COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)***, 2008 YKCA 13

Date: 20080815
Docket: CA07-YU584

Between:

Little Salmon/Carmacks First Nation and Johnny Sam and Eddie Skookum on behalf of themselves and all other members of the Little Salmon/Carmacks First Nation

Respondents
(Petitioners)

And

David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources, The Minister of Energy, Mines and Resources, The Yukon Government and Larry Paulsen

Appellants/Respondents
(Respondents)

And

Attorney General of Canada and Council of Yukon First Nations and Kwanlin Dün First Nation

Intervenors

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

B. Armstrong, Q.C., P. Gawn, M. Leask — Counsel for the Appellants, The Minister of Energy, Mines and Resources and The Yukon Government

A. Pape — Counsel for the Respondents, Little Salmon/Carmacks First Nation and Johnny Sam and Eddie Skookum

	on behalf of themselves and all other members of the Little Salmon/Carmacks First Nation
C. Brobby	Counsel for the Respondent, Larry Paulsen
S. Duncan	Counsel for the Intervenor, Attorney General of Canada
J. Coady and D. Joe	Counsel for the Intervenor, Council of Yukon First Nations
J. Arvay, Q.C.	Counsel for the Intervenor, Kwanlin Dün First Nation
Place and Date of Hearing:	Whitehorse, Yukon Territory 2 and 3 June 2008
Place and Date of Judgment:	Vancouver, B.C. 15 August 2008

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

[1] The central issue in this appeal is whether a duty to consult and, where possible, accommodate First Nations' concerns and interests applies in the context of a modern, comprehensive land claims agreement.

[2] The issue had not previously been decided until the chambers judge, in reasons indexed as 2007 YKSC 28, concluded that a duty to consult and accommodate does apply to the final agreement signed by the Little Salmon/Carmacks First Nation ("Little Salmon/Carmacks"), Canada, and Yukon on 21 July 1997 (the "Final Agreement" or the "Agreement"). The chambers judge found that Yukon failed to comply with a legal duty to consult and, where possible, accommodate Little Salmon/Carmacks in respect of an application by Larry Paulsen for an agricultural grant of Crown land located in the traditional territory of the First Nation and the trapline of Johnny Sam, a member of Little Salmon/Carmacks.

BACKGROUND

[3] The conclusion of the Final Agreement in July 1997 was the fulfillment of a long, intensively negotiated process which began in 1973 when Chief Elijah Smith's delegation to Ottawa requested commencement of land claims negotiations. Those negotiations ultimately led, in 1989, to a comprehensive land claims agreement in principle with the then known Council of Yukon Indians (now the Council of Yukon First Nations (the "Council")). Following further extensive negotiations, the Council,

Canada, and Yukon signed in 1993 an umbrella final agreement (the "Umbrella Agreement").

[4] The Umbrella Agreement is a lengthy and detailed document that sets out the exchange of undefined aboriginal claims, rights, titles and interests for defined treaty rights in respect of land tenure and quantum of settlement land, access to non-settlement or Crown lands, fish and wildlife harvesting, heritage resources, financial compensation and participation in the management of public resources. The Umbrella Agreement is the foundation on which each First Nation treaty in Yukon is built. Each treaty contains all of the provisions of the Umbrella Agreement as well as specific provisions that may vary depending on the individual First Nation.

[5] Little Salmon/Carmacks finalized the Final Agreement and a Self-Government Agreement in 1996. The ratification of the agreements took place over five days in April 1997. After signing in July 1997, the Final Agreement came into effect in October of that year pursuant to federal and territorial legislation: ***Yukon First Nations Land Claims Settlement Act***, S.C. 1994, c. 34 and ***Yukon First Nations Self-Government Act***, S.C. 1994, c. 35; and ***An Act Approving Yukon Land Claim Final Agreements***, R.S.Y. 2002, c. 240 and the ***First Nations (Yukon) Self-Government Act***, R.S.Y. 2002, c. 90.

[6] On 5 November 2001, Mr. Paulsen submitted an application for an agricultural land grant of approximately 65 hectares of Yukon Crown land. Mr. Paulsen proposed to grow hay and other livestock feed, raise livestock, harvest timber, and construct fences, a house, a barn, storage buildings and corrals.

[7] The land is within the boundaries of Mr. Sam's trapping concession issued to him under the ***Wildlife Act***, R.S.Y. 2002, c. 229, which grants to Mr. Sam the exclusive right to trap commercially in the area. Mr. Sam has held the trapping concession since 1957. Prior to that time, the concession was held by his father.

[8] Under section 6.2 of the Final Agreement, excerpted below, all Little Salmon/Carmacks members have the right of access to Crown land for subsistence harvesting in their traditional territory, except where the Crown land is subject to an agreement for sale, such as would be the case if Mr. Paulsen's application were approved and the land grant made.

[9] The area of Mr. Sam's trapline is 21,435 hectares. The 65 hectares represented by Mr. Paulsen's application is approximately one-third of one per cent of the trapline area. In recent years, Mr. Sam has held a trapping licence for two seasons: 1998 to 1999, and 2000 to 2001.

[10] Applications for land grants are subject to several levels of review pursuant to the 1991 Yukon Agriculture Policy, which appears not to have been the subject of legislation or regulation. They are first required to be reviewed by the Agriculture Branch of the Yukon Department of Energy, Mines and Resources and by the Agriculture Land Application Review Committee ("ALARC"). Another level of review is conducted by the Land Application Review Committee ("LARC"). Members of LARC include Yukon government and federal and municipal government agencies as well as Yukon First Nations, including Little Salmon/Carmacks. Pursuant to the LARC terms of reference, Yukon First Nations governments participate as members

of LARC "in the review of applications and land management matters that may affect land and resource management within their respective traditional territories".

[11] Mr. Paulsen's application was reviewed at the Agriculture Branch and ALARC review level between November 2001 through February 2004. During that review, recommendations were made to reconfigure the boundaries of the land grant to address potential heritage and archaeological sites near the river and arability issues. However, for reasons that are unclear, Little Salmon/Carmacks was not notified of the initial review and hence had no opportunity to raise any concerns it might have had.

[12] Mr. Paulsen's application was recommended for advancement to the LARC review stage on 24 February 2004. The role of LARC in the land management process is described by the LARC terms of reference as facilitating inter-departmental and inter-governmental coordination by screening, reviewing, and consulting on, among other things, grants of rights and tenure to Yukon lands. Land applications are circulated to several branches of the Yukon government and the appropriate First Nation government and municipal government whose land and resource management interests might be affected by the application if approved.

[13] LARC gave notice of Mr. Paulsen's application by advertising in local newspapers on 26 March 2004, mailing of application material to all residents living within one kilometre of the parcel, and mailing, on 28 April 2004, a letter and package of information to Little Salmon/Carmacks, the Selkirk First Nation, and the Carmacks Renewable Resources Council. The letter and package invited

comments on the application within 30 days. The package also included notice of the 13 August 2004 meeting date.

[14] Mr. Sam learned of the application through Little Salmon/Carmacks and he asked it to act on his behalf.

[15] A reminder notice of the LARC review of Mr. Paulsen's application was sent by e-mail on 16 July 2004 to Little Salmon/Carmacks, Selkirk First Nation and the Carmacks Renewable Resources Council. The e-mail reiterated the invitation for comments on the application.

[16] Little Salmon/Carmacks expressed its concerns with respect to the Paulsen application by letter dated 27 July 2004:

> *Trapping*
>
> Agriculture Application #746 is within Trapline concession #143, held by a Little Salmon Carmacks First Nation elder. This trapline has a great percentage of its area burnt from forest fires. Previous burns between 1960 and 1989 began to impact this trapline, and the Minto burn of 1995 further affected a significant section of the remaining trappable area. The only area left for this trapper is the small strip of land between the Klondike Highway and the Yukon River. This strip is considered to be suitable land for farming as described in YTG's Agriculture State of the Industry 2000-2001 report. As a result of the report, there has been several agriculture land applications requesting land in the area for raising livestock and building houses. The combination of agricultural and timber harvesting impacts on this already-damaged trapline would certainly be a significant deterrent to the ability of the trapper to continue his traditional pursuits.
>
> *Site Specifics and Trapline Cabins*
>
> There are two site specifics (personal traditional use areas considered to be LSCFN Settlement Lands) in the area in question: S-4B and S-127B. Both of these locations are in close proximity to the point source timber permit application. The impact on these sites and their users

> would be the loss of animals to hunt in the area. S-4B is also the site of Concession #143's base camp and trapper's cabin. (Mr. Roger Rondeau's cabin is in S-127B and he has expressed that he has no concerns with the application.)
>
> *Cultural Sites*
>
> There are potential areas of heritage and cultural interest which may be impacted by point source timber harvesting. An historic First Nation's trail follows the ridge in the area. At present these sites have not been researched or identified; there would need to be an archaeological survey carried out in order to confirm the presence, or lack thereof, of any such sites.

[17] Susan Davis, Director of Little Salmon/Carmacks' Lands Department, normally attends LARC meetings but was unable to attend the LARC meeting of 13 August 2004, at which Mr. Paulsen's application was considered. Little Salmon/Carmacks did not ask for an adjournment of the review of the Paulsen application. Little Salmon/Carmacks was later provided with the minutes of the 13 August meeting, which reflect a discussion of the First Nation's concerns as raised in its 27 July 2004 letter:

> Little Salmon Carmacks First Nation express concern that the application is within Trapline Concession Number 143, held by an elder. Forestfire burns have impacted this trapline, and the only area left is a small strip of land between the Klondike Highway and the Yukon River, which is considered to be suitable land for farming. As a result of the report, there have been several agriculture land applications requesting land in the area for raising livestock and building houses. The combination of agriculture and timber harvesting impacts on this already damaged trapline would be a significant deterrent to the ability of the trapper to continue his traditional pursuits. There are two site specifics, personal/traditional use areas considered to be LSCFN settlement lands in the area in question, S-4B and S-127B. Both of these locations are in close proximity to the point source timber permit application. The impact on these sites and users would be the loss of animals to hunt in the area. S-4B is also the site of Concession 143's base camp and trapper cabin.

> Little Salmon Carmacks First Nation also notes that Mr. Roger Rondeau also has a cabin on the site, and he has no concerns with the application.
>
> Other LSCFN concerns relatied [*sic*] to cultural sites: There are potential areas of heritage and cultural interests which may be impacted by point source timber harvesting. An historic First Nation trail follows the ridge in the area. [A]t present these sites have not been researched or identified, and there would need to be an archaeological survey carried out in order to confirm the prescence [*sic*] or lack thereof of any such sites.
>
> Environment advised they walked the site and discovered an old trap on top of the bluff, facing the Yukon River. The owner of Trapline #143 will have the right to seek compensation. An appropriate 30-metre setback is recommended from the bluff. There was evidence of bears and moose. There will be some loss of wildlife habitat in the area, but it is not significant.

[18] At the end of the meeting, LARC recommended approval in principle of Mr. Paulsen's application.

[19] Little Salmon/Carmacks continued to express opposition. Its Lands Department met with Agricultural Branch staff on 8 September 2004 and repeated its view that its concerns with respect to agricultural land applications were not being taken seriously. At the time, the Agriculture Branch was in the process of revising the Yukon Agriculture Policy. Branch staff advised Little Salmon/Carmacks that the LARC process was used for consultation but that they understood that there was no requirement under the Final Agreement to consult with Little Salmon/Carmacks in respect of agricultural land applications and the Branch was doing so as a matter of courtesy. The Paulsen application was not the specific focus of the meeting.

[20] On 18 October 2004, the Director of the Agriculture Branch informed Mr. Paulsen that LARC had recommended approval in principle of his application subject to certain requirements. As Little Salmon/Carmacks was only advised of the approval in the summer of 2005, when Susan Davis made inquiries of Branch staff as to the status of the application, the First Nation continued to express its opposition to the application by letters to the Lands Branch from Mr. Sam and from Chief Skookum post-October 2004.

[21] The position of Yukon was expressed in a letter of 30 January 2004 from the Deputy Minister to Chief Skookum:

> In the case of dispositions of Crown land in the Traditional Territory of a First Nation with Final and Self-Government Agreements, there is no legal obligation to consult with the First Nation. Aboriginal rights in respect of that Crown land are no longer asserted, and the Final and Self-Government Agreements do not set out an obligation to consult. Also, there is no other applicable legislation that establishes a legal consultation requirement.
>
> The Yukon Government consults with First Nations regarding dispositions because it is good practice when conducting public business to liaise with other governments. First Nations are consulted about land applications because they are owners of significant amounts of Settlement Land and would be interested in what occurs on nearby Crown land. We believe it is good practice to consult on land applications with First Nations and other publics in the nearby territory because the information and interests that are brought to our attention result in better-informed decisions.
>
> The Land Application Review Committee (LARC), the Land Use Advisory Committee (LUAC) and other similar processes are the mechanisms used to effect these consultations. These processes allow First Nation governments to provide views and recommendations, which can be taken into consideration prior to a decision. As well, views of the local municipal government, non-government organizations and private citizens can be provided and taken into consideration.

[…]

> In closing, we look forward to continued participation of the Little Salmon/Carmacks First Nation in these important committees and value your continued input in the interests of practicing good government-to-government relations.
>
> [Emphasis added.]

[22] Little Salmon/Carmacks endeavoured to appeal the LARC decision in August 2005. However, under the LARC terms of reference, only applicants (in this case, Mr. Paulsen) and intervenors (which Little Salmon/Carmacks, as a member of LARC, was not) were entitled to appeal the decision.

[23] Little Salmon/Carmacks continued to express its view that it was important for it to work with Yukon to develop procedures that would provide effective consultation and accommodation measures for land decisions in its traditional territory. The First Nation considered it necessary to oppose the Paulsen application because it believed its aboriginal rights and interests were threatened. Having exhausted its attempts to persuade Yukon, Little Salmon/Carmacks filed a petition in the Supreme Court on 30 May 2006. The petition sought, among other relief, a declaration that the honour of the Crown required the Yukon government to consult with Little Salmon/Carmacks and make all reasonable efforts to accommodate their rights and interests that stood to be adversely affected by the Paulsen application.

[24] As noted by the chambers judge, no transfer of land has taken place. The parties agreed to wait for the Court's decision before completing the land transfer.

SUPREME COURT DECISION

[25] The chambers judge addressed five issues:

1. Does the common law duty to consult and, where appropriate, to accommodate apply to the Final Agreement?
2. If so, was the duty triggered in this case?
3. If so, what is the scope of that duty?
4. Was the duty met in this case?
5. Should the Court exercise its discretion to quash the decision to approve the Paulsen application for agricultural land?

[26] As to the first issue – whether the duty to consult applies to the Final Agreement – the chambers judge applied the recent Supreme Court of Canada decision in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 1:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.

[27] He also considered the meaning of the "honour of the Crown" as that phrase was developed by the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73.

[28] The chambers judge held:

> [66] I conclude that the duty to consult and accommodate arises from the concept of honour of the Crown and is an implied term of

> every treaty. The court clearly states that "the honour of the Crown also infuses every treaty and the performance of every treaty obligation". It is a corollary of section 35 of the *Constitution Act, 1982*. It is also significant that the duty arises in the *Mikisew Cree* case even where the Crown had the right "to take up" land because consultation is required in advance of interference with existing treaty rights.

[29] The chambers judge then considered whether the terms of the Final Agreement precluded the application of the duty to consult. He specifically referred to sections 2.2.4 and 2.6.5 of the Final Agreement, which state:

> 2.2.4 Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.
>
> 2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.

Section 2.5.0 is described in the Final Agreement as the "certainty" clause, excerpted below, pursuant to which Little Salmon/Carmacks, among other things, surrendered to Canada "all their aboriginal claims, rights, titles, and interests, in and to" non-settlement land, including their traditional territory.

[30] The chambers judge then concluded:

> [80] It may be that the parties to the Final Agreement did not contemplate the common law duty as it is expressed in the *Mikisew Cree* case. However, in section 2.2.4, the parties did contemplate and expressly permit the First Nation "to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them".
>
> [81] Section 2.2.4 is "subject to 2.5.0" which I interpret to mean that the Certainty clause is paramount to the ability of the First Nation to

> benefit from a future constitutional right such as the duty to consult and accommodate. But there is a considerable difference between the meaning of the Certainty clause and the ability of aboriginal people to benefit from "any existing or future constitutional rights for aboriginal people that may be applicable to them". The Certainty clause means that aboriginal title has been released in the traditional territory of the First Nation in exchange for specified rights in the Final Agreement. Thus, Yukon First Nations cannot reverse that release of aboriginal rights or renegotiate the Final Agreement based upon a future expansive interpretation of aboriginal title. It does not mean that "existing or future constitutional rights" are released and I interpret this to include interpretative principles based on the honour of the Crown and the interpretation of section 35 of the *Constitution Act, 1982*. Thus, in the context of this Final Agreement, the right of Yukon aboriginal people to exercise and benefit from existing and future constitutional rights is expressly incorporated into the Final Agreement by the parties themselves. To that extent, the Final Agreement has built in some flexibility to accommodate future constitutional rights as the law develops so as to avoid the pitfall of having an agreement that becomes chipped in stone or rigid in its interpretation.
>
> [82] 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 infuses every treaty. It is not based on an aboriginal right which the First Nation has ceded pursuant to 2.5.0 in its Traditional Territory. 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.

[31] The chambers judge rejected Yukon's submission that the Final Agreement did not require consultation in respect to transfers of Crown land in Little Salmon/Carmacks' traditional territory:

> [85] There is no doubt that the Final Agreement did not specify that the duty to consult applied to transfers of land in the Traditional Territory. By the same token, it did not provide for any process for the transfer of Crown land. In that sense, there is very little distinction between *Mikisew Cree* where the treaty was silent on the process of "taking up land" and the court imposed the duty to consult and accommodate as treaty rights were at stake. In my view, when this

> Final Agreement is silent, it is appropriate to apply the duty to consult and accommodate when the right to transfer land has an impact on treaty rights.

[32] The chambers judge then concluded that the duty to consult was triggered in this case:

> [96] The granting of the Paulsen application immediately removes approximately 65 hectares of Crown land from the right to hunt wildlife for subsistence. It also has the effect of removing 65 hectares from the workable portion of the trapline of Johnny Sam. While these impacts may be considered insignificant by some, they go to the heart of what the First Nation sought to protect in its Final Agreement – its culture and way of life, as expressed in its right to harvest. The fact that Johnny Sam can apply for compensation recognizes an economic interest. It does not address the cultural significance or the adverse affect [*sic*] on hunting rights of the First Nation.

[33] The chambers judge concluded that the scope of the duty to consult in this case was "deep consultation" – providing notice, a complete informational package and the results of whatever environmental screening is required not only to the First Nation but also to the affected trapper, Mr. Sam. The chambers judge found that this duty to consult had not been met. Although he determined that the informational component of the duty was to a certain extent satisfied, he found that it did not include Mr. Sam except indirectly through his First Nation. The chambers judge reasoned that the duty was not met in part because the Yukon government denied the existence of a legal duty to consult and the LARC process was not sufficiently directed at satisfying the duty to consult.

[34] Ultimately, the chambers judge decided to quash the decision to approve the Paulsen application:

> [128] What is required is that the Yukon Government accept its legal duty to engage in a meaningful consultation directly with the First Nation and Johnny Sam. There must be a dialogue on a government-to-government basis and not simply a courtesy consultation. That discussion must include the impact on the hunting and trapping rights, the Settlement Lands and the Fish and Wildlife Management plan. A good starting point would be the issues set out in the First Nation's letter of appeal dated July 27, 2005. There is no obligation to reach agreement and the First Nation does not have a veto. There is a mutual obligation to have a meaningful consultation to determine what accommodation can be made. A written decision on the Paulsen 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.

ISSUES ON APPEAL

[35] Yukon appeals from the Supreme Court order on the ground that the chambers judge erred in law in finding that a duty to consult and accommodate applies to the Final Agreement and to the right of Yukon to transfer Crown land, either as an implied term of the agreement or as a common law duty.

[36] In the alternative, if a duty to consult is applicable to the Final Agreement, Yukon says that the chambers judge erred in finding that such a duty was also owed to an individual, Mr. Sam, and that the scope of the duty was "deep consultation", and in finding that the duty was not met by the process followed in this case.

DISCUSSION

[37] The determination of whether the duty to consult and, where possible, accommodate First Nations' rights and interests, in the context of a modern land claims and fish and wildlife treaty must necessarily begin with an examination of the

treaty itself. As the Supreme Court of Canada stated in ***R. v. Badger***, [1996] 1 S.C.R. 771 at para. 76:

> […] Treaty rights, on the other hand [i.e., as opposed to aboriginal rights], are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.

[38] One such interpretive principle is the honour of the Crown as articulated at para. 41 of ***Badger***:

> […] Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. […]

[39] ***Badger*** involved hunting rights under Treaty 8 – the same historic treaty at issue in ***Mikisew*** – and the question of whether the Alberta licensing scheme infringed upon the treaty right. (There were other issues: the impact of the Natural Resources Transfer Agreement, 1930 upon Treaty 8 and whether the existing right to hunt for food could be exercised on privately owned land.)

The Final Agreement

[40] During the many years leading up to the execution of the Final Agreement, Canada provided funding through repayable loans for Little Salmon/Carmacks to hire legal advisors and other experts. The First Nation in this case was represented

by highly competent and experienced counsel. The evidence shows that Little Salmon/Carmacks members took an active interest in the negotiations, including elders whose opinions were accorded great deference. The final legal drafting took place over a year and each of the parties was required to agree to the legal text that was to be ratified.

[41] The Final Agreement does not address all aspects of the continuing relationship between Canada, Yukon and Little Salmon/Carmacks. In substance, it addresses issues relating to land, fish and wildlife resources, management of other resources, and financial compensation. By the agreement, Little Salmon/Carmacks surrendered all undefined aboriginal rights, title and interests in its traditional territory in return for which it received:

- title to 2,589 square kilometres of "settlement land";
- financial compensation of $34,179,210;
- potential for royalty sharing;
- economic development measures;
- rights of access to Crown land (except that disposed of by agreement for sale, surface license, or lease);
- special management areas;
- protection of access to settlement land;
- rights to harvest fish and wildlife;
- rights to harvest forest resources;
- rights to representation and involvement in land use planning and resource management.

[42] A review of the 435 page Final Agreement reveals that it must necessarily have been the product of extensive, informed, and sophisticated negotiation. As with any agreement of similar magnitude, disputes as to interpretation and application will inevitably arise. This is particularly so given that the Final Agreement is essentially the template for all of the ten final agreements negotiated to date in Yukon. It is important to note that, in this case, no one alleges a breach of the terms of the Agreement. Rather, we are concerned with whether a duty to consult is either an implied term of the Agreement or a duty that applies notwithstanding the specific terms of the Agreement.

[43] As I have earlier observed, no transfer of land has yet taken place. In ***Mikisew***, Binnie J. explained at para. 59 that "[w]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 [...] treaty [...] rights) to move directly to a *Sparrow* analysis." [Emphasis in original.] In ***Mikisew***, the Minister of Canadian Heritage had approved the winter road at issue and had announced on the Parks Canada website that authorization was given to build the winter road. The Mikisew applied to the Federal Court to set aside the Minister's approval and an interlocutory injunction against construction of the winter road was issued. A similar suspended state of affairs exists in the case at bar. As no transfer of land has been made, this is not a case that calls for a ***Sparrow*** analysis of infringement and justification. The task for the Court, as outlined in ***Mikisew***, is to consider the process by which Mr. Paulsen's land grant is to be made, and whether that process is compatible with the honour of the Crown.

[44] Certain of the terms of the Final Agreement are of particular significance on this appeal:

The recitals to the Agreement include:

> the Constitution Act, 1982, recognizes and affirms the existing aboriginal rights and treaty rights of the aboriginal peoples of Canada, and treaty rights include rights acquired by way of land claims agreements;
>
> [Emphasis in original.]
>
> the parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Little Salmon/Carmacks First Nation Traditional Territory;
>
> [Emphasis added.]
>
> the parties wish to achieve certainty with respect to their relationships to each other; […].

"Settlement agreement" means a final agreement.

> 2.2.1 Settlement Agreements shall be land claims agreements within the meaning of section 35 of the Constitution Act, 1982.
>
> 2.2.4 Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.
>
> [Emphasis added.]
>
> 2.2.15 Settlement Agreements shall be the entire agreement between the parties thereto and there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them.
>
> [the "entire agreement" clause]
>
> [Emphasis added.]

2.5.0 Certainty

2.5.1 In consideration of the promises, terms, conditions and provisos in a Yukon First Nation's Final Agreement:

2.5.1.1 subject to 5.14.0, that Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada, all their aboriginal claims, rights, titles, and interests, in and to,

(a) Non-Settlement Land and all other land and water including the Mines and Minerals within the sovereignty or jurisdiction of Canada, except the Northwest Territories, British Columbia and Settlement Land,

(b) the Mines and Minerals within all Settlement Land, and

(c) Fee Simple Settlement Land;

2.5.1.2 that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement […]

2.6.0 Interpretation of Settlement Agreements and Application of Law

2.6.1 The provisions of the Umbrella Final Agreement, the specific provisions of the Yukon First Nation Final Agreement and Transboundary Agreement applicable to each Yukon First Nation shall be read together.

2.6.2 Settlement Legislation shall provide that:

2.6.2.1 subject to 2.6.2.2 to 2.6.2.5, all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land;

2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;

[…]

2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.

[Emphasis added.]

6.2.0 Access to Crown Land

6.2.1 A Yukon Indian Person has and a Yukon First Nation has a right of access without the consent of Government to enter, cross and stay on Crown Land and to use Crown Land incidental to such access for a reasonable period of time for all non-commercial purposes if:

6.2.1.1 the access is of a casual and insignificant nature; or

6.2.1.2 the access is for the purpose of Harvesting Fish and Wildlife in accordance with Chapter 16 – Fish and Wildlife.

[Emphasis added.]

[…]

6.2.3 A right of access in 6.2.1 or 6.2.2 does not apply to Crown Land:

6.2.3.1 which is subject to an agreement for sale or a surface licence or lease except,

(a) to the extent the surface licence or lease permits public access, or

(b) where the holder of the interest allows access; […]

16.4.0 Yukon Indian People

[…]

16.4.2 Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory, and with the consent of another Yukon First Nation in that Yukon First Nation's Traditional

> Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.
>
> [Emphasis added.]

Section 16.2.0 defines "subsistence":

> "Subsistence" means:
>
> (a) the use of Edible Fish or Wildlife Products by a Yukon Indian Person for sustenance and for food for traditional ceremonial purposes including potlatches; and
>
> (b) the use by a Yukon Indian Person of Non-Edible By-Products of harvests under (a) for such domestic purposes as clothing, shelter or medicine, and for domestic, spiritual and cultural purposes; but
>
> (c) except for traditional production of handicrafts and implements by a Yukon Indian Person, does not include commercial uses of Edible Fish or Wildlife Products or Non-Edible By-Products.
>
> [Emphasis added.]

Section 16.11, headed Trapline Management and Use, sets out a detailed and comprehensive scheme for the regulation and management of furbearing animals, and includes, at section 16.11.3, a detailed allocation formula.

Section 16.11.13 provides:

> 16.11.13 Yukon Indian People holding traplines whose Furbearer Harvesting opportunities will be diminished due to other resource development activities shall be compensated. Government shall establish a process following the Effective Date of the Yukon First Nation's Final Agreement for compensation, including designation of the Persons responsible for compensation.

> 16.11.13.1 Nothing in 16.11.13 shall be construed to affect a Yukon Indian Person's right to compensation pursuant to Law before the process in 16.11.13 is established.

[45] It is significant to note that there is no specific provision in the Final Agreement that addresses the right of Yukon to transfer land located in the traditional territory of Little Salmon/Carmacks. Although Yukon acknowledged this before the chambers judge, it does not appear to be in doubt that Yukon has the right to so transfer. The chambers judge wrote, "there is no doubt that the right to do so is implied in the Final Agreement" (para. 54), and no appeal is taken from that finding.

The Final Agreement and the duty to consult: submissions on interpretation

[46] Yukon's submissions focus on the various interpretive principles and considerations which are to guide a reading and exposition of the Final Agreement. The Final Agreement is a modern, comprehensive document, the aim of which was to finally settle, with certainty, the Little Salmon/Carmacks' claims to land and resources in Yukon. To achieve that aim, the parties agreed that the Final Agreement was the "entire agreement" between the parties (see clause 2.2.15 quoted above). Consequently, Yukon says that the duty to consult must be found in the Agreement and does not exist outside it.

[47] Yukon submits that a different approach is required when interpreting modern agreements as opposed to historic treaties. Yukon emphasizes the remarks in ***Eastmain Band v. James Bay and Northern Quebec Agreement (Administrator)*** (1992), 99 D.L.R. (4th) 16, [1993] 1 F.C. 501 (C.A.) [cited to D.L.R.]. ***Eastmain***

concerned the interpretation of a modern land claims agreement. The specific issue was whether an environmental review regime established under the treaty applied to the construction of a particular hydro-electric development, which, in turn, required the court to determine whether the development was specifically exempted under the terms of the treaty. The court concluded that the hydro-electric development at issue was exempt from the environmental review regime provided under the agreement.

[48] Yukon's essential position is captured in the following passage from ***Eastmain***, at pp. 28-29:

> When it is modern treaties that are at stake, the aboriginal party must now, too, be bound by the informed commitment that it is now in a position to make. No serious and lasting political compromise or business agreement can be entered into in an atmosphere of distrust and uncertainty. Thus, La Forest J. stated in [*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 147]:
>
> > I think it safe to say that businessmen place a great premium on certainty in their commercial dealings, and that, accordingly, the greatest possible incentive to do business with Indians would be the knowledge that business may be conducted with them on exactly the same basis as with any other person. Any special considerations, extraordinary protections or exemptions that Indians bring with them to the marketplace introduce complications and would seem guaranteed to frighten off potential business partners.
>
> I also think it safe to say that it is in the interests of the aboriginals themselves to interpret the agreements which they sign today in such a way that the other signing parties will not feel themselves at the mercy of constant attempts to renegotiate in the courts.

[49] While I will return to consider more fully Yukon's emphasis on the modern nature of this Agreement, I simply note that in my view ***Eastmain*** is of limited assistance to the case at bar, which involves the application of common law and constitutional principles to the Agreement, an exercise which extends beyond the interpretation of a specific contractual term. However, I also note that the comments of La Forest J. in ***Mitchell***, quoted in ***Eastmain***, were made in the context of the interpretation of a statute. La Forest J. commented on the difference between interpretation of treaties and statutes and stated at p. 143 of ***Mitchell***, “somewhat different considerations must apply in the case of statutes relating to Indians.”

[50] With particular focus on the Agreement, Yukon submits that the parties to the Final Agreement negotiated at length as to its extensive terms. As with all such negotiations, there was give and take. The Final Agreement specifies 67 instances in which "consultation" is required.

[51] The Final Agreement states that "Consult" or "Consultation" means to provide:

> (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
>
> (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
>
> (c) full and fair consideration by the party obliged to consult of any views presented.

[52] Yukon emphasizes that no such consultation is required under the Agreement in respect of proposed dispositions of Crown land. Yukon says that the absence of a consultative requirement clearly signifies an intention to exclude such a requirement. Yukon says that Little Salmon/Carmacks' position – that consultation is a constitutional imperative – will create uncertainty and will result in endless renegotiation of the agreement.

[53] Canada accepts that a duty to consult is triggered by Crown conduct that has potential adverse impacts on aboriginal or treaty rights protected by s. 35(1) of the ***Constitution Act, 1982***. Canada contends that the duty in this case was satisfied if one assesses the treaty as a whole. Canada argues that the provisions of the Final Agreement that preserve availability of land and wildlife supply for harvesting, and allow for participation by First Nations in land use and fish and wildlife management are sufficient to satisfy the duty to consult.

[54] Little Salmon/Carmacks submits that the duty to consult and accommodate is a constitutional obligation that "infuses" and applies to every treaty, whether historic or modern and comprehensive. Little Salmon/Carmacks says that the treaty cannot displace the common law, and says this is so for two reasons. First, governments retain a great deal of discretionary authority that could adversely affect the rights and interests secured by the treaty; and second, myriad government actions could adversely affect the rights and interests secured by the treaty without breaching an express term, thereby frustrating or undermining the achievement of the stated

objectives of the treaty and the goal of reconciliation, which, as Little Salmon/Carmacks says, is an on-going process.

[55] Little Salmon/Carmacks' position is supported by the intervenors, Council of Yukon First Nations and the Kwanlin Dün First Nation ("Kwanlin Dün").

[56] The Council is comprised of 11 Yukon First Nations. One of the Council's objects is the implementation of First Nations land claim settlement agreements. The Council submits that if Yukon's position – that there is no legal obligation to consult – is accepted, then Yukon will be free to grant permits for various uses of Crown lands within traditional territories that are inconsistent or incompatible with the continued exercise of subsistence harvesting treaty rights without consultation, thereby allowing, by unilateral action, the extinguishment of constitutionally protected treaty rights.

[57] Kwanlin Dün is the largest First Nation in the Yukon. It is a signatory to a treaty with the same provisions as the Final Agreement. Kwanlin Dün's traditional territory encompasses the City of Whitehorse and, as such, is exposed to the inevitable pressures associated with an urban environment, including the need to develop Crown lands to accommodate an increasing population.

[58] Kwanlin Dün submits that the full implication of the positions taken by Yukon and Canada is that the honour of the Crown is spent once a final agreement is executed, provided the Crown honours the agreement. Kwanlin Dün acknowledges that the Paulsen application is, in the scheme of things, minor. However, another

application, with potentially greater and more serious impacts, would be subjected to the same result if Yukon's position prevails. That is, Yukon could simply say that the treaty does not require consultation and the affected First Nation would be without recourse.

The Duty to Consult

[59] The Supreme Court of Canada recently reviewed the source of a duty to consult and accommodate in ***Haida Nation***. In ***Haida Nation***, the Supreme Court identified its task as "the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided" (para. 11). The claims to title over and aboriginal rights in Haida Gwaii were still in the claims process at the time the Haida Nation challenged the procedures by which the British Columbia government replaced and transferred tree farm licenses for logging on Haida Gwaii. The Haida Nation submitted that absent consultation and accommodation, it risked acquiring title only to find the land stripped of forests, which were vital to its economy and culture.

[60] Yukon contends that the pre-treaty context of ***Haida Nation*** limits the applicability of the concepts and principles developed in that case to the one at bar. With respect, that position gives insufficient weight to what Chief Justice McLachlin referred to in ***Haida Nation*** as "the age-old tradition of the common law" (para. 11), by which this Court is now being asked to consider the application of a duty to consult in a new circumstance – a modern negotiated land claims agreement. ***Haida Nation*** provided foundational comments on the duty of the Crown to act honourably:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> 17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": [*Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010] at para. 186, quoting [*R. v. Van der Peet*, [1996] 2 S.C.R. 507] at para. 31.
>
> 19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

[61] The principled discussion in ***Haida Nation*** in my view informs the development of the law in this area and should not be rejected as inapplicable. The foregoing passages support the holding in that case that the government had a legal duty to consult with the Haida people about the harvest of timber in the disputed area, including decisions to transfer or replace tree farm licenses. Such "a wider circle of analysis […] is obviously intended for guidance and […] should be accepted as authoritative" (***R. v. Henry***, [2005] 3 S.C.R. 609, 2005 SCC 76 at para. 57).

[62] In the companion case of ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, [2004] 3 S.C.R. 550, 2004 SCC 74, which also involved the duty to consult a First Nation with as yet unproven aboriginal rights and title claims, Chief Justice McLachlin wrote for the Court at para. 24:

> […] As discussed in the companion case of *Haida*, *supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).
>
> [Emphasis added.]

[63] As much as they establish the framework for assessing when the duty to consult arises, and for determining the scope and content of the duty, ***Haida Nation*** and ***Taku River Tlingit*** reaffirm the honour of the Crown as a "core precept" that is to guide the relationship between aboriginal peoples and the Crown. As explained at para. 18 of ***Haida Nation***, "[t]he honour of the Crown gives rise to different duties in different circumstances." Chief Justice McLachlin commented specifically on the treaty context and stated clearly that "[t]he honour of the Crown infuses the processes of treaty making and treaty interpretation" (para. 19). These cases do not presume the duty to consult arises in all aspects of a Crown-First Nations relationship. Rather, ***Haida Nation*** and ***Taku River Tlingit*** assist in articulating the

question at hand: what is required in the circumstances of the case at bar to fulfill the honour of the Crown in its dealings with the First Nation and in the implementation of the Final Agreement?

[64] In ***Mikisew***, the Supreme Court of Canada considered the duty to consult in the context of Treaty 8, an 1899 treaty in which First Nations surrendered 840,000 square kilometres in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan, and the southern portion of the Northwest Territories. The dispute centred on the construction of a 118-kilometre winter road that traversed traplines and hunting grounds, and affected about 14 Mikisew trappers and 100 hunters. The Mikisew were not consulted before the decision was made to approve the road.

[65] Treaty 8 covers eight pages. As Binnie J. noted, at para. 30, it contemplated that portions of surrendered lands would "from time to time" be "taken up", be transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and be placed in an inventory in which they did not.

[66] Ultimately, Binnie J. concluded:

> 51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was

> pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.
>
> [Emphasis in original.]

[67] The inescapable conclusion to be drawn from the reasons of Binnie J. is that the honour of the Crown and a duty to consult and accommodate applies in the interpretation of treaties and exists independent of treaties.

[68] Yukon contends the historical context of Treaty 8 limits the applicability of ***Mikisew***. The considerations which Yukon submits should guide the interpretation of the Final Agreement – the extensive negotiation and ratification process, the Agreement's comprehensive scope, and its expressed objective of certainty – exemplify the modern nature of this Agreement and distinguish it from an historical treaty. Accordingly, Yukon says, the Supreme Court of Canada's extension of the duty to consult and accommodate in ***Mikisew*** to the treaty context does not apply to the Final Agreement.

[69] In my view, an attempt to so categorize the Crown's various relationships and agreements with aboriginal peoples, as based in historic or modern negotiations, does not demonstrate a sufficiently broad and purposive understanding of the constitutional grounding of the Crown's duty to act honourably. Moreover, the language of s. 35 does not support a distinction between historic and modern

agreements. The honour of the Crown, from which the duty to consult derives, has been enshrined in s. 35(1) of the ***Constitution Act, 1982***. This section provides, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Subsection (3) explains, "[f]or greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired." [Emphasis added.]

[70] Further, I note the lack of qualification in the comments of Binnie J. in ***Mikisew***, which is in keeping with s. 35(3). At para. 57, he states, "the honour of the Crown infuses every treaty and the performance of every treaty obligation". At para. 63, he specifically refers to a modern agreement:

> The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. […]

[71] Extrapolating from this passage, the modern nature of a land claims agreement is a contextual factor to be taken into account in determining the duty to consult. To find otherwise would lend credence to Yukon's position that, as a result of entering into the Final Agreement, the relationship between the Crown and Little Salmon/Carmacks is now governed solely by the terms of the Agreement and is not subject to common law or constitutional principles. To the contrary, while the Final Agreement gives structure to the relationship between the Crown and the First Nation, the relationship is a continuing one. The principle of consultation, as was

said in ***Mikisew***, "is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples" (para. 3).

Is the duty to consult an implied term of the treaty?

[72] Yukon submits that the chambers judge erred in law in concluding, at para. 66, that the duty to consult "is an implied term of every treaty" and in therefore finding the duty to consult to be an implied term of the Final Agreement.

[73] Much time was spent by the parties on the issue of whether the duty to consult is an implied term of the Final Agreement. In the end, however, none of the parties seriously contended that the chambers judge's finding on this point could be upheld. I therefore do not propose to discuss the issue further other than to say that none of the traditional bases on which terms may be implied in a contract are readily applied in the context of the Final Agreement: see ***Canadian Pacific Hotels Ltd. v. Bank of Montreal***, [1987] 1 S.C.R. 711.

Does the duty to consult apply to the terms of the Final Agreement?

[74] The more difficult issue is whether the parties intended the terms of the Final Agreement to incorporate all consultative duties and thus to eliminate any that were not expressly stated.

[75] I have already reproduced several of the relevant Final Agreement provisions. Yukon emphasizes two such provisions – those relating to certainty, section 2.5.0 (at page 21 of these reasons), and the entire agreement clause, section 2.2.15 (at page 20). It is uncontroversial that a primary objective of the Agreement is the

reconciliation of government interests and aboriginal rights by providing certainty as to the parties' respective ownership and use of lands and their respective rights and obligations thereto.

[76] The issue at bar focuses on the undisputed fact that section 6.2.3 of the Final Agreement does not require Yukon to consult with the First Nation before exercising its right to dispose of Crown land. The obvious impact on the First Nation is that, once the land is disposed of, the First Nation's right of access to Crown lands for specific purposes, including subsistence harvesting of fish and wildlife on the transferred land, is lost.

[77] Yukon submits that the Final Agreement specifies when consultation is required and highlights the absence of any specific provision providing for consultation with the First Nation with respect to the government's decision to dispose of or transfer Crown land in the traditional territory of the First Nation. Yukon conceives of the duty to consult as a condition or limitation on its right to dispose of Yukon Crown land, and submits any limitation on this right must be found in the express provisions of the Final Agreement. However, as earlier noted, there is no specific provision in the Final Agreement that addresses Yukon's right to transfer land and to which a requirement for consultation might logically attach.

[78] At para. 67 the chambers judge articulated the question before him as "whether the wording of the Final Agreement prevents the common law duty to consult and accommodate from applying to the implied right of the Yukon Government to transfer land in the First Nation's Traditional Territory." At para. 86 of

his reasons, he wrote, "[t]he fact that the right of the Yukon Government to transfer lands in the Traditional Territory of a First Nation is implied rather than expressly stated in the Final Agreement does not mean that the honour of the Crown disappears." I agree, but for reasons different from those of the chambers judge.

[79] The chambers judge accepted Little Salmon/Carmacks' argument that section 2.2.4 permitted an interpretation of the Agreement such as to give rise to the duty to consult.

[80] For ease of reference, section 2.2.4 reads:

> 2.2.4 Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

[81] The gist of the First Nation's argument on this point is that the Final Agreement was executed in 1997 prior to the Supreme Court of Canada's explication of the duty to consult in ***Haida Nation***, ***Taku River Tlingit***, and ***Mikisew***. Little Salmon/Carmacks thus argued that because the duty to consult was unknown at the time the Agreement was signed, it is entitled under section 2.2.4 to take advantage of constitutional rights – i.e. the duty to consult – that had not hitherto been recognized.

[82] Yukon's counter-argument is that section 2.2.4 is specifically subject to the certainty clause. Yukon contends that the intent of section 2.5.0 was that the Agreement would govern, to the extent identified, relations between the parties from

that point forward. The scheme of the Agreement is that Little Salmon/Carmacks surrendered all of its aboriginal claims, rights, title and interests in exchange for, *inter alia*, defined rights and title. Yukon says that, in this respect, "existing or future constitutional rights" in section 2.2.4 means rights not dealt with in the treaty.

[83] Kwanlin Dün supports Little Salmon/Carmacks and argues that section 2.5.0 provided for the surrender of the First Nation's common law aboriginal rights and title in exchange for defined treaty rights. Kwanlin Dün asserts that the duty to consult is a duty imposed on the Crown in the exercise of its powers. It is not a right of aboriginal people within the meaning of section 2.5.0 and could not have been ceded in 1993 since it was only declared by the Supreme Court of Canada in 2004. Kwanlin Dün contends that the phrase "future constitutional rights for aboriginal people" in section 2.2.4 must be constitutional rights relating to the exercise of their treaty rights, namely the right to be consulted.

[84] Canada urges us to refrain from concluding that the duty to consult is a constitutional right. In Canada's view, the duty is a procedural, not substantive one. As I have noted, Canada's position is that the terms of the treaty satisfy any duty to consult and there is thus no need to decide the issue in this case.

[85] A similar argument was made by Canada in ***Chief Joe Hall v. Canada (Attorney General)***, 2007 BCCA 133, 66 B.C.L.R. (4th) 272, 281 D.L.R. (4th) 752, [2007] 7 W.W.R. 1. Chief Justice Finch, writing for a five-member division of the Court, rejected the argument at paras. 47-48:

> The learned chambers judge held that the duty to consult was a "constitutional issue". Counsel for the Attorney General vigorously contested the constitutional nature of the duty to consult. He conceded that the duty is a "legal duty" which has as its source "the honour of the Crown" but argued that "…it is not a constitutional right or obligation."
>
> I do not accept that as a sound proposition. The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed.

[86] Most recently, in ***R. v. Kapp***, 2008 SCC 41, the majority of the Supreme Court of Canada stated at para. 6:

> […] The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.
>
> [Emphasis added.]

[87] The difficulty posed by the arguments advanced by Little Salmon/Carmacks, the Council, and Kwanlin Dün is that they all implicitly accept that the duty to consult is a "constitutional right" as that term is used in section 2.2.4.

[88] In my opinion, there can be no doubt that the duty to consult is recognized as a constitutional duty. However, I am unable to conclude that it is a constitutional right. So far as I am aware, the Supreme Court of Canada has never defined the

duty as a constitutional right, perhaps for reasons relating to the interpretation of s. 35 of the ***Constitution Act, 1982***. Further, it is not necessary, for the purposes of deciding this appeal, to make that finding.

[89] I am therefore unable to conclude that the duty to consult is a constitutional right contemplated by section 2.2.4, even if one could overcome the limiting language of section 2.5.0.

[90] However, as I have noted, the honour of the Crown and the correlative duty to consult are constitutional duties for the reasons expressed in ***Haida Nation***, ***Taku River Tlingit***, and ***Mikisew***. They exist outside and infuse the treaty and govern Yukon's dealings with Yukon First Nations. In my opinion, the duty to consult does apply to the interpretation and implementation of the Final Agreement and is not precluded from application by the terms of the treaty. In my view, such a finding does not render the Final Agreement uncertain or open to unending renegotiation. It simply means that Yukon must be cognizant of potential adverse impacts on First Nations' treaty rights when Yukon proposes to dispose of Crown lands, and, when treaty rights may be affected, Yukon must seek consultation with First Nations. The degree of consultation will be a function of potential impact.

[91] It cannot be said that the honour of the Crown is fully satisfied by the conclusion of treaties, for it is clear that the duty continues to apply in the implementation of treaties. Yukon and Canada's positions would suggest that the conclusion of the Final Agreement achieves reconciliation. In my opinion, that position does not accord with the remarks in ***Haida Nation***, ***Taku River Tlingit***, or

Mikisew. It is clear that treaty making is just one step on the path to reconciliation. As Binnie J. stated in ***Mikisew***, at para. 54, "[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage." As arduous as it has been to conclude treaties, the implementation of them also poses significant challenges. Reconciliation will inevitably be a long and sometimes difficult process, which will require the good faith efforts of all levels of government – federal, territorial, and First Nations.

Was the duty to consult and accommodate met in this case?

[92] The essential position of Little Salmon/Carmacks is that the duty was triggered because the proposed disposition of land had a potential adverse impact on the treaty rights of the First Nation, namely the right to harvest for subsistence as provided in section 16.4.2 of the Final Agreement. The chambers judge also found that the Paulsen application might undermine the Fish and Wildlife Management plan contemplated in section 16 of the Agreement and might also affect settlement lands.

[93] The First Nation emphasizes the right to harvest furbearing animals for subsistence purposes as provided in section 16.4.2 and the right to trade non-edible by-products from the harvest of furbearers under section 16.4.5. The transfer of lands under the Paulsen application is within Mr. Sam's trapline, which has been in his family for generations. Mr. Sam deposed to the importance of the trapline for the purposes of training future generations as to their connection to the land and the aboriginal way of life.

[94] The process for reviewing applications for land grants requires notice to be given to potentially affected First Nations and, indeed, non-aboriginals. The evident purpose of such notice is to manage the complex and potentially conflicting interests of landowners and those entitled to reap the resources on Yukon lands, including lands within the traditional territories of Yukon First Nations. As Yukon stated in its 30 January 2004 letter to Chief Skookum:

> The Yukon Government consults with First Nations regarding dispositions because it is good practice when conducting public business to liaise with other governments. First Nations are consulted about land applications because they are owners of significant amounts of Settlement Land and would be interested in what occurs on nearby Crown land. We believe it is good practice to consult on land applications with First Nations and other publics in the nearby territory because the information and interests that are brought to our attention result in better-informed decisions.

[95] The duty to consult arises whenever Yukon proposes to take action that may have potential adverse effects on treaty rights. The threshold is obviously low because, until a First Nation is informed of the proposed action, it is unable to provide input as to the extent of any impact the proposed action may have on its treaty rights. Yukon will know whether the proposed disposition may potentially affect a First Nation's treaty right, at which point the duty to consult will be triggered. As Mr. Justice Lambert observed in ***Haida Nation v. B.C. and Weyerhaeuser***, 2002 BCCA 147, at para. 46, 99 B.C.L.R. (3d) 209, [2002] 6 W.W.R. 243, a duty to consult logically arises "as a prelude to a potential infringement and should be assessed in relation to the severity of the proposed Crown action." [Emphasis in original.]

[96] In ***Mikisew***, Binnie J. explained the trigger and the content of the duty at para. 34:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

[97] In my opinion, Yukon's recognition that consultation was "good practice" was coincident with the point at which a duty to consult was triggered in this case. As the Supreme Court of Canada has observed on several occasions, the existence and scope of the duty must be determined on a case by case basis. Here, it is clear that there existed potential infringement of treaty rights, thereby triggering the duty to consult. The more difficult issue is the scope of the duty and whether it was satisfied in this case.

[98] The scope of the duty will depend on the terms of the treaty and the rights granted thereunder that may be adversely affected. The greater the potential adverse impact on the treaty right, the greater the need for in-depth consultation.

[99] Yukon submits that the chambers judge erred in considering several matters that were not the subject of the Final Agreement and could not be considered treaty rights. The first was the potential effect of the Paulsen application on Mr. Sam's

trapline. Mr. Sam's trapline concession authorizes commercial harvesting and is issued under the ***Wildlife Act***. There is no right under the Final Agreement for a member of the First Nation to access Crown land for commercial harvesting. Further, the "Fish and Wildlife Management plan" considered by the chambers judge is in fact a five-year work plan that has not been authorized by the Minister and does not form part of the Final Agreement. Lastly, Yukon submits, the First Nation's settlement land is not affected by the Paulsen application. In other words, Yukon contends that since no treaty rights were in fact at risk, any duty to consult was minimal.

[100] In ***Mikisew***, the court held, at para. 64, that the duty to consult lay at "the lower end of the spectrum":

> The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in [*Halfway River First Nation v. British Columbia (Ministry of Forests*), 1999 BCCA 470, 178 D.L.R. (4th) 666] at paras. 159-60.

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.
>
> [All emphasis in original.]

[101] If the duty to consult in ***Mikisew*** was at the lower end of the spectrum, it is clear that the duty in this case also lies at a low level of the spectrum.

[102] It is conceded on all sides that the Paulsen application was relatively modest and straightforward. That is not to say that the application did not have perceived adverse impacts for Mr. Sam and other members of Little Salmon/Carmacks.

[103] The complaint of the First Nation is not with the information provided but rather that it considered that its views were not taken seriously by Yukon.

[104] Yukon says that the process provided under LARC and undertaken in this case amply satisfied any applicable standard of consultation. The LARC process is not, of course, mandated under the Final Agreement. However, as was the case in ***Taku River Tlingit***, it may be enough if a separate consultation process meets the requirements of consultation (see: para. 40).

[105] The LARC process is not perfect. For instance, the introduction to the LARC terms of reference states that "LARC is not constituted by statute and there is no legislative requirement for LARC to consider any lands matter." That statement would obviously provide little comfort to a First Nation that depended on the LARC process to be notified of Crown land dispositions that might affect treaty rights.

[106] Some comfort might be taken from the subsequent introductory statement:

> The Yukon Government recognizes rights and obligations arising from Yukon First Nation Final and Self Government Agreements including the obligation to consult. LARC terms of reference will be revised whenever necessary to comply with legislated mechanisms referenced in statutory agreements (ie. Yukon Environmental and Socioeconomic Assessment Act).

[107] Whatever might constitute the consultation process in a future case, we are concerned here with the process adopted in this case and whether it satisfied the requisite level of consultation.

[108] I have already reviewed in some detail at paras. 10 to 22 of these reasons the process followed in this case.

[109] The chambers judge was critical of the process, in part because Yukon denied that there was a legal duty to consult and he considered that denial infected Yukon's approach to consultation. In my opinion, the criticism levelled at Yukon was unwarranted. Yukon relied on the comprehensive terms of the Final Agreement and, at the time, could legitimately hold the view that, insofar as Yukon transfers of Crown land were concerned, there was no duty to consult the First Nation beyond the terms

of the treaty. That position was taken prior to the decision in ***Mikisew***, which was the first case to consider a duty to consult in the context of a concluded treaty.

[110] Little Salmon/Carmacks' petition sought, among other things, a declaration that the honour of the Crown requires Yukon to consult with the First Nation and make all reasonable efforts to accommodate its rights and interests that stand to be adversely affected by the Paulsen application. In seeking that relief, Little Salmon/Carmacks sought the protection and supervision of its rights under the Final Agreement. The treaty right in question was the right to harvest for subsistence as provided by section 16.4.2. The definition of "subsistence" in chapter 16 of the Final Agreement specifically excludes harvesting for commercial purposes (with some limited exceptions). The management and use of commercial traplines is dealt with under section 16.11 and traplines are confined by an allocation formula set out in section 16.11.13. There is specific provision for compensation to First Nations members whose traplines are diminished. There is no limitation as to what the First Nation may do on settlement lands.

[111] These provisions exemplify why it is important in each case involving a concluded treaty to first examine the terms of the agreement to determine the scope of the duty to consult.

[112] In this case, at the time LARC held a meeting to consider the Paulsen application and the response of the First Nation, all LARC had before it was the letter from Little Salmon/Carmacks of 27 July 2004. That letter referred to Mr. Sam's trapline concession issued under the ***Wildlife Act*** to trap for commercial purposes

and the impact on his trapline, as well as concerns related to heritage and cultural sites. The First Nation was directly notified on two occasions as to the date of the meeting at which the Paulsen application was to be considered and was given an opportunity to be heard. Even in the First Nation's absence, its letter was considered by LARC.

[113] Mr. Sam's affidavits filed in the Supreme Court elaborated on his concerns related to commercial uses of the trapline, but those of course do not relate to the right to subsistence harvesting protected under the treaty. It is true that Mr. Sam expressed concerns related to "cultural transmission" and his desire to pass on the traditional ways to the next generation, which is consistent with one of the objectives of chapter 16, namely "to preserve and enhance the culture, identity and values of Yukon Indian People". That signifies that a potential treaty right might be affected by the Paulsen application.

[114] In any case, it is clear that LARC identified and considered Little Salmon/Carmacks' concerns and it cannot reasonably be said that the meeting was simply an exercise in allowing the First Nation to "blow off steam" while permitting Yukon to "run roughshod" over the First Nation's treaty rights. (See ***Haida Nation*** at para. 27.)

[115] In my opinion, in light of the low level of consultation required by the circumstances of this case, the duty to consult was met.

[116] Lastly, I conclude that the chambers judge erred in requiring consultation with the individual trapper. Mr. Sam was aware of the Paulsen application. He specifically asked that Little Salmon/Carmacks act on his behalf in the LARC process. It would be unreasonable in those circumstances to demand consultation with him. Further, the duty to consult, as an adjunct to the implementation of the Final Agreement, can only apply between the parties to the agreement – Yukon and the First Nation – and not to individual members of the First Nation.

[117] In summary, I would find that a constitutional duty to consult applies in the context of the Final Agreement. The duty to consult in this case was triggered but was at the lower end of the spectrum and was met. In the result, I would allow the

appeal and set aside the Supreme Court order. Because, in a very real sense, success has been divided, I would order that each party bear its own costs of the appeal.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Tysoe"