

**The McLachlin Court and the Promise of Procedural Justice**  
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**Abstract**

In this study, I argue that the Supreme Court of Canada has turned to procedural solutions to substantive disputes over constitutional rights in new and dramatic ways. I examine case studies in the realm of national security, aboriginal rights and social & economic rights to demonstrate this trend and to explore its implications. I conclude that if the Court treats proceduralism unhinged from the substantive outcomes that bring parties to Court in the first place, the Court's procedural turn will seem less prudent and more problematic.

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If we do things the right way, we are likely to do the right thing.  
Lon L. Fuller<sup>2</sup>

## **Introduction**

As I often have to remind my administrative law students, people do not go to court for procedural rights. People do not think that it is fine that they are to be deported, or lose their claim over land, or end up with diminished benefits at work, so long as it is done fairly. Rather, people do not want to be deported. They want to have their land claim recognized and to receive better benefits at work. Parties seek to develop new procedural rights or apply existing rights to new situations so that it will be more likely that they will achieve successful outcomes, or alternatively, so that negative outcomes will be lessened, deferred, or delayed. Procedure, in other words, should never be viewed in isolation. That said, process is important for more reasons than the particular results of particular cases.<sup>3</sup>

All legal process both reflects and advances claims to legitimacy, fairness, and accountability. Further, some kinds of procedural requirements are difficult to disentangle from substantive requirements. For example, the duty to provide reasons and the substantive requirement of reasonableness are inextricably linked.<sup>4</sup> The debate about whether procedure is a means to an end, or an end in itself, or somewhere in between, defines much about the implications of law and, as I will suggest, characterizes some of

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<sup>2</sup> Lon L. Fuller, “What the Law Schools can Contribute to the Making of Lawyers” (1948) 1 J. Legal Educ. 189 at 204.

<sup>3</sup> For a wide ranging discussion of the justifications for procedural justice, see L. Solum, “Procedural Justice” (2004) 78 S. Cal. L. Rev. 181.

<sup>4</sup> See D. Dyzenhaus & E. Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 U.T.L.J. 193.

the most significant contributions of the Supreme Court under the leadership of Chief Justice McLachlin (the “McLachlin Court”).

While procedural justice extends far beyond administrative law, it is fair to say that it is in administrative law that the Supreme Court first identified the potential, and the potential challenges, of procedural justice. In *Cardinal et al. v. Director of Kent Institution*,<sup>5</sup> it famously described fairness as an “independent, unqualified right,” which arises whenever a person’s rights, interests, or privileges are at stake in a public, non-legislative decision. That is to say, the right to fairness exists apart from the difference it might make in any individual case. To underscore this point, Justice Le Dain wrote:

... [T]he denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.<sup>6</sup>

But does process really matter entirely unhinged from any focus on outcomes? Even the Supreme Court is not so sure. Subsequently, in *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*,<sup>7</sup> for example, the Court accepted that in some settings, a procedural flaw is not sufficient to invalidate a public decision if that would have no conceivable impact on the outcome. In *Mobil Oil*, the Supreme Court confirmed

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<sup>5</sup> [1985] 2 S.C.R. 643.

<sup>6</sup> *Ibid.* at 661.

<sup>7</sup> [1994] 1 S.C.R. 202 [*Mobil Oil*].

that, “a court may exercise its discretion not to grant a remedy for a breach of procedural fairness where the result is inevitable.”<sup>8</sup>

Thus, it is fair to say that fairness always matters, but what matters most is not always fairness. This is where prudential reasoning enters the picture. To the extent the Court has discretion as to how a problem or dispute should be resolved, when should the Court impose a substantive outcome and when is a procedural solution to a problem the better approach? When, in other words, is process the prudent choice? Prudence has several meanings, but in this context, I use it generally to mean making decisions based on reason, a strategic or shrewd assessment of the implications of the decision, good judgment in the use of resources, and circumspection as to danger or risk. When applied to procedural justice, I would suggest prudence means deploying or designing procedural solutions to problems based on a calculation of what is justified on reasoned grounds, what will create the most positive set of implications, what may be defended as an effective use of judicial resources and resources of the parties, and what will minimize downside risk (including risk to the credibility and effectiveness of the Court, and to public confidence in the administration of justice).

This debate over the purposes and ends of procedural rights, for many years internal to administrative law, has now spilled over into a wide range of public and private settings. The McLachlin Court has turned to procedural justice as a wellspring for solving difficult disputes in a variety of contexts. In this brief paper, I examine three such contexts: (1) national security, (2) aboriginal rights, and (3) social and economic rights. In each

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<sup>8</sup> *Ibid.* at 228-229 [emphasis added].

context, the Court has turned to creatively designed procedures to address difficult and potentially divisive substantive problems. I have chosen these three settings among many possibilities, in part, because the Chief Justice herself was instrumental in developing the Court’s approach to procedural justice in each of these contexts. The trend is sufficiently prevalent in many disparate settings, however, that I would suggest “prudential proceduralism” has become a defining mark of the Supreme Court during Chief Justice McLachlin’s tenure.

### **Part One: The Idea of Procedural Justice**

Prudential proceduralism carries on a tradition of the “passive virtues” of judicial reasoning highlighted by Alexander Bickel’s ground-breaking work on American constitutional interpretation, *The Least Dangerous Branch*.<sup>9</sup> Bickel argued that Courts should exercise prudence in deciding as little as needed to resolve a particular dispute, and to serve as a catalyst for the voluntary working-out of problems where possible.

The Court has interpreted its public law mandate over the past decade with this prudential concern top of mind. It is manifest, for example, in the many cases in which the Court has affirmed it will not second-guess the wisdom of government action.<sup>10</sup> I suggest a related dynamic is at work when the Supreme Court declines an opportunity to impose an outcome on the parties, and instead tailors a contextual process designed to lead the parties to a just outcome.

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<sup>9</sup> (New York: Bobbs-Merrill, 1962).

<sup>10</sup> See, for example, the Court’s decision in *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66 at para. 84.

The seeds of what I have termed prudential proceduralism were sown long before Chief Justice McLachlin assumed leadership of the Supreme Court a decade ago. For example, the notion of “dialogue” emerged as a central norm of Canadian constitutionalism in the 1999 decision in *Vriend v. Alberta* when the Court adopted “dialogue” as a metaphor for judicial review under the Constitution.<sup>11</sup> Dialogue represented a procedural solution to the substantive problem of which branch of government is paramount where constitutional rights are engaged. Dialogue is focused on how courts and legislatures talk to each other, and more importantly, listen to each other.

Some of the most significant decisions of the Dickson Court (like *Morgantaler*)<sup>12</sup> and of the Lamer Court (like the *Secession Reference*)<sup>13</sup> reflected a similar propensity the Court to opt for proceduralism in the face of very difficult, highly divisive issues. In such cases, the Supreme Court has opted to serve as referees rather than express an opinion on who should win the match. The McLachlin Court’s inclination to procedural solutions, I argue, is different. Both the degree of inventiveness of the procedures selected and the purposes of those procedures reflect the *prudential proceduralism* phenomenon. In the

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<sup>11</sup> [1998] 1 S.C.R. 493. The Court adopted the “dialogue” metaphor from the article by P. Hogg & A. Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997) 35 Osgoode Hall L. J. 75; see also P. Hogg & A. Thornton, “The Charter Dialogue Between Courts and Legislatures” (1999) 20 Policy Options 19

<sup>12</sup> [1988] 1 S.C.R. 30. In *Morgantaler*, the majority of the Supreme Court held that the process by which hospital committees determined when an abortion would be available violated the psychological security of the person under section 7 of the *Charter*. In other words, the majority declined to find criminalizing abortion unconstitutional, and instead found the process to which the abortion provision in the *Criminal Code* had given rise was unconstitutional. Wilson J., concurring, would have decided the case based on a right of women to control their own bodies as a feature of the “liberty” aspect of s.7.

<sup>13</sup> [1998] 2 S.C.R. 217. In the *Secession Reference*, the Court held that a “clear majority” vote in favour of secession based on a “clear question” would give rise to a “duty to negotiate” on the federal and Quebec governments. The Court found that the Constitution required a process rather than an outcome in relation to secession.

cases discussed below, the Court not only has turned to process to solve problems, but has explored the content of process in new ways – the Court has focused not just on the requirement of a fair hearing, or a consultation, or negotiations, but on the features which make such procedures meaningful.

By the term prudential proceduralism, I do not suggest that the Court engages in an explicit, strategic process to deal with substantive problems through procedural means (though I also do not preclude the possibility that this may occur from time to time in particular cases). Further, it is also important not to discount the impact of the arguments advocates have put before the Court, and the role of lower court decisions in shaping the Supreme Court's approach. That said, I suggest the Court has developed a collective orientation that is particularly amenable to procedural solutions. Moreover, as the Court develops creative procedural solutions to problems in one legal area, there is a greater likelihood that similar solutions will be drawn upon in other areas. For example, without the work in developing procedural fairness in administrative law, it might look quite different as a feature of the *Charter*. The adoption of a contextual approach to process under the *Charter*, in turn, represented the building blocks for the Court's development of the duty to consult and accommodate in the context of aboriginal rights. There are elements of the duty to consult and accommodate, in turn, which resonate in the context of the right to collective bargaining, and so forth.

At root, prudential proceduralism is premised on the unshakeable belief that sensible and reasonable people of good faith will always work out their differences if given a fair and

transparent process to do so – it may well be that there is no value more quintessentially Canadian. Similarly, prudential proceduralism is predicated on the belief that administrative decision-makers will come to a reasonable decision if only the affected parties are granted a fair shot at making their point to the decision-maker. Finally, prudential proceduralism builds on the idea that innovative procedure may move forward otherwise intractable disputes. This approach is particularly important where solutions require compromise, and not the all-or-nothing substantive remedies available to courts.

If you do not share these beliefs, of course, prudential proceduralism might well worry you. To some, what I call prudential proceduralism is simply an indication that the Court has avoided the hard questions at key junctures. Regardless, the Court's procedural turn is worthy of scrutiny. It is, I would suggest, the harbinger of the Court's second generation engagement with the *Charter*. While the first generation jurists saw constitutional rights primarily as conferring rights on vulnerable parties, the second generation jurists are more likely to frame those guarantees as a means. In other words, the second generation approach will interfere with government choices less, but will more often compel government to consider, consult, talk, disclose, accommodate, reconsider, and justify the action taken in light of the process followed. This may be a sign of a weakening of the Court's commitment to the constitution as a mechanism to constrain government action, or it just might signal a maturing of that commitment, and an evolution of the Court's role as a catalyst of compromise.

In my view, prudential proceduralism has emerged as a central dynamic in Canadian law for at least five reasons:

- (1) first, process builds on the distinctly Canadian norms of dialogue and reasoned engagement by disputing parties, and enjoys significant acceptance by the public;
- (2) second, process is difficult to challenge or oppose, as the meaningful exchange of views and perspectives has inherent value and appeal;
- (3) third, process defers difficult decisions, and leaves open further opportunity for compromise, settlement, building of trust and improvement of relations. In this way, process results in the parties taking "ownership" over the substantive resolutions which result from the process;
- (4) fourth, a better process minimizes the risk of error in the substantive determination at issue; and
- (5) fifth and finally, imposing a process is not viewed as "judicial activism" in the same way as imposing a substantive result. Process implies respect for the parties and their positions.

Below, I briefly discuss the implications of prudential proceduralism in three contexts: first, I examine the national security context, where procedural guarantees have allowed

the Court to reconcile the needs of government to take extraordinary measures to confront national threats and the rights of those individuals affected by these measures; second, I canvass the setting of aboriginal rights and the Court's development of the duty to consult and accommodate as giving effect to the honour of the Crown in dealing with contested land; and third, I consider the sphere of social rights, and the Court's bold reversal on recognizing a constitutional right to bargain collectively.

In each of these settings, I suggest prudential proceduralism saved the Court from embarking on a divisive course which would have challenged the credibility of the Court, and which made compromise solutions more likely. In each case, the Court served as a catalyst for justice without determining the most just outcome in the circumstances.

## **Part Two: Prudential Proceduralism in Action**

Procedural justice is a contextual dynamic. There is no *Oakes* framework or test to guide the Court in exercising prudential decision-making of the kind I address in this paper. That is not to say there are not common principles and themes which emerge and give shape to the Court's procedural turn. For example, the principle that the Court should decide as little as possible to resolve the issue before it animates each of the prudential judgments discussed below.

I now turn to analyze three brief case studies across disparate areas of law (national security, aboriginal rights, and social and economic rights) in an attempt to draw together these principles and themes.

**(1) National Security**

One of the most difficult settings in which the Court has had to grapple during the McLachlin Court has been national security. At the time of the September 2001 terrorist attacks on the United States, the Supreme Court had under reserve the case of *Suresh v. Canada (Minister of Citizenship and Immigration)*.<sup>14</sup> *Suresh* involved the case of an alleged LTTE member, who as a “terrorist” was subject under the then *Immigration Act* to deportation to Sri Lanka, where he claimed he would be subject to torture.

When *Suresh* was released in January of 2002, it represented the first opportunity for the Court to chart a path through the demands of collective security through state action and the competing demands of individual liberty.

In *Suresh*, the Court first considered the standard of review with respect to Ministerial discretion under the *Immigration Act*, and the constitutionality of the Minister’s power to deport foreign nationals suspected of terrorist activity under s.7 of the *Charter*. The Court found that the exercise of ministerial discretion attracted the highest level of deference from the Court, and further that the deportation of an individual found to meet the

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<sup>14</sup> 2002 SCC 1 [*Suresh*].

definition of “terrorist” under the *Act* was not unconstitutional, even where a *prima facie* case had been met that torture would occur if the person were returned to his or her country of origin.

Having decided in favour of the Crown on two key substantive elements of the case, the Court concluded by deciding in favour of *Suresh* in his challenge of the procedure by which the deportation occurred.

The Court grafted its framework for analyzing procedural fairness at common law (developed in *Baker v. Canada*<sup>15</sup>) and applied this to the context of determining the requirements of procedural fairness under s.7 of the *Charter*. Applying this framework to the circumstances of *Suresh*, the Court held that a person facing deportation to torture under the *Immigration Act* had to be informed of the case to be met. This requirement included further requirements of disclosure, the right to present evidence and test the evidence of the Crown, a right to be heard, and the provision of reasons.

The Court noted that while the Minister had accepted written submissions from *Suresh* in this case, in the absence of access to the materials she was receiving from her staff and on which she based much of her decision, *Suresh* and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. In other words, while *Suresh* had received the right to make submissions, he had not been granted a *meaningful* opportunity to provide input into the decision affecting him.

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<sup>15</sup> [1999] 2 S.C.R. 819.

The Court concluded that the requirements of fairness had not been met in Suresh's case, and that the violation of s.7 of the *Charter* could not be saved under s.1 as a reasonable limit. *Suresh* represents, I argue, an example of the Court engaging in prudential proceduralism. The Court could have invalidated the deportation order on procedural grounds and declined to deal with the substantive elements of the challenge. Instead, the Court intentionally left the procedural issue for last. First, the Court upheld the constitutionality of the deportation power, and indicated it was not prepared to second guess the merits of the Minister's exercise of discretion to apply that power to the facts and circumstances of *Suresh*. By invalidating the deportation on the grounds that the process was unfair, however, the Court was able to locate an important and elusive middle ground. The focus on process allowed the Court at once to advance values of individual civil liberties and collective security.

*Suresh* was issued with a companion case, *Ahani v. Canada (Minister of Citizenship and Immigration)*.<sup>16</sup> On the facts, the Court concluded a prima facie case had not been made out of the possibility of torture if Ahani were deported to Iran, and so the s. 7 Charter issues did not arise as they had in *Suresh*. Even so, while the procedural requirements of s. 7 did not apply, the Court nonetheless applied the *Suresh* framework. The Court concluded that the process followed in *Ahani* was consistent with s. 7's principles of fundamental justice, as he was given a meaningful opportunity to make submissions. This

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<sup>16</sup> 2002 SCC 2.

result has a prudential dimension to it as well – it demonstrates that providing a minimum degree of fairness is not inconsistent with safeguarding national security.

The focus on proceduralism as a mechanism to balance individual liberty and national security was apparent in the Court’s two hearings in the *Charkaoui* matter. First, in *Charkaoui v. Canada (Citizenship and Immigration)*,<sup>17</sup> the Court considered the constitutionality of the security certificate system by which foreign nationals could be held as suspected terrorists for an indefinite period of time. As in *Suresh*, the Court in *Charkaoui* found that Parliament’s choice to provide for the deportation of foreign nationals on national security grounds did not violate the *Charter*, but that the process used by the Government failed to meet the constitutional standards. Again, the Court focused on the content of fairness, and in particular the right to know the case against you in order to participate in a fair proceeding before an independent and impartial decision-maker. While the *Immigration Refugee Protection Act* procedures reflected the exigencies of the national security context, McLachlin C.J., writing for the Court, held that such concerns could not be used to excuse procedures that do not conform to fundamental justice. She concluded that without knowledge of the information put against him or her, the person named in a certificate may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence. If s. 7 was to be satisfied, in other words, either the person would have to be given the necessary information, or a substantial substitute for that information must be found. McLachlin C.J. further held that the scheme could not be saved under s. 1 as

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<sup>17</sup> 2007 SCC 9.

alternative options, which would impair Charkaoui’s procedural rights in a more minimal fashion, were available to government.

In the second case involving the same claimant, *Charkaoui v. Canada (Citizenship and Immigration)*,<sup>18</sup> the Court considered the duty on the government to retain and disclose documents underlying its decision to issue or maintain a security certificate. With its earlier decision in *Suresh* in mind, the Court was concerned in particular with the procedural shortcomings of how the scheme actually worked in the case of Charkaoui. Because of limitations in the disclosure provided, the subject of a security certificate was denied the right to a fair hearing – without disclosure or inquisitorial judicial powers, judges could be making decisions based on incomplete information and only the government would know.<sup>19</sup> The focus of the Court was not merely on identifying the requirement of fairness but also its content. As the Court observed, “It is not enough to say that there is a duty to disclose. We must determine exactly how that duty is to be discharged in the context of the procedures relating to the issuance of a security certificate and the review of its reasonableness, and to the detention review.”<sup>20</sup> The Court once again used the procedural dimension of s. 7 of the *Charter* to find the government had breached its obligations. Importantly, however, the Court found this did not justify a stay of proceedings, but rather justified a better and fairer process.

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<sup>18</sup> 2008 SCC 38 [*Charkaoui 2*].

<sup>19</sup> For a precursor McLachlin Court decision probing a similar issue in a similar way, see *Ruby v. Canada (Solicitor General)*, 2002 SCC 75.

<sup>20</sup> *Charkaoui 2*, *supra* note 18 at para. 59.

Finally, in *Canada v. Khadr*,<sup>21</sup> the Court once again addressed issues of individual rights and collective interests through a procedural lens, concluding that a Canadian held at the Guantanamo Bay facility was entitled to disclosure of relevant documents in the Canadian Government's possession, subject to national security and other interests outlined in the *Canada Evidence Act*.

Khadr represented a different way in which the Court has engaged in prudential proceduralism. The Court held that Canada's participation in the "Guantanamo Bay process" was a violation of Canada's international human rights obligations.<sup>22</sup> That said, having chosen to participate in this process, the Government of Canada triggered its own procedural duties toward Khadr, including the obligation of disclosure. As the Court put it, "Canada has an obligation under s. 7 to provide disclosure to Mr. Khadr to mitigate the effect of Canada's participation by passing on the product of the interviews to U.S. authorities."

While the Court could do little to ensure the substantive outcome sought (i.e. the release of Khadr to Canada), the findings of the Court reflected the ways in which process has become the canvass on which rights in the national security context have been brought to life by the McLachlin Court. While the national security cases considered above reflect a traditional venue for procedural justice (e.g. the right to fairness) the aboriginal rights cases discussed below represent new terrain for the extension of prudential proceduralism.

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<sup>21</sup> 2008 SCC 28.

<sup>22</sup> *Ibid.* at para. 27.

**(2) Aboriginal Rights: Duty to Consult & Accommodate**

Just as national security represented a divisive and intractable dispute in which the Supreme Court has used prudential proceduralism as a catalyst for compromise, the field of aboriginal rights similarly does not lend itself to all-or-nothing solutions.

In *Sparrow*<sup>23</sup>, the Court had interpreted s. 35 of the *Constitution Act* as a remedial measure intended to serve as a constitutional basis on which to afford aboriginal peoples a degree of control over government conduct affecting their rights. In *Van der Peet*, the Court held that s. 35 provides the constitutional framework for reconciling the sovereignty of the Crown with the reality that aboriginals lived on the land in distinctive societies, with their own practices, traditions, and cultures. Since then, as Arthur Pape has observed, “the promotion of reconciliation has been understood as the primary purpose of section 35, in all the Court’s jurisprudence.”<sup>24</sup>

Cases such as *Sparrow* and *Van der Peet* developed the fiduciary relationship between the Crown and Aboriginal peoples, and provided remedies against the application of laws which infringe that obligation without justification. In 2004, the Supreme Court introduced a new and distinctive framework for understanding the relationship between the Crown and aboriginal peoples, one based not on negating laws or tree licenses, but on a process of consultation and accommodation. The importance of consultation with aboriginal

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<sup>23</sup> [1990] 1 S.C.R. 1075.

<sup>24</sup> Arthur Pape, “Consultation, Accommodation and Beyond” (Lecture presented to the Aboriginal Law Conference, Pacific Business & Law Institute, 6 March 2008) [unpublished].

communities is not new,<sup>25</sup> but in *Haida Nation v. British Columbia (Minister of Forests)*,<sup>26</sup> and *Taku River Tlingit First Nation v. British Columbia*,<sup>27</sup> Chief Justice McLachlin, writing again for the Court, developed a creative mix of procedural and substantive constraint on the Crown in dealing with contested resources. The duty to consult and accommodate is rooted in the "honour of the Crown"(developed in *Delgamuukw*, among other cases) which requires the Crown to act "honourably" in its dealings with aboriginal people.

McLachlin C.J. sums up the relationship between the honour of the Crown and the duty to consult and accommodate in the following terms:

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.<sup>28</sup>

The *Haida* challenged the replacement and transfer of tree farm licenses on land subject to their aboriginal title claim. McLachlin C.J. held that when the Crown has knowledge of potentially existing Aboriginal rights or title, and considers activity that risks

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<sup>25</sup> See *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1105-6. See also S. Lawrence & P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252.

<sup>26</sup> 2004 SCC 73 [*Haida*].

<sup>27</sup> 2004 SCC 74 [*Taku River*].

<sup>28</sup> *Haida*, supra note 26 at para. 25.

infringing upon them, the Crown’s legal duty to consult and accommodate is engaged. This duty is proportionate to the *prima facie* strength of the Aboriginal case and the seriousness of the potential harm to that case. In the Haida context, the trial judge had determined that the Haida claim to the forests in question, while unproven, was strong, and that there was a real risk that the forests would be gone by the time the Haida claim was eventually heard and adjudicated. This variability fits with the model of procedural fairness developed by the Court in administrative and Constitutional law (and discussed above in the context of national security case-law. McLachlin C.J. also acknowledged this wellspring of the duty to consult and accommodate, observing that in order to determine the content of the duty, regard may be had to the procedural safeguards developed by administrative law.<sup>29</sup>

In *Taku River*, an aboriginal community challenged a proposed mining road passing through contested territory. McLachlin C.J., writing yet again for the Court, held that the duty to consult and accommodate guarantees attentiveness to Aboriginal concerns and provides for their participation. Nevertheless, once again, the Court reiterated that a duty to consult and accommodate does not compel a particular substantive outcome. McLachlin C.J. elaborated that so long as consultation is “meaningful,” there is no duty to reach an agreement. This process is necessarily one of compromise between Aboriginal concerns and competing societal interests. McLachlin C.J., highlighting a recurring theme of procedural justice, observed that the duty will vary with the circumstances, but always requires meaningful, good faith consultation and willingness

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<sup>29</sup> *Ibid.* at para. 41.

on the part of the Crown to make changes based on information that emerges during the process.

On the facts of *Taku River*, McLachlin C.J. held that the Crown’s duty had been met. She found key facts supporting this finding, including that the Taku River Tlingit received financial support to help them participate, their concerns were identified in a government report made under the Act, and other mitigation strategies were adopted.

As in *Suresh* and *Ahani*, the use of companion cases in the *Haida* and *Taku River* decisions, involving an insufficient and a sufficient process, emphasizes that the Court’s approach is balanced and principled, and reinforces the prudential rationale underlying the Court’s procedural remedy. Unlike the national security cases, however, the duty to consult and accommodate goes beyond meaningful participation to require some connection between process and outcome. In *Taku River*, McLachlin C.J. captures this point by concluding, “Responsiveness is a key requirement of both consultation and accommodation.”<sup>30</sup> The key but often subtle distinction between a right to a process and a right to an outcome lay also at the centre of the debate over social and economic rights under the Charter, and in particular the right to collective bargaining.

### **(3) Social and Economic Rights: Right to Collective Bargaining**

In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,<sup>31</sup> the Court affirmed that s. 2(d) of the *Charter* encompasses a procedural right

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<sup>30</sup> *Taku River*, supra note 27 at para. 25.

<sup>31</sup> 2007 SCC 27.

to collective bargaining. The B.C. *Health and Social Services Delivery Improvement Act* was held to infringe the procedural right to collectively bargain, and not to be saved by s. 1. The constitutional right to collective bargaining, according to the Court, protects the ability of workers to engage in associational activities, and the capacity of workers to act in common to reach shared goals related to workplace issues and terms of employment.

The Court held that determining whether legislation or government activity infringed the right to collective bargaining involved an inquiry into whether the legislation or activity "substantially interferes" with the collective bargaining process. Specifically, the Court analyzed: (1) the importance of the matter affected to the process of collective bargaining; and (2) the manner in which the measure impacts on "the collective right to good faith negotiation and consultation."<sup>32</sup> If the matters affected do not substantially impact on the process of collective bargaining, the legislation or activity would not violate s. 2(d) and the employer may be under no duty to discuss and consult. If, on the other hand, the changes substantially touch on collective bargaining, employers would still not violate s. 2(d) if they preserved a process of consultation and good faith negotiation. Only where the matter is both important to the process of collective bargaining *and* has been imposed in violation of the duty of good faith negotiation will s. 2(d) be breached.

Having established a right to a process, the Court once again also confirmed that such a procedural entitlement entails no right to an outcome. In discussing the nature of the right at issue under s.2(d), McLachlin C.J. and Lebel J., writing for the majority, observe that,

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<sup>32</sup> *Ibid.*, at para. 93.

“In our view, it is entirely possible to protect the “procedure” known as collective bargaining without mandating constitutional protection for the “fruits of that bargaining process.”<sup>33</sup> Subsequently, they emphasize this point in the following terms,

The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method.<sup>34</sup>

As in the national security and aboriginal rights settings, the Court turned to a procedural solution in the context of labour relations in order to advance rights in a potentially divisive setting, where the Court could be vulnerable to the charge of activism. This context also demonstrates how the Court does not simply invoke procedure, but also explores the purposes of process. The majority views the right to collective bargaining and bargaining in good faith. In elaborating on the duty to bargain in good faith, McLachlin C.J. and Lebel J., explain that the parties have a duty to engage in “meaningful dialogue” and that they must be “willing to exchange and explain their positions,” and “must make a reasonable effort to arrive at an acceptable contract.”<sup>35</sup> Subsequently, they reiterate, “the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion.”<sup>36</sup>

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<sup>33</sup> *Ibid.* at para. 29.

<sup>34</sup> *Ibid.* at para. 91.

<sup>35</sup> *Ibid.* at para. 101.

<sup>36</sup> *Ibid.* at para. 114.

In this way, the McLachlin Court once again has affirmed the core principles of prudential proceduralism. As in the national security and aboriginal rights settings, the Court deployed procedural justice in the context of social and economic rights to serve as a catalyst for a just outcome, without imposing what the content of a just solution need be on the parties.

## **Conclusion**

In this brief paper, I have explored that rationale for and some of the implications of the Court's procedural turn. The Supreme Court under Chief Justice McLachlin's leadership has built on a longstanding inclination toward prudential proceduralism and made it a defining feature of Canadian law. In a variety of difficult and divisive settings, the McLachlin Court has embraced the promise of procedural justice.

Where will this second-generation approach to procedural rights lead the Court? Ultimately, in the future, I believe that the distinction between process and substance itself may be called into question. Just as the Court emphasized in each of the three settings analyzed above that participation alone was insufficient to satisfy the right at issue, and rather, that *meaningful* participation was required, the next logical step for the Court may well be to articulate how meaningful participation leads to procedural justice. In other words, are just outcomes a corollary of meaningful participation? This is a question which can only be answered in context, and after one considers the process *and* the outcome to which it led. As the substantive results of the McLachlin Court's

procedural turn become clear, the Court’s vision of procedural justice (or lack thereof) likely will come into view. To reach a conclusion regarding the promise of procedural justice, it may be helpful to keep in mind the words Lon Fuller wrote 50 years before Chief Justice McLachlin assumed leadership of the Supreme Court,

Life is itself a process, and by making process the center of our attention we are getting closer to the most enduring part of reality. For that reason, I believe that the recommended emphasis on procedures for solving conflicts will not tend simply to suppress those conflicts but will promote their just resolution.<sup>37</sup>

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<sup>37</sup> Lon L. Fuller, “What the Law Schools can Contribute to the Making of Lawyers” (1948) 1 J. Legal Educ. 189 at 204.