



Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters

Faculty Scholarship

2010

The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights

Lorne Sossin

Osgoode Hall Law School of York University, lsossin@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Indian and Aboriginal Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Sossin, Lorne. "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights." *Canadian Journal of Administrative Law & Practice*. Volume 23 (2010) 93-113.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights

Lorne Sossin*

This article explores the development and application of the “duty to consult and accommodate” from an administrative law perspective and more broadly considers the promise and limitations of procedural justice through the context of aboriginal rights. The question addressed in this article is the relationship between procedural justice and substantive outcomes in the context of aboriginal rights in Canada. More specifically, by developing a “duty to consult and accommodate” on the part of the Crown with aboriginal communities who have asserted but not yet proven land claims, has the Court advanced the potential for reconciliation, or provided a roadmap for Government to avoid the underlying issue of the rights of aboriginal peoples? The article considers to what extent the duty relies on administrative law concepts such as the duty of fairness and the standard of review of reasonableness and whether this is appropriate.

This analysis is divided into three sections. The first section explores the idea of procedural justice within the context of the judicial role in dispute resolution. The second section examines the duty to consult and accommodate. The third and concluding section considers the implications of procedural justice for reconciliation between the state and aboriginal communities. The article concludes that while procedural justice holds considerable promise as a purpose, reconciliatory procedural mechanism, its limitations increase as time passes without significant procedural enhancements such as the Crown’s “duty to consult and accommodate” aboriginal communities leading to more just outcomes.

Dans cet article, l’auteur analyse le développement et la mise en application du « devoir de consulter et de trouver des accommodements » du point de vue du droit administratif et se penche plus généralement sur les aspects prometteurs et les limites de la justice procédurale dans le contexte des droits autochtones. Dans cet article, l’auteur soulève la question de la relation entre la justice procédurale

* Faculty of Law, University of Toronto. This paper was originally prepared for Osgoode Hall Law School 5th Annual National Forum on Administrative Law & Practice (October 16, 2009). An earlier draft of this paper was presented at the International Political Science Association meeting in Santiago, Chile (July 13, 2009). I am indebted to Amanda Montague for her superb research assistance, and to the Faculty of Law, University of Toronto, and the Social Science and Humanities Research Council, for their generous support of this research.

et l'obtention de véritables résultats dans le contexte des droits autochtones au Canada. Plus spécifiquement, en faisant reposer sur l'État un plus grand « devoir de consulter » les communautés autochtones « et de trouver des accommodements » avec celles ayant fait des revendications territoriales mais dont la démonstration reste à faire, le tribunal a-t-il rendu possible une éventuelle réconciliation ou a-t-il fourni au gouvernement la manière d'éviter de répondre à la question sous-jacente relative aux droits des peuples autochtones? Dans cet article, l'auteur évalue dans quelle mesure ce devoir fait appel à des concepts de droit administratif tels que le devoir d'équité et la norme de la décision raisonnable et si ceci est approprié.

Cette analyse est divisée en trois parties. La première partie traite du concept de justice procédurale dans le contexte de la fonction judiciaire dans la résolution des conflits. La deuxième partie traite du devoir de consulter et d'accommoder. La troisième et dernière partie étudie les exigences de justice procédurale permettant la réconciliation entre l'État et les communautés autochtones. L'auteur conclut que, malgré le fait que la justice procédurale présente des aspects prometteurs en tant que finalité, un mécanisme procédural de réconciliation, ses limites s'accroissent au fur et à mesure que le temps passe sans améliorations procédurales importantes, tel que le « devoir de consulter » les communautés autochtones « et de trouver des accommodements » donnant ouverture à des résultats plus justes.

1. INTRODUCTION

Can procedural justice resolve the many difficult and divisive issues surrounding the recognition of aboriginal rights? This is the question with which Canada now struggles, and the success or failure of its procedural experimentalism will either serve as a beacon or cautionary tale for other countries seeking reconciliation with indigenous populations. In this article, I explore the development and application of the “duty to consult and accommodate” in Canadian constitutional law, and the promise and limitations of procedural justice in the context of aboriginal rights.¹

Parties tend not to pursue procedural rights for their own sake. Rather, parties seek procedural rights so that it will be more likely that they will achieve successful outcomes, or alternatively, so that negative outcomes will be delayed or diminished. Procedure, in other words, should not be viewed in isolation. That said, process is important for more reasons than the particular results of particular cases.² All legal process both reflects and advances claims to legitimacy, fairness, and accountability. Further, some kinds of procedural requirements are difficult to disentangle from substantive requirements. For example, the duty to provide reasons and

¹ This article builds on the analysis in L. Sossin, “The McLachlin Court and the Promise of Procedural Justice” (Prepared for the Canadian Bar Association Conference on The McLachlin Court’s First Decade, Ottawa, Canada, June 19, 2009).

² For a wide ranging discussion of the justifications for procedural justice, see L. Solum, “Procedural Justice” (2004) 78 S. Cal. L. Rev. 181.

the substantive requirement of reasonableness are inextricably linked.³ The debate about whether procedure is a means to an end, or an end in itself, or somewhere in between, defines much about the implications of law and, as I will suggest, has come to characterize the aboriginal rights debate in Canada.

While parties may come to court to seek specific remedies on specific grounds, courts have an inherent discretion as to how a problem or dispute should be resolved. This discretion raises the question of when a court should reach a substantive outcome and when a procedural solution to a problem may be the better approach. When, in other words, is process the prudent choice? Prudence has several meanings, but in this context, I use it generally to mean making decisions based on a reasoned and strategic assessment of the implications of a decision, and circumspection as to danger or risk.

Procedural solutions may be especially prudent in the aboriginal context for several reasons. First, process builds on both Canadian and aboriginal norms of dialogue and reasoned engagement by disputing parties, and enjoys significant acceptance by the public; second, even where not welcomed by the parties, process is difficult to challenge or oppose, as the meaningful exchange of views and perspectives has inherent value and appeal; third, process defers difficult decisions, and leaves open further opportunity for compromise, settlement, building of trust and improvement of relations — in this way, process results in the parties taking “ownership” over the substantive resolutions which result from the process; fourth, a better process minimizes the risk of error in the substantive determination at issue; and fifth and finally, imposing a process is not viewed as “judicial activism” in the same way as imposing a substantive result. Process implies respect for the parties and their positions, which particularly important in the context of aboriginal rights, where the role of judicial intervention has come under particular scrutiny.⁴

The question I address in this article is the relationship between procedural justice and substantive outcomes in the context of aboriginal rights in Canada. More specifically, by developing a “duty to consult and accommodate” on the part of the Crown with aboriginal communities who have asserted but not yet proven land claims, has the court advanced the potential for reconciliation, or provided a roadmap for Government to avoid the underlying issue of the rights of aboriginal peoples?

This analysis is divided into three sections. In the first section, I explore the idea of procedural justice within the context of the judicial role in dispute resolution. The second section examines the duty to consult and accommodate in Canadian constitutional law. The third and concluding section considers the implications of procedural justice for reconciliation between the state and aboriginal communities. I conclude that while procedural justice holds considerable promise, its limitations increase as time passes without significant procedural enhancements such as

³ See D. Dyzenhaus & E. Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193.

⁴ For discussion, see Peter Russell, “Courts as Agents of Justice in Indigenous-Settlor Relations” (Presented at the International Political Science Association meeting in Santiago, Chile, July 13, 2009).

the Crown's "duty to consult and accommodate" aboriginal communities leading to more just outcomes.

2. PART ONE: THE IDEA OF PROCEDURAL JUSTICE

Procedural solutions to substantive disputes may be seen as part of the tradition of the "passive virtues" of judicial reasoning highlighted by Alexander Bickel's ground-breaking work on American constitutional interpretation, *The Least Dangerous Branch*.⁵ Bickel argued that courts should exercise prudence in deciding as little as needed to resolve a particular dispute, and to serve as a catalyst for the voluntary working-out of problems where possible.

In Canada, the seeds of the procedural turn were sown long before the development of the duty to consult and accommodate in the context of aboriginal rights. For example, the notion of "dialogue" emerged as a central norm of Canadian constitutionalism in the 1999 decision in *Vriend v. Alberta* when the Court adopted "dialogue" as a metaphor for judicial review under the Constitution.⁶ Dialogue represented a procedural solution to the substantive problem of which branch of government is paramount where constitutional rights are engaged. Dialogue is focused on how courts and legislatures talk to each other, and more importantly, listen to each other. Some of the most significant decisions of the Supreme Court, on abortion (*Morgentaler*)⁷ and the potential secession of Quebec (the *Secession Reference*)⁸ reflect a similar propensity of the Court to opt for procedural resolutions in the face of difficult and divisive issues. In such cases, the Supreme Court has opted to serve as referees rather than express an opinion on who should win the match.

While I believe this procedural turn by the Court is intentional and coordinated, I do not suggest that the Supreme Court engages in an explicit, strategic process to deal with substantive problems through procedural means (though I also do not preclude the possibility that this may occur from time to time in particular cases). It is important not to discount the impact of the arguments advocates put

⁵ (New York: Bobbs-Merrill, 1962).

⁶ 1998 CarswellAlta 210, 1998 CarswellAlta 211, [1998] 1 S.C.R. 493 (S.C.C.). The Court adopted the "dialogue" metaphor from the article by P. Hogg & A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75; see also P. Hogg & A. Thornton, "The Charter Dialogue Between Courts and Legislatures" (1999) 20 Policy Options 19.

⁷ *R. v. Morgentaler*, 1988 CarswellOnt 954, [1988] 1 S.C.R. 30 (S.C.C.). In *Morgentaler*, the majority of the Supreme Court held that the process by which hospital committees determined when an abortion would be available violated the psychological security of the person under s. 7 of the *Charter*. In other words, the majority declined to find criminalizing abortion unconstitutional, and instead found the process to which the abortion provision in the *Criminal Code* had given rise was unconstitutional. Wilson J., concurring, would have decided the case based on a right of women to control their own bodies as a feature of the "liberty" aspect of s. 7.

⁸ *Reference re Secession of Quebec*, 1998 CarswellNat 1300, 1998 CarswellNat 1299, [1998] 2 S.C.R. 217 (S.C.C.). In the *Secession Reference*, the Court held that a "clear majority" vote in favour of secession based on a "clear question" would give rise to a "duty to negotiate" on the federal and Quebec governments. The Court found that the Constitution required a process rather than an outcome in relation to secession.

before the Court, and the role of lower court decisions in shaping the Supreme Court's approach. Further, the Court does not initiate litigation and cannot orchestrate the parties or issues that come before it. That said, I suggest the Canadian Supreme Court has developed a collective orientation that is particularly amenable to procedural resolutions. Moreover, as the Court develops creative procedural solutions to problems in one legal area, there is a greater likelihood that similar solutions will be drawn upon in other areas. The adoption of a contextual approach to the duty of fairness under administrative law,⁹ and the *Charter*,¹⁰ represented significant building blocks for the Court's development of the duty to consult and accommodate in the context of aboriginal rights. There are elements of the duty to consult and accommodate, in turn, which resonate in the context of the right to collective bargaining.¹¹

At root, procedural justice is premised on the unshakeable belief that sensible and reasonable people of good faith are capable of working out their differences if given a fair and transparent process to do so.¹² Accountability demands nothing less.¹³ As Lon Fuller memorably observed, "If we do things the right way, we are likely to do the right thing."¹⁴

3. PART TWO: THE DUTY TO CONSULT & ACCOMMODATE AS PROCEDURAL JUSTICE

The duty to consult and accommodate and its implications for aboriginal rights in Canada has generated significant controversy and has spawned a rich and burgeoning literature.¹⁵ Is the duty a step forward, backwards, or sideways? Will a

⁹ *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.) at paras. 21-28.

¹⁰ *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 CarswellNat 7, 2002 CarswellNat 8, 2002 SCC 1 (S.C.C.) at para. 115.

¹¹ See *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 CarswellBC 1289, 2007 CarswellBC 1290, 2007 SCC 27 (S.C.C.).

¹² Both Canadian administrative law scholars and aboriginal rights scholars have explored the obligations owed by decision-makers; in the administrative law context, this has led to the development of the concept of administrative decision-makers discharging a public trust — see L. Sossin, "Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law" (2003) 66 Sask. L. Rev. 129-82; in the aboriginal rights context, this has led to the development of decision-making as stewardship — see J. Borrows, "Stewardship and the *First Nations Governance Act*" (2004) 29 Queen's L.J. 103.

¹³ Eddie Clark makes a persuasive argument that the duty to consult should be even more broadly applied, and extended to delegated legislation, on accountability grounds. See E. Clark, *Delegated Legislation and the Duty to be Fair in Canada* (LL.M. Thesis, Toronto, 2008) at 14 21.

¹⁴ Lon L. Fuller, "What the Law Schools can Contribute to the Making of Lawyers" (1948) 1 J. Legal Educ. 189 at 204.

¹⁵ See D. Mullan, "The Duty to Consult Aboriginal Peoples — The Canadian Example" (2009) 22 C.J.A.L.P. 107; J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples* (Markham, ON: LexisNexis Canada, 2008);

new process for Crown-aboriginal dialogue lead to new thinking and new possibilities for reconciliation? It is to these key questions that I now turn.

The Supreme Court of Canada recognized the duty to consult and accommodate, rooted in the “honour of the Crown”, and the *sui generis* fiduciary obligation owed by the Crown to aboriginal peoples. This duty has enormous potential to redress potential injustice for aboriginal communities. It means that aboriginal communities may exercise a right to participate in the management and disposition of land and resources over which they have asserted claims, even if those claims may not be finally resolved for years. The duty to consult, however, is not cut from whole cloth. It builds both on existing approaches to the obligations of the Crown toward aboriginal peoples, and the broader common law duty of fairness owed to those affected by government decision-making.

In *Sparrow*,¹⁶ the Court had interpreted section 35 of the *Constitution Act* as a remedial measure intended to serve as a constitutional basis on which to afford aboriginal peoples a degree of control over government conduct affecting their rights. In *Van der Peet*,¹⁷ the Court held that section 35 provides the constitutional framework for reconciling the sovereignty of the Crown with the reality that aboriginals lived on the land in distinctive societies, with their own practices, traditions, and cultures. Since then, as Arthur Pape has observed, “the promotion of reconciliation has been understood as the primary purpose of section 35, in all the Court’s jurisprudence.”¹⁸

Cases such as *Sparrow*, *Van der Peet* and *Guerin v. Canada*,¹⁹ developed the fiduciary relationship between the Crown and aboriginal peoples, and provided remedies against the application of laws that infringe that obligation without justification. Importantly, *Sparrow* also emphasized that the objective of section 35 is to achieve reconciliation, a principle that guides the duty to consult and accommodate. The contextual nature of the duty, varying based on the particular circumstances,

Monique Passelac-Ross and Veronica Potes, “Consultation with aboriginal peoples in the Athabasca oil sands region: is it meeting the Crown’s legal obligations?” (2007) 98 Resources 1; Veronica Potes, “The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?” (2006) 17 J. Envtl. L. & Prac. 27; H. Treacy, T. Campbell, and J. Dickson, “The Current state of the law in Canada on Crown obligations to consult” (2007) 44 Alta. L. Rev. 571; Timothy Huyer, “Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation” (2006) 21 Windsor Rev. Legal Soc. Issues 33; Thomas Isaac and Anthony Knox, “The Crown’s Duty to Consult Aboriginal People” (2003) 41 Alta. L. Rev. 49; and S. Lawrence and P. Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79 Can. Bar Rev. 252.

¹⁶ *R. v. Sparrow*, 1990 CarswellBC 105, 1990 CarswellBC 756, [1990] 1 S.C.R. 1075 (S.C.C.).

¹⁷ *R. v. Van der Peet*, 1996 CarswellBC 2309, 1996 CarswellBC 2310, [1996] 2 S.C.R. 507 (S.C.C.).

¹⁸ Arthur Pape, “Consultation, Accommodation and Beyond” (Lecture presented to the Aboriginal Law Conference, Pacific Business & Law Institute, 6 March 2008) [unpublished, on file with the author].

¹⁹ *Guerin v. Canada*, 1984 CarswellNat 693, 1984 CarswellNat 813, [1984] 2 S.C.R. 335 (S.C.C.).

was further developed in the Supreme Court's judgment in *Delgamuukw*, which dealt with a significant aboriginal land claim in B.C. and the scope of section 35 rights.²⁰ Potes emphasizes the importance of these earlier cases in interpreting the duty to consult principles: "Because of this context, the duty to consult and, consequently, to accommodate Aboriginal rights and interests, cannot be severed from the overall purpose of protecting the substance of s. 35(1) rights, and of furthering reconciliation between the Aboriginal and non-Aboriginal Canadian societies."²¹

In 2004, the Supreme Court extended the "honour of the Crown" and the Crown-aboriginal fiduciary obligation to a distinctive framework for the relationship between the Crown and aboriginal peoples built on a foundation of procedural justice. The importance of consultation as a constitutional feature of the Crown-aboriginal relationship is not new,²² as indicated above. In *Haida Nation v. British Columbia (Minister of Forests)*,²³ and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,²⁴ Chief Justice McLachlin, writing for the Court, elaborated a creative mix of procedural and substantive constraint on the Crown in dealing with contested resources.

²⁰ *Delgamuukw v. British Columbia*, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 168. *Delgamuukw* represented the longest trial in Canada's history (involving 318 days of testimony and resulting in a judgment 400 pages in length). The Supreme Court identified flaws in the conduct of that trial and ordered a new trial. Significantly, Chief Justice Lamer, after ordering a new trial, observed at para. 186:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. 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". Let us face it, we are all here to stay.

²¹ Veronica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" *supra* note 15 at 29-30.

²² See *R. v. Sparrow*, *supra* note 16 at 1105-1106 [S.C.R.]. See also S. Lawrence & P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252.

²³ 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73 (S.C.C.) [hereinafter "*Haida*"].

²⁴ 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74 (S.C.C.) [hereinafter "*Taku River*"].

In *Haida*, McLachlin C.J. characterizes the connection between the honour of the Crown and the duty to consult and accommodate in the following terms:

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.²⁵

The *Haida* challenged the replacement and transfer of tree farm licenses on land subject to their aboriginal title claim. McLachlin C.J. held that when the Crown has knowledge of potentially existing aboriginal rights or title, and considers activity that risks infringing upon them, the Crown's legal duty to consult and accommodate is engaged. This duty is proportionate to the *prima facie* strength of the aboriginal case and the seriousness of the potential harm to that case. In the *Haida* context, the trial judge had determined that the *Haida* claim to the forests in question, while unproven, was strong, and that there was a real risk that the forests would be gone by the time the *Haida* claim was eventually heard and adjudicated. McLachlin C.J. adopted the finding of the trial judge that the Province had failed to engage in consultations with the *Haida* community regarding the tree licenses at issue in the litigation. She concluded, "It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all."²⁶

In *Taku River*, an aboriginal community challenged a proposed mining road passing through contested territory. McLachlin C.J., writing yet again for the Court, held that the duty to consult and accommodate guarantees attentiveness to aboriginal concerns and provides for their participation. Nevertheless, once again, the Court reiterated that a duty to consult and accommodate does not compel a particular substantive outcome. McLachlin C.J. elaborated that so long as consultation is "meaningful," there is no duty to reach an agreement. This process is necessarily one of compromise between aboriginal concerns and competing societal interests. McLachlin C.J., highlighting a recurring theme of procedural justice, observed that the duty will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process. On the facts of *Taku River*, McLachlin C.J. held that the Crown's duty had been met. She found key facts supporting this finding, including that the *Taku River* Tlingit received financial support to help them participate in an environmental review process, their concerns were identified in a government report made under the Act, and other mitigation

²⁵ *Haida*, *supra* note 23 at para. 25.

²⁶ *Ibid.* at para. 79.

strategies were adopted. In *Taku River*, McLachlin C.J. reiterated that, “Responsiveness is a key requirement of both consultation and accommodation.”²⁷

While *Haida* and *Taku River* build on the Court’s earlier case law in aboriginal rights, the shift from a focus on static constitutional rights to a dynamic proceduralism is palpable. Brian Slattery notes that while the notion of the honour of the Crown in *Sparrow* appeared to emphasize both negotiation and litigation, the court had prior to *Haida* and *Taku River* been almost exclusively involved in guiding the development of the latter category — for him, these cases open up new opportunities to protect asserted rights even before they are proven and to develop a “generative” role to section 35: “In effect, it holds that the Crown, with the assistance of the courts, has the duty to bring into being a new legal order that accommodates Aboriginal rights, through negotiation and agreement with the indigenous peoples affected.”²⁸

While assuming a new and more interventionist role in the *process* of Crown-aboriginal consultation, the Court has also established through *Haida* and *Taku River* that it does not view consultation as requiring any particular substantive *outcome*. This distinction is expressed through the adoption by the Court in *Haida* of reasonableness as the standard of review by which Courts will review the Crown’s fulfillment of the duty to consult and accommodate. By adopting a standard of reasonableness, the Court has signalled that its view of the Constitutional duty on the Crown includes significant deference to the Crown’s judgment. At first glance, this appears anomalous, as decisions by executive officials, regulators and tribunals on constitutional matters traditionally are reviewed on a simple standard of correctness.²⁹

The Court addresses this concern by parsing the judicial role in two parts. First, the Court may review whether the duty to consult and accommodate arises in a given set of circumstances — this determination is reviewed on a standard of correctness. As for the specific measures taken by the Crown to fulfill this duty, the Court will only second-guess the Crown where measures taken are unreasonable. Chief Justice McLachlin explains the distinction in the following terms:

The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, “in . . . information and consultation the concept of reasonableness must come into play So long as every reasonable effort is made to inform and to consult, such efforts would suffice.” The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correct-

²⁷ *Taku River, supra* note 24 at para. 25.

²⁸ Brian Slattery, “Aboriginal rights and the honour of the Crown” (2005) 29 Sup. Ct. L. Rev. (2d) 433 at 436–440.

²⁹ See *Dunsmuir v. New Brunswick*, 2008 CarswellNB 124, 2008 CarswellNB 125, [2008] 1 S.C.R. 190 (S.C.C.) at para. 58.

ness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.³⁰

Parsing the judicial role in this fashion, and attempting to artificially carve out the process of consultation and accommodation from outcomes may well be a recipe for confusion, incoherence and cynicism as time goes by.

The application of the standard of review in the duty to consult cases has not been questioned by the lower courts since it was applied in *Haida*. Subsequent courts have followed the framework provided in that case — questions of law (generally, whether the duty existed and its scope) are assessed on a standard of correctness, while the consultation procedure is assessed on a standard of reasonableness. In *Wii'litswx*, the Court notes that there have been apparently diverging approaches to the reasonableness analysis — one focused on the process (in *Haida*) and one on the final result (in *Gitanyow First Nation v. British Columbia (Minister of Forests)*³¹) — and the B.C. Supreme Court advocates a synthesis of the two. First, the consultation procedure must be assessed on a standard of reasonableness, and if found reasonable, the end result is assessed on a standard of reasonableness, including analysis of whether the need for accommodation was identified and, if so, whether the resulting accommodations were adequate.³² This approach to the standard of review, notwithstanding the cautionary note sounded by Chief Justice McLachlin in *Haida* as to judicial scrutiny of “outcomes” has been followed subsequently in *Brown* and *Ahousaht*.³³

Whether or not the consultation and accommodation efforts fell within a range of reasonably defensible approaches appears to be a largely fact-based inquiry, and thus it is difficult to extract a consistent principle regarding when the duty has or has not been discharged. Is it possible to define the scope of acceptable consultation and accommodation? While each situation must be assessed on its merits and in its context, the criteria to be applied will generally include whether the proposal was still open to decision at the time of consultation, whether the Crown's position changed in light of the consultations, the time taken to consult and consider accommodations, the cost and content of the accommodation and other indicia of good faith.³⁴

Here are some examples of when the court found the process to be unreasonable. In *Wii'litswx*, the Court assessed the determination of the existence and scope of the duty on a reasonableness standard as well, and found that the Crown unreasonably minimized the strength of the claim, and the potential adverse impact, because it placed too much weight on the fact that the claim to title was not yet

³⁰ *Haida*, *supra* note 23 at paras. 62-63.

³¹ 2004 CarswellBC 3064, 2004 BCSC 1734 (B.C. S.C.).

³² *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) at paras. 143-145.

³³ *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.); *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 CarswellNat 2961, 297 D.L.R. (4th) 722 (F.C.A.).

³⁴ For a discussion of these criteria, see Clark, *supra* note 13, at 61-72.

proven. The Court also found it unreasonable to rely on future discretionary decisions (particularly those over which the decision-maker has no control) to satisfy accommodation requirements. Finally, the Court notes that there was essentially no change of position by the Crown following consultation, demonstrating that the consultation was not meaningful.³⁵ In *Brown*, the Court found that the Crown's actions could hardly even be called consultation: meaningful information was withheld from the Nation, and the Nation was not permitted to participate in discussions regarding the proposed accommodations.³⁶

There are several concerns that could (and should) be raised with respect to the reasonableness standard of review and the Court's deference to government preferences in the context of the duty to consult and accommodate. The standard of review of reasonableness in administrative law is rooted in deference to the expertise, policy functions and statutory role of executive decision-makers.³⁷ This rationale has little, if anything, to do with the Crown-aboriginal fiduciary relationship which infuses the duty to consult and accommodate. By contrast, the standard of reasonableness applied to a fiduciary, which relies not on deference but on the obligation of the decision-maker to act with reasonable diligence in light of the interests of parties vulnerable to the decision, does arise out of this set of equitable principles.³⁸

Some scholars have taken issue with the practical implications of the reasonableness standard of review. McCabe expresses the concern that it will be more difficult to assess the reasonableness of accommodation measures than to assess the reasonableness of a consultation process.³⁹ Others have expressed concern that the application of this standard may hinder the protection of aboriginal rights guaranteed by section 35: Huyer advocates showing less deference to the Crown decision-maker, applying a standard of correctness instead of reasonableness to the procedure.⁴⁰ Potes also recommends that a higher standard be applied, similar to the pressing a substantial objective test used in the Oakes test under section 1 of the *Charter* and the justification analysis under section 35 in the context of aboriginal rights.⁴¹

Where does the standard of review debate leave the judicial role in supervising the duty to consult and accommodate? Slattery divides the concept of aboriginal rights into historical rights (obtained through litigation) and settlement rights (ob-

35 *Wii'litswx*, *supra* note 32 at paras. 156, 166, 186, 220, 244.

36 *Brown*, *supra* note 33 at paras. 124, 136.

37 See *Dunsmuir*, *supra* note 29.

38 See *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*, 1995 CarswellNat 1279, [1995] 4 S.C.R. 344 (S.C.C.) at para. 22. For discussion, see L. Sossin, "Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law" *supra* note 12.

39 J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*, *supra* note 15 at 132.

40 Timothy Huyer, *supra* note 15, at 52.

41 Veronica Potes, *supra* note 15 at 44.

tained through negotiation), and argues that the Court has designated its role firmly in the former category:

The Supreme Court evidently feels that the judicial branch should concern itself primarily with the task of recognizing and protecting *historical* rights and leave the task of identifying modern versions of these rights to the executive branch, through the processes of negotiation and agreement with indigenous peoples. But it must be remembered that, without the courts' ability to shield historical rights from governmental intrusion, the chances of reaching agreement on settlement rights would often be very slight indeed.⁴²

Consultation, in this sense, may be viewed as analogous to the treaty negotiation process.⁴³ Courts may ensure the fairness of this process, but will not impose a judicially crafted outcome. Richard Devlin and Ronalda Murphy echo this perspective on the Court's role in the duty: they feel that the true value of the duty is its potential to force conversations that will lead to agreement and hopefully avoid litigation (although recourse to the courts must be available to make the duty meaningful).⁴⁴

So, does this mean that the duty to consult is simply a parallel to the court's role in policing the administrative law duty of procedural fairness? McLachlin C.J. acknowledged administrative law served as a wellspring for the duty to consult and accommodate, observing that in order to determine the content of the duty, regard may be had to the procedural safeguards developed by administrative law.⁴⁵ That said, the Supreme Court rejected the Government's argument that it owed aboriginal groups "mere" administrative law duties until their rights over land or resources, if any, had been finally concluded.

The Court framed this position in the following terms in *Haida*:

The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, ¶20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.⁴⁶

⁴² Brian Slattery, *supra* note 28 at 441.

⁴³ For an elaboration of this analogy, see J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*, *supra* note 15 at 93.

⁴⁴ Richard F. Devlin and Ronalda Murphy, "Recent Developments in the Duty to Consult: Clarification or Transformation" (2003) 14:2 N.J.C.L. 167 at 214.

⁴⁵ *Haida*, *supra* note 23 at para. 41.

⁴⁶ *Haida*, *ibid.* at para. 28.

The Court confirmed that the duty to consult and accommodate does arise prior to the determination of aboriginal claims. Having concluded that governments at all levels owe aboriginal groups this constitutionally entrenched duty, however, the Court has proceeded to define the nature and scope of this duty in terms that appear to draw heavily on administrative law concepts.

For example, the duty to consult and accommodate is defined by the Court in contextual terms. The Court observed that “The content of the duty, however, varies with the circumstances . . . A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.” Compare this to the classic formulation of procedural fairness at administrative law in the Supreme Court’s decision in *Baker*:

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.⁴⁷

In *Baker*, the Court identified the following criteria for assessing the degree of fairness owed in particular circumstances:

- (1) the nature of the decision being made and process followed in making it;
- (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- (3) the importance of the decision to the individual or individuals affected;
- (4) the legitimate expectations of the person challenging the decision;
- (5) the choices of procedure made by the agency itself.

In *Haida*, the Court characterized the criteria for assessing the content of the duty to consult and accommodate in strikingly similar terms:

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.⁴⁸

⁴⁷ *Supra* note 9 at para. 22.

⁴⁸ *Haida*, *supra* note 23 at para. 39.

According to the Court, the result of this analysis in the context of the duty to consult and accommodate is to determine where along a spectrum of possible government obligations this duty falls in particular circumstances:

Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. “[C]onsultation’ in its least technical definition is talking together for mutual understanding”: T. Isaac and A. Knox, “The Crown’s Duty to Consult Aboriginal People” (2003), 41 *Alta. L. Rev.* 49, at p. 61.

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.⁴⁹

Is the spectrum of the duty to consult and accommodate different than the spectrum of the duty of fairness? In the administrative law context, the spectrum has been framed broadly as giving rise to a minimum duty of fairness, a medium duty of fairness and a high duty of fairness. Something similar appears to be developing in the context of the duty to consult. In *Taku River*, in characterizing the degree of consultation appropriate to the circumstances, the Court stated: “While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.”⁵⁰

While many of the actual rights involved in the duty to consult look similar to the rights involved in procedural fairness in administrative law (for example, the provision of notice and disclosure, the opportunity to develop and present views by parties whose rights and interest are affected, the entitlement to reasons before an impartial decision-maker, etc.), two important differences deserve to be highlighted.

First, the duty to consult and accommodate involves not just a procedural guarantee, but also, importantly, a substantive constraint. Governments cannot dis-

⁴⁹ *Ibid.* at paras. 43-44.

⁵⁰ *Taku River*, *supra* note 24 at para. 32.

charge their duty to aboriginal communities simply by demonstrating that they provided a venue for those communities to be heard. It is also necessary to show that the governments' substantive position has been modified as a result. The duty, in other words, includes accommodation and not just consultation, and in this sense provides a far more significant constraint on the Crown than the duty of fairness at administrative law.

Second, the duty to consult may also include the requirement to provide aboriginal communities with the capacity to participate in the consultation process. In other words, the duty is a positive and proactive one, rather than simply a duty to allow for participation. Just how far this positive duty may stretch remains unsettled.

So, if the duty to consult was both based upon and meant to operate beyond administrative law duties of fairness, the question is what exactly the duty was meant to look like in practice. As the Court made clear, guidance may be found in administrative law principles, but something "more" is also needed to discharge the particular duty, and the elaboration of that something "more" was largely left to later judicial comment.

4. PART THREE: THE FUTURE OF PROCEDURAL JUSTICE

The promise of procedural justice is clearly evident in the portrait of meaningful engagement, reasoned compromise and reconciliation set out by the Supreme Court of Canada in *Haida* and *Taku River*. To the skeptics, actions rather than words, and outcomes rather than process, would be the litmus test for the duty. In the five years since the Supreme Court decisions outlining a framework for the duty to consult and accommodate, lower courts have attempted to apply the duty in numerous cases. In so doing, a recurring focus has been on the meaning and judicial oversight of "accommodation."

While the word "accommodate" is explicitly incorporated in the duty, there is still no consensus as to the substance of this part of the duty in practice. The scope and content of the duty to accommodate is still largely ambiguous, with persistent questions as to when this aspect of the duty is triggered, what it entails, and when it is satisfied.⁵¹ Veronica Potes frames this current tension as between a "procedural" and "purposive" approach to the duty to accommodate: the procedural approach closely resembles the duty of procedural fairness, and views the purpose of the duty as removing restraints on Crown action, and providing certainty to industry.⁵² A purposive approach, in contrast, reflects the factors distinguishing these scenarios from other government action:

The fundamental difference between the general duty of procedural fairness and the duty to consult and to accommodate Aboriginal peoples' rights stems from the Constitutional entrenchment of the latter, as well as the objectives pursued by such entrenchment. We protect rights in Constitutions to guard them from majoritarianism. And although this does not render them

⁵¹ Veronica Potes, *supra* note 15 at 31.

⁵² *Ibid.* at 34-35.

invulnerable, any potential infringement must be justified by meeting standards set sufficiently high to discourage such occurrence.⁵³

There appears to be evidence of both approaches to the duty to accommodate in the jurisprudence and the literature. As an example of the purposive approach, *Hupacasath*⁵⁴ was a case in which the Crown had previously been ordered to consult after unilaterally deciding to remove disputed lands from a Tree Farm License and sell them to a third party. In the judgment, the British Columbia Supreme Court found that the Crown had misconceived its duties under the circumstances — since the order to consult came after the decision to remove the lands, consultation alone was never going to be sufficient; rather, since the Crown had already made this decision without consulting affected First Nations (and the decision could not be overturned), the Crown was found to have a duty to work towards accommodation for the removal decision's potential impact on Hupacasath First Nation's aboriginal rights.

The Court in *Huu-Ay-Aht* also appears to have taken a purposive approach in interpreting both the consultation and accommodation aspects of the duty.⁵⁵ *Huu-Ay-Aht* involved a dispute over negotiations surrounding logging operations in areas affecting Huu-Ay-Aht First Nation: regarding accommodation, the British Columbia Supreme Court found that Crown efforts could not be considered “meaningful”, because a single accommodation option was imposed upon HFN. Moreover, the Court observed that those negotiating on behalf of the Crown with the aboriginal community did not even have the authority to grant any other form of accommodation than under the particular Act. The Court also stated that, even if the proposed accommodation may eventually be found acceptable, the Crown still failed to fulfill its duty by not engaging in meaningful consultation.⁵⁶ In other words, if there is no discretion to tailor the accommodation based upon the consultation, neither the consultation nor the accommodation can be meaningful.

The focus on accommodation has also found widespread support in the literature commenting on these cases. Arthur Pape, for example, contends that the central substance of the duty ought to be the accommodation, so that all consultation is viewed as a means to reaching suitable accommodation for the parties.⁵⁷ Potes advocates raising the standard of what constitutes adequate accommodation: she argues that the doctrine of justification — directly applicable in cases of proven aboriginal rights — ought also to inform the duty to consult and accommodate, such that “in deciding among the universe of accommodating measures only demonstrable, compelling, and substantial objectives should trump Aboriginal protected interests.”⁵⁸ Huyer supports similar higher standards in relation to consultation and accommodation, perhaps incorporating a requirement to show minimal impairment

⁵³ *Ibid.* at 35.

⁵⁴ *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 CarswellBC 2330, 2008 BCSC 1505 (B.C. S.C.).

⁵⁵ *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 CarswellBC 1121, 2005 BCSC 697 (B.C. S.C.) at para. 52.

⁵⁶ *Ibid.* at para. 128.

⁵⁷ Arthur Pape (discussion May 29, 2009).

⁵⁸ Veronica Potes, *supra* note 15 at 44.

and proportionality between benefit and impairment in relation to asserted aboriginal rights.⁵⁹ Huyer also suggests that less deference ought to be shown to government decision-makers in assessing the consultation process and outcome, allowing less leeway for invasion and impairment of potential aboriginal rights.⁶⁰

On the other hand, some courts have emphasized the fact that the duty to consult does not include the duty to compromise, and that as long as the Crown made reasonable efforts, the duty is considered discharged even if no accommodation was obtained by the aboriginal group. In *Tzeachten*, for example, the Court found that the level of consultation and the proposals for possible accommodations were sufficient, even though no agreement was reached; the Court states that this kind of impasse “sometimes occurs in negotiations”, and since the Crown demonstrated “conduct consistent with the process of reconciliation”, the duty was discharged.⁶¹ This approach appears to adopt the view that the process, and not the outcome, ought to be the focus of the inquiry when the court reviews Crown decisions. As David Mullan observes, “the process and good faith elements are the ones that have to this point predominated in judicial articulation and assessment of the duty to accommodate. It remains to be seen whether there is any judicial disposition to push the limits further and engage in a fuller merits review of accommodation decisions.”⁶²

This procedural view of the duty to consult and accommodate appears to have also been adopted by some provinces, and has guided the development of provincial consultation guidelines. Alberta, one of the only provinces to have implemented its aboriginal consultation policy, has come under harsh criticism for appearing to view its role as simply managing the consultation process, while delegating the majority of the consultation to proponents — this approach has been criticized for severely limiting available accommodation measures, due to the capacity and nature of proponents.⁶³ Passelac-Ross and Potes argue that the province fails to take the duty to accommodate seriously in its policy, and provides no clear criteria for accommodation, which “favors the kind of unstructured decision-making that the SCC has criticized.”⁶⁴ Likely due to these and other perceived shortcomings, the Assembly of Treaty Chiefs of Treaty No. 6, Treaty No. 7 and Treaty No. 8 unanimously rejected the province’s consultation policy and framework.⁶⁵ It is becoming increasingly clear that a vision of procedural justice unhinged from a focus on outcomes will be viewed as deficient by aboriginal communities, and therefore unlikely to contribute to the project of reconciliation.

⁵⁹ Timothy Huyer, *supra* note 15 at 52.

⁶⁰ *Ibid.* at 48.

⁶¹ *Tzeachten First Nation v. Canada (Attorney General)*, 2008 CarswellNat 3001, 2008 CarswellNat 4647, 2008 FC 928 (F.C.) at para. 70.

⁶² Mullan, *supra* note 15 at 127.

⁶³ Monique Passelac-Ross and Veronica Potes, “Consultation with aboriginal peoples in the Athabasca oil sands region: is it meeting the Crown’s legal obligations?” (2007) 98 Resources 1 at 2, 6.

⁶⁴ *Ibid.* at 6.

⁶⁵ *Ibid.* at 3.

The future of procedural justice thus rests with whether a more just process is able to facilitate more just outcomes. This need not and should not be measured in the traditional winner-takes-all sense of adversarial litigation, but rather in the more appropriate sense of a well-reasoned compromise based on the principled balancing of competing interests.⁶⁶ However, for some observers, balancing interests in this way gives rise to significant dangers, because it suggests that the “interests” that aboriginal groups seek to protect in these cases are equivalent to the other “interests” that threaten those groups’ asserted rights. Huyer contends that the Crown’s broad discretion to justify infringement of aboriginal rights is problematic, given the varying degree of importance between the “interests” being balanced: “on what basis can one balance constitutionally-protected Aboriginal rights against other public policy goals which, although important, do not have constitutional status?”⁶⁷ Potes goes so far as to argue that, if the focus of accommodation is on the balancing of interests, then accommodation could become an assimilationist tool rather than a way to promote reconciliation.

Balancing interests in this context has another connotation, aimed at resolving competing claims by different aboriginal communities. In the context of duty to consult cases, the fact that the Nation asserting a right has an overlapping claim with another nation is generally considered to weaken that Nation’s claim — this is relevant when determining where along the “spectrum” the consultation falls.⁶⁸ However, the B.C. Supreme Court emphasized in *Gitksan* that overlapping claims can co-exist with a claim of aboriginal rights short of exclusive title, and even title can be proven if there is strong enough evidence of exclusivity for one group:

There is no requirement that a First Nation group establish a good *prima facie* claim of aboriginal title or rights with respect to all of the area claimed by it. The overlapping claims certainly preclude each competing group from being successful in proving aboriginal title to the areas which are the subject matter of the overlapping claims because, as stated, at para. 155 of *Delgamuukw*, it would be absurd for two or more groups to have the right of exclusive use and occupation to the same area. However, as pointed out, at para. 156 of *Delgamuukw*, the common law principle of exclusivity should be imported into the concept of aboriginal title with caution and the presence of other aboriginal groups does not necessarily preclude a finding of exclusivity. One group may be successful over another group in proving exclusivity to establish aboriginal title. In addition, in the event that the overlapping claims result in a finding that aboriginal title to a disputed area has not been established, it is still possible for the Court to conclude that the

⁶⁶ Heather L. Treacy, Tara L. Campbell and Jamie D. Dickson, “The Current state of the law in Canada on Crown obligations to consult” (Mar. 2007) 44 *Alta. L. Rev.* 571 at 615.

⁶⁷ Timothy Huyer, *supra* note 15, at 48.

⁶⁸ See: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 1999 CarswellBC 159, 118 B.C.A.C. 144 (B.C. C.A. [In Chambers]) at paras. 15, 20; *Hupacasath First Nation v. British Columbia (Minister of Forests)*, *supra* note 54 at para. 32; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, *supra* note 55 at para. 120.

competing groups have each established aboriginal rights in respect of the area.⁶⁹

While the future of procedural justice's promise turns on whether the duty to consult and accommodate leads to just outcomes, that promise may also be limited by how broadly or narrowly the duty is construed. The Court made clear in *Haida* that the duty does not extend to third parties, such as companies extracting resources from land over which there is an aboriginal land claim. The Court leaves open which public bodies, beyond the federal and provincial Crown itself, may be subject to the duty. For example, should the duty apply to independent adjudicative and regulatory bodies? Recent case-law suggests that these bodies are not in the same position as the Crown, but that they may be required to assess the adequacy of the Crown's consultation efforts before rendering their decisions. The two central cases to make this holding, *Kwikwetlem* and *Carrier Sekani*, find that when projects must go through multiple discrete processes of approval by separate decision-makers, consultation efforts must be assessed at each stage. In *Kwikwetlem*, the Court finds that the granting of the certificate of public necessity and convenience is discrete from the granting of the Environmental Assessment Certificate, and therefore the BC Utilities Commission was obligated to assess the consultation efforts up to that point before granting the certificate.⁷⁰ The Court in *Carrier Sekani* emphasized that timely assessment of consultation efforts was necessary in order to ensure that aboriginal concerns are incorporated before the project has been defined and crystallized, so that the Nation's interests are substantively taken into account.⁷¹

It should be emphasized, however, that this does not mean that each regulatory body is saddled with the task of assessing the Crown's consultation for the project as a whole. Thus, the Ontario Energy Board notes in *Hydro One* that their granting of leave to construct transmission lines was contingent on the completion of the Environmental Assessment process, and thus the consultation efforts in relation to that process were beyond the jurisdiction of the Board:

There is only one Crown. The requirement is that the Crown ensure that Aboriginal consultation takes place for all aspects of the project. *It is not necessary that each Crown actor that is involved with an approval for the project take on the responsibility to ensure that consultation for the entire project has been completed; such an approach would be unworkable.* It would lead to confusion and uncertainty and the potential for duplication and inconsistency. It would also potentially lead to a circular situation in which each Crown actor finds itself unable to render a final finding on consultation because it is awaiting the completion of other processes.⁷²

⁶⁹ *Gitksan Houses v. British Columbia (Minister of Forests)*, 2002 CarswellBC 2928, 2002 BCSC 1701 (B.C. S.C.) at para. 74.

⁷⁰ *Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2009 CarswellBC 341, 2009 BCCA 68 (B.C. C.A.) at para. 70.

⁷¹ *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 CarswellBC 340, 2009 BCCA 67 (B.C. C.A.) at paras. 51-52.

⁷² *Hydro One Networks Inc., Re*, 2008 CarswellOnt 8804 (Ont. Energy Bd.) at para. 256 [emphasis added].

Ultimately, the promise of procedural justice lies to a considerable extent in the Crown's efforts to give life to its obligation to act "honourably". One way in which this commitment can affect bureaucratic culture is to entrench the commitment in legislation authorizing executive authority itself. In his introduction of a revised *Mining Act* to the Ontario legislature, Hon. Michael Gravelle, Minister of Northern Development and Mines, stated that the amendments were the result of extensive consultation with many stakeholders, including First Nations and aboriginal organizations. He stated that the proposed amendments to the Act sought to balance the divergent positions expressed during those consultations, in order to promote mining exploration that is more respectful of aboriginal communities.⁷³

Aboriginal and Treaty rights are explicitly recognized in the Purposes section of the Bill:

2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment.

Under the proposed legislation, prospectors seeking new licenses or license renewals are required to complete an awareness program to ensure they are aware of, among other things, aboriginal engagement practices and consultation requirements (sections 7-8). Every lease issued under the Act is deemed to include the following (section 46): "The Lessee's rights under this lease are subject to the protection provided for existing Aboriginal or treaty rights in section 35 of the *Constitution Act, 1982* and the Lessee shall conduct itself on the demised premises in a manner consistent with the protection provided to any such rights." The Bill requires notification and/or consultation with aboriginal communities throughout the mining sequence, based on a graduated regulatory system for exploration. Exploration plans are required for lower impact activities (section 78.1) — which must fulfill any consultation requirements — and exploration permits must be applied for in activities with higher impacts (section 78.2). The Director will consider the adequacy of consultation with affected aboriginal communities, including whether arrangements have been made with those communities. Finally, the Bill provides for a dispute resolution mechanism for issues and disputes that may arise related to the consultation process (section 170.1). The details of this process will be set out in the regulations.

Finally, the issue of whether the duty to consult and accommodate applies to contexts where treaties have been concluded and are in operation and set out procedural rights remains an unsettled question shortly to be decided by the Supreme Court. In *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines*

⁷³ The timetable for the development of these amendments also notes that further consultation with both industry and aboriginal peoples will take place in the development of the regulations for the Act, which is where much of the protocol for aboriginal consultation will be laid out.

& Resources),⁷⁴ the Chambers Judge and the Court of Appeal both held that the duty to consult and accommodate applies to land claims agreements, specifically the Little Salmon/Carmacks First Nation Final Agreement. The Courts reached those conclusions by applying principles articulated in *Haida* and *Taku River*, that the honour of the Crown infuses the processes of making, interpreting and applying treaties, and governments must act with honour and integrity in all three contexts. Yukon argued that the duty should not apply in the context of a fully negotiated modern, comprehensive treaty. The lower Courts considered the treaty a step along the way to reconciliation but not the end point. Until that end point is reached, the duty to consult and accommodate provides the procedural roadmap toward reconciliation. How the Supreme Court approaches the duty in the context of this appeal may give an important indication of the future of the duty, and perhaps the potential of procedural justice.

5. CONCLUSION

The duty to consult and accommodate is a novel development in Canadian public law, in several ways: (1) it is a common law duty, but has constitutional force and effect; (2) it is based on principles particular to aboriginal peoples, since it requires governments to act consistently with the honour of the Crown principle in all decisions that might affect aboriginal interests intended for protection by section 35; and (3) its purpose is to promote the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.⁷⁵

It is likely too early to reach definitive conclusions regarding the success or failure of the duty to consult and accommodate as a form of procedural justice aimed at the reconciliation of aboriginal peoples and non-aboriginal peoples. It is already apparent, however, that the duty to consult and accommodate has changed the discourse of aboriginal rights in Canada, and ushered in a new era of possibility in Crown-aboriginal relations. That discourse is now focused on a dynamic tension between process and outcome. The judicial role has emphasized that the process must be meaningful. It will remain for the political sphere to determine whether meaningful consultation and accommodation can yield innovative and lasting resolution to longstanding and complex disputes. If the new emphasis on just procedures fails to result in just outcomes, the Supreme Court's bold attempt to build trust and facilitate compromise through the duty to consult and accommodate will seriously and perhaps irrevocably erode the potential for reconciliation between Canada and its aboriginal peoples.

⁷⁴ 2008 CarswellYukon 62, [2008] 4 C.N.L.R. 25 (Y.T. C.A.); leave to appeal allowed 2009 CarswellYukon 3, 2009 CarswellYukon 4 (S.C.C.); application/notice of appeal 2009 CarswellYukon 125 (S.C.C.).

⁷⁵ This characterization of the duty to consult and accommodate is borrowed from Arthur Pape, "The Duty to Consult and Accommodate: A Unique Development in Canadian Administrative Law" (Paper prepared for the Osgoode Hall Law School 5th Annual National Forum on Administrative Law & Practice, October 16, 2009).