Deference With A Difference: Dunsmuir and Aboriginal Rights

The Supreme Court decision in *Ktunaxa Nation v BC (Forests, Lands and Natural Resources Operations*)[1] treats both Charter and s. 35 rights in a single judicial review, providing an interesting case study to identify and consider points of difference between the application of deference in Aboriginal rights and Charter contexts. The case involved a regulatory approval allowing the development of the Jumbo Glacier Resort,[2] a proposed ski resort near Invermere, BC, on land identified by the Ktunaxa Nation as "Qat'muk,"[3] the home of the "Grizzly Bear Spirit". The majority, written by McLachlin CJC and Rowe J, rejected the claim that the Minister's approval had violated the Ktunaxa's freedom of religion under s. 2(a) of the *Charter*. The Minister's conclusion that the duty to consult and accommodate the Ktunaxa's claimed rights had been satisfied was also upheld as reasonable. The majority's approach might be described as "separate paths" for Aboriginal and Charter rights, with the distinct breaches involved leading to mutually exclusive grounds for judicial review. The concurring minority, written by Moldaver J, agreed with the majority on the s. 35 duty to consult, but found an infringement of s. 2(a) that was nevertheless proportionate to the statutory objectives under the *Doré/Loyola*[4] framework. In contrast to the majority, Moldaver J's approach integrated Indigenous and Charter interests, at least in regard to the Charter right, such that the Indigenous character of the religious claim was significant, and the accommodations negotiated through s. 35 consultations were critical to the determination that the Minister's decision was ultimately reasonable (an integration that was incomplete: see Naiomi Metallic's article in this special issue for a discussion of the definition of the statutory objectives in the proportionality analysis).

In spite of these quite different approaches, both the majority and minority addressed the question of whether s. 2(a) had been infringed by the Minister's decision as a threshold question of constitutional

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[1] 2017 SCC 54, [2017] 2 SCR 386 [*Ktunaxa Nation*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16816/index.do>

[2] See online: <http://jumboglacierresort.com/>

[3] See online: <http://www.ktunaxa.org/qatmuk/>

[4] *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], online: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7998/index.do>; *Loyola High School v Quebec*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*], online: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14703/index.do>. For discussion, see Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law. Part II: Substantive Review" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3d ed (Toronto: Emond Montgomery Press, 2018) 507 and Audrey Macklin's article in this special issue.

law that attracted *de novo* review on the correctness standard,[5] achieving uniformity in their methodology of review that was absent in *Mouvement laïque québécois v Saguenay (City).*[6] The duty to consult in *Ktunaxa Nation* (like many other cases), however, was not about whether a known right had been infringed, but rather the interim protection of "potential, but yet unproven" rights (*Haida Nation v BC*[7]). The process of consultation and ultimate decision attracted reasonableness, in line with the existing law on the duty to consult and in step with deferential review of discretionary decisions more generally. But the Aboriginal right or rights at stake were not determined before deference was applied. As McLachlin CJC and Rowe J emphasized, judicial review of administrative decisions for breach of the duty to consult is not the forum for pronouncements on the validity of Aboriginal rights claims: "To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes."[8] By contrast, the lack of analysis of the Charter right by the Minister was no obstacle to the Court considering the scope of Charter claim on judicial review.[9] What explains this "incongruent" difference?[10]

McLachlin CJC and Rowe J point to the need for a full evidential record to determine an Aboriginal right, beyond what might be entered for the purpose of the duty to consult, which requires only a preliminary assessment of the strength of the claimed rights.[11] The task of proving the *existence* of historically grounded Aboriginal rights may well be different from the task of demonstrating that the scope of a *known* Charter right includes protection in a given case. But is the difference of approach grounded in practical concerns about the proof of the rights (difference 1)? Or is it grounded in the jurisprudence that dictates a case-by-case proof of rights under s. 35, versus a proof of violation of a right under the

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[5] There is of course much to be said on the freedom of religion aspects of the decision; see, for e.g., Howard Kislowicz and Senwung Luk, *"Ktunaxa Nation*: On the 'Spiritual Focal Point of Worship' Test," Ablawg (7 Nov 2017), online: < https://ablawg.ca/2017/11/07/ktunaxa-nation-on-the-spiritual-focal-point-of-worship-test/> , and Howard Kislowicz and Senwung Luk, "Re-contextualizing *Ktunaxa Nation v British Columbia:* Crown Land, History and Indigenous Religious Freedom" *Draft paper*, Osgoode Constitutional Cases Conference (6 April 2018) [check 2nd citation]

[6] 2015 SCC 16, [2015] 2 SCR 3 [*MLQ*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15288/index.do>

[7] 2004 SCC 73 at para 27, [2004] 3 SCR 511 [*Haida Nation*], online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do>.

[8] *Ktunaxa Nation*, *supra* note 1 at para 84.

[9] *Ibid*. at para 60.

[10] See comments of Paul Daly, "The Supreme Court of Canada and the Standard of Review: Recent Cases" (11 Nov 2017), *Administrative Law Matters*, online: <http://www.administrativelawmatters.com/blog/2017/11/11/the-supreme-court-of-canada-and-the-standard-of-review-recent-cases/>.

[11] *Ktunaxa Nation*, *supra* note 1 at para 84.

Charter (difference 2)? If the practical concerns are the obstacle, *Nova Scotia v Martin,*[12] and *Paul v BC*,[13] suggest that other considerations take precedence over practical concerns in relation to access to constitutional arguments before administrative decisions-makers, including s. 35 rights. If difference 2 is the obstacle, the question becomes whether government's obligation to consider the constitution when interpreting statutes and discretionary authority is really all that different when it comes to Aboriginal rights, including the "potential, yet unproven" ones. The discussion of Charter values after *Doré*,[14] and the subsequent treatment of challenges that go to the scope of the rights on a correctness standard (such as in *Ktunaxa Nation,* and the majority in *MLQ*), might demonstrate that when a remedy is sought for an alleged breach of a Charter right, the values at stake transform or crystallize into a dispute about the right that requires adjudication and articulation of the right, whether courts address the dispute *de novo* or through the lens of reasonableness. Are the values behind Aboriginal rights not "rights-like" enough to require or allow for parallel treatment?

The second difference points to a third: the premise that Aboriginal rights and/or their accommodation should be articulated through negotiation. As the Supreme Court has stated repeatedly, in one way or another, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place."[15] The negotiation of rights recognition gives rise to the constitutional duty to consult and accommodate to prevent the unilateral exploitation of claimed resources "during the process of proving and resolving the Aboriginal claim to that resource," a process that the Court recognizes "may take time, sometimes a very long time."[16] In the interim, however, the Crown retains the right and authority to continue managing the resources subject to Aboriginal claims, and to make "decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns."[17] As McLachlin CJC and Rowe J acknowledge in *Ktunaxa Nation*, the consultation and accommodation process conducted by the Minister will not satisfy the Ktunaxa, "[b]ut in the difficult period between claim assertion and claim

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[12] 2003 SCC 54, [2003] 2 SCR 504, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2088/index.do> .
[13]2003 SCC 55, [2003] 2 SCR 585, online: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2089/index.do >.
[14] See, for e.g., Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 SCLR article 12, online: < http://digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/12/> and Audrey Macklin, "Charter Right or Charter-Lite?: Administrative Discretion and the Charter" (2014) 67 SCLR Article 18, online: < http://digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/18/>, and articles by Fox-Decent & Pless and Macklin in *supra* note 4.
[15] *R v Sparrow*, [1990] 1 SCR 1075 at 1105,online: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do >; See also *Delgamuukw v BC*, [1997] 3 SCR 1010 at para 186, online: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do >.
[16] *Haida Nation*, *supra* note 7 at paras 26-27.
[17] *Ibid.*, at para 45.

resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket."[18]

If Aboriginal rights are "TBD," what are "the proper processes" for the determination of Aboriginal rights that the majority in *Ktunaxa Nation* alludes to? A recent policy announcement by the Trudeau government suggests that creating specialized mechanisms for recognizing Aboriginal rights is finally on the policy agenda.[19] The status quo is that Indigenous peoples can litigate their claims or attempt to work through comprehensive claims processes in relation to title and other s. 35 rights. It is old news that these treaty processes are deeply troubled, and that both litigation and negotiation generally take "a very long time," a euphemism that buries concerns about expense burdens and access to justice.[20] In *Ktunaxa Nation*, the majority plainly want to support the "proper" resolution of rights claims, but they do not question the access to "proper processes" before they defer to the Minister's assessment of the Qat'muk sacred site claim, as part of their review of the adequacy of the consultation process under the reasonableness standard.[21] The implication of deference here is that if government manages legal risk by consulting beyond what the legal duty might require in relation to "weak" rights claims (as this particular Ktunaxa claim was assessed, reasonably so according to the Court), it is unnecessary for the Minister or the courts to fully articulate and assess that claim. How does such deference serve to support "a solid constitutional base" for negotiations? This point of deference in *Ktunaxa Nation*, however, is less about difference and more about the common administrative law theme of inconsistency[22] given that earlier cases establish that deference is not owed on the preliminary assessment of the strength of the right and related determinations of the scope of consultation obligations.[23]

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[18] *Ktunaxa Nation*, *supra* note 1 at para 86.
[19] Government of Canada, "Government of Canada to create Recognition and Implementation of Rights Framework," Justin Trudeau, Prime Minister of Canada Website, (14 Feb 2018): < https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework >.
[20] See, for e.g., the Report of the Special Ministerial Representative on Renewing the Comprehensive Land Claims Policy, Douglas R Eyford, "A New Direction: Advancing Aboriginal and Treaty Rights" (April 2015), online: < http://www.aadnc-aandc.gc.ca/eng/1426169199009/1426169236218 >. See also, the Submission to the UN Committee on the Elimination of Racial Discrimination by the Union of British Columbia Indian Chiefs, "Canada: Indigenous Peoples' Inherent Title and Rights in British Columbia" for the 93rd Session, 31 July - 25 August, 2017, at 2-3, online: < http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_NGO_CAN_28180_E.pdf >.
[21] *Ktunaxa Nation*, *supra* note 1 at para 100.
[22] See Paul Daly's explanation of the addictive qualities of standard of review analysis in this special issue.
[23] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 2 SCR 103 at para 48, online: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7896/index.do >; *Haida Nation*, *supra* note 7 at para 63.

A fourth difference to consider is structural, relating deference to the obligation to implement and respect constitutional rights in administrative decision-making. Under s. 32, the Charter applies to administrative delegates such that they must interpret statutes and make decisions that accord with the Charter. Deference is thus owed to administrative decision-makers who properly take Charter rights and values into account in their decisions because their expertise must evolve to include respecting the Charter in relation to their specific field of regulation. Section 35 did not come with an application clause. Instead, the obligation to make decisions that respect and implement rights stems from the honour of the Crown. *Haida Nation* established that aspects of the duty to consult may be delegated but the honour of the Crown itself cannot be delegated.[24] In *Clyde River*, the Supreme Court further explained: "While the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate."[25] "Reliance" rather than delegation ensures that at least some issues of accommodation and disputes about claims will find their way back to the 'real' Crown.[26] This approach might suggest respect for "nation-to-nation" treaty relations in which the relationship is maintained between the head of state and the First Nation (and arguably fail[27]), but it also might signal the ongoing political quality of Aboriginal rights, even when the rights at stake were recognized through a modern land claim agreement, as they were in *Clyde River*.

The incompletely delegable quality of the honour of the Crown appears to indicate that administrative expertise is limited, suggesting a re-examination of the premises for judicial deference to non-Crown agencies in such contexts is required.[28] Deference to decisions by Ministers, whose actions directly represent the Crown, might also be inappropriate, or based on a different theory altogether: instead of, or in addition to, the "politics of deference", there is an ongoing politics of sovereignty at stake.[29]

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[24] *Haida Nation*, *supra* note 7 at 53.
[25] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*., 2017 SCC 40, [2017] 1 SCR 1069 [*Clyde River*] at para 22, online: < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16743/index.do >.
[26] *Ibid.* at paras 28-29.
[27] Myeengun Henry, "First Nation questions relationship with Canada following court ruling" *Toronto Star*, Opinion: Commentary (11 Aug 2017), online: < https://www.thestar.com/opinion/commentary/2017/08/11/first-nation-questions-relationship-with-canada-following.html >.
[28] This line of analysis is further developed in Janna Promislow, "Delegation, Deference, and Difference: Searching for a principled approach to implementing and administering Aboriginal rights", draft paper prepared for Osgoode 2017 Constitutional Cases Conference, 6 April 2018.
[29] For related discussion, see for e.g., Jeremy Webber, "We Are Still in the Age of Encounter: Section 35 and a Canada beyond Sovereignty" in Patrick Macklem & Douglas Sanderson, eds., *From Recognition to Reconciliation.*

Alternatively, having waited for a negotiated solution for long enough, the courts might take a different tact by reviewing Aboriginal rights as parallel to Charter rights, and thus recognizing these rights as also "ripe" for implementation. Deference under that approach would presumably be more like the "*robust* proportionality" required by the Supreme Court in *Doré*[30] than reasonableness as it applies to review of discretionary decisions more generally.[31] And like the treatment of the s.2(a) right in *Ktunaxa Nation*, a dispute about the scope a right might be treated as a threshold issue that can be adjudicated through judicial review on a correctness standard.

Although it may be obvious that constitutional Aboriginal rights must be implemented as rights, and on par with Charter rights, this view does not imply that approaches to deference in relation to Charter rights should necessarily be transferred to apply in relation to Aboriginal rights. Rather, the preceding comparison and identification of points of differences in the application of deference to the review of decisions implicating Aboriginal rights is the start of a bigger discussion. Do the differences identified hold up? Are they principled? If Aboriginal rights are really different when it comes to their implementation and administration through all the branches of government, is deference indicated in the review of government decisions that affect Aboriginal rights? And if so, in what contexts and how should such deferential review be carried out? These are questions for another day.

Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights (Toronto: University of Toronto Press, 2016).

[30] *Loyola*, *supra* note 4 at paras 3 (emphasis in original) and 40, explaining *Doré.*

[31] For an interesting example of the honour of the Crown and reconciliation purposes informing the "context" of reasonableness, see *Kainaiwa/Blood Tribe v Alberta*, 2017 ABQB 107, online: < https://www.canlii.org/en/ab/abqb/doc/2017/2017abqb107/2017abqb107.html>.