

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)**

BETWEEN:

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Beml, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ells, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theodore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colln R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky

**Appellants
(Appellants)**

AND:

Her Majesty the Queen

**Respondent
(Respondent)**

AND:

Attorney General of Alberta, Attorney General of Quebec, Attorney General of Ontario, Attorney General of Saskatchewan, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Souke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Helltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Nee Tahi Buhn Indian Band, Tseshahat First Nation, Assembly of First Nations, Sportsfishing Defence Alliance, BC Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association and United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association and Atlantic Fishing Industry Alliance

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PART I - STATEMENT OF FACTS

1. The Haisla Nation is an Aboriginal Nation located in north coastal British Columbia and is an Indian Band as defined in the *Indian Act*, R.S.C. 1985, c. 1-5, as amended. The members of the Haisla Nation are "aboriginal peoples of Canada" within the meaning of ss. 35(1) and 35(2) of the *Constitution Act, 1982*.

2. The Haisla Nation has, since time immemorial, used the lands and resources within Haisla Territory in ways that are integral to the distinct culture of its people, including but not limited to, hunting, fishing, gathering, trade, land management, and spiritual assembly.

3. The Haisla Nation has opted to attempt to resolve its outstanding aboriginal rights and title claim through negotiation, rather than litigation. The Haisla Nation has been involved in the British Columbia Treaty Process since 1995, and is currently at Stage 4, the negotiation of an Agreement-in-Principle. Until its claims are finally resolved through treaty, the Haisla Nation has consistently sought to resolve issues relating to its aboriginal rights and title through honourable negotiation with the Crown and, where appropriate, with industry.

4. For example, the Haisla Nation has entered into a series of comprehensive Fisheries Agreements with the Government of Canada. These Agreements provide the Haisla Nation with a role in the management of marine resources within Haisla Territory, provide an interim accommodation of the Haisla Nation right to fish, and provide communal commercial licences for the harvest of certain species. The Haisla Nation has also entered into agreements, such as the Kitlope Management Agreement, that assure the Haisla Nation a meaningful role in the management of the lands and resources within Haisla Territory.

5. Since the decision of this Court in *Haida Nation v. British Columbia (Minister of Forests)*,¹ the negotiation of interim accommodation agreements has accelerated. One such agreement is the Haisla Nation Forest and Range Agreement ("FRA"), which

¹ [2004] 3 S.C.R. 511; 2004 SCC 73 [hereinafter "*Haida Nation*"].

provides the Haisla Nation with interim accommodation, in the form of revenue sharing and forest tenure, for infringements of the economic aspect of Haisla Nation aboriginal rights and title related to forestry activities within Haisla Territory.

6. The Haisla Nation considers the negotiation of accommodation agreements as an essential component of the Crown's obligation to consult with the Haisla Nation, and as a necessary means of ensuring that its claim of aboriginal rights and title is recognized and protected as it proceeds in treaty negotiations.

PART II - QUESTION IN ISSUE

7. The Haisla Nation will provide its perspective on the application of s. 25 of the Charter to the Pilot Sales Program (the "Program").

PART III - ARGUMENT

A. Reconciliation Through Consultation and Accommodation

8. Since 1982, common law aboriginal rights and treaty rights have been protected in the *Constitution Act, 1982*. Section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed."²

9. This Court has urged negotiated settlements in order to achieve reconciliation between aboriginal rights and Crown sovereignty. It is only through negotiated settlements that the purpose of s. 35(1) can be achieved:

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".³

10. The duty to consult and accommodate is an essential component of rights recognition, negotiation, and reconciliation:

Section 35 represents a promise of rights recognition, and ... [this] promise is realized and sovereignty claims reconciled through a process of honourable negotiation. It is a corollary of s. 35 that the Crown act

² *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.

³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 186.

honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.⁴

11. In *Haida Nation*, this Court dismissed British Columbia's position that the obligation to consult and accommodate was only triggered once aboriginal rights and title had been established in Court. Instead the Court held that the Crown has a duty to consult with, and where appropriate, to accommodate Aboriginal Nations with regard to decisions that have the potential to infringe upon asserted, yet unproven, aboriginal rights and title.⁵ More recently, this Court reinforced the inextricable link between consultation and accommodation, finding that "Consultation that excludes from the outset any form of accommodation would be meaningless".⁶

12. In the wake of this Court's guidance, the negotiation of interim accommodation agreements has become the logical and preferred means, pending treaty, of reconciling s. 35 rights with Crown sovereignty. In British Columbia, such agreements have become the hallmark of the Province's "New Relationship" with Aboriginal people; British Columbia's New Relationship Document commits the Province to the "reconciliation of Aboriginal and Crown titles and jurisdictions",⁷ and to, amongst other things, "mutually acceptable arrangements for sharing benefits, including resource revenue benefits".⁸

13. The Haisla Nation has been actively involved in the negotiation of interim accommodation agreements. In order to enable adequate accommodation for infringements of aboriginal rights and title, these agreements have provided the Haisla Nation with rights and freedoms to which others in society may not have access. By providing interim accommodation of the Haisla Nation's constitutionally protected rights, these agreements permit the Crown to discharge its obligations to consult and accommodate, and promote reconciliation between Haisla Nation aboriginal rights and title and the interests of the Crown.

⁴ *Haida Nation*, *supra*, para. 20.

⁵ *Haida Nation*, *supra*, para. 27.

⁶ *Mikisew Cree FN v. Canada (Min. Canadian Heritage)*, [2005] 3 S.C.R. 388; 2005 SCC 69 at para. 54.

⁷ The New Relationship Document, http://www.gov.bc.ca/themes/new_relationship.html, p. 1.

⁸ The New Relationship Document, http://www.gov.bc.ca/themes/new_relationship.html, p. 3.

14. Interim accommodation agreements and other such instruments are logical and necessary components of the reconciliation that this Court has prescribed for Aboriginal Nations and the Crown. The rights and freedoms set out in these agreements are not only intimately connected to s. 35 rights, but are expressly provided as a means of accommodating those rights in an environment that predates a treaty or the establishment of those rights in Court. The failure to extend the application of s. 25 to these rights and freedoms would impoverish s. 35's promise of protection for aboriginal and treaty rights.

B. Purposive Interpretation of Section 25

15. Section 25 protects aboriginal, treaty, or "other rights or freedoms" that pertain to the aboriginal peoples of Canada from Charter challenge. A purposive reading of s. 25 requires that the interpretation of the words "other rights and freedoms" include those rights and freedoms provided for by way of instruments, including accommodation agreements, that are integral to the process of rights recognition and that are a critical step in the reconciliation of those s. 35 rights with Crown sovereignty.

16. The Program fits squarely into the category of those "other rights and freedoms" that s. 25 is designed to protect. The Program was a response to this Court's decision in *R. v. Sparrow*⁹ and provided Aboriginal Nations with benefits, as described by Brenner C.J.S.C., "in a manner consistent with and respectful of the unique relationship between British Columbia aboriginal communities and the fishery".¹⁰ As further noted by Brenner C.J.S.C., the Program was a trial run for treaty by facilitating "resolution of treaty and self-government issues" by testing "arrangements for possible inclusion in treaties..."¹¹

17. The Respondent Canada articulates the intimate connection between the Program and the underlying s. 35 rights:

The Program also aimed to facilitate the process of negotiating a resolution of claims by aboriginal people and to assist aboriginal

⁹ [1990] 1 S.C.R. 1075.

¹⁰ Oral Reasons for Judgment of Brenner C.J., Supreme Court of British Columbia (July 12, 2004), para. 91.

¹¹ *Ibid.*, para. 96.

communities, a vulnerable and disadvantaged group with a unique interest in the fishery. Although the Program is not a direct fulfillment of established rights under s. 35 of the *Constitution Act, 1982*, its objectives support the ultimate purpose of s. 35: the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.¹²

18. The rights and freedoms provided for in the Program, as well as in accommodation agreements signed between the Haisla Nation and the Crown, are founded in *sui generis* s. 35 rights. In order for *sui generis* rights to be recognized, a *sui generis* process is required. This Court has found that consultation is that process. The resultant accommodation agreements are the legal mechanisms required to satisfy the obligation to consult and to implement *Haida Nation*. As such, they support the ultimate purpose of s. 35 by fulfilling the "promise of rights recognition". The rights and freedoms that emerge from this *sui generis* process ought to be protected by s. 25.

19. Agreements such as the FRA are grounded in the strong assertion of Haisla Nation aboriginal rights and title over its Territory. The rights and benefits found in the FRA are expressly granted as interim accommodation for infringements of the economic component of Haisla Nation aboriginal rights and title. British Columbia satisfies its obligation to consult with regard to the economic component of Haisla Nation rights and title and obtains a measure of certainty, while the Haisla Nation receives much needed economic stimulus and an opportunity to address social ills within the community. This exchange amounts to interim reconciliation of conflicting claims of ownership over the forest resource. The Haisla Nation has also negotiated, and continues to negotiate, other agreements of mutual benefit to the Haisla Nation, the Crown, and industry, and that reflect this Court's direction to pursue reconciliation through negotiated settlements.

20. Rights and freedoms granted in furtherance of the ultimate purpose of s. 35 are not merely the product of licences or contracts. Accommodation agreements and other like instruments are critical means for the Crown and Aboriginal Nations to reconcile their differing views on the ownership of lands and resources in British Columbia pending an overall resolution of these differences through treaty. While accommodation agreements do not themselves attract constitutional protection, and the rights and freedoms provided are not "existing aboriginal and treaty rights" protected by s. 35,

¹² Respondent's Factum, para. 113.

those rights and freedoms are required to reconcile s. 35 rights with Crown sovereignty. As such, they must necessarily be the "other rights and freedoms" contemplated by s. 25.

21. Both the Appellants and the Respondent provide the Court with their concept of the requirements for an "other right or freedom" to be afforded the protection of s. 25. In so doing, they ask this Court to narrow the scope of the protection of s. 25 in a way that renders the term "other rights and freedoms" meaningless. In particular, the Parties' articulation of the criteria required for s. 25 protection essentially requires the proof of an aboriginal right. This position is inconsistent with *Haida Nation*. It also lacks recognition of the process of lawmaking that caused the words "other rights or freedoms" to be explicitly included within s. 25.

22. The characteristics of "other rights and freedoms" advanced by the Appellants are those that describe aboriginal rights protected by s. 35 (i.e. communal, associated with pre-contact society, traditional aboriginal norms and values, based on historical evidence).¹³ Aboriginal and treaty rights, however, are already enumerated in s. 25. Since, as the Appellants correctly note, "every word is presumed to have a role to play in advancing the legislative purpose",¹⁴ it is clear that by specifically including the term "other rights or freedoms", s. 25 was intended to cover an additional category of rights and freedoms beyond those aboriginal and treaty rights already protected under s. 35.

23. The Appellants note that "a key objective of treaties and the negotiation of modern land claims agreements is the *reconciliation* of Aboriginal peoples and other Canadians",¹⁵ and go on to argue the inconsistency of the Program with the objective of furthering the "long process of reconciliation".¹⁶ The Haisla Nation submits that if the granting of a right or freedom furthers the process of reconciliation, it must be entitled to the protection of s. 25. Despite the Appellants' contention, there is little doubt that the Program, by entrenching the unique connection of Aboriginal Nations with the fishery and by furthering the process of treaty making, exhibits the requisite characteristic. The

¹³ Appellants' Factum, para. 114.

¹⁴ Appellants' Factum, para. 109.

¹⁵ Appellants' Factum, para. 119.

¹⁶ Appellants' Factum, para. 119.

Court need only look to the inclusion of a commercial fishing component in final treaty arrangements in British Columbia as evidence that the Program has indeed served the purpose of reconciliation.

24. The Respondent Canada argues that in order to be afforded protection under s. 25, an "other right or freedom" must be "of significant magnitude to warrant overriding a *Charter* right or freedom", must "manifest a strong degree of permanence" and "be intimately related to the protection and affirmation of aboriginal distinctiveness".¹⁷

25. The rights and freedoms provided in the Program, and in accommodation agreements, are of sufficient magnitude to require protection from collateral attack. These instruments facilitate rights recognition through shared decision making, land management, resource sharing and revenue sharing. They are the critical means for aboriginal rights to be recognized pending treaty, reflect the honour of the Crown, and are required in order for the Crown and Aboriginal Nations to implement this Court's judgment in *Haida Nation*. As these rights and freedoms are provided in order to further the ultimate purpose of s. 35, they must fit within the "other rights and freedoms" contemplated by s. 25.

26. Canada's view that an "other right or freedom" must "manifest a strong degree of permanence"¹⁸ finds no support in the jurisprudence, and is in fact directly at odds with the recognition by this Court that interim relief in the form of consultation and accommodation processes are a necessary aspect of reconciliation:

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. *While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests [emphasis added]*.¹⁹

¹⁷ Respondent's Factum, para. 137.

¹⁸ Respondent's Factum, para. 137.

¹⁹ *Haida Nation*, *supra*, para. 25.

27. The importance of interim relief pending treaty was stressed by the Royal Commission on Aboriginal Peoples, 1996:

One of the most pressing issues regarding lands and resources is the availability of interim relief. Even with the reforms proposed here, it will take considerable time to resolve land claims. Meanwhile, lands subject to claims are being sold, trees are being harvested, game is being killed or driven out, and communities are living in poverty. It is crucial that there be some protection of Aboriginal interests while the treaty process is being pursued...

The best forms of relief combine a high degree of protection for a portion of the territory, institutions for the co-management of critical resources in the territory, and financing for Aboriginal people in the form of a share of resource revenues. This provides substantial protection without freezing development.²⁰

28. Rights and freedoms provided as a means of recognizing and accommodating asserted aboriginal rights and title are by their very nature interim – the reconciliation of s. 35 rights only achieves permanence through treaty. Requiring “other rights and freedoms” to manifest permanence would undermine the obligation to consult and accommodate, as such an obligation expressly exists to provide interim protection for aboriginal rights and title. Section 25 must be available as a shield to guard s. 35 rights, which are permanent in nature, from collateral attacks on instruments expressly designed to accommodate those rights in the interim.

29. Finally, there can be nothing more “intimately related to the protection and affirmation of aboriginal distinctiveness”²¹ than rights and freedoms expressly granted as a recognition of Aboriginal Nations’ unresolved claims of aboriginal rights and title, and as accommodation for those rights pending their resolution.

30. As noted, Canada's defense of the Program recognizes that “its objectives support the ultimate purpose of s. 35: the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”.²² When attempting to distance the Program from the protection of s. 25, however, Canada describes the rights

²⁰ Excerpt from the Report of the Royal Commission on Aboriginal Peoples, 1996, Volume 5, pp. 14 - 15.

²¹ Respondent's Factum, para. 137.

²² Respondent's Factum, para. 113.

provided as “peripheral or ephemeral”.²³ These positions are contradictory, and, to the extent that they strive to undermine the certainty of accommodation agreements, are inconsistent with the honour of the Crown.

31. Canada argues that interim accommodations do not qualify for protection under s. 25 because they are “solely the product of a consultative process”.²⁴ That consultative process, however, has been confirmed by this Court as being inextricably linked to the reconciliation of aboriginal rights with Crown sovereignty and as flowing from the protection accorded by s. 35. Canada suggests that the fact that the consultative process necessitates balance, flexibility and compromise somehow means that accommodation flowing from this process lacks the “foundational character contemplated by s. 25”.²⁵ On the contrary, these characteristics make the rights and freedoms flowing from consultation processes precisely the sort of accommodations contemplated by this Court in *Haida Nation*, and precisely the sort that breathe life and purpose into the “other rights and freedoms” of s. 25.

C. Maintaining the Integrity of the Rights Recognition Process

32. By setting a threshold for “other rights and freedoms” that essentially requires proof of aboriginal rights, the Appellants and Respondent are attempting what British Columbia failed to achieve in *Haida Nation*: limiting “reconciliation to the post-proof sphere”.²⁶

33. By finding that the duty to consult and accommodate exists as an interim measure, this Court required s. 35 rights to be protected while Aboriginal Nations and the Crown seek an ultimate reconciliation through treaty. Accommodation agreements and other like instruments are the means by which the Crown and Aboriginal Nations have fulfilled this Court’s direction to reconcile the competing interests pending resolution of outstanding land claims through honourable negotiation.

²³ Respondent’s Factum, para. 129.

²⁴ Respondent’s Factum, para. 140.

²⁵ Respondent’s Factum, para. 140.

²⁶ *Haida Nation*, *supra*, para. 33.

34. Aboriginal people in Canada are distinct from others in society, and their distinct rights have protection under the supreme law of the land. The Program is not merely the provision of a licence to fish, just as the FRA is not merely a contract to access timber. These instruments are an explicit recognition of the *sui generis* rights of Aboriginal peoples, rights that must, according to this Court, be reconciled with the Crown's assertion of sovereignty. The rights and freedoms provided through these instruments must be protected from Charter challenge. The exposure of these rights and freedoms to challenges like the one mounted by the Appellants places in jeopardy the ability of the Crown to satisfy its legal and honourable obligation to consult with and accommodate Aboriginal Nations, and with it, the ability to bridge the gap between asserted aboriginal rights and title and reconciliation through treaty.

35. Section 25 extends protection to "any rights or freedoms that now exist by way of land claims agreements or *may be so acquired*" (emphasis added). As recognized by the Royal Commission, however, the road to the resolution of treaties is long and difficult. Until the Haisla Nation, and other Aboriginal Nations throughout British Columbia, reach land claims agreements, there must be substantive respect for and accommodation of their aboriginal rights and title. The Haisla Nation therefore requests that this Court provide the support necessary to implement its decision in *Haida Nation* by taking a purposive approach to the interpretation of "other rights and freedoms" in s. 25. Such an approach would grant protection from Charter challenge to the rights and freedoms provided for by way of instruments, including accommodation agreements, that recognize and accommodate s. 35 aboriginal rights and title on an interim basis and that further the process of reconciliation, the ultimate purpose of s. 35.

PART V - RELIEF SOUGHT

36. It is respectfully submitted that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of November, 2007.

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PART VI - TABLE OF AUTHORITIES

Caselaw**Paragraph No.
Referred to in
Factum**

<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	9
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 3 S.C.R. 511	5, 10, 11, 26, 32
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<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i> , [2005] 3 S.C.R. 388	11
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	16

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<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11, s. 25	7, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 28, 30, 31, 35
<i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982</i> (U.K.), 1982, c. 11, s. 35	1, 8, 9, 12, 14, 17, 18, 20, 25, 28, 30, 31, 33, 35

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