

***Little Salmon/Carmacks First Nation v. The Government of Yukon (Minister of Energy, Mines and Resources), 2007 YKSC 28***

Decision date: May 23, 2007

**PLEASE NOTE: The Yukon Court of Appeal will hear an appeal of this case in early June 2008.<sup>1</sup>**

This case addresses issues related to consultation and affects the following chapters of EAGLE's "Nation to Nation: The Law of Consultation and Accommodation" materials: Chapter 3 (Section 35(1) of the *Constitution Act, 1982*), Chapter 4 (The Crown's Obligations to Consult and Accommodate) and Chapter 10 (Other Possible Sources of Duty to Consult).

In this case, the Little Salmon/Carmacks First Nation (the "First Nation") applied for a judicial review of a decision of the Director of the Agriculture Branch of the Department of Energy, Mines and Resources (the "Director") for failing to comply with the duty to consult and, perhaps, accommodate. The Director decided to grant an agricultural land application (the "Application") in the traditional territory of the First Nation and the trapline of one of its members (the "Decision").

The First Nation, Canada and Yukon are signatories to the Little Salmon/Carmacks First Nation Final Agreement (the "Final Agreement"). The relevant land is adjacent to the trapline cabin of the trapline holder and near some Settlement Lands under the Final Agreement. As the judge explained, "[t]his case deals with the question of whether the duty to consult and accommodate applies to a modern Final Agreement."<sup>2</sup>

**Consultation Activities**

The judge discussed the Final Agreement at length, highlighting its "Certainty" and "Interpretation of Settlement Agreements and Application of Law" provisions. He also noted that Yukon government policy asserted that, because of the Final Agreement, no legal obligation to consult with the First Nation existed and that any consultation the government conducted was only "good practice." According to the policy, such consultation occurred through the Land Application Review Committee ("LARC"), the Land Use Advisory Committee and other similar processes.

Two and a half years after the beginning of the review process for the Application (and a month after posting a public notice of the Application), the Agriculture Branch notified the First Nation directly that it intended to submit the Application to LARC and would provide an information package to the First Nation. It invited comments within 30 days. More than a month later, the FN received the information package. The trapline holder did not receive the package and learned about the Application from the First Nation.

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<sup>1</sup> The Council of Yukon First Nations intends to intervene in support of this decision and the government of Canada intends to intervene in support of the appeal.

<sup>2</sup> Para. 4.

The First Nation opposed the Application because of potential cumulative and more immediate impacts of the proposed agricultural development on the trapline, on some adjacent Settlement Lands and on heritage and archaeological sites. The First Nation could not attend a LARC meeting when LARC considered the Application but expected that LARC knew that it could not attend and would defer discussion of the Application. LARC did not defer the discussion. At the meeting, government officials acknowledged the potential impacts that the First Nation highlighted in its opposition to the Application.

The Director approved the Application about a month later based on the recommendation of LARC. The First Nation and the trapline holder learned of the approval and wrote to the Director opposing the Application. The First Nation did not receive a copy of the approval letter for another eight months. The following month, the First Nation filed a detailed appeal of the Decision. The Agriculture Branch did not allow the appeal, noting that, as LARC members, the First Nation was not entitled to appeal the Decision (the LARC terms of reference only gave the applicant and any interveners the right to appeal).

### **The Court Decision**

The First Nation, relying on the *Haida*, *Taku River* and *Mikisew Cree* decisions,<sup>3</sup> argued that the common law duty to consult and accommodate applied and was an implied duty of the Final Agreement. The government and the recipient of the agricultural land application argued that the *Mikisew Cree* decision is distinguishable and that the duty “does not apply where the duty to consult has been defined and limited to specific circumstances in this modern Final Agreement.”<sup>4</sup> The Crown argued that:

[T]he principle of the honour of the Crown applies to the terms of the Final Agreement but should not be invoked to undermine the certainty the Final Agreement intended to achieve, and particularly should not apply to its discretion to grant land.<sup>5</sup>

The court examined the meaning of “the honour of the Crown.” It decided: “the duty to consult and accommodate arises from the concept of honour of the Crown and is an implied term of every treaty”; and, even where a treaty allows government to interfere with the rights in that treaty, “consultation is required in advance of interference with existing treaty rights.”<sup>6</sup> The question became whether or not provisions in the Final Agreement prevented the application of the duty of consultation and accommodation to the implied government right in the Final Agreement to take land.

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<sup>3</sup> Respectively, *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550 (see our discussion of these two cases in “Nation to Nation: The Law of Consultation and Accommodation” and access the decisions at <http://scc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html> and <http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html>, respectively) and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 (access this decision at <http://scc.lexum.umontreal.ca/en/2005/2005scc69/2005scc69.html> and see our synopsis of this decision at <http://www.eaglelaw.org/education/pubpage/conandacom/mikisew%20%case%20update%2006%2020%2006.pdf>).

<sup>4</sup> Para. 5.

<sup>5</sup> Para. 5.

<sup>6</sup> Para. 66.

The judge found that the “Certainty” provision “means that aboriginal title has been released in the traditional territory of the First Nation in exchange for specified rights in the Final Agreement”<sup>7</sup> and the First Nation could not reverse or renegotiate those Aboriginal rights or title. However, he made clear that the releases did not apply to “existing or future constitutional rights,” which another provision protects,<sup>8</sup> and which, he explained “include interpretative principles based on the honour of the Crown and the interpretation of section 35 of the *Constitution Act, 1982*.”<sup>9</sup> The judge decided:

The duty to consult and accommodate is a constitutional treaty obligation based on the honour of the Crown and section 35 of the *Constitution Act, 1982*.... It is not based on an aboriginal right which the First Nation has ceded.... It is a principle of treaty interpretation to ensure that the treaty rights exchanged for aboriginal title are respected. Its purpose is to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address.<sup>10</sup>

The Crown argued that the Final Agreement specifically set out the only existing consultation duties and that they did not apply to the government’s authority to transfer land because the Final Agreement does not expressly mention that authority. The judge found that “it is appropriate to apply the duty to consult and accommodate” to such implied government rights when the exercise of those rights has an impact on treaty rights.<sup>11</sup> The implied nature of such rights “does not mean that the honour of the Crown disappears.”<sup>12</sup> In sum, the duty may apply to such land transfers “to ensure that the treaty rights are respected”<sup>13</sup> and in this case it did apply.

When considering whether the Decision had triggered the duty, the judge noted the significance of the potential permanent adverse impacts on the right to subsistence harvesting,<sup>14</sup> the potential “non-compensable”<sup>15</sup> adverse impacts on renewable resources management and the potential adverse impacts on some of the nearby Settlement Lands. The judge emphasized that, as with historical treaties, “the Crown always has notice of the contents of the Final Agreement” and here:

[S]ignificant treaty rights of the First Nation... may be adversely affected... [and they] are not ‘remote or insubstantial’.... they go to the heart of this Final Agreement as the Yukon Government pursues its agricultural policy in the First Nation’s Traditional Territory.... The

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<sup>7</sup> Para. 81.

<sup>8</sup> He noted that the Final Agreement also protected the right to argue in court regarding the existence of fiduciary or other aspects of the First Nation-Crown relationship.

<sup>9</sup> Para. 81. He emphasized that the parties purposely incorporated this protection.

<sup>10</sup> Para. 82.

<sup>11</sup> Para. 85.

<sup>12</sup> Para. 86.

<sup>13</sup> Para. 86. He also pointed out that nothing in the Final Agreement expressly stated that no consultation and accommodation duty existed other than what its provisions contained.

<sup>14</sup> At para. 96, he explained that, although the trapline holder could apply for compensation (acknowledging an economic interest), the Final Agreement “does not address the cultural significance or the adverse [effect] on hunting rights of the First Nation.”

<sup>15</sup> Para. 101.

creation of agricultural land by this transfer clearly engages the Yukon Government's treaty obligations. These impacts were identified and acknowledged in the minutes of the LARC meeting.<sup>16</sup>

As for the scope of the duty owed, the judge found that the potentially permanent nature of the impacts and the clear adverse impacts on subsistence harvesting and resource planning rights in the Final Agreement required deep consultation with the First Nation and the trapline holder.<sup>17</sup> He noted: “[the Application] impacts directly on an area of Traditional Territory where the parties are pursuing a ‘cooperative approach’ to consider designating the area for habitat protection.”<sup>18</sup>

After considering five important factors, the judge decided that the Crown had not fulfilled its duty. First, although the Crown provided information to the First Nation, it did so more than two years after it began considering the Application. Further, an early reconfiguration of the Application was as much for agriculture management reasons as it was to accommodate the First Nation.

Second, drawing a distinction between listening “as a courtesy” and discussing where and when to make accommodation, the judge found it “difficult to conclude that a duty has been met when the legal requirement of the duty is denied.”<sup>19</sup> He also found that the LARC process was “more akin to an information gathering process combined with a recommendation” and “would not meet the test that was met in the *Taku River Tlingit* case where the process was mandated by statute,” explaining: “[t]here is a vast difference between a legal duty to consult in order to address treaty obligations and a policy process that gives equal weight to all views and recommendations from the public.”<sup>20</sup>

Third, the Decision did not refer to the First Nation or its treaty rights (and was not communicated to the First Nation for more than six months). The LARC minutes did mention loss and negative impacts, but “not in the context of any legal obligation to engage the First Nation.”<sup>21</sup>

Fourth, the denial of the First Nation's appeal of the Decision was based on the LARC terms of reference appeal limits *regarding a LARC recommendation*,<sup>22</sup> did not refer to the Decision and showed a questionable “privilege of a temporary membership that provides no appeal, with the result that an intervenor has greater rights than the First Nation.” In

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<sup>16</sup> Para. 103.

<sup>17</sup> Paras. 109 and 110.

<sup>18</sup> Para. 109.

<sup>19</sup> Para. 116.

<sup>20</sup> Para. 117. He added that the LARC process “was never treated as a process for achieving the common law duty of consulting and accommodating First Nation rights under the Final Agreement.”

<sup>21</sup> Para. 118. The judge made clear that:

The appropriate consultation must include an exchange of views and a negotiation about accommodation between the Director (or a person with the decision-making authority) and the First Nation (including the trapper) in the context of a duty to consult and accommodate the First Nation's rights in the Final Agreement.

<sup>22</sup> That is, the limit on appeal did not apply to the Decision, but only to the LARC recommendation.

sum: “The practice of LARC “membership” for a First Nation was a pre-treaty concept that is ill-suited for executing the common law duty to consult and accommodate.”<sup>23</sup>

Fifth, the judge decided: “the environmental screening report should have been completed much earlier and provided to the First Nation as part of the duty to consult” particularly because (he assumed) the report was “intended to be a meaningful document for the purpose of informing decision-making, rather than having the appearance of being an after-thought to justify a past decision.”<sup>24</sup>

The duty was not fulfilled because of the lack of direct consultation with the First Nation and the trapline holder to address the First Nation’s treaty rights and the impacts the Decision would have on the subsistence harvesting right, the Settlement Lands and the resource management plan that arose from the Final Agreement. Referring to the requirements of the *Haida* decision, the judge found that the government consultation process did not meet the standard of reasonableness, summarizing:

[The government] applied a pre-land claim process that was not designed to address rights under the Final Agreement in a meaningful way. It executed the process in an unreasonable manner in refusing to engage the First Nation and its treaty rights and conducting the environmental assessment after... [the Decision] was made.<sup>25</sup>

### **Remedy**

The judge noted: “the Final Agreement is a modern comprehensive land claim agreement that must be respected and honoured by the Crown if the contemplated reconciliation is to be achieved.”<sup>26</sup> The judge:

1. Emphasized that the Crown had to accept its duty to consult the First Nation and the trapline holder;
2. Suggested that the issues set out in the First Nation’s appeal letter “would be a good place to start”; and
3. Explained that a written decision regarding the Application “must address the rights of the First Nation under the Final Agreement, how those rights are impacted and where it is possible to accommodate them.”<sup>27</sup>

The judge quashed and set aside the Decision. He decided against setting aside the environmental screening, noting that the consultation process could address any further environmental issues that arose.

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<sup>23</sup> Para. 119.

<sup>24</sup> Para. 121.

<sup>25</sup> Para. 125.

<sup>26</sup> Para. 127.

<sup>27</sup> Para. 128.