeal's decision contradicts the jurisprudence developed by this Court. For example, this Court recently said (emphasis added):

> Once an aboriginal right is proven, [provincial legislation] would be of no effect to the extent that it was inconsistent with that right, unless that inconsistency could be justified according to the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075.
>
> *Paul v. British Columbia (Forest Appeals Commission),* 2003 SCC 55, at para. 10
>
> See also *Sparrow*, supra, at pp. 1111-13, 1119; *R. v. Nikal*, [1996] 1 S.C.R. 1013, at paras. 109-110; *R. v. Badger*, [1996] 1 S.C.R. 771, at paras. 95-98; *R. v. Gladstone*, [1996] 2 S.C.R. 723, at paras. 54-5, 64, 84; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 160-9; *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, at paras. 43-4

23. In this regard, the Business Interveners adopt the submissions of the Business Coalition in the *Taku* appeal, at paras. 16-35 and 42-3 of their factum. The Business Interveners also agree with the submissions of the Crown Appellants (at paras. 89-121 of their factum) that the Crown owes neither fiduciary nor constitutional obligations to consult in respect of unproven rights.

24. The Respondents rely (at paras. 202-4 of their factum) on this Court's decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, in support of the declarations made by the Court of Appeal. Contrary to the Respondents' submission, the *Doucet-Boudreau* decision, which involved minority language education rights, illustrates that the nature and scope of the right must be defined before an appropriate remedy may be crafted. Iacobucci and Arbour JJ., for the majority, explained that in fashioning a remedy for violation of a Charter right, the nature of the right and the circumstances in which it was infringed are relevant:

> [55] …an appropriate and just remedy in the circumstances of a Charter claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied.

The majority of this Court also explained (at para. 58) that a Charter remedy must be "fair to the party against whom the order is made". It is submitted that a similar analysis operates in an aboriginal rights case: the rights must be determined, the circumstances in which they were

infringed must be reviewed, and fairness to affected parties must be considered, before the courts can craft an appropriate and just remedy.

(c) Consultation and accommodation obligations rest with the Crown

25. The Business Interveners submit that constitutional obligations in respect of aboriginal people rest with the Crown, not with private parties. The Business Interveners adopt the submissions of the Crown Appellants (at paras. 122-132 of their factum) and the Appellant Weyerhaeuser (at paras. 38-47 and 91-97 of its factum).

26. As this Court confirmed in *Delgamuukw*, aboriginal rights are not absolute: they may be infringed by both the federal and provincial governments, who then bear the onus of justifying that infringement. Only in the context of justification of infringement by the Crown has this Court discussed the issue of consultation. In effect the decisions of the Court of Appeal convert the shield of justification into the sword of a new constitutional duty. Nowhere has this Court suggested that a duty to consult with aboriginal groups, let alone a duty to accommodate asserted aboriginal interests, rests with private parties.

27. A duty on the part of private parties to consult with and accommodate aboriginal claims is impossible to reconcile with the Crown's explicit duty to balance the interests of aboriginal groups with other activities in the public interest. As this Court has confirmed, the Crown may infringe aboriginal rights where other public objectives justify the infringement. This Court recently agreed, for example, that the Provincial Crown must balance the preservation of aboriginal heritage with the need to promote the exploitation of British Columbia's natural resources. Because the Crown must balance these conflicting interests, it cannot fall to private parties to accommodate asserted claims of aboriginal rights or title.

Kitkatla Band v. British Columbia, [2002] 2 S.C.R. 146, at paras. 62-3, 76

See also *Delgamuukw*, *supra*, per Chief Justice Lamer at paras. 161, 165 and *Gladstone*, *supra*, at paras. 73-75

28. Private parties do not have the resources or the expertise to assess the potential soundness of an asserted claim of aboriginal rights or title, and thus have no way of knowing the scope of the required consultation or the obligation to seek accommodation. While the federal and

provincial Crown are direct participants in the treaty negotiation process and may be able to perform a preliminary assessment of aboriginal claims, private parties do not participate in this process and have no means of performing such an assessment. The problem is exacerbated where aboriginal groups present overlapping claims.

(d) No constitutional obligation on the part of private parties

29. The constitutional protection afforded aboriginal rights is expressed in s. 35 of the *Constitution Act, 1982*, which affirms existing aboriginal rights. Section 35 does not create new, free-standing rights. It is therefore necessary to examine the nature of common law aboriginal rights and title as they existed prior to the enactment of s. 35, as well as this Court's definitions of aboriginal rights and title since s. 35 came into force.

30. Constitutional questions cannot be determined in a vacuum. Furthermore, in litigation dealing with s. 35, this Court has made it clear that the first step in any analysis is to determine the nature of the right asserted.

Bell ExpressVu Limited Partnership v. Rex et al., [2002] 2 S.C.R. 559, at para. 59

Northern Telecom Ltd. v. Communications Workers of Canada, [1980] 1 S.C.R. 115, at pp. 139-140

R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 51

Mitchell v. Minister of National Revenue, [2001] 1 S.C.R. 911, at para. 14

31. In this case, two s. 35 rights appear to be in issue in light of the findings of the learned Chambers judge. First, the learned Chambers judge held that there was a "reasonable probability that the [Respondents] will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of " the Queen Charlotte Islands (para 47; emphasis added). Second he found that "there is a substantial probability that the [Respondents] will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth areas of" the Queen Charlotte Islands. (para. 47; emphasis added) He also found a "reasonable probability exists that the [Respondents] would be able to show a prima facie case of infringement of " the right to harvest red cedar trees" (para 48). However, the Chambers judge was "unable to predict what likelihood there is that the [Respondents] would be able to establish infringement of other aspects of their rights" in relation to Block 6 (para 48).

32. It is against these findings of fact in respect of potential aboriginal rights and title that the alleged new constitutional or fiduciary duty must be analyzed.

(i) Aboriginal Rights

33. In *Van der Peet, supra*, this Court set out the test for determining whether an aboriginal right had been established: “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right” (at para. 46).

34. In this case, apprehended infringement of the aboriginal rights asserted by the Respondents (relating to the harvest of red cedar trees) can be addressed by the law of injunctions. There have been numerous cases dealing with injunctive relief relating to aboriginal rights and the Respondents advance no justification for creation of a new remedy to replace or augment existing remedies.

> See, *e.g., MacMillan Bloedel v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.); *Westar Timber Ltd. v. Gitksan Wet’suwet’en Tribal Council* (1989), 37 B.C.L.R. (2d) 352 (C.A.)

(ii) Aboriginal Title

35. In *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313, the first modern acknowledgment of aboriginal title in this country, Judson J. said, at p. 328: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . . .”

36. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 382, Dickson J. (as he then was) spoke of the "legal right to occupy and possess certain lands”. That case, of course, involved the federal Crown’s obligations in respect of the disposition of reserve land.

37. This Court attempted to provide a more comprehensive description of aboriginal title in *Delgamuukw.* It may be recalled that the plaintiffs in that case originally advanced claims for “ownership" and "jurisdiction" over the territories in question. The trial judge dismissed those claims. The majority decision of the Court of Appeal for British Columbia did not disturb the trial judge’s conclusions on ownership and jurisdiction (see, e.g., reasons of Macfarlane J.A., [1993] 5 W.W.R. 97, at paras. 24-27, 275-77). On appeal to this Court, the claims for ownership

and jurisdiction were "replaced" with claims for aboriginal title and self-government, respectively (*Delgamuukw*, *supra*, at paras. 16-20, 30, 73).

38. In his reasons in *Delgamuukw*, Chief Justice Lamer explained that "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title…" (at para. 117). "What aboriginal title confers is the right to the land itself" (at para. 138; see also para. 140). Chief Justice Lamer elaborated on the nature of unextinguished aboriginal title in his justification analysis (at para. 166; emphasis in original):

> …aboriginal title encompasses the right to <u>exclusive</u> use and occupation of land; second, aboriginal title encompasses <u>the right to choose</u> to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have an inescapable <u>economic component</u>.

39. This Court's jurisprudence makes it clear that the essence of aboriginal title, if it exists, is exclusive use and occupation of the land in question, carrying with it "the right to choose to what uses land can be put". Aboriginal title is not ownership but is a *sui generis* right to use and occupation. Significantly, aboriginal title has an "inescapable economic component". Private interests, such as those represented by the Business Interveners, inevitably conflict with the economic component of aboriginal title. The desire to exploit natural resources is in direct conflict with the assertion of aboriginal title, which contemplates exclusive use and occupation of the land. According to this Court in *Delgamuukw* (at para. 165) the need to exploit natural resources in the Province can, in principle, justify the infringement of aboriginal title. But, as this Court explained in *Kitkatla*, *supra*, it is the Crown's responsibility to balance the need to exploit natural resources with aboriginal rights and title.

40. As explained earlier, the potential infringement of aboriginal rights, which encompass activities integral to defined aboriginal culture, can be addressed by the law of injunctions. The Respondents assert that the harvest of red cedar trees is essential to their culture, and the Chambers judge acknowledged the probability that the Respondents could establish an aboriginal right to harvest red cedar trees in some areas. The Chambers judge was unable, however, to identify any specific potential infringement of other aboriginal rights, including aboriginal <u>title</u>, asserted by the Respondents. Because the potential infringement of aboriginal rights can be

protected by the law of injunctions, any other potential infringement is purely economic. The issue in respect of aboriginal title is whether there is any alleged infringement of "the right to choose to what uses land can be put".

41. How can Weyerhaeuser owe a constitutional duty to consult with and accommodate the Respondents in respect of this economic interest prior to proof of the extent and scope of any aboriginal title? It is submitted that Weyerhaeuser is entitled to assume that tenures and rights acquired from the Province are constitutionally valid. A requirement of consultation prior to the establishment of aboriginal rights or title inevitably implies that the tenures and rights are encumbered or invalid. It is submitted that until aboriginal title has been established, it is inappropriate to assume that tenures and rights granted by the Crown are defective: private parties are entitled to assume that those tenures and rights are valid until competing rights have been established.

(e) New duty is extraordinary interlocutory relief

42. In effect, the Respondents have been granted extraordinary interlocutory injunctive relief, tantamount to the suspension of legislation, prior to meeting the criteria for injunctive relief and prior to establishing any aboriginal rights or any infringement of those rights. Even the Court of Appeal acknowledged that the validity of Weyerhaeuser's T.F.L. "could much more readily be argued after the extent of any infringement of aboriginal title and rights by T.F.L. 39 has been determined by a Court of competent jurisdiction" (*Haida (#1)*, at para. 58).

43. The Business Interveners agree with the Appellant Weyerhaeuser (at paras. 48-56 of its factum), as well as several of the intervening Attorneys General, that the principles relating to interlocutory injunctions should govern rights and obligations prior to resolution of the underlying aboriginal claims. These principles would rarely lead to injunctive relief where the interest is aboriginal title (with its inevitable economic component), and no aboriginal rights as defined by this Court in *R. v. Van der Peet* are engaged. It is submitted that there is no reason for the courts to depart from the principles developed in the law of injunctions to address the apprehension of immediate harm. In this regard the Business Interveners adopt the submissions included in the factum of the Business Coalition in the *Taku* appeal, at paras. 36-41.

(f) No fiduciary obligation on the part of private parties

44. The very hallmark of a fiduciary obligation is the duty of loyalty, which requires that the fiduciary act in the best interests of the beneficiary. For this reason, the fiduciary concept should not be strained to apply to the situation of private parties and aboriginal peoples who are competing for the use of the same land. Because of the inherent conflict, private parties who operate on Crown land simply cannot be trustees or fiduciaries for aboriginal peoples. It is neither reasonable nor appropriate to expect private parties to subordinate their own interests and duties to others (such as creditors and shareholders) to asserted, but not yet established, aboriginal claims.

E.D.G. v. Hammer, 2003 SCC 52, at para. 23

K.L.B. v. British Columbia, 2003 SCC 51, at paras. 41, 48

45. It is also unjust to impose fiduciary obligations on private parties when even the Crown does not owe fiduciary obligations to aboriginal groups in every circumstance. This Court confirmed in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 (at para. 83) that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary, and that, in particular, not every obligation owed by the Crown to an aboriginal group is fiduciary in nature. In *K.L.B. v. British Columbia*, *supra*, Chief Justice McLachlin said this (at para. 40):

> Fiduciary duties arise in a number of different contexts, including express trusts, relationships marked by discretionary power and trust, and the special responsibilities of the Crown in dealing with aboriginal interests…. which have been held to include a requirement of using due diligence in advancing particular interests of aboriginal peoples….

46. Similarly, in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, this Court agreed that even in recognized fiduciary relationships not all obligations are fiduciary in nature. La Forest J. and Sopinka J. both cited with approval comments of Southin J. (as she then was) in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.) (at pp. 597-8 and 647 S.C.R.):

> The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the

> special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty -- if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

47. The Respondents acknowledge at para. 91 of their factum that the fiduciary duty they postulate does not mean that aboriginal interests must always be put first. This acknowledgment illustrates why the fiduciary concept is of no assistance when applied to those decisions of the Crown that involve the balancing of conflicting interests, including asserted but unproven aboriginal interests. The hallmark of the fiduciary relationship (as the Respondents acknowledge at para. 92 of their factum) is the obligation to act in the interest of the beneficiary, not the balancing of that interest with the interests of others and with the Crown's overarching duty to govern in the public interest.

48. It is also inappropriate to impose a fiduciary duty in circumstances where it is impossible for the alleged fiduciary to know the extent of its obligations. In *K.L.B.*, *supra*, Chief Justice McLachlin explained that breach of fiduciary duty "requires fault", and that it is inappropriate to impose liability for breach of fiduciary duty unless the nature of the "wrong" was "ascertainable at the time it is committed" (at para. 45; see also *E.D.G.*, *supra*, at para. 25). Where aboriginal rights have been asserted but not established, it is impossible for private parties to ascertain the potential "wrong" they may be committing. It is therefore inappropriate to subject them to potential liability for breach of fiduciary duty.

49. It is submitted, therefore, that Lambert J.A. erred when he suggested that private parties might ultimately be liable in damages for failing to consult and seek to accommodate asserted aboriginal interests. Because the vast majority of aboriginal rights in British Columbia have yet to be established through the courts, through treaties, or through any other formal process, private parties cannot be sure with whom they should consult or which rights should be

accommodated. Even when consultation has apparently taken place, as the Skeena situation demonstrates, an accommodation agreement can be challenged by dissident aboriginals who claim the agreement was reached without authority. The difficulty is more acute where aboriginal groups have presented overlapping claims. It is neither fair nor just to expose private parties to liability for failing to consult or accommodate when the aboriginal rights in question have not been determined.

(g) Crown cannot in any event delegate fiduciary obligations

50. There is no authority for a theory of "implied delegation" of the Crown's duty to consult to third parties. If a fiduciary duty exists, the Crown cannot abdicate that responsibility by contracting it away. This Court recently cautioned against the expansion of the concept of fiduciary duty to impose liability where it does not arise on any other legal basis. This Court has also explained the limits on the doctrine of vicarious liability. The Court of Appeal's decision in the case at bar is inconsistent with this Court's recent decisions on fiduciary obligations and vicarious liability.

K.L.B. and *E.D.G.*, both *supra*; *M.B. v. British Columbia*, 2003 SCC 53

(h) "Knowing receipt"

51. The Business Interveners adopt the position of the Appellant Weyerhaeuser, expressed at paras. 66 through 90 of its factum, that the doctrine of "knowing receipt" cannot be the foundation of private party obligations to aboriginal groups. The spectre of this type of vague, restitutionary liability (where neither the "property" nor the scope of the "trust obligation" has been ascertained) would undoubtedly have negative implications for the development of natural resources in the Province.

Decisions below not merely procedural

52. The Respondents have submitted (at para. 155 of their factum) that the issue in respect of the order against Weyerhaeuser is "primarily one of jurisdiction and procedure". This submission ignores the terms of the Court of Appeal's judgment, as well as the subsequent interpretation of the judgment by aboriginal groups.

53. The Court of Appeal granted the following declaration (emphasis added):

> 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 long term objectives of the Crown and Weyerhaeuser to manage TFL 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.

54. The affidavits filed with this factum confirm that aboriginal groups throughout the Province of British Columbia have relied on the decisions of the Court of Appeal in this case to assert substantive, enforceable legal rights (see in particular the exhibits attached to the affidavits of Ms. Beets and Mr. Allard, at Appendices "C" and "F", as well as the decision of Gerow J. in *Heiltsuk, supra*). By recasting the Court of Appeal's decision as merely procedural, the Respondents appear to acknowledge that there is no lawful justification for imposing a substantive obligation on private parties. The Business Interveners agree that there is no lawful justification for such an obligation.

55. The Respondents' submissions make it clear that the implications of the decisions below are far from "procedural". The Respondents' "objectives for consultation and accommodation" include the designation of additional protected areas, the amendment of forest licences "regarding the method of logging", reduction of the allowable annual cut for all of the Queen Charlotte Islands, and the integration of Haida law into the management of the Queen Charlotte Islands (see, e.g., paras. 130-141, 181 of their factum). These objectives clearly engage the substantive interests of Weyerhaeuser and other private parties.

Conclusion

56. The decisions under appeal encumber all existing grants, licences and permits granted by the Province. If the decisions are correct, a citizen of the Province cannot accept that any grant, licence or permit from the Province is constitutionally valid. Further, the citizens of the Province who have accepted such grants, licences or permits have unknowingly assumed constitutional or fiduciary obligations to aboriginal groups who assert interests inconsistent with those grants, licences or permits. The inevitable consequence of the decisions of the Court of Appeal, as revealed in the affidavits adduced by the Business Interveners, has been institutional paralysis on

the part of the Province and creation of a cloud over grants, licences and permits in the Province. It would be inappropriate for this Court to affirm the judgment of the Court below and thereby impose this constitutional chaos on the whole country.

PART IV

SUBMISSIONS ON COSTS

57. The Business Interveners submit that they should not be required to pay the costs of any party. By agreement, as expressed in the order granting leave to appeal, the Crown Appellants are to pay the party and party costs of the Respondents in any event of the cause. By order of Iacobucci J. on November 24, 2003, the Business Interveners are to pay to the Appellants and Respondents any additional disbursements occasioned by the intervention, pursuant to Rule 59(1)(a). The Business Interveners will, in accordance with this order, pay any disbursements attributable to their intervention.

PART V

NATURE OF ORDER SOUGHT

58. The Business Interveners support the Appellants' request for an order that the appeal be allowed, restoring the Chambers judge's dismissal of the Respondents' petition, and that the Constitutional Question be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Charles F. Willms
Counsel for the Business Interveners

Vancouver, B.C.
January 13, 2003

PART VI

TABLE OF AUTHORITIES

PARA. NO. (s)

PART VII

STATUTES RELIED ON