Date: 20080612

Docket: A-313-07

Citation: 2008 FCA 212

CORAM: **NOËL J.A.**
NADON J.A.
RYER J.A.

BETWEEN:

The AHOUSAHT INDIAN BAND, The DITIDAHT INDIAN BAND,
The EHATTESAHT INDIAN BAND, The HESQUIAHT INDIAN BAND,
The HUPACASATH INDIAN BAND, The HUU-AY-AHT INDIAN BAND,
The KA:'YU:K'T'H/CHE:K'TLES7ET'H' INDIAN BAND,
The MOHAWCHAHT/MUCHALAHT INDIAN BAND,
The NUCHATLAHT INDIAN BAND, The NUCHATLAHT INDIAN BAND,
The TLA-O-QUI-AHT INDIAN BAND, The TOQUAHT INDIAN BAND,
The TSEHAHT INDIAN BAND, The UCHUCKLESAHT INDIAN BAND
And The UCLUELET INDIAN BAND

Appellants

and

THE MINISTER OF FISHERIES AND OCEANS

Respondent

Heard at Vancouver, British Columbia, on April 23, 2008.

Judgment delivered at Ottawa, Ontario, on June 12, 2008.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY:
CONCURRING REASONS BY: NOËL J.A.
RYERJ.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a judgment of Mr. Justice Blais of the Federal Court (as he then was) dated May 29, 2007 (2007 FC 567), who dismissed the appellants' application for judicial review of a decision of the Minister of Fisheries and Oceans (the "Minister" or the "respondent") to

implement a three-year plan for the management of the Pacific coast commercial groundfish fisheries (the "Fisheries") effective April 2006 (the "Pilot Plan").

[2] Before the Applications Judge, the appellants, fourteen First Nations (the "Nuu-chah-nulth First Nations" or "the appellants"), whose lands are located on the west coast of Vancouver Island, argued that the Minister had failed to uphold the honour of the Crown and to meet his constitutional duty to consult and accommodate them before implementing the Pilot Plan.

[3] In dismissing the appellants' judicial review application, Blais J. concluded that the Minister had not breached his constitutional duty to consult pursuant to subsection 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (U.K.)*, 1982, c.11 (the "Constitution").

THE FACTS

[4] In the Reasons which he gave in support of his decision, Blais J. carefully and thoroughly reviewed the facts relevant to the issues before him. Although the Judge's summary of the evidence is somewhat lengthy, it is essential to a proper understanding of the issues raised in the appeal. Before reproducing the relevant paragraphs of the Judge's Reasons, a few words concerning the reasons which led the Minister to introduce the Pilot Plan will be useful.

[5] There are over sixty different species of fish on the Pacific coast, with seven different fleets. Because the nature of the Fisheries is that species intermingle, this leads to what is referred to in the industry as a "bycatch". In effect, although fishers may be licensed to catch one species of fish, for example halibut, they may well catch a number of other fish, i.e. the bycatch, while attempting to catch halibut. In such a situation,

because fishers can only retain the fish that they are licensed to catch, the non-licensed fish must be returned to the water and, depending on the type of fish so returned, there is a high probability that the fish will die when returned to the water. This is clearly the situation in the case of rock fish.

[6] In 2001, the Minister determined that changes in the Fisheries had to be made, failing which significant curtailment thereof would be necessary. The proposed changes were meant to address conservation and protection issues pertaining to endangered and at risk rock fish species, bycatch mortality and to allow the Department of Fisheries and Oceans ("DFO") to assess stocks by improving the monitoring and catch reporting for all species.

[7] In June 2003, the *Species at Risk Act*, S.C. 2002, c. 29, was enacted, resulting in the classification of Boccaccio rock fish as a threatened species and the identification of 11 other rock fish species as high priority for possible listing as "species at risk" under the Act.

[8] In March 2005, DFO decided that commencing with the 2006 fishing season, 100% electronic monitoring of catch would be required for all commercial groundfish fishing trips. Monitoring was deemed necessary in order to accurately account for all catch by a fishing vessel, be it landed or at sea releases. Through this means, DFO believed that it would have more accurate information to determine whether total allowable catches ("TAC") within a given commercial groundfish Fishery were being exceeded. With more accurate information, the early closure of the Fisheries became a real prospect once TACs were reached.

[9] As a result, a system of individual quotas ("IQs") became essential so to avoid the early closure of the Fisheries, which would, it goes without saying, lead to a severe disruption to fishers and communities that depend on the Fisheries. In order to effectively manage commercial fisheries, the support of stakeholders,

including the appellants, was crucial to the success of DFO's management plans. It is in this context that the consultation process with stakeholders took place.

[10] I now reproduce paragraphs 6 to 23 of the Judge's Reasons:

> [6] Discussions between DFO and industry associations commenced in March 2003, and resulted in discussion papers being prepared and in the formation of the Commercial Groundfish Integrated Advisory Committee (CGIAC), which had representatives from the commercial fishing industry, including the four major industry associations in groundfish fisheries, as well as the Province of British Columbia and DFO. The CGIAC also included representatives of coastal communities, of the Marine Conservation Caucus, of the Sports Fish Advisory Board and of the B.C. Aboriginal Fisheries Commission (BCAFC). It should be noted that the BCAFC designated someone from the NTC as their representative in 2004 and in 2005. While the designated representative failed to attend the four meetings of the CGIAC in 2004, the BCAFC was represented at the 2005 meetings, first by an NTC commercial fisher and, subsequently, by an employee of the NTC.
>
> [7] The CGIAC created a committee comprised of sixteen of its members, known as the Commercial Industry Caucus (CIC), which prepared the proposal that later became the Pilot Plan. There was no aboriginal representative on this committee.
>
> [8] In March 2005, all hook/line and trap commercial groundfish fisheries licence eligibility holders and vessel owners were informed, in a letter sent by DFO, that mandatory 100 percent at-sea monitoring would be implemented starting in 2006. Also in March 2005, the Commercial Industry Caucus Pilot Integration Proposal (the Reform Proposal) was submitted to the CGIAC and to DFO.
>
> [9] Stakeholder consultation on the Reform Proposal began in June 2005, first with the creation of a website by DFO, providing information on the Reform Proposal and the various policies that led to this proposal, and second, by sending a letter, along with a consultation guide, to all groundfish fisheries licence holders, through which they were invited to send their comments to DFO on the Reform Proposal. Letters and consultation guides were also sent to all British Columbia coastal First Nations, seeking their input. The second stage of the stakeholder consultations took place in October and November 2005, when representatives from DFO travelled to four cities in the province to engage in discussions with stakeholders. The final stage of the consultation process consisted of bilateral discussions with affected First Nations. That being said, the applicants were not included in these planned bilateral discussions as the respondent did not consider their asserted aboriginal rights to be adversely impacted by the Reform Proposal.

[10] The applicants note that the notion of bilateral consultation with the Niu-chah-nulth First Nations was first raised by the applicants in January 2005, and then again at the CGIAC meetings of April 15, 2005 and May 30, 2005.

[11] The first meeting between DFO representatives and representatives of the applicants where the Reform Proposal was to have been discussed was the JTWG meeting that was to have been held in September 2005. However, this meeting was cancelled by the NTC as the head of the NTC Fisheries Department, Dr. Hall, was not available.

[12] The meeting was rescheduled on November 18, 2005, at which time Ms. Trager [Diana Trager, the Regional Resource Management Coordinator for the Groundfish Management Unit], representing DFO, met with NTC officials to discuss various fisheries issues, including the Reform Proposal. A further meeting took place between DFO representatives and representatives of the applicants on November 28, 2005, where Ms. Trager provided a presentation on the Reform Proposal and answered questions.

[13] Another meeting of the JTWG was held on November 29, 2005, but the discussion was limited to the draft consultation protocol proposed by the applicants in a letter dated November 23, 2005, which would allow consultation to proceed on a number of fisheries issues, including the Reform Proposal. There were six stages to this consultation protocol:

1. Identification of policy proposals
2. Explanation and initial discussion of the policy proposals
3. Provision and consideration of further information
4. Nuu-chah-nulth response
5. DFO response
6. Accommodation

[14] The respondent agreed to take the consultation protocol under advisement and, in a letter dated December 20, 2005, Mr. Sprout [Paul Sprout, the Regional Director General for DFO in the Pacific Region] noted that they were still awaiting comments from their colleagues in Ottawa, but that DFO was essentially in agreement with the first five stages of the consultation protocol, and suggested that they should proceed immediately with these stages.

[15] A subsequent meeting was held on January 23, 2006, but discussion was limited to the consultation protocol, since the applicants maintained that they were not prepared to discuss the Reform Proposal until DFO committed to the proposed consultation protocol. At this meeting, Mr. Kadowaki [Ronald Kadowaki, the Lead Director for Pacific Fisheries Reform] advised the applicants' representatives that DFO was essentially in agreement with the first five stages of the consultation protocol, but that the sixth stage would depend on what happened in the first five stages. Additionally, Mr. Kadowaki notes in his affidavit that he stressed the urgency of the groundfish initiative, as one of the major groundfish fisheries would be opening in March 2006, and thus that it was imperative that the consultations be

undertaken on an urgent basis. He also indicated that DFO was not prepared to agree to the timeline proposed in the consultation protocol for this initiative.

[16] Another attempt was made to schedule a meeting for the first week of February 2006 to move on to stage 3 of the consultation protocol, which was rebuked by the applicants, stating again that they were not prepared to engage in substantial consultations until there was an agreement on the consultation protocol. Dr. Hall stated that the preparation of questions for stage 3, while underway, had not been a high priority "pending agreement on the Consultation Protocol and in relation to other higher priority activities in recent weeks".

[17] In a letter dated February 16, 2006, Mr. Kadowaki wrote that "DFO is in agreement with many aspects of your proposed consultation protocol and we believe that it can provide the basis of a useful and practical framework for consultations". Mr. Kadowaki also reiterated the urgency of consultations on the Reform Proposal, as implementation was being considered for the 2006 fishing season.

[18] While the applicants submit that, through this letter, DFO agreed to be bound by the consultation protocol, the respondent maintains that there was no such commitment by DFO. The respondent also notes that this letter must be read in light of the previous letter sent by Ms. Trager dated January 16, 2006, where she indicated to the applicants that DFO was considering implementing the Reform Proposal for the 2006 fishing season, and in light of Mr. Kadowaki's affidavit where he states that it was made clear to the applicants that DFO did not agree with the proposed timeline.

[19] On February 20, 2006, the applicants indicated that they were prepared to move forward with the consultations and proceed with stage 3 of their consultation protocol. As such, they forwarded 102 questions to Ms. Trager.

[20] On February 24, 2006, another meeting was held at which DFO provided draft answers to some of the questions submitted. Responses were later provided by DFO on 94 of the 102 questions in an email sent March 13, 2006.

[21] No further meetings were held after that, but correspondence continued to be exchanged between the parties, including letters from the applicants objecting to the lack of consultation and voicing their opposition to the Reform Proposal. A letter was also sent seeking a meeting with the Minister during his visit to the region in March 2006. While the Minister did not meet with them on that occasion, the respondent notes that there was a meeting between the Minister and the Nuu-chah-nulth First Nations in January 2006.

[22] A series of memoranda to the Minister were sent on February 17, 2006, March 17, 2006, March 31, 2006 and April 5, 2006, in which the concerns expressed by First Nations are clearly noted. In particular, the first memorandum goes into much detail about the opposition from First Nations, including the NTC.

> [23] When the final proposal was released in April 2006, it largely reflected the CIC proposal to the CGIAC, although some changes were made, including the implementation of the proposal as a pilot plan for a three-year period, the fact that quota reallocation between licences within a groundfish fishery were to take place on a temporary basis for the current fishing year only, and a commitment by DFO that additional lingcod and dogfish catch history would be made available to First Nations as lingcod and dogfish quotas.

THE DECISION OF THE FEDERAL COURT

[11] After setting out the issues before him, namely, the scope of the Minister's duty to consult with the appellants, whether the steps taken by the Minister were sufficient to meet his duty to consult and what appropriate remedy the Court should order, if necessary, the Judge turned to the Supreme Court's decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, for guidance with respect to the relevant principles. Specifically, he referred to paragraphs 16, 20, 27 and 35 of *Haida*, *supra*, where the Supreme Court held that (i) in defining rights guaranteed under section 35 of the Constitution, the Crown must act honourably and, in so doing, must consult and, where appropriate, accommodate Aboriginal peoples; and that (ii) a duty to consult will arise when the Crown has knowledge, real or constructive, of the existence of an Aboriginal right that might be affected by the Crown's conduct.

[12] The Judge then proceeded to determine the nature of the Aboriginal right at issue, which he found to be a right to fish commercially. This led him to note that although the Minister did not dispute the fact that he had knowledge of the appellants' claim to a right to fish commercially, he did not concede that the conduct contemplated under the Pilot Plan would affect the appellants' right in question.

[13] With regard to the appellants' contention that their food, social and ceremonial rights ("FSC rights") were also at issue, the Judge found that since no adverse impacts on these rights had been shown by the appellants, it followed that the Minister did not have a duty to consult in regard thereto.

[14] The Judge then turned his attention to the scope of the Minister's duty to consult insofar as the appellants' right to fish commercially was concerned and sought to determine where that duty was located on the spectrum discussed in *Haida, supra*. He began his analysis with the proposition that determining the Aboriginal right which gave rise to the duty to consult was a necessary precondition to the determination of the scope and content of that duty and, in support of that proposition, he referred to paragraphs 43 to 45 of *Haida, supra*. As I have already indicated, the Judge found the right at issue to be the right to fish commercially.

[15] The Judge then reviewed the arguments put forward by both sides with regard to the scope of the Minister's duty in the light of the evidence and of a number of Supreme Court decisions, namely: *Haida, supra*; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388; *R. v. Nikal*, [1996] 1 S.C.R. 1013; and *R. v. Gladstone*, [1996] 2 S.C.R. 723. This led him to the conclusion that any infringement or adverse effects on the appellants' right to fish commercially would be limited and that, as a result, the Minister's duty to consult was located at the lower end of the spectrum. At paragraph 46 of his Reasons, the Judge stated his conclusion in the following terms:

> [46] Having carefully considered the submissions from both parties in light of the applicable jurisprudence, I am satisfied that any infringements or adverse effects on the rights of the applicants to fish commercially resulting from the Pilot Plan would be limited, particularly in light of the fact that the respondent was pursuing a compelling and substantial objective of conservation of the resource in question for the benefit of all Canadians, including the applicants. As such, it is my conclusion that the duty to consult and accommodate the interests of the applicants would have been located on the lower end of the spectrum.

[16] The Judge then went on to examine whether the steps taken by the Minister were sufficient to meet his duty to consult. First, he addressed the period during which the Reform Proposal was being developed. In his view, bilateral consultations were not warranted during that period of time because the respondent's duty to consult was located at the lower end of the spectrum, so that the appellants' involvement in the multilateral process through the CGIAC was such that the Minister was not required to take additional steps to consult with the appellants.

[17] Second, the Judge addressed the period of time commencing once the Reform Proposal was submitted to the Minister. He found that while the appellants had only received a formal copy of the Reform Proposal in June 2005, they had been aware since January 2005 of the general direction that was being pursued by reason of the participation of their representative in the CGIAC. The Judge noted that once the Reform Proposal was submitted, DFO began a process of stakeholder consultations in which the appellants were invited to participate by way of completion of a written questionnaire seeking their comments and of stakeholder meetings. The Judge further noted that the appellants were well aware of the key proposal contained in the Reform Proposal, i.e. the imposition of IQs which were a fact of life in most commercial groundfish fisheries since 1997 and to which they were, as a matter of principle, opposed. The Judge continued by observing that although the

Minister did not, at the outset, intend to conduct bilateral consultations with the appellants, believing that multilateral consultations were sufficient to meet their concerns, he eventually did engage in bilateral consultations with the appellants. The Judge then noted that the appellants' main complaint was that the bilateral consultations had not been completed before the Minister made the decision to implement the Pilot Plan and that, in their opinion, the failure to complete these consultations resulted from the fact that DFO was delinquent in commencing the consultations, thus leaving insufficient time to complete them.

[18] After pointing out that the Minister took the position that the failure to complete the bilateral consultations was the result of the appellants refusal to engage in meaningful discussions of the substantial issues arising from the Reform Proposal, the Judge indicated that although there could be no doubt that DFO should have begun the bilateral consultation process earlier than it did, i.e. in November 2005, he expressed the view that DFO "could not do everything at once" (paragraph 59). He also indicated that the appellants were partly responsible for the delays which had occurred during the course of the bilateral consultations.

[19] At paragraphs 64 to 66 of his Reasons , the Judge summarized his view of the matter and expressed his conclusion to the effect that the Minister had not breached his duty to consult the appellants in implementing the Pilot Plan prior to completion of the bilateral discussions:

> [64] To sum up, a representative of the applicants was designated by the BCAFC to attend meetings of the CGIAC, thus allowing the applicants to be kept informed, however indirectly, of the work being done by the CIC on the Reform Proposal. Once DFO was ready to proceed with stakeholder consultations, the applicants were sent a letter explaining the situation, as well as a copy of the Reform Proposal and a written questionnaire allowing them to submit comments to the Minister. The applicants also participated in one of the

stakeholder meetings held in November 2005. Two bilateral meetings were also held with the applicants in November 2005, at which the Reform Proposal was discussed. The applicants then submitted to the respondent a proposed consultation protocol, and refused to discuss substantive issues for the next two and a half months, insisting that the Minister first agree to this protocol before proceeding any further. Once the consultation process resumed in February, the applicants forwarded over one hundred questions to DFO, many of which the respondent insists were not clearly connected to any aboriginal interest that would give rise to the duty to consult. Nonetheless, DFO endeavoured to provide as many answers as possible within a very short timeframe. Meanwhile, a series of memoranda to the Minister were prepared in respect of the Reform Proposal, which outlined the opposition from First Nations, including the applicants. Finally, when the Pilot Plan was adopted, it contained some important changes meant to address concerns of stakeholders, notably the fact that it was now to be a three-year pilot project. There was also a specific commitment to First Nations that additional lingcod and dogfish catch history would be made available to them as lingcod and dogfish quotas. That measure, according to the respondent, was meant to address concerns raised by the NTC and other First Nations regarding quota and non-target species, as well as to address any additional costs incurred by the applicants as a result of the implementation of the Pilot Plan. As such, it is clear that a measure was introduced in the Pilot Plan to accommodate the potential adverse effects of the Reform Proposal identified by the applicants.

[65] While it is conceded by the respondent that bilateral consultations with the applicants had not concluded prior to a decision being made by the Minister on the Pilot Plan, I agree with the respondent that the applicants were provided with sufficient opportunities to participate in the process to satisfy the duty of the Minister to consult in this case, and that some of the delays that prevented the consultations from concluding prior to the decision being made were caused by the applicants.

[66] Given the multilateral consultations that were held by DFO in which the applicants took part, given the conservation issues at stake, given the potential impact on groundfish fisheries of the introduction of the 100 per cent monitoring of all catch for the 2006 fishing season without the implementation of transferable IQs, and given that the plan was introduced as a three-year pilot only, I am satisfied that the Minister's decision to proceed without waiting for bilateral consultations with the applicants to conclude was justified, and did not constitute a failure to abide by his duty to consult with the applicants.

[Emphasis added]

SUBMISSIONS OF THE PARTIES

A. Appellants' Submissions

[20] The appellants submit that since the implementation of the Pilot Plan "might" adversely affect their Aboriginal rights, i.e. commercial and FSC rights, it triggered the respondent's duty to consult. They argue that the respondent's rejection of consultations with respect to impacts other than on their commercial right to fish was an error of law that is reviewable on a correctness standard and that Blais J. erred in law by failing to apply this standard when reviewing the respondent's determination. The appellants also say that the Judge made a patently unreasonable finding when he found that they were not concerned about the effects of the Pilot Plan upon their FSC rights.

[21] With respect to the scope of the duty to consult, the appellants say that Blais J. erred in law in limiting the duty to consult to their commercial right to fish and in finding that the duty fell at the lower end of the spectrum. On the basis of *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *R. v. Gladstone*, [1996] 2 S.C.R. 723, the appellants submit that whether the respondent's action was justified depends on the degree of consultations rather than on whether the objective of the action was conservation. Furthermore, they submit that the Judge erred in law in failing to look at each aspect of the Pilot Plan in determining whether it was justified and point to the fact that the transferable IQs found in the Pilot Plan did not have conservation as their main objective.

[22] The appellants also submit that Blais J. erred in determining that the respondent had met his duty to consult because he incorrectly determined the scope of consultations required. Further, the appellants submit that the multilateral stakeholder consultations, the nature of the Pilot Plan, the

accommodation made by the respondent and their behaviour did not and cannot serve to eliminate their right to be meaningfully consulted.

[23] With respect to the issue of multilateral consultations, the appellants assert that the Judge erred in finding that these consultations were sufficient to satisfy the respondent's duty to consult. In their view, such consultations were not sufficient, even if the scope of the duty to consult is at the lower end of the spectrum.

[24] The appellants further argue that it was wrong for the Judge to consider the urgency of implementing the Pilot Plan and the fact that that plan was a three-year pilot project only in determining whether the Minister had met his duty to consult and accommodate. In their view, the duty to consult depends on the strength of the claim at issue and the degree of infringement, and as a result, even if the Pilot Plan was a pilot project, serious impacts on their rights could still result from implementation of the Pilot Plan. With respect to the accommodation made by the respondent, the appellants say that lingcod and dogfish allocations in favour of First Nations were unilateral measures that cannot satisfy the respondent's duty to consult.

[25] Finally, the appellants submit that the Judge erred in finding that their conduct somehow lessened their right to be consulted. They say that they should not be blamed for the fact that they consistently requested bilateral consultations in accordance with the proposed framework set out in *Haida, supra*.

B. Respondent's Submissions

[26] The respondent submits that Blais J. was correct in finding that any adverse impacts on the appellants' rights were limited and that the duty to consult pertained only to the appellants' commercial right to fish. With respect to the appellants' FSC rights, the respondent argues that the Pilot Plan does not impact these rights, as any allocations for such rights were to be made before any allocations were made to the commercial sector. Hence, the respondent submits that the Judge was correct in concluding that the appellants' FSC rights would not be impacted by the implementation of the Pilot Plan because there was no "meaningful impact" on these rights. Furthermore, the respondent submits that any impact on the treaty process does not trigger a duty to consult.

[27] With respect to the scope of the duty to consult, the respondent submits that the Judge correctly determined that that duty lies at the lower end of the spectrum, since the adverse impacts on the appellants' commercial right to fish were limited. Indeed, according to the respondent, it was not shown that there would be any alteration of the Fisheries or high risk of non-compensable damages resulting from the Pilot Plan. The respondent says that the appellants incorrectly submit that the Judge based his finding with respect to the scope of the duty on the fact that a commercial right was at issue and that any impact was justified because the goal of the Pilot Plan was conservation. Rather, the Judge based his finding on the fact that the only alleged right impacted was a commercial right and that the impacts on this right would be limited, because of, amongst other things, the conservation aspect of the Pilot Plan.

[28] While the respondent admits that the consultations did not conclude to the satisfaction of the appellants before the Minister made his decision, he submits that Blais J. correctly concluded that there was no breach of the duty to consult, pointing out that there was no requirement that the consultations conclude to the satisfaction of the First Nations and that the reason why the consultations had not concluded was due in part to the appellants' conduct. The respondent further submits that the appellants' position on IQs had crystallized by the time of the bilateral meetings in February 2006 and according to *Taku, supra,* consultations can terminate at this point. The respondent also submits that the urgency of making a decision in light of conservation concerns was also a factor to be considered in determining the Minister's duty to consult.

[29] The respondent argues that, in the end, the Judge rightly concluded that the appellants' participation in the multilateral process coupled with the fact that any duty to consult was at the lower end of the spectrum was sufficient to satisfy any duty to consult while the Reform Proposal was being developed. However, the appellants' participation was only one factor, along with others, that led to the conclusion that the Minister had satisfied his duty to consult.

[30] On the issue of accommodation, the respondent submits that for most of the period at issue, the appellants did not consult with the Minister's officials and opportunities to discuss accommodation were limited. Moreover, although DFO attempted to consult with the appellants about making extra quota available as a means to accommodate them, the appellants were no longer interested in consulting with DFO after they were advised that the Minister would be implementing the Pilot Plan in April 2006.

[31] In the event that this Court finds that the Minister breached his duty to consult and to accommodate the appellants, the respondent submits that the Court should exercise its discretion and not quash the Pilot Plan. Rather, the Minister proposes other remedies such as a declaration of the need for further consultation between the parties, directions as to the scope, content and schedule of the consultations and providing leave to the parties to seek further directions.

ISSUES

[32] The appeal raises the following issues:

1. Did the Judge err in finding that the right at issue was the appellants' right to fish commercially?
2. Did the Judge err in finding that the scope of the Minister's duty to consult lies at the lower end of the spectrum?
3. Did the Judge err in finding that the Minister met his duty to consult and accommodate?

ANALYSIS

A. Standard of review

[33] The learned Judge did not determine what standard of review applied to the Minister's decision to introduce the Pilot Plan. In *Haida*, *supra*, the Supreme Court offered the following guidance with respect to the standard of review applicable to a decision of the Crown which gave rise to a duty to consult:

> 61 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, 2003 SCC 55. 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: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. 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: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> 62 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.
>
> 63 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]

[34] Thus, in my view, the determination of the existence and extent of the duty to consult or accommodate is a question of law and, hence, reviewable on a standard of correctness. However, when the Crown has correctly determined that question, its decision will be set aside only if the process of consultation and accommodation is unreasonable. In my view, the Supreme Court's recent decision in *Dunsmuir v. New Brunswick,* 2008 SCC 9, does not change the standard of review applicable in this case.

B. Existence of the Duty to Consult or Accommodate

[35] The Crown's duty to consult and accommodate, as explained in *Haida, supra*, arises 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" (*Haida, supra*, para. 35) (See also: *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71). As a corollary to this proposition is the one that the duty to consult is triggered at a low threshold (see *Mikisew, supra*, at para. 55).

[36] In the present matter, the Minister does not dispute the fact that he had knowledge of the appellants' claimed Aboriginal rights. However, the Minister does not concede that the appellants have a strong claim and, in support of that view, relies on the Supreme Court's decision in *R. v. NTC Smokehouse*, [1996] 2 S.C.R. 672, where the Supreme Court held that two of the appellant First Nations did not have commercial rights to sell fish.

[37] The appellants say that rights other than their right to fish commercially might be affected by the implementation of the Pilot Plan. Firstly, with respect to the potential impact on treaty settlements and socioeconomic impacts on First Nation communities, I agree entirely with the Applications Judge that since treaty settlements constitute a discrete process, such impact would not trigger a duty to consult. With respect to their FSC rights, the Judge found, and I agree entirely with him, that the appellants did not adduce any evidence to support their contention that these rights "might" be adversely impacted. Even if the duty to consult is triggered at a low threshold (see *Mikisew Crew First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at

para. 55), mere submissions are not, in my view, sufficient to demonstrate that the Pilot Plan might have negative impacts upon the Aboriginal right to fish for FSC purposes.

[38] Hence, I am of the view that Blais J. did not err in finding that the respondent correctly determined that the appellants' right to fish commercially was the only right which might be adversely affected by the Pilot Plan. Although the Judge did not say what standard of review he applied, it is clear from his Reasons that he did not show any deference and thus he applied the standard of correctness.

C. Scope of the Duty to Consult

[39] The scope of the duty to consult depends not only on the strength of the case supporting the existence of the right at issue, but also on whether the right is limited and on whether there are potentially adverse effects upon the right claimed (*Haida, supra*, paras. 39 and 68). The Supreme Court has made it clear that when the Aboriginal right at issue is limited or the potential for infringement is minor, the scope of the duty lies at the lower end of the spectrum. At paragraphs 43 to 45 in *Haida, supra*, the Court said:

> ¶ 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> ¶ 44 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.
>
> ¶ 45 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]

[40] The relevant weight to be given to each of the factors mentioned in *Haida, supra*, will depend upon the facts of the case. For example, one factor may be determinative for locating on the spectrum the duty to consult. In *Mikisew Cree First Nation, supra*, the Court found that the Crown's duty to consult laws at the lower end of the spectrum, notwithstanding that the rights at issue (treaty rights to hunt and trap) were certain and that the impacts upon those rights were clear, established and demonstrably adverse to the continued exercise of hunting and trapping rights.

[41] In the present matter, even though the Judge appears to have accepted that the appellants made a strong *prima facie* case with respect to their right to fish commercially, he nonetheless found that the Minister's duty to consult was located at the lower end of the spectrum because "any

infringements or adverse effects on the rights of the [appellants] to fish commercially resulting from the Pilot Plan would be limited, particularly in light of the fact that the [respondent] was pursuing a compelling and substantial objective of conservation of the resource in question for the benefit of all Canadians, including the [appellants]" (Judge's Reasons, paragraph 46).

[42] It appears that the Judge came to that view in part by reason of the Minister's submission that a government can legitimately pursue a broad range of objectives that can justify an infringement of the Aboriginal rights at issue. Such justification to the infringement would lead to a finding of a minimal duty to consult. This conclusion raises the question of whether the doctrine of justification, as set out in *Sparrow, supra*, and *Gladstone, supra,* is applicable in cases where the scope of the duty to consult is at issue.

[43] In *Mikisew Cree First Nation, supra*, the Supreme Court discussed the application of *Sparrow, supra*, in the context of the analysis of the Crown's duty to consult:

> 56 In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify Badger's identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in Badger) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.
>
> 57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its procedural obligations,

> quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's substantive treaty obligations as well.
>
> 58 *Sparrow* holds not only that rights protected by s. 35 of the Constitution Act, 1982 are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in Sparrow-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.
>
> (3) Was the Process Followed by the Minister Through Parks Canada in this Case Sufficient?
>
> 59 Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure if *implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.
>
> [Emphasis added]

[44] In light of the above considerations, I am of the view that the learned Judge was wrong to rely on the grounds put forward by the Minister to justify the infringement of the appellants' right to fish commercially at the stage of determining what the scope of the Minister's duty to consult was. Even if the Judge did not expressly state in his Reasons that he was relying on *Sparrow, supra*, and on the Supreme Court's subsequent decision in *Gladstone, supra*, he nonetheless referred to passages in those decisions in characterizing the Minister's objective of conservation as "compelling and substantial". As appears clearly from its decision in *Mikisew Cree First Nation, supra*, the Supreme Court views the process followed and the duty to consult attached to it as a question distinct from that of whether there is infringement of an Aboriginal right and whether the

infringement is justified. Thus, the conservation objective of the Pilot Plan was, in my view, not relevant at this stage of the analysis, except to the extent that the pursuit of conservation would lead to or result in minimal impact on the Aboriginal right at issue.

[45] The proper approach required the Judge, in my view, to focus on whether the Aboriginal claim was weak, limited, or whether the potential for infringement was minor. Although the Judge erred in the approach that he took, I am nonetheless satisfied that he was correct in finding that the Minister's duty to consult was located at the lower end of the spectrum. Like the Judge, I am satisfied that any impact of the Pilot Plan on the appellants' right to fish commercially would be limited. On the evidence, it is unclear how exactly the Pilot Plan impacts negatively upon the appellants' right. It is clear, however, that the implementation of the Pilot Plan does not result in either an alteration of the Fisheries or create a high risk of non-compensable damages.

[46] I therefore conclude, as did the Judge, that the scope of the Minister's duty herein lies at the lower end of the spectrum. Again, although the Judge did not mention what standard of review he applied, he does not appear to have shown deference and therefore, in my view, he applied the correctness standard.

D. Was the Duty to Consult Met?

[47] Because he found that the Minister had correctly determined the right which triggered the duty to consult and the scope of that duty, the Judge then addressed the issue of whether the process of consultation and accommodation implemented by the Minister was reasonable. After reviewing the evidence and the authorities, he concluded that "the Minister's decision to proceed without

waiting for bilateral consultations with the applicants to conclude was justified, and did not constitute a failure to abide by his duty to consult with the applicants" (Judge's Reasons, para. 66).

[48] More particularly, the Judge first dealt with the period during which the Reform Proposal was being developed. He concluded that during this period, bilateral consultations were not required and that the multilateral process through the CGIAC was sufficient to satisfy the Minister's duty. With respect to the period during which the reform proposal was put forward for discussion by the Minister, the Judge found that notwithstanding the fact that bilateral consultations with the appellants had not run their full course, the Minister had nonetheless fulfilled his duty to consult. In so concluding, the Judge observed that the appellants' conduct was responsible for some of the delays which had prevented the bilateral consultation process from concluding prior to the Minister's decision.

[49] The determination of whether the Minister's duty to consult and accommodate is reasonable depends essentially on the scope of the duty to consult. Where the scope of the duty is located at the lower end of the spectrum, as here, the respondent's duty may possibly be limited to giving notice of its intended action, disclosing information and discussing issues raised in response to the notice.

[50] In the present matter, there can be no doubt, in my view, that the respondent clearly demonstrated an intention of substantially addressing Aboriginal concerns through a meaningful process of consultation. I can see no basis to disagree with the Judge's finding that the Minister provided the appellants with sufficient opportunities to participate in the process. The Judge also

found, and I see no reason to disagree with his view, that the appellants were partly to blame for the delays which occurred during the course of the consultation process.

[51] In *R. v. Douglas*, 2007 BCCA 265, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 352 (QL), the British Columbia Court of Appeal dealt with the question of whether multilateral consultations were sufficient so as to satisfy the Minister's duty to consult. The Court held that given the nature of the Fishery, the number of First Nations involved and the lack of unanimity between them, joint consultation was reasonable and appropriate as DFO had provided the First Nations with the necessary information, technical assistance and opportunities to express their concerns:

> 40 In this case, DFO conducted extensive and detailed consultations with Fraser River First Nations as to its conservation objectives. Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO's emphasis on joint consultations was reasonable and appropriate. DFO provided the necessary information and technical assistance. DFO provided opportunities for the First Nations to express their concerns and resources to facilitate the meetings. DFO adjusted the escapement target and exploitation rate in response to First Nations' concerns. In this way, DFO complied with the standard set out in Halfway River, supra, and in Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 64. Because the Cheam refused to participate in the joint consultations, DFO attempted to consult them separately. The trial judge found, and the appeal judge agreed, that DFO's efforts to engage the Cheam in consultation were reasonable and in good faith.
>
> [Emphasis added]

[52] In *Douglas, supra*, the B.C. Court of Appeal also found that First Nations were duty-bound to consult with the Minister in good faith and that they could not, by their conduct, place unnecessary obstacles in the way of the consultation process. The Court, at paragraph 39 of its

Reasons, referred to the following passage from *Halfway River First Nation, supra*, which identified a reciprocal duty of First Nations in the consultation process:

> 161. … There is a reciprocal duty on Aboriginal Peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions…

[53] In *Douglas, supra*, the B.C. Court of Appeal went on to find that the First Nations had not fulfilled their reciprocal duty to carry out their end of the consultation process to the extent that its members deliberately frustrated the Minister's attempts to consult:

> 45 Finally, it is illogical to conclude that DFO failed to conduct adequate consultations with the Cheam because DFO did not approach them on a minor matter, when the trial judge found that the Cheam had failed to respond to repeated requests to meet, consult or respond on the major issues. Significantly, the Cheam failed to communicate their needs in concrete terms in response to DFO's request that they do so. The Cheam did not fulfil their reciprocal obligation to carry out their end of the consultation. To hold that members of a First Nation who deliberately frustrated all of the government's attempts to consult, and thereby failed in its own obligations should receive a remedy for an infringement of its aboriginal right because the government did not approach it on a minor issue goes far beyond what is required to justify DFO's conduct. DFO's duty as described by the Supreme Court of Canada in Sparrow was to uphold the honour of the Crown and conform to the unique contemporary relationship between the Crown and aboriginal peoples. As the trial judge held, "the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed" (at para. 73).

[54] It follows from *Haida, supra*, that in determining whether the Minister has met his duty to consult, perfect satisfaction is not required. To the extent that the Minister makes reasonable efforts to inform and consult the First Nations which might be affected by the Minister's intended course of action, this will normally suffice to discharge the duty. As McLauchlin C.J. said at paragraph 39 of her Reasons in *Haida, supra*:

> [39] The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the general scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

[55] In my view, the Minister, in the present matter, took sufficient steps to discharge his duty to consult. His efforts, while not perfect, were reasonable and appropriate in the circumstances. DFO's commitment to continue to consult with the appellants and make extra lingcod and dogfish quota available as a means to accommodate potential impacts of the Pilot Plan on the appellants' commercial right to fish shows good faith on its part. Indeed, the appellants do not take the position that DFO acted in bad faith.

[56] I therefore conclude that Blais J. did not make a reviewable error in finding that the Minister had met his duty to consult with the appellants.

DISPOSITION

[57] For these reasons, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Marc Noël J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-313-07
(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MAY 29, 2007 (2007 FC 567) IN COURT FILE T-781-06)	
STYLE OF CAUSE:	THE AHOUSAHT INDIAN BAND et al v. MINISTER OF FISHERIES AND OCEANS.
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 23, 2008
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	NOËL J.A. RYER J.A.
DATED:	June 12, 2008

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