The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 29 Article 22

2005

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Citation Information
Tzimas, E. Ria. "Haida Nation and Taku River: A Commentary On Aboriginal Consultation and Reconciliation." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 29. (2005).
DOI: https://doi.org/10.60082/2563-8505.1088
https://digitalcommons.osgoode.yorku.ca/sclr/vol29/iss1/22

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Haida Nation and *Taku River*: A Commentary on Aboriginal Consultation and Reconciliation

E. Ria Tzimas[*]

I. INTRODUCTION

On November 18, 2004 the Supreme Court of Canada released its two landmark decisions on Aboriginal consultation. *Haida Nation v. British Columbia (Minister of Forests)*,[1] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,[2] together, provide the most significant discussion to date by the Court on Aboriginal consultation. The main issue before the Court was very narrow: did the governments have an obligation to consult Aboriginal peoples over government authorized activities in instances where the Aboriginal rights were unknown, uncertain, or in dispute, and if so, the extent of that obligation. Uncertainty over the existence or extent of an asserted right made it difficult to draw conclusions with any certainty over the extent of any potential infringement, and the further extent of what might amount to an appropriate interim agreement or accommodation.

The Supreme Court of Canada concluded that where the Crown, federal or provincial, has "knowledge, real or constructive," of the potential existence of an Aboriginal right, title or a treaty right, and contemplates conduct that might adversely affect that right or title, the honour of the Crown requires the Crown to consult and in some circumstances accommodate that interest. The content and extent of the consultation and possible accommodation is determined by both the strength of the asserted interest and the degree of the potential infringement of the

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[*] The views expressed in this article are those of the author alone and do not represent the views of the Government of Ontario.

[1] [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 [hereinafter "*Haida*"].

[2] [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 [hereinafter "*Taku River*"].

intended government action. The Court also concluded that Aboriginal claimants should advance their claims with clarity, focusing on the scope and nature of the rights they assert and on the alleged infringements. The obligation by the Crown to accommodate was defined as seeking a compromise or "harmonizing conflicting interests" so as to move "further down the path of reconciliation." In its analysis of the scope and content of consultation, the Court acknowledged that the strength of asserted claims may vary and therefore articulated a corresponding consultation spectrum, ranging from notification to accommodation. With respect to third parties who are typically the proponents seeking government authorization for their actions, whether an approval of a project, a licence, or some other regular intervention, the Court reversed the B.C. Court of Appeal's conclusion that they shared in the duty to consult. Instead, the Court signaled that third parties might have specific obligations assigned to them to assist with the overall consultation process. Although governments could not delegate their constitutional duties to consult Aboriginal people, they could use their legislative capacity to involve third parties in the conduct of effective consultations.

There can be little doubt that the two judgments have and will continue to have profound implications on the governments' conduct, not only *vis-à-vis* Aboriginal peoples but in their overall interaction and balancing of Aboriginal and non-Aboriginal public interests. However, it is far from obvious that the judgments reflect quite the constitutional paradigm shift suggested by Professor Slattery, or that they provide a basis for questioning provincial jurisdiction even in the face of Aboriginal title assertions. What is clear is that the judgments are grounded firmly on the existing jurisprudence not only as it concerns Aboriginal disputes, but more broadly speaking as it concerns the overall operation of the Canadian Constitution. This is reflected in the extent to which the Court focused on reconciliation as the endpoint of any consultation. Be it the balancing of interests, the give and take by both sides, accommodation and sharing, the Court's clear message is to urge everyone to work together within the existing constitutional structure to find common ground and common solutions. That message is neither unique to Aboriginal disputes nor new to the constitutional discourse. The Court discussed reconciliation as a key animus of the Constitution in *Refer-*

ence re Secession of Quebec.[3] In *Haida* and in *Taku River* the Court anchored its analysis on the view that the diversity of interests, Aboriginal and non-Aboriginal alike can be reconciled within the unity of the principles of federalism encompassed by the Constitution. When viewed from that perspective, although the analysis and questions raised by professors Slattery and McNeil are challenging and provocative, it is doubtful that this Court would look to either a paradigm shift or a radical change on questions of jurisdiction to address Aboriginal concerns. The more likely progression will be to continue to find solutions within the four corners of the Constitution.

The following is a commentary on the analysis and conclusions offered by professors Slattery and McNeil. To bring the discussion into focus, the first part offers an overview of the two cases. The second part analyzes the key components of the two judgments with reference and contrasts to the suggestions and analyses offered by professors Slattery and McNeil. The third part takes a close look at the Court's emerging vision of reconciliation and considers the ingredients that might be required to effect reconciliation in the context of Aboriginal concerns. The commentary concludes with some thoughts on where the discussion concerning Aboriginal consultation and reconciliation is likely to go and what the future challenges might be.

II. Overview of the Supreme Court of Canada's Decisions in *Haida Nation* and *Taku River Tlingit First Nation*

1. Background

Both *Haida* and *Taku River* concerned Aboriginal consultation in instances where the existence and extent of alleged Aboriginal title rights were uncertain and in dispute. In both instances, British Columbia took the position that there could be no duty to consult under section 35 of the *Constitution Act, 1982*, until the existence of Aboriginal title was proven in Court. This resulted in a tension over when to consult, what to consult about in the face of uncertainty, how to account for asserted

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[3] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217.

rights, and what kinds of interim solutions might be reached to respond to the concerns in the least disruptive ways. The background and the particular histories of the cases are useful to understand, as they set up the context against which the Court articulated its conclusions on consultation.

(a) Taku River Tlingit First Nation

At issue in *Taku River* was a project by Redfern Resources Ltd. to re-open the Tulsequah Chief Mine, previously operated by Cominco Ltd. in the 1950s. Redfern intended to extract approximately 2,500 tonnes of ore per day. The mine is located in northern British Columbia near the border between the Yukon Territory and the state of Alaska. A controversial aspect of the project centred on Redfern's stated plan to build an access road to the mine site to haul the ore from the Tulsequah Chief Mine to the Town of Atlin. The road would cross a portion of the traditional territory of the Tlingit First Nation where the First Nation's traditional land use activities were most concentrated. Although the area is not covered by treaty, at the relevant time the area was the subject of treaty negotiations between the Tlingit and the governments of Canada and British Columbia. The Court also noted that the First Nation's traditional territory encompassed the whole of the Taku River watershed, and that the Tlingit relied on hunting, fishing and gathering to sustain themselves.[4]

In September 1994, Redfern applied for the requisite approval for the road under B.C.'s *Environmental Assessment Act* (EAA). A Project Committee was established under the EAA to review the process and to make recommendations to the executive director of the Environmental Assessment Office. Members of the committee included representatives from the federal and provincial governments as well as the Tlingit. For *three and one half years*, the process "apparently accommodated the expressed needs" of the Tlingit First Nation who at all times asserted their Aboriginal rights and their concerns about the impact of the proposed road on their cultural habitat and on their treaty negotiations. Following the production of the Project Committee Report and the Tlingit's Recommendations Report to the Minister of the Environment,

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[4] *Taku River*, *supra*, note 2, at paras. 30-32.

Lands and Parks, and the Minister of Energy Mines and Petroleum Resources, the Ministers issued a Project Approval Certificate, the process then came to a halt.[5]

The lower court set aside the Minister's decision to issue a Project Approval Certificate. The majority of the B.C. Court of Appeal dismissed the province's and Redfern's appeal and held that even in the face of asserted but not proven rights, the Crown owed a constitutional *and* fiduciary duty to consult the Taku River Tlingit First Nation.

(b) Haida Nation

In *Haida,* the Council of the Haida Nation, the governing body of the Haida Nation, brought an application for judicial review of several decisions of the Minister of Forests in 1981, 1995, and 2000 to replace Tree Farm Licence 39 (T.F.L. 39) and to approve the transfer from MacMillan Bloedel Limited to Weyerhaeuser Company Limited in 2000. Haida Nation alleged that the Minister acted either without jurisdiction or in excess of jurisdiction.

Some of the essential facts animating the case were the following:

- The Haida have inhabited the Queen Charlotte Islands continuously from at least 1774 (the time of first contact) to the present;
- From at least 1846 to the present the Haida were the only Aboriginal people living on the Queen Charlotte Islands. They never surrendered their Aboriginal rights and always claimed Aboriginal title to all of the lands comprising the Queen Charlotte Islands; and,
- From a time which is uncertain, but that in any event pre-dates 1846 (the time of assertion of British sovereignty) the Haida used red cedar trees from the old-growth forests of the Queen Charlotte Islands for the construction of canoes, houses, totem poles, masks, boxes and other objects of art, ceremony and utility, such that red cedar has always been an integral part of the Haida culture. In the Supreme

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[5] Based on the submissions before the Supreme Court of Canada, the consultative process over three and one half years came to a halt, in large measure because the Tlingits were seeking to veto Redfern's proposals and were not in fact prepared to come to a compromise. Counsel for the Tlingit suggested that the Tlingits were seeking "collateral sustainability" and not a veto, but counsel for Redfern highlighted for the Court correspondence by the Tlingit that spoke of absolute consent and a veto.

> Court of Canada in their oral submissions, the Haida Nation spoke of the red cedar as "their sister."[6]

Against these facts, the Haida argued that until its title claim is resolved, the Crown has an obligation to treat the lands in question as if they were encumbered by "Haida Nation title." The province argued that there was no obligation to consult until title is proven.

The lower court rejected the notion of a presumptive encumbrance because it would force the Crown to justify its conduct in relation to an unproven right. That would have the effect of giving priority to the Haida interest without an understanding of the extent of the alleged right claimed. Specifically, the lower Court concluded that the Crown's fiduciary obligations could not be determined in the absence of a trial on that issue. In law, without proven rights, the court held that there was no legal obligation on the part of the province to consult. The lower Court did speculate that on the strength of the evidence before it, there was probably a "moral duty to consult."

The B.C. Court of Appeal rejected the concern over the presumption of title and the implications for the Crown and instead purported to "solve" the issue of alleged but not as yet proven rights, by creating a free-standing obligation to consult grounded in broad notions of the Crown's fiduciary obligations. The crucial conclusion on this point was that:

> The duty to consult and seek accommodation does not arise simply from a Sparrow analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection.[7]

And in additional reasons, Lambert J. of the Court of Appeal noted that:

> The fiduciary duty of the Crown, federal or provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so

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[6] Significantly more detail concerning the history and the circumstances of the Haida Nation is outlined in the lower court decision, *Haida Nation v. British Columbia (Minister of Forests)*, [2000] B.C.J. No. 2427, 36 C.E.L.R. (N.S.) 155 (S.G.), at paras. 6 and 24, which were adopted by the British Columbia Court of Appeal, [2002] B.C.J. No. 1882, and additional reasons at [2002] B.C.J. No. 378, 99 B.C.L.R. (3d) 209 (C.A.).

[7] *Haida*, [2002] B.C.J. No. 378, 99 B.C.L.R. (3d) 209, at para. 55 (C.A.).

> that, in cases of conflicting rights, the interests of the Indian people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty. All the principles which must inform the tests for justification of a *prima facie* infringement, such as consultation, accommodation, and minimal impairment, represent examples of the Crown's fiduciary duty to Indian peoples. [8]

Grounded on principles of fiduciary law Lambert J. extended the obligation to consult *and* to accommodate, not only to the Crown but to third parties. He used the doctrine of "knowing receipt" to conclude that by virtue of Weyerhaeuser's awareness of the Crown fiduciary obligations and by stepping into the relationship, it too would assume fiduciary obligations to the Haida.

2. The Decisions of the Supreme Court of Canada

British Columbia's conduct passed Supreme Court scrutiny in *Taku River* but failed in *Haida*. Although admittedly, both the Haida and the Tlingit presented strong *prima facie* Aboriginal title and rights assertions, thus eclipsing the concerns raised by several Crowns on the difficulties that uncertain assertions raise, the Supreme Court did not view the uncertainty over the existence and extent of the asserted rights as an impediment to consultation. The prospects of constitutionally protected rights being somehow compromised, even if such rights were undefined or unclear, made it necessary to err on the side of caution and protect them. Such protection could be achieved through consultation.

With that view of consultation, the Supreme Court concluded that British Columbia's failure to conduct *any* consultation with the Haida was fatal. By comparison, in *Taku River*, where the consultation was considered "deep," unfolding over the course of three and one half years, with continued participation by the Tlingit, the Court concluded that British Columbia had met its consultation obligations. Moreover, in the face of the province's significant efforts to balance the interests of the Tlingit with those of Redfern, the Court rejected the argument by the Tlingit to the effect that in the absence of an agreement between them

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[8] *Haida*, [2002] B.C.J. No. 1882, 2002 BCCA 462, at para. 62.

and the province, the consultation efforts were inadequate, and that the province could not issue the Project Certificate.

The primary value of the two judgments lies in the analytical framework that the Supreme Court laid out. To appreciate the parameters of that framework, to evaluate the applicability of these judgments to other factual circumstances, and to consider whether they signal any shifts in the Aboriginal/constitutional discourse it is necessary to review the constitutive elements of the judgment: (a) the honour of the Crown; (b) the timing, scope, and context of the duty to consult and accommodate; (c) the question of provincial jurisdiction; (d) the obligations of Aboriginal claimants; and (e) the challenge to government conduct.

(a) The Honour of the Crown

The Supreme Court launched its analysis with its conclusion that the source for the duty to consult Aboriginal peoples over asserted claims lies in the concept of the honour of the Crown. Historically, "the honour of the Crown" related to the 19th century English legal principle that the King could do no wrong.[9] The animating idea behind this principle was that the Crown, as head of the state of England, was a benevolent leader who would not knowingly aggrieve a subject nor fail to observe a promise.

In the context of Aboriginal cases the Supreme Court of Canada had previously used the "honour of the Crown" as an interpretative tool to determine the legal content of treaties, and in particular to resolve ambiguities.[10] After 1982, the concept of the honour of the Crown was also used to describe the content of the legal duties owed by the Crown to

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[9] In the words of Lord Denman, the benevolent leader would not knowingly aggrieve a subject nor fail to observe a promise to even "the meanest and most criminal of his subjects," *The King v. Garside and Mosley* (1834), 2 AD. & E. 266, 111 E.R. 103, at 107 and 276 (K.B.).

[10] A frequently cited statement of this approach was set out by the Ontario Court of Appeal in *R. v. Taylor* (1982), 34 O.R. (2d) 360, 62 C.C.C (2d) 172, at V, where MacKinnon, A.C.J.O., writing for the court, stated:

> The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned.

Aboriginal peoples pursuant to section 35(1) of the *Constitution Act, 1982*.[11]

In *Haida* and *Taku River*, the honour of the Crown emerged as a sufficiently fluid concept that it could diffuse the tension between credible but unproven Aboriginal assertions and the potentially negative impacts of government authorized activities on those assertions. In their submissions before the Supreme Court, the Haida Nation, Taku River Tlingit First Nation, and several of the intervener First Nations stated that governments were using to their advantage either cumbersome and elaborate treaty processes or lengthy court proceedings to postpone or prolong the actual recognition and determination of Aboriginal rights, thereby avoiding consultation obligations and exploiting natural resources without reference or concern for the potential existence of Aboriginal rights and title. If that were allowed to continue, Aboriginal peoples could face pyrrhic victories. Although their asserted rights would eventually be recognized, the benefit of those rights, *i.e.*, the resources, would no longer exist. For their part, many of the governments that participated in the appeal highlighted the difficulties associated with the management of the particular resources at stake with the understanding and balancing of insufficiently certain Aboriginal assertions, particularly in instances where the assertions were not nearly as strong as those in the two cases before the Court. The governments cautioned that the viability of certain resource industries could be at stake if the consultation threshold was too low.

Against this tension, the attractiveness of the honour of the Crown as a governing legal concept to the Court is almost obvious. In *Taku River* the Court noted:

> The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act,* 1982, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be

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[11] See *e.g.*, *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1110, 1114 (Aboriginal rights context); and *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at 813 (treaty rights context).

> interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).[12]

If the honour of the Crown is such that the Crown must always act honourably and if the exercise of discretionary control by the Crown raises significant risks that potential Aboriginal interests, which are embedded in active Aboriginal claims, are at risk of being compromised, then consultation, and where necessary accommodation, is seen as a significant way of maintaining the Crown's honour.

The generosity with which the Crown's honour is to be interpreted should not obscure the Court's sensitivity and understanding of the challenges posed by either uncertain Aboriginal assertions or assertions in dispute. That sensitivity is reflected in the broad parameters to the Crown's honour that are highlighted in both judgments.

First, the Court had no difficulty appreciating the uncertainty of disputed assertions, and as a result, it rejected the Court of Appeal's approach to consultation as an obligation that is free-standing, grounded in fiduciary law. Specifically, it stated that the mere assertion of a right was insufficient to engage the Crown's honour in a way that required the Crown to act in the Aboriginal groups' best interests, as a fiduciary when it exercised discretionary control over the subject of the asserted right or title.[13]

Second, the honour of the Crown, while significant as a source of government duties and obligations, is shaped by the interaction between asserted rights that carry potential section 35 protection and government authorized activities that might affect the asserted rights. In other words, the honour of the Crown is informed by the potential risk of infringement and the implication of "dishonourable conduct." If on the one hand the Crown can do no wrong and on the other there is a risk of a wrong, then consultation is seen to be capable of preserving the Crown's honour:

> 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

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12 *Taku River Tlingit First Nation*, *supra*, at para. 24.

13 *Haida*, *supra*, note 1, at para. 18.

> may require it to consult and, where indicated, accommodate Aboriginal interests. [14]

Taken out of context, it is tempting to interpret the Court's comments as outlining positive duties to identify Aboriginal rights and negotiate with Aboriginal peoples even in the absence of potentially infringing activities by the government. But in the context of the two cases, the Court's direction has to be understood in terms of the government's potentially infringing conduct. Recalling that in *Haida* the determination of the asserted title and right was caught up in a slow and seemingly unproductive treaty process, the Court signalled that while the process of negotiation continued, government-authorized activities that might comprise the content of the assertions could not proceed without consultation and possibly accommodation. It is far from certain, however, that in the absence of potentially infringing activities the Court envisioned that governments would be obligated to initiate negotiations with Aboriginal peoples.

That the context of the two cases is relevant and that there are contours to the honour of the Crown and to its application is further reflected in the following conclusion:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where clams affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. *The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution.* But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. [15]

This analysis is grounded squarely on the Court's Aboriginal legal framework that was introduced in *Sparrow*,[16] considered further in cases

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14 *Id.*, at para. 25.

15 *Id.*, at para. 27 (emphasis added).

16 *Supra*, at note 11.

such as *Gladstone*[17] and in *Nikal*[18] and which culminated in *Delgamuukw*[19] where the Court noted:

> The Aboriginal rights recognized and affirmed by s. 35(1), including Aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments.[20]

Acting honourably then, the Crown has to determine, recognize and respect those claims that have already been established by treaty or judicial decision or that are either being negotiated or litigated. As those processes unfold, if Aboriginal interests stemming from those claims run the risk of being affected by government action, the Crown must act honourably and in good faith. It must act with integrity, avoiding even the appearance of sharp dealing. This articulation is consistent with the approach taken in earlier Aboriginal cases.[21]

The counterpoint to the obligations emerging out of the Crown's honour is the Court's explicit recognition that the Crown may manage its resource and address other public interests. In both decisions, the Court recognizes repeatedly that the Crown must balance Aboriginal concerns with other societal interests. The Court also acknowledged that the Crown might have to make decisions in the face of disagreement as to the adequacy of its response to the Aboriginal concerns. In the face of a good faith and transparent process, such disagreement would not be fatal to a Crown decision.[22] In fact, the Court explicitly stated, "[m]ere hard bargaining will not offend an Aboriginal people's right to be con-

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17 *R. v. Gladstone,* [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723.

18 *R. v. Nikal,* [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013.

19 *Delgamuukw v. British Columbia,* [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010.

20 *Id*., at para. 160.

21 In *R. v. Marshall,* [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, Binnie J. analyzed the honour of the Crown in the following terms (at para. 49):

> …the honour of the Crown is always at stake in its dealings with aboriginal people. This is one of the principles of interpretation set forth in *Badger*, *supra*, by Cory J., at para. 41:
>
> > ... the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.

See also *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1, at 2.

22 *Haida*, *supra*, note 1, at paras. 45, 50, & 61.

sulted."[23] The outcome in *Taku River* underscored the Court's analysis in that case and lent significant credibility to its concern that it offer a framework that could enable the balancing of Aboriginal interests and allow the Crown some latitude in the conduct of its affairs.

(b) The Timing, Scope and Content of the Duty to Consult and Accommodate

Credible but unproven claims are enough to trigger consultation obligations. Honourable conduct, good faith and fair dealing, and the balancing of interests inform the timing, scope, and the content of consultation. Beginning with the question of when the duty to consult is triggered, the Court set up a very low threshold. Consultation, and where necessary accommodation, before the final determination of claims was described as, "an essential corollary to the honourable process of reconciliation that s. 35 demands."[24] As a duty that is founded on the Crown's honour and the ultimate goal of reconciliation, consultation is required "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[25] In response to the practical concern that the very uncertainty over the potential nature of the claim impedes the ability to meaningfully discuss interim accommodations, the Court acknowledged the difficulty and responded by drawing a distinction between the duty to consult and its scope or content and concluded that:

> There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. 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. Parties can assess these matters, and if they cannot agree,

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23 *Haida*, *id*., at para. 42.

24 *Haida*, *supra*, note 1, at para. 38.

25 *Id.*, at para. 35.

> tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.[26]

The Court then explained that the content of the duty to consult would vary with the circumstances. Explicitly transposing the consultation spectrum articulated by Lamer C.J. in *Delgamuukw*[27] for cases where the Aboriginal right was not in dispute, the Court concluded that the scope of the consultation would be proportionate to a *preliminary assessment* of the strength of an Aboriginal assertion and the seriousness or extent of the potentially adverse effect upon the right or title claimed. That spectrum would allow for the requisite flexibility to conduct good faith meaningful consultations appropriate to the particular circumstances.[28] At one end of the spectrum lie cases where either the claim to title is weak, the Aboriginal right is limited, or the potential for infringement is minor.[29] In such instances the duty on the Crown would be limited to giving notice, disclosing information, and discussing any issues raised in response to the notice. At the other end of the spectrum lie strong *prima facie* cases, where the right and potential infringement is significant, and the risk of non-compensable damages is high.[30] At that end of the spectrum, the consultation would have to be "deep" requiring the opportunity to make submissions for consideration, formal participation by the relevant Aboriginal group in the decision-making process, and the provision of written reasons demonstrating that the Aboriginal concerns were considered and explaining how those submissions impacted on the decision.

Over and above consultation, the accommodation of an Aboriginal assertion is mandated in instances where there is a strong *prima facie* case for the claim and where the consequences of the government's proposed action may adversely affect the interests subsumed within that claim in a significant way. The Court spoke of accommodation as an interlocutory or quasi-injunctive measure that would avoid irreparable harm or that would minimize the effects of infringement, pending final

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26 *Haida*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 37.

27 *Supra*, note 19; *Haida*, *id.*, para. 40*ff*.

28 *Id.*, at para. 41.

29 *Id.*, at para. 43.

30 *Id.*, at para. 44.

resolution of the underlying claim. Following a review of dictionary definitions of the term "accommodation," the Court concluded:

> The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation.[31]

(c) Provincial Jurisdiction and the Capacity to Act Honourably

An essential element in the overall analytical framework is the implicit and explicit role of provincial governments. Consistent with the observations in *Delgamuukw* that provinces could infringe section 35 rights with the appropriate justification measures, the Court reminded everyone that by virtue of section 109 of the *Constitution Act, 1867* and implicitly, sections 92(5) and (13) of the same Act, the provinces have the necessary tools to effect consultation. Contrary to Professor McNeil's suggestion that provinces might not have the jurisdiction to infringe Aboriginal title for the purposes of resource development,[32] the Court could have, but chose not to question provincial jurisdiction. Rather than dispute provincial ownership of its lands, it concluded that through their legislative authority over provincial resources, governments could incorporate legal requirements to meet their constitutional obligations. In echoing the need for relevant legislation to provide guidance on consultation,[33] the Court mapped out the path that governments ought to follow to balance the societal interests of the "distinctive Aboriginal societies" with the broader political community of which they are part.[34]

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[31] *Id.*, at para. 49.

[32] Professor McNeil relies heavily on *R. v. Dick*, [1985] S.C.J. No. 62, [1985] 2 S.C.R. 309 and in particular, the *obiter* at 321-22 that provincial legislation regulating rights would have to be read down because of s. 91(24). That *obiter* however was held to be incorrect in *R. v. Côté*, [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139 and in *Delgamuukw*. Cases such as *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture*), [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146 and even *Paul* reflect little if any appetite to limit provincial jurisdiction. And even if that were to happen, there is a good chance that by operation of the *Indian Act* the provincial laws would likely be referentially incorporated to avoid any disruption or a vacuum in the relevant legislation.

[33] This was first raised in *R. v. Côté*, *supra*, note 32.

[34] *Supra*, note 19, at para. 161.

(d) The Obligations of Aboriginal Claimants

Consistent with its overall view of reconciliation as a process of give and take, of compromise, and of harmony, the Court was clear that good faith conduct is required on both sides. It specifically noted that Aboriginal claimants must neither frustrate reasonable good faith efforts to consult nor take unreasonable positions "to thwart government from making decisions or acting in cases, where despite meaningful consultation, agreement is not reached."[35] Although the Court's commentary on what constitutes good faith conduct on the part of Aboriginal claimants is limited, it clearly noted that claimants can facilitate the process by outlining their claims with clarity and focusing on the scope and nature of the Aboriginal rights being asserted as well as the alleged infringements.[36] This would likely include the requirement that claimants respond to government notices and invitations to consult in a timely manner, that they offer sufficient information to the government to enable the assessment of the strength of a particular assertion, and that they articulate how a contemplated government action might impact on the asserted right.

In the absence of such information, even with the best of good faith intentions by a government, it would be virtually impossible to effect any meaningful consultation. It should also be noted that in linking the strength of the assertion with the extent of the potential infringement, the Court drew a direct relationship between the two. That is, the assertion must be credible, the underlying claim must be more than dubious, and the likelihood that the contemplated government action might infringe must also be articulated. If the contemplated government activity does not amount to an infringement then the consultation would fall at the low end of the spectrum. While it is fair to agree that the only way to really assess both variables of the equation is through dialogue, that cannot be done, and consultation cannot be meaningful, without the participation of all sides.

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35 *Haida, supra*, note 26, at para. 42.

36 *Id.*, at para. 36.

III. *HAIDA NATION* AND *TAKU RIVER TLINGIT FIRST NATION* AGAINST THE BROADER CONSTITUTIONAL CONTEXT

The Court's emphasis on the honour of the Crown and the duty to consult and, in some instances, accommodate in the face of credible but unproven or uncertain rights is significant, and the meaning of the two judgments read together should not be underestimated. By extension, however, the suggestion that these judgments have completely changed the jurisprudence as it concerns Aboriginal issues obscures this Court's concept of reconciliation.

Reconciliation in the Aboriginal discourse is not new.[37] What is new is the Court's view of reconciliation in Crown-Aboriginal relations as an ongoing process of living together involving mutual recognition and respect. The process of information exchanges, of meaningful discussion, of participation in decision-making, the understanding of various perspectives, the flexibility, and the give and take required to accommodate Aboriginal interests grow out of the Court's vision of how the Constitution operates as a whole to effect unity within a plane of diversity.

The vision of reconciliation as a critical constitutional value to democracy was considered extensively in the *Secession Reference* case.[38] In that instance, the Court used the Constitution as its touchstone to respond to various questions concerning a future secession by Quebec. Its essential approach to the problem was to view Canadian constitutional democracy "as a 'global system of rules and principles' for the 'reconciliation of diversity with unity' by means of 'continuous processes' of democratic discussion, negotiation and change."[39] The outcome was to direct the parties to work within the confines of the Constitution to develop a complex set of practices in which the conflicts over the recognition of diversity and the requirements of unity would be conciliated over time.[40]

The Court grounded constitutional reconciliation on four vital and underlying constitutional principles that act in symbiosis such that one

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[37] See *e.g., R. v. Van der Peet,* [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507; *Delgamuukw*, supra, note 19.

[38] [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217.

[39] See "The Unattainable Yet Attainable Democracy: Canada and Quebec Face the New Century", J. Tully, The Desjardins Lecture, McGill University (23 March 2000).

[40] *Id.,* at p. 4.

cannot trump the others: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.[41] Taken together:

> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree."[42]

Working through the specific principles, the Court concluded:

> Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light.[43]
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> …
>
> In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.[44]

And building on that, the Court stated:

> [T]here can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.[45]

Blending federalism with the principles of democracy, the Court then noted:

> A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the

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41 *Supra*, note 38, at para. 49.
42 *Id.*, at para. 52.
43 *Id.*, at para. 55.
44 *Id.*, at para. 56.
45 *Id.*, at para. 57.

> limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.[46]

The weaving of these principles culminated in the view of reconciliation as an essential requirement for the operation of a democratic system of government. The contours of reconciliation were explained in the following way:

> Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.[47]

And so as to remove any doubt that this process of discussion might be limited to a federal-provincial context, the Court specifically turned its mind to section 35(1) noting that section's explicit role of protecting existing Aboriginal and treaty rights.[48]

With the above as the model for dialogue within the Constitution, the Court also made some significant comments about the role of the courts generally in the assessment of constitutional disputes and resolutions. Albeit in the context of potential secession negotiations, the Court cautioned that a court would not have access to all of the information available to political actors. It also noted that the methods appropriate for the search for truth in a court of law were ill-suited to understanding and drawing conclusions over constitutional negotiations. It concluded that:

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46 *Id.*, at para. 66.

47 *Id.*, at para. 68.

48 *Id.*, at para. 82.

> …it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.[49]

The noted remarks in the *Secession Reference* explain much about the unspoken premises that inform the proposed solution to the challenges in *Haida* and in *Taku River*. They also offer a glimpse as to what might follow in future cases.

First, in the face of the resounding confidence in the federal system and the recognition that the principle of federalism remains an organizational theme of the Constitution, it should come as no surprise that the Court demonstrated little patience for British Columbia's submission that somehow it did not have consultation obligations. It also might explain why the Court may not be prepared to eclipse the provinces' control and regulation of their resources by denying them jurisdiction. Such an approach could jeopardize the underlying principles of federalism, and in particular the division of powers. Confidence in the federal system and the Constitution is another reason to conclude that the Court sought to strengthen the existing constitutional paradigm rather than introduce any significant shifts.

Second, the Court's very deliberate observation that nobody has a monopoly on truth, and that seeking to acknowledge and address dissenting voices in the laws of the community reflects tremendous depth in the content of consultation and reconciliation. It is only when one appreciates that depth that one can make sense of the following:

> 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

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[49] *Id.*, at para. 101.

> 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 decision in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.[50]

But that depth also brings into focus the complexities and challenges of consultation. When read in conjunction with the *Secession Reference* case what also comes into focus is the extent to which the honour of the Crown and the upholding of constitutional values find expression in consultation and reconciliation.

Third, the Court's comments on its role in the constitutional discourse finds parallel remarks in *Haida* and in *Taku River*. In those judgments, although the standard of review was not directly an issue, the Court explained that governments would be held to a standard of reasonableness, the implication being that Courts should not second guess the assessment and conclusion of the decision makers. So long as reasonable efforts to consult were made by governments, they would be seen to discharge their duties. While it is fair to conclude that the Court will expect governments to follow its strong invitation to provide guidelines to decision makers, to use their legislative powers as necessary to respond to Aboriginal interests and to promote reconciliation, for the same reasons that the Court stated that it was ill-suited to assess the outcome of constitutional negotiation, the Court will likely be reluctant to second guess Aboriginal consultation processes.

IV. ACHIEVING RECONCILIATION

The glaring question in this discourse is whether the reconciliation envisioned by the Supreme Court in these two judgments can work in the context of Aboriginal issues. The Court's model implies that the Aboriginal group advancing an assertion and the relevant government decision makers, in conjunction in many cases with third party proponents, can evaluate the strength and credibility of the assertion, reach agreement on the scope and content of the assertion, and then fashion interim arrangements that presumably minimize the impact on the

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[50] Haida, *supra*, note 26, at para. 45.

asserted rights, but in most instances, enable the particular activity to proceed.

As straightforward as that might sound, it is far from clear that the proposed efforts can unfold smoothly to effect reconciliation. A number of reasons inform this conclusion. First, the content of reconciliation, *i.e.*, the give and take, the compromise, and/or the sharing, is premised on an equality of positions and an equality of bargaining power. Although, in the appropriate factual circumstances the honour of the Crown may require a government to extend the appropriate resources to an Aboriginal group to enable the requisite dialogue, it is far from certain that such would be enough to level the playing field. Empowerment, capacity building and respect are the kinds of elements that are essential to the success of reconciliation. That however cannot occur overnight.

Second, the time required to effect reconciliation is typically entirely out of step with the timelines involved in the authorization of government activities. Coming to terms with the content, extent, and scope of an assertion cannot be something that is rushed. By extension, however, the financial exigencies that inform third party development and activities that governments are asked to authorize mandate very different time requirements. Neither judgment offers any guidance on how to bridge the time gaps. If the timelines in *Taku River* are to be the measure, the inevitable question is how many parties, Aboriginal and non-Aboriginal proponents alike, have the financial means to stay a three and one half year course? And in the face of significant fiscal challenges, can it really be said that taxpayers, through their governments, are in any better position to shoulder the burden?

Third, it is far from certain that the lowering of the consultation threshold will advance dialogue, reduce the prospects of litigation and promote reconciliation. For all the good faith conduct that a government may demonstrate and for all the guidance that an Aboriginal party may offer, there may still be a fundamental disagreement over the validity, the content, the scope, and the implications of an asserted right. The determination of the strength of an assertion is an essential prerequisite to any negotiation. But not every assertion carries with it the kind of *prima facie* strength reflected in *Haida*. What consultation does, is to bring on the consideration of issues sooner rather than later. But if progress cannot be made and the parties end up in court, those are hardly circumstances that can foster the kind of give and take envisioned by the Court and required for reconciliation.

The fourth and perhaps most challenging dimension to reconciliation comes back to the issue of uncertainty. To the Court, uncertainty did not appear to be a problem because it viewed the reconciliation as an ongoing process. But in practical terms such uncertainty makes it very difficult to make any real progress. The Court described interim arrangements and accommodation as quasi-injunctive in nature. But that carries the serious implication that when the assertions are finally determined, those interim measures may or may not support the justification requirements of section 35. The situation would be less of a problem if the interim arrangements exceeded the requirements of justification. The same could not be said if the interim arrangements fell short of justification. In such situations, in the absence of some agreement concerning the future requirements of justification, the Aboriginal claimants would likely seek damages for any shortfall. Depending on the issue at stake that could have severe implications for governments. In the face of such prospects, what incentive would there be to work towards practical certainty? And if the further implication is that parties could not get beyond interim agreements and interim accommodation measures, would that really foster reconciliation or would it perpetuate a status quo that is less than satisfactory?

V. CONCLUDING REMARKS

Perhaps only time will tell how well reconciliation will fare in the Aboriginal discourse. In its observation that the content of consultation cannot be prescribed, that future cases will fill in the contours and content of consultation, it is clear that the Court was under no illusion about the challenges that lie ahead. But not every consultation has to be a problem. It is possible that through ongoing and deliberate dialogue that is premised on good faith efforts to accomplish mutual respect and mutual understanding, Aboriginal and non-Aboriginal people alike can work towards reconciliation. And although such efforts take time, perhaps the Court's overriding objective was to signal that time was running out, and that the parties had to move forward in the direction of reconciliation. Even in the face of significant differences the Court is asking parties to forget about being negative and impeding dialogue. It urges everyone to work together to achieve positive results. That as an objective is an essential first step that ought not to be ignored. Chief

Justice Lamer said in *Delgamuukw* that, "we are all here to stay."[51] The judgments in *Haida* and *Taku River* ask everyone to make it work.

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51 [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 186.