Citation: Haida Nation v. B.C. and Weyerhaeuser
2002 BCCA 147

Date: 20020227
Docket: CA027999
Registry: Vancouver



# COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFFS
(APPELLANTS)

AND:

**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 And WEYERHAEUSER COMPANY LIMITED**

DEFENDANTS
(RESPONDENTS)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Lambert
The Honourable Mr. Justice Low

L. Mandell,Q.C., M. Jackson, Q.C., T-L. Williams-Davidson and C. Sharvit — Counsel for the Appellants

P.J. Pearlman, Q.C. and K. Kickbush — Counsel for the Respondents The Minister of Forests and The Attorney General of British Columbia

J.J.L. Hunter, Q.C. and S.S. Pike — Counsel for the Respondent Weyerhaeuser Company Limited

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| Place and Date of Hearing: | Vancouver, British Columbia<br>8 February, 2002 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>27 February, 2002 |

**Written Reasons by:**
The Honourable Mr. Justice Lambert

**Concurred in by:**
The Honourable Chief Justice Finch
The Honourable Mr. Justice Low

**Reasons for Judgment of the Honourable Mr. Justice Lambert:**



## 1. The Issue

[1] The principal issue in this appeal is about whether there is an obligation on the Crown and on third parties to consult with an aboriginal people who have specifically claimed aboriginal title or aboriginal rights, about potential infringements, before the aboriginal title or rights have been determined by a Court of competent jurisdiction.

[2] There was a second issue about whether the Crown title to land and timber over which a claim to aboriginal title extends must be regarded as subject to a legal or equitable encumbrance which should have prevented the Crown from dealing with the land and timber. This second issue is stated somewhat differently by each of the parties.

[3] I propose to dispose of the second issue first. In a preliminary question raised as a point of law in these proceedings at the outset, this question was posed:

> … whether the interest claimed by the Petitioners, namely aboriginal title, including ownership, title and other aboriginal rights over all of Haida Gwaii (the Queen Charlotte Islands), including the land, water, flora and fauna and resources thereof, is

> capable of constituting an encumbrance within the meaning of section 28 of the ***Forest Act***.

[4] That preliminary question was appealed to this Court, where the decision of this Court is reported at [1998] 1 C.N.L.R. 98. Mr. Justice Esson, in reasons concurred in by Madam Justice Southin and Madam Justice Huddart, interpreted the preliminary question in this way:

> I therefore see no reason to doubt that, as a matter of plain or grammatical meaning, the Aboriginal title claimed by the Haida Nation, if it exists, constitutes an encumbrance on the Crown's title to the timber. The words "if it exists" do not appear in the question put before the court but are implicit in the words "the interest claimed by the petitioners". As in the ***Meares Island*** case, the court must deal with a state of facts which is to some extent hypothetical in that the interest claimed has not been established.
>
> (my emphasis)

[5] In my opinion, having regard to the question asked as a preliminary question of law, and having regard to the interpretation given by this Court to that question, I do not think that it should be regarded as open to this division of the Court now to decide that claims to aboriginal title or aboriginal rights, which have not been proven, even though they may be the subject of a good *prima facie* case, can

provide the ground for a decision leading to a declaration of an encumbrance and to a remedy for ignoring the encumbrance. I think that the manner in which the question was dealt with, requiring that the words, "if it exists" must modify any unproven aboriginal title in relation to that question, now prevents this division of the Court from re-visiting the previous decision of the Court.



[6] For that reason I would not accede to the second ground of appeal. The same question can be reconsidered in the context of these proceedings as a whole when the existence of aboriginal title and aboriginal rights will be determined.

[7] I will now turn to the principal issue.

[8] The Haida people, as petitioners, say that there is a legal obligation on the Crown and on Weyerhaeuser to consult them before authorizing logging operations on the Queen Charlotte Islands, known to the Haida people as Haida Gwaii, and over which the Haida people have claimed to hold aboriginal title.

[9] The Crown and Weyerhaeuser say that there is no obligation on the Crown or on Weyerhaeuser to consult the Haida people about logging on the Queen Charlotte Islands until the Haida people have obtained a judgment of a court of

competent jurisdiction declaring the aboriginal title and rights of the Haida people over Haida Gwaii and demonstrating that the logging operations would be a *prima facie* infringement of that aboriginal title or those aboriginal rights.

[10] The issue is an important one. If the Crown can ignore or override aboriginal title or aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed aboriginal title or rights, even on an interim basis.

[11] This case has been presented as a petition for judicial review. It is not, technically, an interlocutory proceeding. But its resolution could provide the beginning of an alternative framework for dealing with the reconciliation of claims to constitutionally protected aboriginal title and aboriginal rights, on the one hand, and the public interest, both aboriginal and non-aboriginal, in the elusive economic prosperity of the primary industries of the province.

[12] The interlocutory injunction process continues to be a valuable interim process for balancing competing interests while litigation is pending. It provides a framework for reconciling competing interests on the basis of standards which can be used for weighing, on a preliminary basis, the validity of all or some aspects of the claims to title and rights, and which can be used for assessing the balance of inconvenience in the granting of an interlocutory injunction over all or part of the area claimed and in relation to some or all of the interests claimed.

[13] The importance of having a framework or frameworks for dealing with the reconciliation process before the title and rights are finally confirmed or denied by concluded treaty or judgment of a competent court is clearly elucidated in the vivid phrases of Mr. Justice Seaton in the majority judgment for a five judge division of this Court in ***MacMillan Bloedel v. Mullin*** (1985), 61 B.C.L.R. 145, at 151 and 156:

> The proposal is to clear-cut the area. Almost nothing will be left. I cannot think of any native right that could be exercised on lands that have recently been logged.
>
> ...
>
> The Indians wish to retain their culture on Meares Island as well as in urban museums.

[14] But the interlocutory injunction process is not necessarily suitable for balancing competing interests in every case. If there are obligations with respect to consultation and accommodation between the parties which are in effect as binding legal obligations before title is declared, then the exercise of those obligations may provide 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.



## 2. The Proceedings

[15] The petitioners applied for a declaration that the 1981, 1995, and 2000 replacements of Tree Farm Licence 39, or such parts of Tree Farm Licence 39 as relate to Block 6, are invalid, or, in the alternative, in the case of the 1995 and 2000 replacements, orders in the nature of *certiorari* quashing the replacements. The petitioners relied on the ***Judicial Review Procedure Act***; ss. 35 and 36 of the ***Forest Act***; s. 109 of the ***Constitution Act, 1867***; and ss. 35 and 52 of the ***Constitution Act, 1982***.

[16] The arguments of the petitioners and of the Crown developed in the course of the hearing of the petition in

Supreme Court chambers. By the time the argument of the petitioners was concluded their position was that the replacements of T.F.L. 39 in 1981, 1995 and 2000 were invalid because the fiduciary and legal duty of the Crown to consult with the Haida people had not been complied with and had, indeed, been ignored.



[17] The chambers judge's reasons are reported at [2001] 2 C.N.L.R. 83. Accordingly, it is unnecessary for me to summarize them. They deal comprehensively with the issues, which the chambers judge stated in this way:

> (a) As a matter of law, the lands within Block 6 were subject to the asserted claim of the Haida Nation to Aboriginal title, which claim constitutes an encumbrance on the provincial Crown's title to the timber, within the meaning of s. 35 of the ***Forest Act***. That legal encumbrance prohibited the Minister from replacing T.F.L. 39 to M&B and Weyerhaeuser. In doing so, the Minister acted without statutory authorization, and thereby exceeded his jurisdiction under ss. 35 and 36 of the ***Forest Act***.
>
> (b) In the alternative, if the asserted Aboriginal title of the Haida Nation does not constitute a legal encumbrance on the timber on Block 6, then the Haida claim to Aboriginal title constitutes an equitable encumbrance on the timber by reason of the fiduciary relationship existing between the Crown and all Aboriginal peoples. This claim imposed a fiduciary duty on the provincial Crown to treat the timber on Block 6 as being legally encumbered by the Haida title, unless and until the Crown established that it was not so encumbered. In replacing T.F.L. 39 in 1981, 1995, and 2000, without disproving the

> Haida claim, and without incorporating conditions in T.F.L. 39 that would adequately accommodate and protect the asserted Aboriginal title of the Haida Nation in relation to the timber on Block 6, the Minister acted in breach of the Crown's fiduciary duty, and without jurisdiction.
>
> (c) In the further alternative, if there was no legal or equitable encumbrance on the timber within Block 6, then in 1995 and 2000, the Minister acted in breach of a fiduciary duty owed by the provincial Crown to the Haida Nation, not to replace T.F.L. 39 without first consulting with the Haida Nation in good faith, and with the intention of substantially addressing their concerns with respect to their asserted Aboriginal title to the lands comprising Block 6. In replacing T.F.L. 39 in 1995 and 2000, without first consulting with the Haida Nation in good faith, the Minister acted unlawfully and in violation of the Crown's fiduciary obligation.



[18] The chambers judge dismissed the petition. He decided, in essence, that until the nature and extent of the aboriginal title and aboriginal rights of the Haida Nation had been conclusively determined by legal proceedings, questions of infringement could not be decided with any certainty and questions about justification could not be accurately framed or decided with respect to what he regarded as speculative infringements of unproven rights.

[19] The chambers judge relied on the reasoning set out in the decision of another chambers judge of the Supreme Court of British Columbia in ***Westbank v. British Columbia (Ministry of***

***Forests) and Wenger*** (2000), 191 D.L.R. (4th) 180, though he was not bound to follow that reasoning because the ***Westbank*** case was decided on other grounds. The chambers judge in this case did not refer to the ***Taku River Tlingit*** judgment of Madam Justice Kirkpatrick which was decided six months before his reasons were released. (***Taku River Tlingit First Nation v. Ringstead*** (2000), 77 B.C.L.R. (3d) 310 And, of course, he did not have the benefit of the decision of this Court in the ***Taku River Tlingit*** case which deals with the key question of consultation before aboriginal title and aboriginal rights are established by court order. I will shortly turn to the ***Taku River Tlingit*** decision in this Court.



## 3. The Relevant Facts

[20] There was extensive affidavit evidence in relation to the petition. The chambers judge considered that evidence carefully and made a number of findings of fact, most of which can be said to be either undisputed or conclusively established.

[21] In relation to the genesis of the proceedings, the chambers judge gave this summary:

[6] The undisputed facts that give rise to this lawsuit may be summarized as follows:

(a) The area within T.F.L. 39 known as Block 6 is made up of several areas, all of which are located on the islands of Haida Gwaii, and contains old growth forests and second growth forests, including spruce, cedar, and hemlock timber (as well as other species), portions of which have been logged off.

(b) For more than 100 years, the Haida people have claimed title to all the lands and surrounding waters of the Queen Charlotte Islands.

(c) MacMillan Bloedel Limited ("M&B") was engaged in logging timber on the Queen Charlotte Islands since about the time of World War I, acquired T.F.L. 39 in 1961, and conducted logging operations pursuant to T.F.L. 39 until the transfer of its rights under T.F.L. 39 to Weyerhaeuser in November 1999.

(d) T.F.L. 39 granted to M&B the exclusive right to harvest quantities of timber on the Queen Charlotte Islands within the areas collectively known as Block 6.

(e) In 1981 and 1995, the Minister offered to replace, and upon acceptance of the offer by M&B, did replace T.F.L. 39 pursuant to the procedure authorized by the *Forest Act*.

(f) In February 1995, the Haida Nation filed a petition challenging the validity of the replacement of T.F.L. 39 that became effective March 1, 1995. On November 7, 1997, the Court of Appeal held that the Aboriginal title claimed by the Haida Nation, if it exists, would constitute an encumbrance on the Crown's title to timber, within the meaning of s. 28 of the

> *Forest Act* (now s. 35). That litigation was never formally concluded.
>
> (g) On September 1, 1999, the Minister sent to M&B an offer to replace T.F.L. 39, with the knowledge that Weyerhaeuser would likely become the successor to M&B, and on February 10, 2000, the Minister issued the replacement to Weyerhaeuser effective March 1, 2000.
>
> (h) The three decisions of the Minister to replace T.F.L. 39, which are complained of, were all made without the consent of the Haida Nation, and the decisions in 1995 and 2000 were made against the objections of the Haida. The Haida also objected to the transfer of T.F.L. 39 from M&B to Weyerhaeuser.
>
> (i) This lawsuit was commenced on January 13, 2000.
>
> (my emphasis.)

[22] In relation to the facts that are germane to the alleged obligation of consultation on the part of the Crown and Weyerhaeuser, the chambers judge said this:

> [25] The evidence presented on this application was voluminous, and of necessity, my comments on the evidence will be general in nature. I find the following conclusions to be inescapable:
>
> (a) The Haida people have inhabited the Queen Charlotte Islands continuously from at least 1774 to the present time.
>
> (b) At the time of the assertion of British sovereignty in 1846, and likely for many years before then, the Haida were the only

Aboriginal people who lived on the Queen Charlotte Islands.

(c) From 1846 to the present time, the Haida have been the only Aboriginal people living on the Queen Charlotte Islands.

(d) The Haida have never been conquered, they have never surrendered their Aboriginal rights by treaty, and their Aboriginal rights have not been extinguished by federal legislation.

(e) For more than 100 years, the Haida have claimed to possess Aboriginal title to all of the lands comprising the Queen Charlotte Islands.

(f) From a time which is uncertain, but which pre-dates 1846, up to the present time, the Haida have used large red cedar trees from the old-growth forests of the Queen Charlotte Islands for the construction of canoes, houses, and totem poles, and have also used red cedar for carving masks, boxes, and other objects of art, ceremony, and utility.

(g) Since before 1846, the Haida have utilized red cedar trees obtained from old growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39.

(h) Red cedar has long been, and still is, an integral part of the Haida culture.

(i) Old growth red cedar timber has been, and will in the future continue to be harvested from Block 6, pursuant to T.F.L. 39.

(j) For a number of years, the Haida have expressed their objections to the Crown, to the rate at which the old-growth forests of Haida Gwaii are being logged off, the methods of logging being used, and the environmental effects of the

logging on the land, watersheds, fish, and wildlife.

(k) Since the decision of the Court of Appeal in ***Delgamuukw*** on June 25, 1993, the Province has known that there was no blanket extinguishment of Aboriginal rights in British Columbia.

(l) Since at least 1994, the Province has known that the Haida objected to T.F.L. 39 being replaced without their consent and without the reconciliation of their title with Crown title.

(m) Since 1994, and probably much earlier, there has been available to the Province a significant body of evidence that indicates the Haida people exclusively occupied and used both coastal and inland areas of the Queen Charlotte Islands, including some of the coastal and inland areas of Block 6, since before the assertion of sovereignty in 1846, and evidence that indicates the importance of red cedar in the Haida culture.

(n) Since the Court of Appeal's decision on November 7, 1997, in ***Haida Nation v. British Columbia Minister of Forests*** [1998] 1 C.N.L.R. 98, the Province has known that, if the Haida proved their claim of Aboriginal title, their title would constitute an encumbrance on the timber on Block 6.

(my emphasis.)

[23] After dismissing the petition, the chambers judge considered the existence of a moral duty (as opposed to a legal duty) on the part of the Crown to consult with the Haida people about both long term logging plans and operational

logging plans for T.F.L. 39. I suppose the relevance of the moral duty to consult is similar to the relevance of a moral duty to negotiate referred to by Chief Justice Lamer where in ***Delgamuukw***, [1997] 3 S.C.R. 1010 at the conclusion of his reasons, in para. 186, he says:

> Moreover the Crown is under a moral, if not a legal, duty to enter into and conduct negotiations in good faith.

(Parenthetically, I would say that Chief Justice Lamer's observation does not say that there is no legal duty to negotiate, a question which I will happily leave to another day.)

[24] In relation to the moral duty, the chambers judge set out these facts:

> [46] There was much discussion about the Crown's alleged moral duty to negotiate with the Haida concerning their claims, and the petitioners insisted that the honour of the Crown is called into question by its failure to consult with the Haida in good faith in connection with the decisions to replace T.F.L. 39 in 1994-95 and 1999-2000. As I understood it, the argument was based to a considerable extent on the alleged strength of the Haida claim to Aboriginal title. Since I think there is some merit in this argument, I will comment on it, beginning with some general observation on the evidence that points to the existence of Aboriginal title.

[47] In my opinion, there is a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii, and that these areas will include coastal areas of Block 6. As to inland areas of Block 6, I would describe the Haida's chance of success at this stage, as being a reasonable possibility. Moreover, in my view, there is a substantial probability that the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth forest areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to those forest areas is proven.

[48] I am also of the opinion that a reasonable probability exists that the Haida would be able to show a *prima facie* case of infringement of this last-mentioned right, by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply. I find myself unable to predict what likelihood there is that the Haida would be able to establish infringement of other aspects of their rights in relation to the lands and timber of Block 6.

[49] In making these statements, I am mindful of the essential elements that must be proved to establish a claim of Aboriginal title or other Aboriginal rights, as defined and described in ***Regina v. Van der Peet*** [1996] 4 C.N.L.R. 177 (S.C.C.) at par.'s 46 to 74, and ***Delgamuukw v. British Columbia*** [1997] 3 S.C.R. 1010; [1998] 1 C.N.L.R. 14, at par.'s 140 to 159.

[50] I recognize that there are legitimate issues with respect to the Haida claim of Aboriginal title to the lands of Block 6, and particularly as to those lands that are more than one kilometre inland from shore. It seems clear that most of Block 6 is "inland". There is also an understandable dispute concerning the issue of infringement, and the extent of infringement (if any), by Crown-authorized activities on Block 6. The Crown cannot be faulted for raising these fact issues, and it appears that a great deal of further evidence will have to be presented and assessed, before these questions can

> be resolved. But I think it is fair to say that the Haida claim goes far beyond the mere "assertion" of Aboriginal title.
>
> [51] In my judgment, the provincial Crown should have been able to make a similar assessment of the apparent strength of the Haida claims, long before September 1, 1999, when the Minister offered to replace T.F.L. 39. I think this factor favours the creation of a moral duty to consult in relation to the decision to replace T.F.L. 39.
>
> (my emphasis)



[25] The chambers judge then dealt with the Interim Measures procedures promulgated by the Provincial Crown in relation to pending treaty negotiations and asked himself why they had not been pursued by the Crown in this case. Then he summarized additional evidence which he considered was relevant to the moral duty to consult. He said this:

> [59] Finally, there was other evidence that, in my view, indicates that the decision of the Minister to replace T.F.L. 39 should be subject to the moral duty to consult with the Haida. I summarize that evidence as follows:
>
> (a) The evidence indicated that T.F.L. 39 has an area of about 241,000 hectares, and that the licence area constitutes almost one-quarter of the total land area of Haida Gwaii (which is about 5,800 square kilometres).
>
> (b) It was unclear from the evidence as to how much of the total area of Block 6 has been logged off. But from the one-hour helicopter view of the Graham Island

> portion of Block 6 that I took after court on August 3, 2000 (along with representatives of the petitioners and respondents), it was apparent that large areas of Block 6 have been logged off.
>
> (c) Although I could not discern from the evidence how much of the old-growth forests of Haida Gwaii or Block 6 have been logged off, and how much remains, such forests are obviously limited in quantity, and I find it understandable that the Haida would want to reduce the rate at which logging is being conducted in old-growth forests on Block 6. They say these forests take 500 years or more to grow.
>
> (d) Consultation at the operational level does not permit the Haida to influence the quantity of the annual allowable cut on Block 6.

[60] In my opinion, once the decision to replace T.F.L. 39 is made (followed by the required offer and acceptance procedure) it is inevitable that logging and road building activities will be authorized and carried out on Block 6, pursuant to T.F.L. 39. I conclude that the decision to replace T.F.L. 39 has high potential to affect Haida title, if it is established. Consultation at the replacement stage would enable the Haida to seek the inclusion of terms and conditions in T.F.L. 39 that would address their major concerns, on a long-term basis.

[61] In the circumstances, I conclude that the Crown does have a moral duty to consult with the Haida concerning their Aboriginal claims, in connection with the decision to replace T.F.L. 39. ...

(my emphasis)

[26] It is an important fact that Weyerhaeuser employs something in the order of 200 workers in its Queen Charlotte Islands operations and has investments in plant, machinery and equipment and in the Tree Farm Licence itself. Weyerhaeuser has a considerable business interest in the long term and short term continuance of its logging operations on T.F.L. 39 and the Crown must bear Weyerhaeuser's interest in mind as well as the interests of the Haida people when considering the overall public interest of the people of British Columbia in the Queen Charlotte Islands, or Haida Gwaii.



## 4. The *Taku River Tlingit* Case

[27] Just one week before this appeal was set for hearing, the reasons of this Court in the ***Taku River Tlingit*** case were handed down. (***Taku River Tlingit First Nation v. Ringstad***, 2002 B.C.C.A. 59, 31 January 2002.) In that case, in similar but somewhat different circumstances to this case, Madam Justice Rowles, after full consideration, decided an issue that in its general terms was identical to the issue in this appeal. See paras. 153 to 194 of Madam Justice Rowles' reasons which address the same question as in this appeal under the heading: "**(b) Proposition two: Absent the establishment of aboriginal rights or title, the Ministers of**

**the Crown did not owe the Tlingits any constitutional or fiduciary duty of consultation.**"

[28] Madam Justice Rowles decided that there was an obligation on the Crown to consult the aboriginal people who had claimed aboriginal title and aboriginal rights, in the circumstances of that case, and that it could not be said, as the Crown said in that case and this case, that the obligation to consult never arose until a court of competent jurisdiction decided on the existence and scope of the aboriginal title and aboriginal rights. Madam Justice Huddart concurred with the reasons of Madam Justice Rowles. Madam Justice Southin dissented in the result, though as I read paras. 97 to 100 of her reasons, she considered that the requirements of ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, with respect to consultation, were met by the steps mandated by and taken under the ***Environmental Assessment Act.***

[29] In my opinion, having regard to the way the issue that I have described was addressed by Madam Justice Rowles, by reference to the fundamental authorities in the Supreme Court of Canada, particularly ***R. v. Sparrow***, [1990] 1 S.C.R. 1075; ***R. v. Van der Peet***, [1996] 2 S.C.R. 507; ***Guerin v. The Queen***, [1984] 2 S.C.R. 335; and ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, and by elucidating the general

principles and then applying them to the facts, makes those general principles as stated by Madam Justice Rowles and as concurred in by Madam Justice Huddart binding on this Court and determinative of the outcome of this appeal.

[30] The ***Taku River Tlingit*** case cannot be distinguished on the basis of the differences in the nature and scope of the aboriginal title and aboriginal rights claimed in that case and in this case, nor on the difference between the legislative schemes authorizing the government and third party actions in the two cases, nor on the fact that a consultation process of sorts was set out in the applicable legislation in the ***Taku River Tlingit*** case.

[31] I do not propose to repeat or summarize Madam Justice Rowles' reasons. They are readily available, and, as I say, they determine the outcome of this appeal. I intend only to add some observations of my own directed to specific points made in argument on this appeal, and to indicate the nature of the remedy which should, in my opinion, be granted in this case.

[32] Before leaving the ***Taku River Tlingit*** case I wish to address a point made by the respondents in argument. The point arises from Madam Justice Rowles' reasons, in para. 151, which reads:

> [151] While the analysis in ***Delgamuukw*** was directed to the question of whether the province was able to extinguish aboriginal title, in my opinion, the Supreme Court's analysis on the three questions arising out of the division of powers under the ***Constitution Act, 1867,*** would also apply so as to limit the power of the province to infringe aboriginal rights and title.



Counsel for the respondents suggested that Madam Justice Rowles was saying that the Provincial Legislature could not authorize any administrative action which might constitute an infringement of aboriginal title and so Madam Justice Rowles' reasons rested on a false premise. See ***R. v. Côté,*** [1996] 3 S.C.R. 139. But Madam Justice Rowles was not saying that. From the context it is clear that what was being said was that the Provincial Legislature lacked capacity to authorize an infringement by a law in relation to a matter coming within the class of subjects "Indians, and Lands reserved for the Indians". But, of course, the Provincial Legislature has the legislative capacity to authorize what proves to constitute an infringement of aboriginal title by a law of general application.

## 5. The Roots of the Obligation to Consult

[33] 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. That trust-like relationship was reflected in the Royal proclamation of 1763:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.
>
> (my emphasis)

[34] 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.

[35] In ***R. v. Sparrow***, Chief Justice Dickson and Mr. Justice La Forest said this, at p. 1108-1109, about the roots of the fiduciary duty:

> In ***Guerin***, ... the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the

> surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, ***Guerin***, together with ***R. v. Taylor and Williams*** (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1).
>
> (my emphasis.)



[36] 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. One manifestation of the fiduciary duty of the Crown to the aboriginal peoples is that it grounds a general guiding principle for s. 35(1) of the ***Constitution Act, 1982***.

[37] It would be contrary to that guiding principle to interpret s. 35(1), which reads in this way:

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

as if it required that before an aboriginal right could be recognized and affirmed, it first had to be made the subject matter of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction; and finally made the

subject of a declaratory or other order of the court. That is not what s. 35(1) says and it would be contrary to the guiding principles of s. 35(1), as set out in ***R. v. Sparrow,*** to give it that interpretation. Yet that interpretation is what was effectively given to it by the chambers judge in this case and by the chambers judge in ***Westbank v. British Columbia***.



## 6. The Content of the Duty to Consult

[38] Chief Justice Lamer addressed the question of the content of the duty to consult in ***Delgamuukw*** at paras. 165 to 169 under the heading "Justification and Aboriginal Title". Since the complete text of that statement of Chief Justice Lamer's reasons is available I will not set it out in full here. However, para. 168 is of crucial importance to these reasons.

> 168 Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. **There is always a duty of**

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

[39] Para. 169 deals with compensation for infringement and with the relationship between advance consultation and subsequent infringement. This is what was said:

> 169 Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in ***Sparrow*** and which I repeated in ***Gladstone***. Indeed, compensation for breaches of fiduciary duty are a well-established

> part of the landscape of aboriginal rights: ***Guerin***. **In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed.** The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement **and the extent to which aboriginal interests were accommodated.** Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day. (The emphasis and double emphasis are mine.)



[40] I regard the reference to "the extent to which aboriginal interests were accommodated" in relation to the determination of compensation for an infringement as being a significant indication that Chief Justice Lamer regarded the accommodation process as a process which preceded the infringement which itself will occur before the aboriginal title is declared by a court of competent jurisdiction in proceedings alleging both the title and the infringement.

## 7. The Timing Fallacy

[41] The chambers judge in this case and the chambers judge in ***Westbank v. British Columbia*** decided that until the precise nature of the aboriginal title or aboriginal rights in

question have been determined there could be no conclusive determination of whether the title or rights had been *prima facie* infringed and accordingly no conclusive determination of whether the *prima facie* infringement was justified. All that is true. But it does not mean that there is no fiduciary duty on the Crown to consult the aboriginal people in question after title is asserted and before it is proven to exist, if, were title to be proved, there would be an infringement.

[42] How could the consultation aspect of the justification test with respect to a *prima facie* infringement be met if the consultation did not take place until after the infringement? By then it is too late for consultation about that particular infringement. By then, perhaps, the test for justification can no longer be met and the only remedies may be a permanent injunction and compensatory damages.

[43] One only has to consider the reasons delivered by the Supreme Court of Canada in ***R. v. Sparrow*** and ***R. v. Gladstone,*** [1996] 2 S.C.R. 723 to understand that the major aspects of justification, including consultation, must be in place before the infringement occurs and, normally, before the aboriginal right is proven in court. In ***Gladstone***, the Supreme Court of Canada ordered an inquiry about justification in circumstances where the date for assessment of the justification must have

preceded the infringement and must have occurred long before the aboriginal rights were established in the prosecution for offences under the ***Fisheries Act***.

[44] And when Chief Justice Lamer says, in ***Delgamuukw***, that the measure of compensation for an infringement may depend on the extent to which aboriginal interests were accommodated, he is clearly contemplating accommodations decided upon and put in place before the infringement, and, normally, before the aboriginal right is endorsed by a court of competent jurisdiction.

[45] During the course of argument it was suggested that the unanimous decision of the Ontario Court of Appeal, delivered by Mr. Justice Borins, in ***TransCanada Pipelines Ltd. v. Beardmore (Township)*** (2000), 186 D.L.R. (4th) 403, reached a conclusion contrary to the conclusion that I have reached and which was reached by this Court in ***Taku River Tlingit***. But I do not think that is so. What Mr. Justice Borins said, at para. 120, followed his quotation of a passage from Lawrence and Macklem "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 Can. Bar. Rev. 252 at 255. I will set out the quotation from Lawrence and Macklem and then para. 120 of Mr. Justice Borin's reasons:

> Properly understood, the duty to consult also acts as a **prelude** to a potential infringement of an Aboriginal or treaty right. Consultation requirements ought to be calibrated according to the nature and extent of Aboriginal interests and the severity of the **proposed** Crown action in order to provide incentives to the parties to reach negotiated agreements. In most cases, the duty requires the Crown to make good faith efforts to negotiate an agreement with the First Nation in question that translates Aboriginal interests adversely affected by the proposed Crown action into binding Aboriginal or treaty rights.

[120] As Lawrence and Macklem point out at p. 262, "in most cases involving the assertion of Aboriginal or treaty rights, the First Nation in question is simultaneously attempting to establish the existence of its rights and prevent interference with those rights by the Crown or a third party." As the decisions of the Supreme Court illustrate, 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***. It is at this stage of the proceeding that the Crown is required to address **whether it has fulfilled its duty to consult** with a First Nation if it intends to justify the constitutionality of its action.

(my emphasis and double emphasis)

[46] Of course, I say with respect, Mr. Justice Borins is correct. In a court proceeding by the aboriginal people to establish aboriginal rights and allege an infringement, the first step is to consider whether aboriginal title or

aboriginal rights have been established, on a balance of probabilities, and to decide on the nature and scope of the title and rights; the second step is to determine whether the particular title and rights have been infringed by a specific action; and the third step is to ask whether the Crown has discharged its onus to show justification including "whether it has fulfilled its duty to consult with a First Nation". But the Ontario Court of Appeal is not saying that the duty to consult does not arise until the court considers whether it has been discharged. What the Ontario Court of Appeal is saying is that the duty to consult arises "as a prelude to a potential infringement" and should be assessed in relation to "the severity of the proposed Crown action". So, in factual terms the consultation ought to precede the infringement, and both are likely to precede the court determination of the existence of aboriginal title and aboriginal rights, but as a matter of logical progression in court then, first the title is proved, then the infringement is proved, and then the onus shifts to the Crown to establish that there was justification for the infringement at and before the time when the infringement occurred.

[47] I do not consider that there is any divergence of views between this Court and the Ontario Court of Appeal on the question of consultation.



**8. The Remedy**

[48] Both the Crown Provincial and Weyerhaeuser had an obligation to consult the Haida people in 1999 and 2000 about accommodating the aboriginal title and aboriginal rights of the Haida people when consideration was being given to the renewal of Tree Farm Licence 39 and Block 6. That obligation extended to both the cultural interests and the economic interests of the Haida people. Similar obligations had existed much earlier and had continued through until 1999 and 2000 and on to the present time. But in this appeal, the Haida people have confined their claim to the 1999 and 2000 renewal of T.F.L. 39 and the transfer of the beneficial interests in T.F.L. 39 from MacMillan Bloedel to Weyerhaeuser.

[49] In this case, the obligation to consult and to seek an accommodation arose from these circumstances:

a) The Provincial Crown had fiduciary obligations of utmost good faith to the Haida people with

respect to the Haida claims to aboriginal title and aboriginal rights;

b) The Provincial Crown and Weyerhaeuser were aware of the Haida claims to aboriginal title and aboriginal rights over all or at least some significant part of the area covered by T.F.L. 39 and Block 6, through evidence supplied to them by the Haida people and through further evidence available to them on reasonable inquiry, an inquiry which they were obliged to make; and

c) The claims of the Haida people to aboriginal title and aboriginal rights were supported by a good *prima facie* case in relation to all or some significant part of the area covered by T.F.L. 39 and Block 6.

[50] In reaching the conclusion that the Haida people had a good *prima* facie case to a claim for aboriginal title and aboriginal rights, I rely on these findings of the chambers judge made following his assessment of the evidence:

> [47] In my opinion, there is a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii, and that these areas will include coastal areas of Block 6. As to inland areas of Block 6, I would describe the Haida's chance of success at this stage, as being a reasonable possibility. Moreover, in my view, there is a substantial probability that the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth forest areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to those forest areas is proven.
>
> [48] I am also of the opinion that a reasonable probability exists that the Haida would be able to show a *prima facie* case of infringement of this last-mentioned right, by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply.
>
> (my emphasis)

[51] The strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation. I am not saying that if there is something less than a good *prima facie* case then there is no obligation to consult. I do not have to deal with such a case on this appeal. But certainly the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights.

[52] In my opinion, the obligations to consult and seek an accommodation with the Haida people were enforceable, legal and equitable duties at the relevant times in 1999 and 2000 of the Crown Provincial, MacMillan Bloedel, and its successor, Weyerhaeuser. The chambers judge has found as a fact that the Haida people were not consulted when the replacement of T.F.L. 39 and its transfer to Weyerhaeuser occurred, and that the Haida people objected to the replacement and to the transfer. No accommodation with the Haida people was sought by the Crown, by MacMillan Bloedel, or by Weyerhaeuser. In my opinion, the Crown Provincial and Weyerhaeuser were in breach of these enforceable, legal and equitable duties to the Haida people.

[53] I consider that the courts have considerable discretion in shaping the appropriate remedy in this judicial review proceeding taken before any final determination of the title and rights of the Haida people by a court of competent jurisdiction.

[54] The aim of the remedy should be to protect the interests of all parties pending the final determination of the nature and scope of aboriginal title and aboriginal rights. Once that final decision is made, and perhaps in the same proceedings, a final determination can be made of the quality

and extent of any *prima facie* infringement of the aboriginal title and aboriginal rights that may have occurred before that determination, including, particularly, over the period when the Crown and Weyerhaeuser were in possession of sufficient facts that they ought to have known of the probability that infringements were occurring. When the decisions are made about infringement then further decisions about justification can be made. The decisions about justification will surely recognize that, at least until early 2002, no consultation with respect to long term planning for logging on T.F.L. 39, and minimal or no consultation with respect to short term planning, took place between the Crown and Weyerhaeuser, on the one hand, and the Haida people, on the other. And, of course, no accommodations were attempted by the Crown or Weyerhaeuser and no accommodations were reached.

[55] The discharge of the obligation to consult, as expressed in ***Sparrow***, ***Gladstone***, and ***Delgamuukw***, has been framed as an element among the circumstances which would justify a *prima facie* infringement of the aboriginal title or aboriginal rights. As I have said, the consultation must take place before the infringement. But where there are fiduciary duties of the Crown to Indian peoples it is my opinion that the obligation to consult is a free standing enforceable legal and

equitable duty. It is not enough to say that the contemplated infringement is justified by economic forces and will be certain to be justified even if there is no consultation. The duty to consult and seek an accommodation does not arise simply from a ***Sparrow*** analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection.



[56] All those decisions will underlie the final orders that will be made declaring the respective rights of the parties in relation to the continuation, modification, or replacement, of T.F.L. 39 and in relation to compensatory damages, if any, for unjustified or only partly justified infringement of the aboriginal title and aboriginal rights of the Haida people.

[57] Of course, as both this Court and the Supreme Court of Canada have said many times, a negotiated settlement, by treaty or otherwise, complete or partial, is always better than a judgment after litigation pursued to the end.

[58] As I have said, the Crown Provincial and Weyerhaeuser were in breach of an enforceable, legal and equitable duty to consult with the Haida people and to seek an accommodation with them at the time when the processes were under way for a replacement of T.F.L. 39 and Block 6 and for a transfer of T.F.L. 39 from MacMillan Bloedel to Weyerhaeuser in the year

2000. That enforceable legal and equitable duty has continued from then until the present time and will continue until the Haida title and rights are determined by treaty or by a Court of competent jurisdiction. But it does not necessarily follow that the replacement of T.F.L. 39 in 2000 and the transfer to Weyerhaeuser are either invalid or void. That question was not, in my opinion, sufficiently fully argued on this appeal. And it 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.

[59] For those reasons I would not now make an order about the validity, invalidity, or partial validity of T.F.L. 39 and Block 6. That does not mean that, if circumstances change, there cannot be consideration of that question as an interim matter in these proceedings on the basis of proper argument and full facts. But it seems to me that the proper time to determine that question would be at the same time as the determination of aboriginal title, aboriginal rights, *prima facie* infringement, and justification, by a Court of competent jurisdiction. At that time also the question of whether the Provincial Crown title is encumbered by aboriginal title and rights is likely to be determined and argument could be directed to the effect of any such encumbrance on T.F.L. 39.

[60] However, I would grant a declaration to the petitioners that the Crown Provincial and Weyerhaeuser have now, and had in 1999 and 2000, and earlier, a legally enforceable duty 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 T.F.L. 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.

[61] In the end, the manner in which the duty to consult and reach accommodations is discharged in the immediate and the long-term future will have a very significant impact on the final determinations by a court of competent jurisdiction which is considering the aboriginal title and aboriginal rights of the Haida people, about whether that title or those rights have been infringed, or continue to be infringed, and, particularly, about whether any infringement was justified.

[62] The extent to which any further remedies may be required or may properly be claimed at a later but still interim stage in these proceedings cannot now be predicted. Much may depend on the quality of the consultation and accommodation processes. So, to the extent it may be thought necessary, I

would order that the parties have liberty to apply to a judge of the Supreme Court of British Columbia for whatever orders they may be instructed to seek, pending the conclusion of the proceedings with respect to the determination of aboriginal title and aboriginal rights, infringement and justification.

[63] I would allow the appeal accordingly, and make the declaration and order I have described.

"The Honourable Mr. Justice Lambert"

I AGREE:

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Low"