**Court File No. 29419**

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

**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 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**

**RESPONDENT (APPELLANTS)**

**AND:**

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, SQUAMISH INDIAN BAND and LAX KW'ALAAMS INDIAN BAND, THE FIRST NATIONS SUMMIT, THE DENE THA' FIRST NATION, THE HAISLA NATION, TENIMGYET, also known as ART MATTHEWS, GITXSAN HEREDITARY CHIEF, THE BUSINESS COUNCIL OF BRITISH COLUMBIA & YUKON CHAMBER OF COMMERCE, COUNCIL OF FOREST INDUSTRIES AND MINING ASSOCIATION OF BRITISH COLUMBIA and THE BRITISH COLUMBIA CATTLEMEN'S ASSOCIATION**

**INTERVENERS**

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# FACTUM OF THE INTERVENER HAISLA NATION

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## PART I

## STATEMENT OF FACTS

**1. The Intervener the Haisla Nation, also known as the Kitamaat Indian Band, (the "Haisla Nation") is an Aboriginal nation whose territory lies in northwestern coastal British Columbia.**

**2. The Haisla Nation adopts the facts as set forth in the Respondents Council of Haida Nation Factum, and sets out the following additional relevant facts.**

**3. The traditional territory of the Haisla Nation covers 5,000 square miles. One large forestry company holds a Tree Farm License covering the majority of Haisla Nation traditional territory. Other logging companies operate, under license from the British Columbia Ministry of Forests, in the traditional territory of the Haisla Nation. In addition, a number of other branches of the provincial government regularly make resource related decisions that impact the Haisla Nation's aboriginal rights, including aboriginal title.**

**4. On December 15, 1993 the Haisla Nation issued a Statement of Intent to enter into treaty negotiations with Canada and British Columbia. In 1995, the British Columbia Treaty Commission ("BCTC") determined that all parties were in a state of sufficient readiness for negotiations and the parties proceeded to Stage II of the BCTC Process (Appendix 1).**

**5. The BCTC Process involves six stages: filing a Statement of Intent to negotiate a treaty; preparing for negotiations and assessing readiness; negotiating a framework agreement; negotiating an agreement-in-principle; negotiating a final treaty; and implementing the treaty.**

***Gitanyow First Nation* v. *Canada*, [1999] 3 C.N.L.R. 89, para. 25.**

**6. The BCTC Process requires that all parties to the treaty negotiation execute a framework agreement that will govern the substantive negotiations to follow. The Framework Agreement entered into by the Haisla Nation included a commitment to negotiate a treaty in accordance with the BCTC Process in a timely way (Appendix 2).**

**7. The Haisla Nation has been engaged in the BCTC Process since 1996. The Haisla Nation has dedicated considerable resources to this process, and has incurred a significant debt to engage in and continue in this process.**

**8. On December 10, 1999, the Haisla Nation filed a Writ of Summons and Statement of Claim seeking, amongst other remedies, a declaration that the Haisla Nation has unextinguished aboriginal title to its territory. On July 18, 2000, the Haisla Nation's aboriginal title action was placed into abeyance, by agreement of all the parties, in recognition of the intention of all parties to negotiate under the BCTC Process rather than litigate.**

**9. British Columbia and Canada have, throughout treaty negotiations with the Haisla Nation, taken the position that the Haisla Nation has to choose between treaty negotiations or aboriginal title litigation. Canada and British Columbia have made it clear to the Haisla Nation that they will terminate treaty negotiations with the Haisla Nation should the Haisla Nation proceed to actively litigate aboriginal title. This is exactly what happened in the case on appeal. The Province broke off treaty negotiations with the Haida Nation when the Haida Nation commenced litigation relating to the matters at issue in this appeal.**

***Factum of the Respondents Council of the Haida Nation et al*., paras. 27 and 62.**

**10. The Haisla Nation has noted a marked improvement in the treaty negotation process and in its ability to interest government and industry in constructive discussions since the Court of Appeal decided the case on appeal.**

## PART II

## POINTS IN ISSUE

**11. The points in issue are set out in the Facta of the Appellants and of the Respondents.**

## PART III

## ARGUMENT

### A. The Protective Aspect of Section 35 of the *Constitution Act, 1982*

**12. Section 35(1) of the *Constitution Act, 1982*, provides as follows:**

> **35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.**

***Sparrow* was this Court's first opportunity to explore "the scope of s. 35(1)… and to indicate its strength as a promise to the aboriginal peoples of Canada". That decision made it clear that s. 35 is to be "construed in a purposive way". The words of the constitutional provision are to be interpreted in a generous, liberal and remedial way. As the Court put it, the general guiding principle of s. 35(1) is that:**

> **…the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust–like, rather than adversarial, and the contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship (p. 1108).**

***R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 1106-1108.**

**13. As *Sparrow* noted, "s. 35(1) is a solemn commitment that must be given meaningful content" (S*parrow* p. 1108). Part of this meaningful content is the duty s. 35(1) places upon the Courts to provide redress if the Crown has unjustifiably infringed aboriginal rights (including aboriginal title). This redress could take the**

**form of striking down a statutory provision or regulation. It could afford a defence to an aboriginal person charged with an offence.**

***R.* v. *Gladstone*, [1996] 2 S.C.R. 723;**
***R.* v. *Marshall*, [1999] 3 S.C.R. 456;**
***R* v. *Sioui*, [1990] 1 S.C.R. 1025;**
***R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.**

**14. The Appellants argue that this corrective aspect of s. 35(1) exhausts the full extent of the right. This conclusion is by no means inevitable. Constitutional protections are elaborated over time. In *New Brunswick* v. *G.(J.)*, the security of the person under s. 7 of the Charter was extended beyond the criminal law (paras. 65-67). In *Blencoe*, the concept of liberty under s. 7 of the Charter was extended beyond mere freedom from personal restraint. It is entirely open to this Court to develop a fuller protective ambit for s. 35(1) rights.**

***New Brunswick (Min. of Health and Community Services)* v. *G.(J.)* [J.G.], [1993] 3 S.C.R. 46, paras. 65-67.**

***Blencoe* v. *British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, paras. 45, 49-50.**

**15. The purpose of s. 35(1) is not simply to provide redress when the Crown violates an aboriginal right. The provision is also protective. By establishing a consultation and accommodation requirement, s. 35 serves to minimize the likelihood or risk that aboriginal rights will be unjustifiably infringed in the first place. In *Sparrow* Chief Justice Dickson wrote:**

> **The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the Constitution Act, 1982, which deal with aboriginal rights, it said the following, at p. 322:**

> **This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future … (pp. 1106-1107).**

**Limiting s. 35(1) to only a source of redress once rights and infringements have been established through litigation would amount to a similar approach to s. 35 as the one cautioned against in *Sparrow*: s. 35 would be largely limited to a mere promise to recognize those rights sometime in the future. Aboriginal nations who could afford years of litigation with the Crown could only hope for recognition and affirmation of their rights once this litigation was complete. Aboriginal nations who could not afford comprehensive aboriginal rights and title litigation – the large majority of Aboriginal nations – would be entirely dependent upon whether the Crown might some day be willing to negotiate some form of recognition of these rights. The protective aspect of these s. 35(1) rights would be severely impaired.**

***R.* v. *Sparrow*, *supra*, 1106–1107.**

**16. *Van der Peet* confirmed the protective purpose of s. 35. Chief Justice Lamer wrote:**

> **A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and affirming are "rights". Further, because it requires the court to analyze a given constitutional provision "in the light of the interests it was meant to protect" (*Big M Drug Mart. Ltd.*, supra, at p. 344), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.**

***R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 21 (emphasis added).**

**The Appellants' approach to s. 35 would limit that provision to redress following lengthy adversarial proceedings. It pays little heed to the interests that s. 35 was "meant to protect": the recognition and affirmation rights of aboriginal peoples.**

**17. Consultation between the Crown and Aboriginal nations is required to allow the Crown to understand the scope and nature of the constitutional rights that may be infringed. Consultation is a means of avoiding infringement and litigation, as Justice Huddart noted in *Halfway River*:**

> **I share Mr. Justice Finch's view that the District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt in determining whether to grant Cutting Permit 212 to Canfor. This constitutional obligation required him to interpret the *Forest Act* and the *Forest Practices Code* so that he might apply government forest policy with respect for Halfway's rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation: *Delgamuukw* v. *B.C.*, [1997] 3 S.C.R. 1010 at 1112-1113 per Lamer C.J.C.; and see the discussion by Williams C.J.S.C. in *Cheslatta Carrier Nation* v. *B.C.* (1998), 53 B.C.L.R. 1 at 14-15 (para. 178).**
>
> **. . .**
>
> **It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible. This characterization is crucial to an assessment of whether a particular treaty or aboriginal right has been, or will be infringed (para. 180).**

***Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), paras. 178 and 180.**

**The British Columbia Supreme Court came to a similar conclusion: "One of the principal purposes of consultation is to enable the Minister to gain a proper understanding of the aboriginal interests and to seek ways to accommodate those interests".**

***Gitxsan First Nation* v. *British Columbia (Minister of Forests)*, [2003] 2 C.N.L.R. 142 (B.C.S.C.), para. 85.**

**Thus, recognition and affirmation requires good faith dialogue between the Crown and Aboriginal nations with a view to identifying rights and avoiding or minimizing potential infringements. The Crown's obligation to consult with Aboriginal nations flows directly from the Crown's constitutional obligation to recognize and affirm aboriginal rights as enshrined in s. 35.**

**18. Consultation is not, of course, an end in itself. Rather, the purpose of consultation is to identify the potential that an anticipated Crown decision will infringe s. 35 rights and to determine what mitigative and compensatory steps are available. By consultation the Crown must determine whether the available justificatory steps allow the Crown decision to lawfully proceed. Thus the Courts have concluded that the consultation must be "meaningful". As Justice Finch put in *Halfway*:**

> **The Crown's duty to consult imposes upon it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plans of action…**

***Halfway, supra*, para. 160.**

***Blueberry River Indian Band* v. *British Columbia (Minister of Employment and Investment)*, [1997] B.C.J. No. 2864 (B.C.S.C), para. 8.**

***Kelly Lake Cree Nation* v. *British Columbia (Minister of Energy and Mines)*, [1999] 3 C.N.L.R. 126 (B.C.S.C.), para. 240.**

***Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2002] 1 C.N.L.R. 169 (F.C.T.D.), para. 154.**

**19. The Appellants argue that s. 35 has no legal implications or relevance until an Aboriginal nation establishes the existence of an aboriginal right through litigation. This impoverished approach to constitutional interpretation would shear away the protective aspect of s. 35. This approach would directly conflict with the "purposive" reading of s. 35 rights as it would not focus on the protection of aboriginal rights, but would be limited to providing redress and compensation for**

**infringement. It does not reflect a "liberal" interpretation of s. 35 as it narrows the function of s. 35 to addressing infringements long after the fact as opposed to avoiding them in the first place. It is not a "remedial" approach to s. 35 as it minimizes, to as great a degree as possible, the role that s. 35 will play in addressing the underlying problem: the Crown's historic failure to recognize and affirm the rights of aboriginal peoples.**

**20. Canada would concede a circumscribed protective role for s. 35(1). Canada would see the Crown being obliged to read a statutory regime under which a power is being exercised to include a "limited" requirement to "seriously consider … potential aboriginal rights". But even this minimal obligation is, according to Canada, optional. If the "applicable statutory provisions, properly interpreted, preclude consultation then there is no obligation to consult that is enforceable prior to proof of an aboriginal right". Canada says that the Crown should "always act towards aboriginal peoples in a manner consistent with the constitutional values and purpose behind section 35 and consistent with the honour of the Crown". At the same time, however, Canada argues that the Crown may, at its option, effectively force Aboriginal nations into years of litigation prior to s. 35 imposing any legal obligation upon the Crown.**

***Factum of the Intervener Attorney General of Canada*, paras. 5, 7, 26 and 37.**

**21. Canada's position that it is open to the Crown to design its legislation so as to eliminate the Crown's obligation to even "seriously consider aboriginal rights" prior to litigation was rejected by the Supreme Court of Canada in *Adams.* Here the Court noted that it is open to the Crown in the context of Charter rights to enact legislation that confers "… a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right". The Court will examine whether the discretion has been exercised in a way that "accommodates the guarantees of the Charter". The Court <u>rejected</u> this approach, however, with respect to s. 35 of the *Constitution Act, 1982*.**

***R.* v. *Adams*, [1996] 3 S.C.R. 101, para. 53.**

**22. In *Adams*, Chief Justice Lamer stated:**

> **I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982*. In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test (emphasis added) (para. 54).**

**While in *Adams* the aboriginal fishing right had been established, the language above indicates that the Court is concerned not just with providing some form of redress after aboriginal rights litigation is undertaken and complete, but with giving effect to s. 35's broader protective function: avoiding "risk" of substantial infringement and providing "substantial guidance" and "sufficient directives" to Crown decision makers in order to allow them to "fulfil their fiduciary duties". Canada's optional approach to s. 35 is at odds with s. 35's broader protective function.**

***R.* v. *Adams*, *supra*, para. 54.**

**23. In *Adams* the Court rejected the Crown's position that because aboriginal fishing rights were not recognized by French colonial law, no such right was ever "received into the common law with the transition to British sovereignty in 1763". The Court rejected the Crown's argument noting that s. 35(1):**

> **… would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received legal approval of British or French colonizers (para. 33).**

**For the same reason this Court should reject the Crown's parallel argument that s. 35(1) only protects particular rights of particular Aboriginal nations that have been fortunate enough to have their rights conclusively litigated.**

***R.* v. *Adams, supra*, para. 33.**

**B. <u>*Sui Generis* Rights Require a *Sui Generis* Approach by the Courts</u>**

**24. Aboriginal rights, including aboriginal title, are *sui generis*, possessed of characteristics that "cannot be completely explained by reference either to the common law rules of real property or to rules of property found in aboriginal legal systems". The *sui generis* nature of aboriginal title precludes "the application of 'traditional real property rules' to elucidate the content of that title".**

***R.* v. *Guerin*, [1984] 2 S.C.R. 335, p. 382.**

***Delgamuukw* v. *B.C.*, [1997] 3 S.C.R. 1010, paras. 112 and 130.**

**25. The very nature of aboriginal rights, including aboriginal title, makes them difficult and expensive to prove in Court. While traditional property rights may be established through instruments such as a deed of title or letters patent, duly filed in a land registry system, aboriginal property rights do not have the benefit of a registry or of documents that evidence their existence.**

**26. Aboriginal rights and aboriginal title are held by Aboriginal nations that relied predominantly on oral history and practices to record and transmit property**

**rights. The difficulty of proving these rights was recognized by Chief Justice Lamer in *Van der Peet:***

> **… a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times when there were no written records of the practices, customs and traditions engaged in.**

***Van der Peet, supra*, para 68.**

**See also *Delgamuukw* v. *B.C., supra*, paras. 82-83.**

**27. An aboriginal title action would require extensive oral history evidence, the introduction of archival and other documentary records, along with expert evidence on anthropology, archaeology, linguistics, history and other disciplines. All oral history and expert witnesses would be subjected to extensive cross-examination. Thus the very nature of aboriginal title would lead to a protracted and expensive trial.**

***B.C. (Ministry of Forests)* v. *Okanagan Indian Band*, 2003 SCC 71, para. 3.**

**28. When Aboriginal nations have sought to prove their rights in less expensive and less time-consuming ways, the Crown has successfully moved that issues of existence of aboriginal rights, infringement and justification be determined by way of a full trial.**

***Kelly Lake Cree Nation, supra*, para. 27.**

***B.C. (Ministry of Forests)* v. *Okanagan Indian Band, supra*, para. 7.**

**29. In this context it is submitted that the *sui generis* nature of aboriginal rights, including title, requires a *sui generis* approach to the remedial options available to protect these rights. In the same way that aboriginal title cannot be captured by**

**traditional real property concepts, the protection of aboriginal title need not and should not rely solely upon traditional remedial concepts.**

**30. Both the Appellants Minister of Forests et al. and the Appellants Weyerhaeuser suggest the contrary. The constitutional recognition and affirmation of aboriginal rights, they argue, places the Crown under no obligation to talk to the Aboriginal nation about a potentially damaging Crown decision. If an Aboriginal nation believes that a decision threatens aboriginal rights, they say, the Aboriginal nation can commence an action and apply for an interlocutory injunction.**

***Factum of the Appellants Minister of Forests et al.*, para. 45.**

***Factum of the Appellant Weyerhaeuser,* paras. 48–49, 56.**

**Other Crown interveners also sound a ringing (if unusual) endorsement of interlocutory injunctions as a method to protect aboriginal rights as litigation proceeds:**

***Factum of the Intervener Attorney General of Canada,* para. 101.**

***Factum of the Intervener Attorney General of Ontario,* para. 29-42.**

***Factum of the Intervener Attorney General of Manitoba,* para. 20.**

**31. At first blush it is curious that the Appellants seek to limit the interim remedial options of Aboriginal nations to injunctions; a far more disruptive remedy than that fashioned by the Court of Appeal. In the present situation an injunction would have prevented logging for many years as the Haida Nation aboriginal title action moved through the Courts. The answer may lie in the fact that, as counsel for Weyerhaeuser has pointed out in another forum, Aboriginal nations have been notoriously unsuccessful in obtaining injunctive relief:**

> **Since the *Sparrow* decision (though not necessarily because of it) there do not appear to have been any instances in which an**

> **interlocutory injunction has been granted to stop development of land pending resolution of a land claim (p.1.3.8).**
>
> **. . .**
>
> **The Supreme Court of Canada judgment in *Delgamuukw* has not made injunctions easier to obtain. In fact, the Court of Appeal has specifically stated that "nothing in *Delgamuukw* has changed any of the existing law with reference to injunctions." Four applications for injunctions have been brought since the *Delgamuukw* decision came down, and all have been dismissed on the balance of convenience (p.1.3.10).**
>
> **. . .**
>
> **While interlocutory injunctions are peculiarly fact specific remedies, there are three more general factors that may go some distance to explaining what appears to be a growing reluctance of courts to issue interlocutory injunctions to prevent development from proceeding during the resolution of Aboriginal claims litigation:**
>
> **(i) the realization that unlike most interlocutory injunctions, an injunction when issued in an aboriginal rights case is likely to be in place for a very long time;**
>
> **(ii) the increasing consideration of the public interest in assessing the balance of convenience during aboriginal rights litigation; and**
>
> **(iii) our increasing understanding of the nature and scope of aboriginal rights (p.1.3.11).**

**Aboriginal nations have repeatedly failed in their attempts to obtain interlocutory injunctive relief over the last decade or more.**

**John Hunter, "Advancing Aboriginal Title Claims after Delgamuukw: The Role of the Injunction" (presented at the Continuing Legal Education Conference on Litigating Aboriginal Title, June 2002), p. 1.3.8, 1.3.10 and 1.3.11.**

**32. Legal scholars have also cautioned against the reliance on the availability of injunctive remedies to address the Crown's failure to consult:**

> **Although the duty to consult requires remedial flexibility on the question of whether and to what extent the Crown ought to be**

> **ordered to engage in consultation, it requires bright-line rules regarding the availability of interlocutory injunctions. … Despite a number of early high-profile successes in obtaining interlocutory injunctions, lower courts have become increasingly reluctant to order this form of interim relief in cases involving Aboriginal or treaty rights or an alleged failure of the Crown to fulfill its duty to consult.**

**Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult", (2002) 79 Can. Bar Rev. 252 at 275.**

**33. Aboriginal nations have repeatedly failed to meet the "balance of convenience" requirement to obtain an injunction given the economic dislocation inherent in prohibiting industrial activity pending a trial that may not complete for several years. Further, few Aboriginal nations are in a financial position to post the necessary undertaking for damages. Thus, British Columbia and Weyerhaeuser advocate this traditional method of protecting rights pending trial, comfortable in the knowledge that this method has proved as singularly ineffective to afford protection to aboriginal rights.**

**See for example:**

***Siska Indian Band* v. *British Columbia (Min. of Forests)* (1998) 62 B.C.L.R. (3d) 133 (B.C.S.C.).**

***Nanoose Indian Band* v. *British Columbia,* [1995] B.C.J. No. 3059.**

***Yellow Quill First Nation* v. *Saskatchewan (Min. of Environment),* [2002] 2 C.N.L.R. 359 (Sask QB).**

**34. Recognizing the inadequacy of the standard test for injunctive relief to address aboriginal rights issues, the Intervener Attorney General of Ontario suggests that it is open to the Courts to modify the injunctive test to properly reflect the "relative situations of the parties and [the] recognition of the substantive promise of s. 35". It is submitted that there is no need to bend the principles of injunctive relief to attempt to meet the substantive promise of s. 35. Our increasing understanding of the nature and scope of aboriginal rights warrants an alternative**

**remedy to interlocutory injunctions. Section 35 itself can found a sufficient, flexible, and less intrusive remedy – as it did in the case on appeal.**

***Factum of the Intervener Attorney General of Ontario,* para. 38.**

**35. The unique nature of aboriginal rights requires remedial flexibility. The Court of Appeal's approach to interim relief allows for meaningful interim protection for aboriginal rights without the negative economic consequences inherent in injunctive relief. It forces the parties to sit down together to work out constructive solutions. This alternative *sui generis* approach is justified by the *sui generis* nature of the rights at issue.**

## C. Negotiated Settlements to be Preferred to Litigation

**36. The decision of the Court of Appeal is consistent with the decisions of this Court that urge negotiated settlements to achieve reconciliation between aboriginal rights and Crown sovereignty. In *Van der Peet*, Chief Justice Lamer stated:**

> **As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty.**

***Van der Peet*, *supra*, para 49.**

**It is only through negotiated settlements that the purpose of s. 35(1) can be achieved. As Chief Justice Lamer stated in *Delgamuukw*:**

> **Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s.35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown".**

***Delgamuukw*, *supra*, para. 186.**

**37. The need for negotiated settlements was recently reaffirmed by this Court in *B.C. (Ministry of Forests)* v. *Okanagan Indian Band*, *supra*, where an order for interim costs to the Aboriginal nation defendants was upheld, along with detailed terms imposed by the Court of Appeal to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible through negotiation. The majority of this Court stated:**

> **The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown…**

***B.C. (Ministry of Forests)* v. *Okanagan Indian Band*, *supra*, para. 47.**

**38. If an Aboriginal nation were required to establish its aboriginal rights in Court before the Crown was obliged to consult and accommodate, there is only one realistic avenue to protect its aboriginal rights: litigation. The decision under appeal is consistent with the direction of this Court in that it encourages government and Aboriginal nations to make a good faith effort and reach agreement with respect to decisions that have the potential to infringe aboriginal rights.**

**39. The Appellants Minister of Forests et al. argue that the decision under appeal could reduce the incentives for progress in treaty negotiations. In fact the opposite is the case. The decisions under appeal have the potential to breathe new life into a moribund treaty process. Aboriginal nations that have entered into treaty negotiations in British Columbia are seeking negotiated settlements aimed at reconciling their prior existing aboriginal rights with Crown sovereignty. This has entailed considerable effort, including the investment of time, human resources, and money (through debt financing), as well as the development of good faith relationships with negotiating counterparts (Canada and British Columbia's treaty negotiators). In the case of the Haisla Nation, negotiations are soon to enter their second decade.**

***Appendix 1*.**

***Factum of the Appellants Minister of Forests et al.*, para. 50.**

**40. One of the most significant challenges that Aboriginal nations that are in the BCTC Process face is how to protect their aboriginal rights, in the interim, while negotiations are proceeding but before a treaty has been finalized. Aboriginal nations that are in the BCTC Process face a greater challenge in this regard than Aboriginal nations that have not engaged in treaty negotiations. The Crown's "negotiate or litigate" policy places the Aboriginal nations participating in the BCTC Process in a potentially untenable position. Once committed to treaty negotiations, these Aboriginal nations are prevented from litigating to protect their aboriginal rights, the very rights they are seeking to obtain greater protection for through the treaty negotiation process.**

**41. If the Crown was under no pre-litigation obligation to consult with Aboriginal nations and accommodate their asserted rights, Aboriginal nations in treaty negotiations would have to sit idly by and watch their aboriginal rights, including aboriginal title, being infringed by the very parties they are negotiating with. British Columbia and Canada would have no particular incentive to bargain as the status quo would carry with it no meaningful obligations to Aboriginal nations. By the same token, aboriginal leadership would come under increasing pressure to justify remaining in a process that provides no interim recognition and affirmation of their rights. The decision under appeal provides a realistic and balanced foundation for successful treaty talks.**

**42. The Appellants Minister of Forests et al. submit that "any remedy should encourage all parties to the treaty process to continue to strive for workable means of reconciling aboriginal title with Crown sovereignty".**

**Precisely. But a decision of this Court that there is no fiduciary or constitutional duty to consult with and accommodate an Aboriginal nation until aboriginal rights are established through litigation would force that Aboriginal nation to choose between its commitment to the BCTC Process or taking the necessary steps to**

**protect its aboriginal rights. The requirement to make this choice would undermine the credibility and legitimacy of the treaty negotiation process.**

***Factum of the Appellants Minister of Forests et al.*, para. 48.**

**43. Finally, lawyers familiar with aboriginal issues in British Columbia have pointed out that:**

> **If there is a lesson to be learned for governments in the *Saanichton Marina Ltd.* v. *Claxton* and *Sparrow* cases, it is that the best time to make mutually beneficial agreements is before the courts define constitutionally protected Aboriginal rights. Once such rights are defined, there is much less room for negotiation.**

**Harry Slade and Paul Pearlman, "British Columbia's Historical Departure from the Treaty Process" in Kunin ed. *Prospering Together: The Economic Impact of the Aboriginal Title Settlements in B.C.* (Vancouver: The Laurier Institution, 1998) 45 at 71.**

**The time for productive negotiations is prior to a full judicial determination of the exact extent of every right of each Aboriginal nation. The only remedy that would encourage parties to continue in the BCTC Process would be a remedy that is aimed at providing some measure of interim protection to aboriginal rights. The Court of Appeal's decision provides such a remedy.**

**D. <u>Economic Development in the Province Will Not Be Hindered</u>**

**44. The Appellants Minister of Forests et al. warn that:**

> **"a duty to accommodate First Nations' assertions of title before tenures are decided or renewed, and before land management decisions are made has the potential to stifle economic development…"**

***Factum of the Appellants Minister of Forests et al.*, para. 50.**

**In fact, in the two years since *Taku River* was decided, the economy of British Columbia has not ground to a halt. The principal impact has been that British**

**Columbia has started taking steps towards a reconciliation of aboriginal rights, including aboriginal title, with government interests.**

***Taku River First Nation* v. *Ringstad et al.*, [2002] 2 C.N.L.R. 312 (B.C.C.A.).**

**45. Since the Court of Appeal issued its decision, British Columbia has implemented a detailed consultation and accommodation policy in order to ensure that the Crown meets its constitutional obligations. British Columbia has amended forestry legislation to provide for direct awards of timber tenures to Aboriginal nations, and has initiated a program to claw back timber volume from large-scale licencees in the Province to be allocated, in part, to Aboriginal nations.**

***http:/srmwww.gov.bc.ca/clrg/alrb/cabinet/ConsultationPolicyFN.pdf*.**

***Forest (First Nations Development) Amendment Act*, S.B.C. 2002, c. 44.**

***Forestry Revitalization Act*, S.B.C. 2003, c. 17.**

**46. British Columbia is also negotiating Interim Forestry Agreements with Aboriginal nations in British Columbia. These Interim Forestry Agreements provide the Aboriginal nations with access to timber volume and a share of the revenue generated from forestry operations in British Columbia. The Intervener Haisla Nation is negotiating such an agreement with British Columbia.**

***Factum of the Appellants Minister of Forests et al.*, para. 28.**

**47. The changes in legislation and forestry policy and the development of Interim Measures Agreements clearly show that there are steps available to the British Columbia Ministry of Forests to address obligations arising out of the British Columbia Court of Appeal's decision. All of these positive developments in Crown/aboriginal relations followed on the heels of the *Haida* and *Taku* decisions,**

**which underlines the public importance of this Court upholding these decisions. The Intervener Haisla Nation submits that other provincial Ministries would be able to adopt similar measures that would allow them to meet their obligations to Aboriginal nations while continuing to do business.**

**48. It is only through consultation and accommodation of Aboriginal nations' aboriginal rights, including title, prior to making decisions that may infringe those rights, that the Crown can give effect to the constitutional promise embodied in s. 35(1) of the *Constitution Act, 1982*.**

## PART IV

## RELIEF SOUGHT

**49. It is respectfully submitted that this appeal be dismissed.**

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January, 2004.**

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## PART V

## LIST OF AUTHORITIES

# PART VI

## APPENDIX 1

**APPENDIX 2**

**Court File No. 29419**

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

**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 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**

**RESPONDENT (APPELLANTS)**

**AND:**

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, SQUAMISH INDIAN BAND and LAX KW'ALAAMS INDIAN BAND, THE FIRST NATIONS SUMMIT, THE DENE THA' FIRST NATION, THE HAISLA NATION, TENIMGYET, also known as ART MATTHEWS, GITXSAN HEREDITARY CHIEF, THE BUSINESS COUNCIL OF BRITISH COLUMBIA & YUKON CHAMBER OF COMMERCE, COUNCIL OF FOREST INDUSTRIES AND MINING ASSOCIATION OF BRITISH COLUMBIA and THE BRITISH COLUMBIA CATTLEMEN'S ASSOCIATION**

**INTERVENERS**

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# FACTUM OF THE INTERVENER HAISLA NATION

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