

Judicial Deference and the Significance of the Supreme Court of Canada's Decisions in *Haida* and *Taku River*

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Introduction

The authors of this paper have stated several times in earlier published works that the principal obstacle to achieving certainty for Canadian natural resource development as it relates to the rights of aboriginal peoples, is the reticence of Canada's federal, provincial and territorial governments to accept that the key to such certainty is the full implementation of the doctrine of the Crown's duty to consult and, where appropriate, accommodate aboriginal peoples (the "Doctrine"). Combining the Doctrine with greater judicial deference to the decisions of Crown decision-makers which are effecting the Doctrine through a regulatory scheme as discussed in this paper is key to gaining increased certainty for government decision-making.¹

In the November, 2004 Supreme Court of Canada decisions of *Haida Nation v. B.C. (Minister of Forests)*² ("*Haida*") and *Taku River Tlingit First Nation v. B.C. (Project Assessment Director)*³ ("*Taku River*") McLachlin C.J., for a unanimous Court in both decisions, confirmed that such certainty, through the associated, if nascent, doctrines of "reconciliation" and "the honour of the Crown", flows from the Doctrine and the Crown responding to the existence of the Doctrine with appropriate procedures for satisfying the Doctrine.⁴ In addition, McLachlin C.J. has provided more guidance as to what the Crown ought to do to achieve greater judicial deference than has yet appeared in the decisions of our highest court.⁵ Finally, she has accepted that the administrative law concept of judicial deference is relevant to making the Doctrine work more smoothly over time.⁶

The authors are of the view that the result of this clear articulation of the Doctrine by the Court in *Haida*, and *Taku River*, is that there will, in future, be recognition that the Doctrine must now be considered as the point at which Canadian constitutional law generated by Section 35 of the

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¹ For example, see T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41:1 *Alb. Law Rev.* 49 at 77: "Certainty involves engagement by the Crown in the process of relationship-building and, to the extent that such relationships require infringement of Aboriginal or treaty rights, it will be necessary for the Crown at the right time and in the right way to exercise its duty to consult." See also T. Isaac and A. Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2004) 53 *U.N.B. Law J.* 3 and T. Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed. (Saskatoon, Sk.: Purich Publishing, 2004), at 213 – 228.

² *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida*").

³ *Taku River Tlingit First Nation v. B.C. (Project Assessment Director)*, [2004] 3 S.C.R. 550 ("*Taku River*").

⁴ *Haida*, *supra* note 2 at paras. 16, 17 and *Taku River*, *supra* note 3 at para. 25.

⁵ *Haida*, *ibid.* at para. 51.

⁶ *Ibid.* at paras. 60- 63.

*Constitution Act, 1982*⁷ (“Section 35”) and administrative law touch, if not substantially overlap. As it turns out, how constitutionally protected aboriginal and treaty rights are to be reconciled to the Crown getting on with the job of governing fits closely with the vocabulary, doctrines and spirit of how the Crown is to deal with Canada’s citizenry generally. It was made clear in the lower courts’ treatment of the *Taku River* case that the constitutional and the administrative aspects of that case created *separate* causes of action.⁸ In the end, however, a unanimous Supreme Court of Canada, by implication of their not deciding in terms of separate causes of action, dealt with the two strands as a single thread.

Judicial Deference

While there has been a predominance of “victory” and “defeat” attitudes in the Section 35-related litigation, seen at the distance of history, such case law will ultimately become blurred in what the Chief Justice wisely denominated as the “process of reconciliation” if the Doctrine can be implemented in the myriad of circumstances in which it is triggered and in a manner as smoothly as any other administrative processes. The result should be that only a small minority of Doctrine cases find their way into the courts. Canadian law has some distance yet to go in that regard, but it seems not unreasonable to predict that, before too long, leave to appeal in respect of cases relating to the Doctrine will be denied more often than allowed.

Achieving such a positive state of affairs is going to require Canada’s governments to: (a) understand the Doctrine and its need to be applied in a pragmatic way, (b) understand the concept of “judicial deference”, (c) create regulatory schemes that will attract judicial deference to decisions which implement the Doctrine, and (d) implement such regulatory schemes so as to choose correct consultation procedures and processes in respect of each consultation circumstance and implement such procedures and processes in a reasonable manner.

“Judicial deference” is a legal concept born long ago in the context of appeals from the judgment of inferior judges. It is a common sense conclusion that those exercising an appellate jurisdiction should be comfortable to reconsider *points of law* which the inferior court arguably got wrong, but be much less comfortable in reconsidering the inferior court’s conclusions in respect of *facts*. Not surprisingly, that common sense conclusion was recognized by the common law as the recognized basis for appellate courts normally *deferring* to inferior courts in respect of matters or fact.⁹

A prodigious quantity of legal powder and shot has been expended by courts in Canada and elsewhere in considering the indicia of courts deferring to Crown decision-makers in respect of

⁷ *Constitution Act, 1982*, R.S.C. 1985, App. 11, No. 44, being Sched. B to the *Canada Act 1982* (U.K.), 1982, c.11, as am. by the *Constitution Amendment Proclamation 1983*, R.S.C. 1985, App. 11, No. 46 [am. s. 25(b) and add. 35(3), 35(4), 35.1, 37.1 and 54.1] [“*Constitution Act, 1982*”].

⁸ *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* (2002), 211 D.L.R. (4th) 89, [2002] B.C.J. No. 155 (QL)(B.C.C.A.) affirming (2000), 77 B.C.L.R. (3d) 310, [2000] B.C.J. No. 1301 (QL) (B.C.S.C.).

⁹ *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802, Ritchie J. wrote at p.808 “These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts.”

the Crown's dealing with its subjects in the administrative law arena.¹⁰ This is not surprising. Administrative law deals with the review of administrative decisions made by persons and tribunals authorized to make decisions by all manner of legislation and delegated legislation. Stanley De Smith, arguably the father of administrative law in the common law context, used to start the lectures of one academic term by saying something to the effect of, "This term we will study forty-eight cases which fit into forty-six categories". In administrative law, the separate categories are often not easy to discern as they are dictated by scarcely visible differences in the statutes and regulations that authorized the making of the administrative decisions being reviewed.

For current purposes, we can be spared the use of the legal microscope at the De Smith level. All that needs to be understood that what ought to be the Crown's reaction to *Haida* and *Taku River* should be what Iacobucci J. said in *Pezim v. B.C. (Sup't of Brokers)*:¹¹

There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have *developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. ...*

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. [emphasis added.]

¹⁰ S.A. De Smith & The Rt Hon The Lord Woolf & Jefferey Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) pp. 223 - 373 ("De Smith"), *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, [1967] 1 All E.R. 208 (H.L.)(*Anisminic*), *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417 (S.C.C.).

¹¹ *Pezim v. B.C. (Sup't of Brokers)*, [1994] 2 S.C.R. 557 at 589-590 ("*Pezim*").

So there it is. In Canadian law, there is a judicially announced spectrum for judicial deference (the “Deference Spectrum”) which runs from pure questions of law open to review on the old common law appellate logic noted above to the determination of facts by very specialized Crown delegates at the other. The Deference Spectrum comes complete with a shading of judicial tests from that of “correctness” at the pure law extreme, to “reasonableness” at the specialized fact consideration extreme. In effect, the Deference Spectrum runs from “Was the tribunal’s decision in respect of a legal matter the right one?” to “Was the tribunal’s conclusions as to complex facts reasonable?”.

In light of the old common law thinking noted above, none of this should be surprising. The complication develops in administrative law in respect of each expression of Parliament’s will in statute and in the delegated legislation or regulations derived from statute. Such expressions of the legislative mind are infinitely varied and their implementation further multiplies the number of finely distinguished categories available for legal analysis.

Two statutory devices particularly shape administrative law’s reaction to administrative action. The first is the privative clause in legislation that attempts by various examples to prevent review of administrative decisions made under authority of statute. The second is the introduction of express statutory appeal processes into administrative procedures. In each case, the central question for the courts in carrying on judicial review of administrative decisions is “What discretion is left to the court in its review of action done under the authority of the statute?” Lengthy commentaries have been written on these issues by judges and academic writers.¹² For our purposes, we need only remember the Deference Spectrum from *Pezim*. What interests us is what is the best means for the Crown to lay legislative paths that will attract judicial deference with respect to the working out of the Doctrine in the numberless circumstances in which it may be invoked.

The Doctrine Spectrum and the Deference Spectrum in *Haida*

Haida expressly describes how the Crown is to determine the appropriate procedure for any particular working out of the Doctrine. The following paragraphs from *Haida* speak for themselves:

... 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

¹² See Note 10 for case law, discussion of *Anisminic* by Lord Cooke in *The Hamlyn Lectures* on “Turning Points in English Law” (London: Sweet and Maxwell, 1997) at 63ff; René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2d ed., trans. by Donald Breen (Toronto: Carswell, 1990) vol. 4, pp. 73 - 143, William Lahey and Diana Ginn, “After the Revolution: Being Pragmatic and Functional in Canada’s Trial Courts and Courts of Appeal” (Fall, 2002) 25 Dalhousie L.J. 259, H. Wade MacLauchlan, “Reconciling Curial Deference with a Functional Approach in Substantive and Procedural Judicial Review” (1994) 7 C.J.A.L.P. 1.

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.

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. ***The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.*** Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary. [emphasis added.]¹³

We now know, therefore, that the appropriate procedures for the working of the Doctrine are located across another spectrum (the "Doctrine Spectrum"). In respect of any particular invocation of the Doctrine, the appropriate place on the Doctrine Spectrum is derived from an analysis of the significance of potential infringement and the related risk of damages.

Haida also deals directly with the question of what the Chief Justice calls the "standard of review" with respect to effecting the Doctrine in practice. Lacking a statutory or other guidance outside the common law, McLachlin C.J. turned to "general principles of administrative law":

Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a

¹³ *Haida*, *supra* note 2 at paras. 43- 45.

process. *General principles of administrative law*, however, suggest the following.

On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a *degree of deference to the decision-maker*. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that *a degree of deference to the findings of fact of the initial adjudicator may be appropriate*. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: ... Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: ...

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 correctness. 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. [emphasis added.]¹⁴

In those few words, the Chief Justice definitively removes all notion of the Doctrine existing in some *sui generis* world devoid of guidance from the general common law and makes the eminently sensible conclusion that administrative law principles – in effect, the Deference

¹⁴ *Ibid.* at paras. 60 -63.

Spectrum – provides a familiar touchstone to the judiciary in testing any particular implementation of the Doctrine.¹⁵

Note, in order to avoid confusion, that there are two spectra at work in *Haida*; the Doctrine Spectrum expressly described in paragraphs 43 to 45 of *Haida*, and the Deference Spectrum impliedly set out in the quotation from *Haida* at footnote 15.

The Crown in all its manifestations is now clearly on notice that when carrying the Doctrine into effect in circumstances of asserted but unproven aboriginal title, it must follow a three-step process.

First, it must make a legal analysis of the strength of the claim for aboriginal rights or title and the possible impact of the administrative action on such asserted rights or title; thereby identifying an “aboriginal interest” and then weighing the significance of the proposed infringement of such aboriginal interest and the likelihood of non-compensable damage resulting therefrom.

Second, having determined what kind and quality of aboriginal interest is being dealt with, it must determine where on the Doctrine Spectrum such aboriginal interest lies; that is, what consultative *procedure* is appropriate to the Crown adequately dealing with such an aboriginal interest.

Third, the Crown must act reasonably in carrying out its chosen procedure in consulting in respect of, and in some cases attempting to accommodate, such aboriginal interest.

The courts will readily review the Crown’s choice of the extent to which the Crown will take the strength of the asserted aboriginal right or title seriously. However, if the legal question of whether the Crown has taken the asserted aboriginal right or title seriously enough, the courts are more likely to *defer* to the fair working out of the Crown’s established procedure for dealing with similar combinations of circumstances.¹⁶

¹⁵ As Binnie J. noted in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 at para. 115: “The *Constitution Act, 1982* ushered in a new chapter but it did not start a new book.”

¹⁶ Judicial deference has appeared in a recent decision of the British Columbia Supreme Court. In *Blaney v. B.C. (Min. of Agric, Food and Fish.)*, 2005 BCSC 283 (B.C.S.C.), Powers J. granted an order requiring additional consultation and *potential* accommodation with a First Nation respecting the First Nation’s claim that it was not appropriately consulted in respect of the issuance of an amendment to a fish farming licence. The Court held that while the Crown possesses a duty to consult the First Nation in this circumstance, that it was not entirely met, and that the appropriate remedy is for further consultation and *potential* accommodation to occur. Powers J. went on to say that in conducting such consultation and potential accommodation, both aboriginal *and* non-aboriginal interests must be considered. (para. 127) Finally, the First Nation also requested a permanent injunction from the placement of Atlantic salmon at the fish farm without proper authorization from the Department of Fisheries and Oceans for the “harmful alteration, disruption or destruction” (“HADD”) of fish habitat contrary to the *Fisheries Act*. Interestingly, Powers J. defers to the process outlined in the *Fisheries Act* for dealing with HADD and states “I conclude that ***this is a matter better resolved through the process provided by the Fisheries Act***, rather than making findings with only a portion of the evidence available. I am satisfied that ***this is a matter that is more properly handled, at this stage, through the Department*** [...] I anticipate the Department ... would consult with the [First Nation] ...”. (paras. 148, 149) [emphasis added.]

McLachlin C.J. was not dogmatic in her determination of where on the Deference Spectrum the key issues of the right consultative procedure fell. Throughout her reasons, she uses the term “likely”, as she is largely dealing with the hypothetical but we assume she was leaving room for the exceptions which usually disprove a rule rather than doubting the underlying analysis.

Advice to the Crown in *Haida*

The Chief Justice gave three kinds of advice to the Crown in *Haida* about how to obtain judicial deference in cases involving the Doctrine.

First, she described what is contained in appropriate consultation at either end of the Doctrine Spectrum. We now know that mere consultation in the context of the Doctrine need not be more than “...talking together for mutual understanding”¹⁷ while, at the far end of the spectrum, deep consultation may involve:

- (a) the opportunity to make submissions for consideration;
- (b) formal participation in decision making process; and
- (c) provision of written reasons to show that aboriginal concerns were considered and to reveal the impact they had on the decision¹⁸.

We also know, in the spirit of De Smith that, “this list is neither exhaustive nor mandatory for every case.”¹⁹ As we will discuss below, we can see the complex procedures for the working out of “deep consultation” in *Taku River* as the Crown, industry and the Taku River Tlingit engaged for over three years in a process which met the Chief Justice’s three possible indicia of “deep consultation”.

Second, McLachlin C.J. suggests broadly what the Crown might do to put the Doctrine into a formal administrative framework. Recall the Deference Spectrum; in it, judicial deference is at its strongest in dealing with the working out of the statutory duties of tribunals in carefully adjusted procedures applied with specialized knowledge and profound experience in the area addressed by such procedures. In this regard, she suggests that the Crown may wish to establish “...dispute resolution procedures such as mediation or administrative regimes with impartial decision-makers in complex or difficult cases.”²⁰

In this too, she contemplates a spectrum running from simple mediation – an impartial facilitator working out mutual understanding, to a tribunal – a quasi-judicial body more or less as complicated than the securities commission referred to in *Pezim*.

She further held that it is “open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby

¹⁷ *Haida*, *supra* note 2 at para 43.

¹⁸ *Ibid.* at para 44.

¹⁹ *Ibid.*

²⁰ *Ibid.*

strengthening the reconciliation process and reducing recourse to the courts.”²¹ She went on state that British Columbia’s *Provincial Policy for Consultation with First Nations*, while falling short of being a regulatory scheme, “may guard against unstructured discretion and provide a guide for decision makers.”²²

This goes to the heart of the Supreme Court of Canada’s advice to the Crown about how judicial deference relating to the Doctrine is to be achieved. The Crown is told to create “regulatory schemes”, very broad language which could contemplate almost any action that the Crown may take to regulate activities in Canada. The Crown is also told to anticipate the variety of circumstances that we have already been told to expect in the description of the Doctrine Spectrum so that there are different procedures for different problems. McLachlin C.J. confirms that this will strengthen the “reconciliation process” – the fundamental aim of the Doctrine, while “...reducing recourse to the courts.”²³

Such reduction in reliance on the courts is the direct and broadly beneficial concomitant of judicial deference. Expert tribunals will normally be deferred to by those called upon to provide judicial review of their administrative decisions. Review of their decisions by the courts would never cease, but the volume of such review could be materially reduced. The Crown is invited to contrast the deliberations of such expert tribunals with the “unstructured discretionary administrative regime” referred to in *R. v. Adams*.²⁴ We also know from *Adams* that, in 1996, the Supreme Court of Canada was calling on governments to ensure that decision makers that may affect aboriginal interests must make their decisions within structured regulatory scheme:

If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations *must outline specific criteria* for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights.²⁵ [emphasis added.]

Third, the Chief Justice gives an approving nod to two consultation regimes, British Columbia’s *Provincial Policy for Consultation with First Nations*²⁶ and the *Guide for Consultation with Maoris (1997)* of the New Zealand Ministry of Justice.²⁷ In her approving nods, however, there is no sense that mere policies or guidelines achieve what could be achieved by her “regulatory schemes”. The “regulatory scheme” is clearly something more complicated and formal than mere policies. The “regulatory scheme” is likely something calibrated to the degrees of the Doctrine Spectrum and something that calls upon the full toolbox of administrative remedies: without limitation, legislation, statutory mediation, specialized quasi-judicial tribunals, privative

²¹ *Ibid.*, at para. 51.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*, *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54 (“*Adams*”); see also *R. v. Marshall* (reconsideration refused), [1999] 3 S.C.R. 533 at para. 33.

²⁵ *Adams, ibid.* at para. 54.

²⁶ *Haida, supra* note 2 at para. 51.

²⁷ *Ibid.* at para. 46. Note also that the Government of Alberta promulgated a consultation policy on May 16, 2005, see the *First Nations Consultation Policy on Land Management and Resource Development* found at the Aboriginal Affairs and Northern Development website (URL <http://www.aand.gov.ab.ca/PDFs/ConsultationPolicy-May16.pdf>).

clauses, and formal rights of appeal - all the mechanisms of *structured* discretion. Only then can the working out of the Doctrine in practice obtain the maximum of judicial deference, which should be the ultimate goal of governments operating in this arena.

Advice to the Crown in *Taku River*

For anyone who has closely followed the judicial development of the Doctrine, it was virtually axiomatic that the decision in *Taku River*, as it relates to the appropriateness of the working out of the Doctrine, was predictable at the Supreme Court of Canada level.

In *Taku River*, the Supreme Court of Canada affirmed that the British Columbia environmental assessment process (the “EA Process”) met the standard set out in *Haida* for procedural and substantive fairness in respect of the Taku River Tlingit’s concerns relating to a mining company’s attempt to reopen a closed mine in North-West, British Columbia. In effect, the EA Process was at the right place as the Doctrine Spectrum. Although the Taku River Tlingit were dissatisfied with the EA Process, and its ultimate outcomes and reports, the Supreme Court of Canada affirmed that the EA Process, in this instance, met the necessary thresholds of fairness and honour in the context of a “deep consultation” which is required of the Crown. A brief examination of the specific factors that lead the Court to this conclusion provides insight into what is an appropriate application of the Doctrine in circumstances calling for “deep consultation” and some insight into what lesser levels of consultation might be.

In *Taku River*, the Supreme Court of Canada expressly noted the following, with approval, about the EA Process and how it dealt with various issues raised by the Taku River Tlingit in the *Taku River* consultation process:

1. The Taku River Tlingit were invited and were full participants in the EA Process. They were also provided with financial assistance in order to participate in the EA Process.²⁸
2. The Taku River Tlingit were able to affect procedural choices within the EA Process’s Project Committee, resulting in the establishment of a steering group on Aboriginal issues, and a subcommittee on the road access to the mine.²⁹
3. Information and analysis required of the project proponent was informed by the Taku River Tlingit’s concerns.³⁰
4. The British Columbia Environmental Assessment Office (the “EAO”) facilitated access to other government agencies and decision-makers when the Taku River Tlingit raised concerns beyond the scope of the EA Process.³¹
5. The Province, in response to the concerns of the Taku River Tlingit, funded monitoring programs: the Grizzly Bear Long-term Cumulative Effects Assessment and Ungulate Monitoring Program.³²

²⁸ *Taku River*, *supra* note 3 at para. 37.

²⁹ *Ibid.* at para. 41.

³⁰ *Ibid.*

³¹ *Ibid.* at para. 12.

6. Due to the expressed concerns of the Taku River Tlingit, the EAO commissioned a consultant to produce a report on the Taku River Tlingit's traditional land use. On the expression of further concerns by the Taku River Tlingit, an addendum was commissioned.³³
7. The EAO granted extensions to the statutory time for the EA Process.³⁴
8. In the EAO's Recommendations Report, the Project Committee noted that the Taku River Tlingit disagreed with its recommendations and suggested mitigation measures to address the concerns of the Taku River Tlingit .³⁵
9. The Taku River Tlingit were permitted to prepare a minority report, which was submitted to the Ministers along with the majority report.³⁶
10. The majority report to the Ministers itself, in the words of McLachlin C.J. "meaningfully discussed" the Taku River Tlingit's dissenting opinions and recommended mitigation strategies.³⁷
11. The majority report made clear that the Taku River Tlingit's concerns would require further addressing by the project proponent in the permitting process related to the mine reopening.³⁸
12. The mitigation strategies relating to the concerns of the Taku River Tlingit suggested in the majority report were adopted by the Ministers.³⁹

This list of twelve aspects of the procedure applied to achieve appropriate application of the Doctrine set out in *Taku River* provides express guidance to governments on how to undertake some types of decision-making in a manner that upholds the honour of the Crown and to which the courts will defer in the context of "deep consultation" at the most complicated end of the Doctrine Spectrum.

Taku River is interesting in that it applies the lessons of *Haida* relating to the Doctrine to a set of facts completely different from those in *Haida*. While not all Crown decision-making will necessarily accord with or require application of all twelve procedural elements as they are set out in *Taku River* (or may reasonably require other procedural elements), *Taku River* provides guidance to governments as to what kind of procedures make up appropriate "deep consultation" and, presumably, lesser levels of consultation further back along the Doctrine Spectrum. The consultation procedures in *Taku River* are fair and reasonable and are thus connected to appropriate procedural elements of the administrative law principle of procedural fairness.

³² *Ibid.*

³³ *Ibid.* at para. 13.

³⁴ *Ibid.* at para. 41.

³⁵ *Ibid.* at para. 42

³⁶ *Ibid.* at para. 34

³⁷ *Ibid.* at paras. 41, 44.

³⁸ *Ibid.* at paras. 44, 46.

³⁹ *Ibid.* at para. 17.

Taken together, they exemplify in different aspects fitted to specific circumstances all three of the principles for appropriate deep consultation stated by the Chief Justice in paragraph 44 of *Haida*.

The Federal Court has previously given clear guidance on appropriate consultation procedures. Between five and eight years prior to *Taku River*, two decisions dealing with the Nunavut Agreement⁴⁰ confirmed the need for appropriately structured decision making by the Crown. *Nunavut Tunngavik Inc. v. Canada (Min. of Fisheries and Oceans)*⁴¹ concerned a decision of the Minister of Fisheries and Oceans regarding turbot quotas affecting an area within the Nunavut Agreement. The Inuit representative body, Nunavut Tunngavik Inc. (“NTI”), argued that the Minister failed to consider the advice of the Nunavut Wildlife Management Board (the “NWMB”), constituted under the Nunavut Agreement. Campbell J. held that the Nunavut Agreement states that there must be “meaningful inclusion of the NWMB in the decision-making process *before* any decisions are made,⁴² and that the Minister could not simply receive and examine the recommendations given by the NWMB. He also concluded that the relationship between the Minister and the NWMB was intended to be “mandatory, close, cooperative and highly respectful”.⁴³ The Federal Court of Appeal agreed with the trial court’s conclusion to set aside the Minister’s decision and referred the matter back to the Minister for reconsideration.

A few years later, NTI again challenged the authority of the Minister.⁴⁴ In the Federal Court’s second NTI decision, Blais J. *dismissed* a similar application by NTI to the effect that the Minister had erred in failing to apply the principles set out in the Nunavut Agreement.⁴⁵ However, in the second NTI decision there was clear evidence that:

- (a) the Minister took into account all of the relevant considerations;
- (b) the Minister communicated clearly that such consideration occurred; and
- (c) there was a clear paper trail to show that the Minister received and considered the applicable advice.

The Federal Court of Appeal affirmed the trial court’s decision⁴⁶ and NTI’s leave to appeal application to the Supreme Court of Canada was dismissed.

⁴⁰ The comprehensive land claim agreement between Canada and the Inuit in 1993.

⁴¹ *Nunavut Tunngavik Inc. v. Canada (Min. of Fisheries and Oceans)*, [1997] 4 C.N.L.R. 193 (F.C.T.D.).

⁴² *Ibid.* at 211.

⁴³ *Ibid.* at 210.

⁴⁴ *Nunavut Tunngavik Inc. v. Canada (Min. of Fisheries and Oceans)*, [2000] 3 C.N.L.R. 136 (F.C.T.D.); *aff’d* [2001] 1 C.N.L.R. iv (Fed. C.A.).

⁴⁵ *Ibid.* at paras. 91, 92, 94 (F.C.T.D.): “[T]he authority of the NWMB was in the nature of advice and recommendations and the Minister did look into it. It was within the Minister’s discretion and within the limits of the Agreement to take into consideration a number of factors including growth and decline in stock. ... Finally, in view of the situation that prevails in the Atlantic affecting every eastern province and territory with respect to Atlantic fishery, the end result provided by the Minister’s decision on quota allocation can not be seen as unfair in view of the important decline in stock.”

⁴⁶ *Ibid.* at para. 4 (Fed. C.A.): “[B]ecause of the classically polycentric nature of the allocation of a fixed quota among competing groups of fishers, the proper standard of review of the exercise of the Minister’s discretion is

Both *Taku River* and the NTI decisions make it clear that the Crown can be correct in choosing the right procedure on the Doctrine Spectrum and carry through its chosen procedures reasonably in order to achieve appropriate consultation and accommodation without having put its mind to the creation of a specialized “regulatory scheme” tailored to fit the Doctrine. As it turned out, in all those cases, the discretion of the Crown was by no means “unstructured”. Rather, it followed the well-established structures of environmental and fisheries legislation both of which contained the three principles of appropriate “deep consultation” in *Haida*.⁴⁷

A not too careful reading of *Taku River* might lead to the conclusions that

- (a) most material natural resource developments require an environmental assessment of some form,
- (b) environmental assessments in most Canadian jurisdictions are carried out according to complex exercises in structured recommendations and decision-making,
- (c) the Supreme Court of Canada has accepted that such legislation properly applied can effect appropriate consultation and accommodation and therefore meet the standard required by the Doctrine, and
- (d) therefore, by applying the lessons drawn from *Taku River* in this way, there is no need for an express “regulatory scheme” calibrated to the Doctrine Spectrum since the vast majority of deep consultation will be carried on in the context of an environmental impact assessment as occurred in *Taku River*.

The logic of conclusion (d) in the previous paragraph is far from completely wrong and must have its appeal for governments that may be reeling under the apprehension of what living up to the honour of the Crown may cost on a case by case basis, let alone when it is to be applied to generating “regulatory schemes” calibrated to the whole of the Doctrine Spectrum. The “regulatory scheme” is a vague concept, but we have much guidance in working out what such a scheme should be from the Chief Justice in *Haida* and *Taku River*. She has told us what generally is found on the Doctrine Spectrum. She has told us that the Crown must act honourably at every calibration of the Doctrine Spectrum. She has accepted the guidance of general administrative law with implied reference to all possible useful tools and mechanisms in legislation and regulations to achieve judicial deference.

Conclusion - The Regulatory Scheme

It is a task beyond this paper to provide government with a proposed recipe for the Chief Justice’s “regulatory schemes”. The Chief Justice provided broad brush guidance, but a prudent

patent unreasonableness. The Minister’s decision easily withstands that test. The decision has a rational basis, because it was open to the Minister to determine the quota by reference to quotas historically allocated for turbot fishing in Davis Strait, rather than to the allocation of quotas in other zones in the Atlantic fishery.

⁴⁷ For example, see the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119 (rep. 2002, c. 43, s. 58) and replaced with the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

solicitor must come to the conclusion that fairly complex analysis must precede the promulgation of any such regulatory scheme.

That said, it is fair to ask how legislation and existing government decision-making processes may be overhauled in order to allow them to address the Doctrine along the whole calibration of the Doctrine Spectrum? We would suggest the following broad principles.

First, the governments of Canada should consider whether a common regulatory scheme can be worked out between some or all of Canada's jurisdictions working together. It seems likely that courts would be more likely to defer to a broadly developed and commonly adopted scheme. Things seldom work like that in Canada, but even the cooperation of two, three or four key jurisdictions would likely be useful.

Second, the regulatory scheme should concentrate not only upon outlining appropriate procedures calibrated to the consultation levels of the Doctrine Spectrum but should also set up formal legal examination of where on the Doctrine Spectrum any particular Doctrine-engaging circumstances fall for consultation purposes. Using the principle of judicial deference, it is reasonable to predict greater deference to the Crown's decision of the choice of appropriate consultation procedures if it were usually given by one or more experts in the working of the Doctrine Spectrum.

The question then arises as to whether there should be a single statute in each jurisdiction that

- (a) establishes some expert capacity within government or even a quasi-judicial tribunal to determine where on the Doctrine Spectrum any circumstances fall;
- (b) accepts the Doctrine Spectrum;
- (c) accepts that no statute can possibly cover all circumstances;
- (d) sets up reasonable procedures for varying degrees of consultation from "mere" to "deep"; and
- (e) allows for those procedures to be invoked in respect of an exercise by the Crown of the Doctrine regardless of the statutory or other basis of such exercise.

Such an approach may go some way towards ending "unstructured discretion", but not all the way. Judicial deference is at its height when experts follow their specialized procedures in respect of complex situations of fact and mixed law and fact. This suggests that several levels of expert Doctrine practitioners should be mandated within governments to act as adjuncts to the existing statutory regime where the existing regime falls short of the honour of the Crown standard in dealing with the working out of the Doctrine in respect of any particular statute or regulations applied to any particular circumstances.

In addition, legislators should consider both a privative clause for such legislation and also provisions relating to the regulation of appeals from decisions made under it. Structured discretion is not a mystery in Canada. It is complicated and almost infinitely diverse based on the legislatures never closing the categories of statutorily established structured discretion as they

seek to deal fairly with all material issues for Canadian society. In such diversity lies the appearance of mystery. Canada and its provinces and territories cannot afford to continue to plead mystery as an excuse for not building a regulatory scheme to achieve maximum judicial deference in the working out of the Doctrine.

The building of regulatory schemes should not be a unilateral process. To the extent possible, the Crown should seek involvement of aboriginal peoples of the proposed regulatory schemes as those that will form the foundation of future consultation and accommodation. The wisdom of such an approach, were it obtainable, suggests that the best regulatory scheme would be one in which aboriginal peoples have had material input.

The underlying message to governments from the unanimous Supreme Court of Canada is in some ways mixed.

On the one hand, the solution to the problem of certainty in the area of aboriginal interests and government decision-making is straightforward – the application of the Doctrine within structured regulatory schemes. On the other hand, the implementation will be complex and will require wholesale change of how governments do business and make decisions. This will inevitably require additional short term resources to achieve huge long-term economies.

It seems reasonably clear that there is no other easy answer or quick fix. Neither special terms in treaties nor *ad hoc* understandings by governments with individual First Nations or broader aboriginal representative groups can supply all of the legal toolbox appropriate for achieving judicial deference in respect of a myriad of individual circumstances involving the Doctrine over the long term. The law has gone past such side deals. Aboriginal peoples now deal, and will, henceforth, always deal with the Crown under administrative law principles of fairness heightened by the ever present honour of the Crown. The *ad hoc* must now be replaced by clear regulatory schemes that efficiently integrate implementation of the Doctrine into the long future of Canadian administrative law. All Canadian jurisdictions now need to supply the clearest and most logical mechanisms for implementing the law set out in *Haida* and *Taku River*. This can be achieved in hopefully similar federal, provincial and territorial regulatory schemes of the sort called for by the unanimous Supreme Court of Canada and as discussed generally above. The longer it takes the Crown in its various guises to implement that wisdom, the more it will cost the Crown, industry and aboriginal peoples.