IN THE SUPREME COURT OF THE YUKON TERRITORY

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

Date: 20070523
S.C. No. 06-A0033
Registry: Whitehorse

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

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 GOVERNMENT OF YUKON and LARRY PAULSEN

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Arthur Pape and Debra Fendrick	Counsel for the Petitioners
Penelope Gawn and Monica Leask	Counsel for the Respondent Government of Yukon
Christina Sutherland	Counsel for the Respondent Larry Paulsen

REASONS FOR JUDGMENT

INTRODUCTION

[1] Little Salmon/Carmacks First Nation (the First Nation) applies for judicial review of a decision by the Director of the Agriculture Branch (the Director) on October 18, 2004 to grant an agricultural land application to Larry Paulsen (the Paulsen application) in the Traditional Territory of the First Nation and the trapline of Johnny Sam, a member

of the First Nation. The First Nation seeks to set aside the Director's decision for failing to comply with the legal duty to consult and, where possible, to accommodate the First Nation, a duty based upon the honour of the Crown. The First Nation signed the Little Salmon/Carmacks First Nation Final Agreement (the Final Agreement) with Canada and Yukon on July 21, 1997.

[2] The First Nation also says that a further environmental assessment must be conducted pursuant to the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 (the *YESA Act*).

[3] The First Nation says that the common law duty to consult and accommodate is engaged based on the cases from *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, to *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74, and *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (*Haida Nation*, *Taku River Tlingit*, and *Mikisew Cree*, respectively). The *Haida Nation* and *Taku River Tlingit* cases deal with the duty to consult and accommodate in pre-claim cases. The *Mikisew Cree* case deals with the duty in the context of an historic treaty.

[4] This case deals with the question of whether the duty to consult and accommodate applies to a modern Final Agreement.

[5] The Yukon Government and Mr. Paulsen oppose the application on the grounds that the *Mikisew Cree* case is distinguishable. They say that the duty to consult and accommodate does not apply where the duty to consult has been defined and limited to specific circumstances in this modern Final Agreement. The Yukon Government says

that the 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.

[6] I will first discuss the background to the Final Agreement, the land application process and this specific application.

[7] I will then consider whether the duty to consult applies to this Final Agreement, and if so, whether it was triggered by this application. I will also discuss the scope of the duty and whether it was met.

BACKGROUND FACTS

The Final Agreement

[8] The Final Agreement is a modern comprehensive land claim agreement. Negotiations began in 1973 between Canada and the Council for Yukon Indians. The First Nation is a member of the Council. The Yukon Government did not become a full party to the negotiations until 1985. In 1993, the Umbrella Final Agreement was signed by Canada, the Yukon and the Council for Yukon Indians.

[9] Each First Nation is required to engage in negotiations to conclude a Final Agreement which contains all the provisions of the Umbrella Final Agreement as well as specific provisions for each First Nation.

[10] The First Nation in this case signed its Final Agreement and its Self-Government Agreement on July 21, 1997, after an intensive ratification process by the members of the First Nation. The Final Agreement consists of 369 pages of text.

[11] The Final Agreements have resulted in significant changes in First Nation governance and the relationship between the Yukon Government and Yukon First Nations. That relationship is often described as government-to-government.

[12] The Final Agreements are described as comprehensive because they are much more than a land and money exchange. They cover such matters as settlement land, special management areas, land use planning, development assessment, heritage, water management, fish and wildlife, forest resources, taxation and economic development areas.

[13] Central to the Final Agreement is a provision entitled Certainty and a provision entitled Interpretation of Settlement Agreements and Application of Law. This decision will focus on the interpretation of these and other provisions in the Final Agreement.

The Land Application Process

[14] The 1991 Yukon Agriculture Policy was developed prior to the Umbrella Final Agreement and the Little Salmon/Carmacks First Nation Final Agreement. It has not been revised since 1991. When an application is received under the 1991 Yukon Agriculture Policy, the first step is for the Agriculture Branch to conduct a pre-screening with the Land Claims and Implementation Secretariat and Lands Branch of the Yukon Government, in order to ensure that the parcel of land applied for is vacant territorial

land and available for application. A soil inspection is conducted to determine whether the agronomic capability of the land meets approved standards.

[15] The applicant is required to prepare a Farm Development Plan which is subjected to a technical review by the Agriculture Land Application Review Committee (ALARC), consisting of various relevant Yukon Government departments.

[16] The next step in the process is to proceed to the Land Application Review Committee (LARC). The role of LARC, as stated in its Terms of Reference dated April 1, 2003, is “to facilitate inter-departmental and inter-governmental coordination of land management matters”. Its membership includes the Yukon Government, Yukon First Nations, Municipal and Federal Government agencies. A minimum of ten Yukon Government agencies may participate as LARC members. First Nation Governments participate as members of LARC when land applications may affect land management “within their respective traditional territories”. Similarly, municipalities and local governments participate as members of LARC when a land application may affect land management "within their respective community boundaries".

[17] The Traditional Territory of a First Nation is an area of significant size set out in the Final Agreement of each First Nation where, for example, the members of the First Nation continue to exercise subsistence hunting rights.

[18] The mandate of LARC is set out in 6.1 of the LARC Terms of Reference:

> “LARC will review matters concerning land applications from a technical land-management perspective, in accordance with legislation, First Nation Final & Self Government Agreements and criteria in specific land application policies.”

[19] Prior to 2003, the federal government owned most of the Crown land in the Yukon. On April 1, 2003, the new *Yukon Act* came into effect, devolving control of lands and waters from the federal government to the Yukon Government. As a result, the Yukon Government assumed responsibility for environmental screening of all land dispositions in Yukon.

[20] The policy of the Yukon Government regarding the review of land applications in the Traditional Territory of a First Nation is clear:

> "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."

[21] Thus, the Yukon Government submits that its consultation with Yukon First Nations with Final Agreements is not a legal obligation but good practice and the same policy applies to municipal governments, non-government organizations and private citizens.

The Paulsen Application

[22] On November 5, 2001, Larry Paulsen submitted Application #746 to the Agriculture Branch of the Yukon Department of Energy, Mines and Resources (the Agriculture Branch) for an agricultural land grant of some 65 hectares, about 40 km north of Carmacks, near McGregor Creek, between the North Klondike Highway and the Yukon River. The land applied for is within Trapline #143 and the First Nation's Traditional Territory. The land applied for amounts to one-half of one percent of the trapline area. It is adjacent to the trapline cabin of Johnny Sam. There are also Settlement Lands of the First Nation in the vicinity.

[23] Mr. Paulsen proposed to grow hay and other livestock feed, raise livestock, harvest timber and construct physical works including fences, a house, a barn, storage buildings and corrals. Hunting and trapping wildlife is prohibited within one kilometre of a residence, unless the person has the permission of the occupant to do so.

[24] Trapline #143 is a category 2 trapline in the Final Agreement which means it is administered by the Yukon Government. The First Nation administers category 1 traplines.

[25] The 1991 Yukon Agriculture Policy is in effect and applies to the Paulsen application. The *Yukon Environmental Assessment Act*, S.Y. 2003 c. 2, applies to fulfil the environmental assessment required after devolution.

[26] After pre-screening, the Paulsen application was scheduled for review by ALARC on June 26, 2002. However, Mr. Paulsen had not submitted a Farm Development Plan so the application could not proceed. ALARC also noted that a 1999 rural residential application was rejected in the area due to First Nation concerns regarding heritage and archaeological issues.

[27] Based on that history, and because the Agriculture Branch conducted a soil inspection on June 10, 2003, that concluded the application did not represent the most efficient use of the land, ALARC recommended on September 30, 2003, that the Agriculture Branch contact Mr. Paulsen to discuss reconfiguring the parcel he had applied for.

[28] As a result of discussions with Agriculture Branch officials, Mr. Paulsen reconfigured the parcel on October 20, 2003. ALARC subsequently recommended, on February 24, 2004, that the application proceed to LARC.

[29] The Agriculture Branch posted a Public Notice of the application on March 26, 2004, inviting written comments within 20 days. Newspaper advertisements also notified the public of the Paulsen application.

[30] The Agriculture Branch also notified the First Nation directly on April 28, 2004, that it would be submitting the application to LARC, provided an information package,

and invited comments within 30 days. The First Nation received the information package in June 2004, which included notice of the LARC meeting date of August 13, 2004.

[31] Johnny Sam did not receive an information package. He learned of the application from his First Nation and asked them to act on his behalf.

[32] The First Nation wrote to the Branch on July 27, 2004, stating that they opposed the application for various reasons – including concerns about cumulative adverse impacts from the proposed agricultural development and forestry activity on Trapline #143, which was already severely damaged by several forest fires. The First Nation also raised concern about the impact on two parcels of First Nation Settlement Land adjacent to the parcel applied for, and because of heritage and archaeological sites in areas where timber harvesting was proposed, including on an historic First Nation trail.

[33] LARC considered the application at a meeting on August 13, 2004, although the First Nation was not able to attend. The First Nation did not ask for an adjournment or express concern about the meeting proceeding. In later correspondence, the First Nation said that Yukon Government officials knew the First Nation was not able to attend and expected that the discussion would be deferred. The Chair of LARC stated that there was no automatic deferral where a First Nation did not attend but that any request for a deferral would have been seriously considered.

[34] According to the minutes of the LARC meeting, Yukon officials at the meeting acknowledged that granting the application would result in loss of wildlife habitat and animals to hunt in the area, that Settlement Lands used as the locations of Johnny

Sam's base camp and trapper cabin would be affected, and that potential heritage and cultural areas might be impacted. The LARC agreed to recommend approval of the application, on the basis that there would be an archaeological survey, and that the owner of Trapline #143 could apply for compensation. The minutes of the LARC meeting conclude:

> "Recommendation: Approval in principle. Setback from the bluff 30 meters; setback to the edge of the Klondike Highway right-of-way; and an access permit is required. Subdivision approval will be required. Trapper, based on reduced trapping opportunities, has opportunity to seek compensation."

[35] The Yukon Government archaeologist advised on September 2, 2004, that there was no evidence of prehistoric cultural material within the proposed application but recommended a 30-metre buffer from the terrace edge to protect any undiscovered sites.

[36] On September 8, 2004, the First Nation staff met with Branch officials who were conducting an Agriculture Policy Review. The Agriculture Branch was in the process of revising the 1991 Yukon Agriculture Policy, which it stated was outdated and in the process of revision. The meeting did not focus specifically on the Paulsen application. The First Nation representatives expressed the view that their interests were not being seriously considered in the context of agricultural land applications, and that such applications should not be considered before completing work on a Yukon River management plan and land use plans called for by the Fish and Wildlife Management plan that had been established by the governments of Yukon and the First Nation and the Carmacks Renewable Resources Council. Branch officials said that they consult on

such applications through LARC, that they were not required to formally consult the First Nation on such matters under the Land Claims Agreement, and that they met and talked with the First Nation about these things only as a courtesy.

[37] The Fish and Wildlife Management plan states in its introduction:

> “The Little Salmon/Carmacks First Nation (LSCFN) Final Agreement requires a cooperative approach to fish and wildlife management involving the First Nation, the Carmacks Renewable Resources Council (CRRC) and Yukon Government (YTG). This community-based fish and wildlife plan reflects this new relationship by involving the LSCFN, CRRC, YTG and the community in the development of a five-year work plan to address local concerns about fish and wildlife. The plan coordinates the management of fish and wildlife from 2004-2009 in the LSCFN traditional territory.”

[38] The Fish and Wildlife Management plan makes specific reference to "pursuing designating" the area of the Yukon River which includes the Paulsen application, as a habitat protection area. The Yukon Government did not specifically agree to designate a habitat protection area. The commitment to pursue the matter was assigned to the Carmacks Renewable Resources Council and the First Nation.

[39] On October 18, 2004, the Director of the Agriculture Branch approved the Paulsen application based upon the recommendations of LARC. The Director’s letter indicated that there were no registered intervenors. Mr. Paulsen and any registered intervenor had 60 days to appeal the decision. Mr. Paulsen accepted the decision on October 19, 2004.

[40] The First Nation and Johnny Sam became aware of the LARC recommendation approving the Paulsen application in principle. Further letters were written by the First Nation and Johnny Sam in December 2004 to the Director of the Agriculture Branch opposing the Paulsen application.

[41] Johnny Sam advised that his trapline has been in his family for decades. It is where he learned traditional activities and where he wishes to pass on traditional activities to his grandchildren.

[42] The First Nation advised that it had agreed with the Carmacks Renewable Resources Council that a meeting was required with the Branch to identify areas within the Traditional Territory that would be suitable for agricultural purposes.

[43] The Director replied by letter of January 24, 2005 that he did not think that the failure to follow the usual practice of direct contact with the trapper invalidated the LARC recommendation. The Director did not refer to his approval letter of October 18, 2004, but he wrote that the First Nation's "idea points in a positive direction".

[44] The First Nation did not receive a copy of the Director’s approval letter until July 27, 2005.

[45] On August 24, 2005, the First Nation filed a nine-page appeal from the Director’s decision approving the application. It said the decision should be reversed for the following reasons:

- The LARC meeting which discussed this application did not consider a number of important factors;

- The decision ignores and fails to accommodate trapping rights under the First Nation Final Agreement;

- The decision is inconsistent with the First Nation Final Agreement because it will adversely affect First Nation settlement lands;

- The decision ignores and is inconsistent with the Fish and Wildlife Management plan established jointly by the First Nation, the Yukon Government and the Carmacks Renewable Resources Council;

- The decision will probably not result in a successful agricultural enterprise because of water shortages for irrigation; and

- The decision is inconsistent with the Crown's duties to consult the First Nation and effectively accommodate its rights protected by s. 35 of the *Constitution Act*, 1982.

[46] On December 12, 2005, a Department Assistant Deputy Minister wrote to the First Nation, saying that he would not review the decision of the Director of the Agriculture Branch because the First Nation is a member of LARC, not an intervenor. The LARC Terms of Reference only provide an appeal to an applicant or an intervenor.

[47] The *Yukon Environmental Assessment Act* requires an environmental screening. The Agriculture Branch did not complete the environmental assessment until March 21, 2005.

[48] No transfer of land has taken place as the Yukon Government and the First Nation have agreed to wait for the Court's decision.

ISSUES

[49] The following issues will be considered:

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?

Issue 1: Does the common law duty to consult and, where appropriate, to accommodate apply to the Final Agreement?

[50] The First Nation and the Yukon Government have a genuine and principled disagreement about whether the duty of the Crown to consult and accommodate, as set out in the *Mikisew Cree* case, applies to the Final Agreement.

[51] The First Nation says that the right of the Yukon Government to transfer land in its Traditional Territory is subject to the honour of the Crown and therefore the duty to consult and accommodate is engaged. In effect, it submits that the duty of consultation and accommodation is an implied duty of the Final Agreement.

[52] The Yukon Government acknowledges that the honour of the Crown applies to the terms of the Final Agreement. However, it says that the right to transfer land in the Traditional Territory of the First Nation is not limited by any term in the Final Agreement. It further states that the interpretation of the Certainty clause and the specific terms of the duty to consult set out in the Final Agreement support the proposition that there is no other duty to consult that should be applied. In its own words:

> "The respondents say that any common law duty to consult and accommodate which might otherwise have arisen in this case has been replaced by the rights set out in the Final Agreement which is a land claims agreement within the meaning of section 35 of the *Constitution Act*, 1982 and thus a constitutionally entrenched treaty.
>
> . . .
>
> The primary objective of the Final Agreement was to bring about a reconciliation of government interests and aboriginal rights by giving the parties to the treaty certainty as to the nature and extent of their rights and obligations, including the rights of the parties to own and use lands. To add to or alter the nature of those Final Agreement obligations would actually challenge the certainty the parties wished to achieve and thereby undermine the process of reconciliation.
>
> . . .
>
> By carrying out its obligations to the First Nation under the treaty, Yukon acts consistently with the honour of the Crown. While the honour of the Crown infuses the interpretation of the treaty, it should not be invoked to undermine the certainty that this modern treaty is intended to achieve."

[53] The Yukon Government's position boils down to two major propositions: the certainty argument and the submission that the only duty to consult has been expressed in the Final Agreement.

[54] The Government points out that there is no specific provision that provides for consultation of any kind with the First Nation in the Government's decision to dispose of or transfer land in the Traditional Territory of the First Nation. The Government acknowledges that there is no specific section of the Final Agreement that provides for the transfer of land, but there is no doubt that the right to do so is implied in the Final Agreement. There is no express provision that restricts the use of non-Settlement Land in the Traditional Territory. The Government says:

> “The clear and unambiguous language of the treaty is that Subsistence harvesting on Crown Land is limited to Crown Land to which there exists a right of access as set out in the treaty. The treaty clearly contemplates dispositions of Crown Land. Had the parties to the treaty intended that an obligation to consult be imposed prior to such disposition, such an obligation would have been included, in explicit terms.”

The Modern Law of Treaty Interpretation

[55] Both the Yukon Government and the First Nation agree that the honour of the Crown infuses the interpretation of the Final Agreement. Therefore, it is useful to consider what the "honour of the Crown" means in the context of treaty interpretation.

[56] I use the word "modern" in the title as Binnie J. used it in the opening line of his judgment in the *Mikisew Cree* case:

> “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.”

[57] The Mikisew Cree entered into Treaty 8 in 1899 surrendering 840,000 square kilometres of land in northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. In exchange, the First Nations were promised hunting, trapping and fishing rights in the surrendered lands subject to regulation and “such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”

[58] The Mikisew Cree did not receive their reserve land until the 1986 Treaty Land Entitlement Agreement. Less than 15 years later, the federal government proposed a 118 kilometre winter road, originally through the Peace Point Reserve, later modified to traverse the traplines of 14 Mikisew families and affect the hunting grounds of as many as 100 hunters. The total area of the road would be approximately 23 square kilometres. Although it may be obvious, it should be stated that a winter road is precisely that: it is not an all-weather road which is a permanent structure, but rather a road constructed for the winter season only and dependent on adequate snow conditions and ice on rivers.

[59] The Mikisew Cree were invited to respond to the Terms of Reference for the environmental assessment on January 19, 2000, and participate in open house sessions to take place over the summer of 2000. The Mikisew Cree did not formally respond until October 10, 2000, some two months after the deadline for "public" comment. The Mikisew Cree did not consider the open house to be an appropriate forum for them to be consulted.

[60] Parks Canada, after deciding to authorize the winter road, eventually apologized to the Mikisew Cree First Nation for the way the consultation process unfolded. The authorization did not make any reference to any obligation to the Mikisew Cree. The Minister of Parks Canada then said that the Mikisew Cree could not now complain because they declined to participate in the public process.

[61] The decision in *Mikisew Cree* flows from the earlier decisions of the Supreme Court of Canada in *Taku River* and *Haida Nation*. The latter were cases of judicial review of British Columbia government decisions where the asserted aboriginal rights were pre-proof, non-treaty situations. The court stated that the aboriginal interest in those cases was “insufficiently specific” (*Haida Nation*, paragraph 18) to require the Crown to act as a fiduciary. Thus, the Court developed the concept of the government's duty to consult aboriginal peoples and accommodate their interests based upon the honour of the Crown and section 35 of the *Constitution Act*, *1982*, even in pre-proof, non-treaty circumstances.

[62] Section 35 of the *Constitution Act, 1982*, states:

> “(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> . . .
>
> (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.”

[63] I will summarize the meaning of the “honour of the Crown” from the jurisprudence in the *Haida Nation* case:

1. The honour of the Crown is always at stake in its dealings with Aboriginal peoples (para. 16).

2. The Crown must act honourably from the assertion of sovereignty to the resolution of claims and the implementation of treaties (para. 17).

3. The honour of the Crown infuses the processes of treaty making and treaty interpretation (para. 19).

4. It is a corollary of section 35 of the *Constitution Act* that the Crown acts honourably in defining the rights it guarantees and in reconciling them with other rights and interests (para. 20).

5. The duty to consult and accommodate is part of a process of fair dealing flowing from section 35(1) of the *Constitution Act* (para. 32).

[64] The significance of the *Mikisew Cree* case is that the Supreme Court of Canada applied the duty to consult and accommodate to the interpretation of a treaty, albeit an historic one. In that case, Binnie J. writing for the Court, stated:

> "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. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.
>
> . . .

> 3. . . . The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well." (my emphasis)

[65] In response to the assertion of the federal minister that the treaty itself constituted the accommodation of the aboriginal interest, Binnie J. stated:

> "54. This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.
>
> 55. The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the

> Mikisew hunting and trapping rights over the lands in question.
>
> 56. In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. . . .
>
> 57. As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well." (my emphasis)

[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.

[67] The question to be addressed is 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.

[68] To buttress its submission, the Yukon Government submits that the *Mikisew Cree* case is distinguishable on the following grounds:

1. None of the parties in the *Mikisew Cree* case expected that Treaty 8 "constituted a finished land use blueprint" (paragraph 27);

2. Treaty 8 did not have a process for land use planning as found in this Final Agreement, which specifically provides for land use planning, development assessment, water management, fish and wildlife management, and economic development;

3. Treaty 8 demands a process by which lands may be transferred from a category where the First Nations had harvesting rights to a category where they do not (paragraph 33). The Yukon Government submits this Final Agreement provides a process without requiring a duty to consult and accommodate.

4. Treaty 8 was the subject of negotiations wherein the Crown promised that the Indians' right to hunt, fish and trap would continue "after the treaty as existed before it" (paragraph 47). The Final Agreement does not contain such a promise.

5. Treaty 8 may have contemplated "a long journey that is unlikely to end any time soon" (paragraph 56). This is to be contrasted to the certainty intention expressed in the Yukon Final Agreement.

6. As suggested in paragraphs 62 and 63 of the *Mikisew Cree* decision, the Crown obligation is clear in the case at bar and there is no duty to consult any more than is specifically required in the Final Agreement.

[69] There are undoubtedly distinguishing features between Treaty 8 and the Final Agreement. At the same time, there is no question that the Final Agreement represents the beginning of “a long journey”. While there are no oral agreements in the Final Agreement, it contemplated that the members of the First Nation would continue to harvest fish and wildlife on their Traditional Territory, although there was no commitment that the right to hunt, fish and trap would remain the same as before the treaty.

[70] What is very similar in Treaty 8 and the Final Agreement is that the Crown has a right to transfer land and neither the Treaty nor the Final Agreement sets out a process. What is different is that the Final Agreement contains, among other things, land use planning and fish and wildlife management provisions.

The Certainty Argument

[71] I now turn to the specific sections of the Final Agreement that the Yukon Government and the First Nation rely upon for their respective views of the certainty argument. The Yukon Government submits that the primary objective of the Final Agreement was to bring about reconciliation of government interests and aboriginal rights by giving certainty to the rights of the parties to own and use lands. In other words, the First Nation exchanged their aboriginal title for specified rights in their Traditional Territory that are defined in the Final Agreement.

[72] This submission is supported by certain paragraphs of the “Whereas” section at the beginning of the Final Agreement:

> “ . . .
>
> . . . 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;
>
> the parties wish to achieve certainty with respect to their relationships to each other;
>
> the parties to this Agreement have negotiated this land claims agreement securing for the Little Salmon/Carmacks First Nation and Little Salmon/Carmacks People the rights and benefits set out herein; . . . “

[73] The Final Agreement sets out in section 2.6.7 that these objectives are statements of the intentions of the parties and shall be used to assist in the interpretation of doubtful or ambiguous expressions.

[74] The Yukon Government submits that these objectives were confirmed in the Certainty section 2.5.0 of the Final Agreement which states that the First Nation and its People:

> “. . . cede, release and surrender to Her Majesty the Queen in Right of Canada, all their aboriginal claims, rights, titles, and interests in and to . . . “

all Non-Settlement Land which includes their Traditional Territory where this transfer of land to Mr. Paulsen has been approved.

[75] Further, section 2.5.1.4 states that neither the First Nation nor any person it represents:

> ". . . shall . . . assert any cause of action, action for declaration, claim or demand of whatever kind or nature, which they ever had, now have, or may hereafter have against Her Majesty the Queen . . . based on, (a) any aboriginal claim, right, title or interest ceded, released or surrendered pursuant to 2.5.1.1 and 2.5.1.2 . . .".

[76] The Yukon Government also relies upon specific rules of interpretation set out in the Final Agreement:

> "2.6.3 There shall not be any presumption that doubtful expressions in a Settlement Agreement be resolved in favour of any party to a Settlement Agreement or any beneficiary of a Settlement Agreement.
>
> 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."

[77] The Government does not suggest that this case involves a doubtful expression issue but submits that these sections distinguish this modern comprehensive land claim agreement from the historic treaties like Treaty 8 in the *Mikisew Cree* case.

[78] The Final Agreement has other provisions that must be considered. The opening "Whereas" section also includes the following objectives:

> "
>
> . . .
>
> . . . the parties to this Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between Little Salmon/Carmacks People and the land;
>
> the parties to this Agreement wish to encourage and protect the cultural distinctiveness and social well-being of Little Salmon/Carmacks People;
>
> . . . "

[79] The Final Agreement also contains the following provisions:

> "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."

[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.

The Only Duty to Consult is in the Final Agreement.

[83] The Final Agreement contains very specific obligations on the Government to consult in specified situations. The definition section of the Final Agreement states:

> '"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."

[84] The Yukon Government submits that the Final Agreement has expressly provided for the duty to consult in specific circumstances and the right to dispose of land in the First Nation's Traditional Territory is clearly not one of them. In this submission, the Yukon Government is stating that it has the exclusive authority to transfer land in the First Nation's Traditional Territory without having a legal obligation to consider what effect the transfer of land may have on the rights and interests of the First Nation expressed in the Final Agreement.

[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.

[86] The 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. Indeed, the Yukon

Government concedes that the honour of the Crown applies to the specific terms of the Final Agreement. As I interpret the *Mikisew Cree* case, the Supreme Court of Canada has stated that the honour of the Crown, as a corollary to section 35 of the *Constitution Act, 1982*, infuses treaty making, implementation and interpretation. So the duty of the Crown to consult and accommodate may apply to transfers of land in the Traditional Territory of a First Nation to ensure that the treaty rights are respected.

[87] There is no express provision of the Final Agreement that states that the only duty to consult and accommodate is specified in the Final Agreement. To the contrary, section 2.2.4 provides that existing or future constitutional rights may be applicable and section 2.6.5 confirms that nothing in the Final Agreement shall be construed to preclude the advocacy of such a relationship between the Crown and Yukon First Nations.

[88] I conclude that the duty to consult and accommodate, based on the honour of the Crown and section 35 of the *Constitution Act*, applies to the Final Agreement and the right of the Yukon Government to transfer land in the First Nations Traditional Territory.

[89] I now turn to the question of whether the duty is triggered in this case.

Issue 2: If so, was the duty triggered in this case?

[90] The threshold for triggering the duty to consult and accommodate is a low one. In *Haida Nation*, a pre-proof claim, McLachlin C.J., stated at paragraph 35:

> “The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive,

> of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it".

[91] In *Mikisew Cree*, a treaty case, Binnie J. said at paragraph 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." (my emphasis)

[92] The duty will be triggered in this case if the proposed transfer of land has adverse effects on rights of the First Nation secured in the Final Agreement. I now turn to the rights potentially affected in the Final Agreement.

The Right to Harvest for Subsistence

[93] The right to harvest for Subsistence is found in Chapter 16 – Fish and Wildlife in the Final Agreement. It is a significant right that applies to the Traditional Territory of the First Nation and I set out below some of the pertinent provisions:

> "16.3.1 This chapter sets out powers and responsibilities of Government and Yukon First Nations for the management of Fish and Wildlife and their habitats, while, subject to 16.5.1.1, 16.5.1.2 and 16.5.1.3, respecting the Minister's ultimate jurisdiction, consistent with this chapter, for the management of Fish and Wildlife and their habitats.
>
> 16.3.2 The management and Harvesting of Fish, Wildlife and their habitats shall be governed by the principle of Conservation.
>
> …

> 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.
>
> 16.4.3 Yukon Indian People shall have the right to employ within their Traditional Territories traditional and current methods of and equipment for Harvesting pursuant to 16.4.2, or limited pursuant to a Basic Needs Level allocation or pursuant to a basic needs allocation of Salmon, subject to limitations prescribed pursuant to Settlement Agreements."

[94] Harvesting is defined as gathering, hunting, trapping or fishing. The trapping right (harvesting of fur bearers in section 16.4.5) includes the right to give, trade, barter or sell any non-edible by-product from the harvest of fur bearers.

[95] There are 15 specific powers granted to Yukon First Nations in section 16.5.1. of the Final Agreement that relate to management, administration and allocation of their subsistence harvesting rights. There are two specific powers and responsibilities of the First Nation that demonstrate the role that may be fulfilled by First Nations:

> "16.5.1.8 may manage local populations of Fish and Wildlife within Settlement Land, to the extent coordination with other Fish and Wildlife management programs is not considered necessary by the Board;
>
> 16.5.1.9 may participate in management of Fish and Wildlife within the Yukon in the manner set out in this chapter;"

[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 on hunting rights of the First Nation.

[97] It is also clear that although the ultimate jurisdiction for the management of Fish and Wildlife and their habitats remains with the Yukon Government, the Final Agreement has, among others, the objective:

> "16.1.1.11 to enhance and promote the full participation of Yukon Indian People in renewable resources management."

Renewable Resources Management

[98] The land applied for is alongside the Yukon River in an area that the First Nation identified for habitat protection in the Fish and Wildlife Management plan. The plan is a community-based fish and wildlife plan involving the First Nation, the Carmacks Renewable Resources Council and the Yukon Government.

[99] The Carmacks Renewable Resources Council consists of three Yukon Government and three First Nation nominees. It was established pursuant to section

16.6.0 of the Final Agreement “as a primary instrument for local renewable resources management” for the First Nation's Traditional Territory.

[100] The objectives of Chapter 16 – Fish and Wildlife, include the following:

> “16.1.1.1 to ensure Conservation in the management of all Fish and Wildlife resources and their habitats;
>
> 16.1.1.2 to preserve and enhance the renewable resources economy;
>
> …
>
> 16.1.1.5 to guarantee the rights of Yukon Indian People to harvest and the rights of Yukon First Nations to manage renewable resources on Settlement Land;”

[101] The point for the purpose of triggering the duty is that the granting of the Paulsen application, in addition to permanently affecting the right of the members of the First Nation to harvest, may undermine the Fish and Wildlife Management plan and the objectives of chapter 16 of the Final Agreement. This adverse impact is non-compensable.

Settlement Land

[102] The Paulsen application also has the potential to adversely affect two parcels of Settlement Land selected by the First Nation. The Settlement Land was allocated in a fixed amount for each First Nation. Section 9.1.0 sets out the objective:

> “9.1.1 The objective of this chapter is to recognize the fundamental importance of land in protecting and enhancing a Yukon First Nation's cultural identity, traditional values and life style, and in providing a foundation for a Yukon First Nation's self-government arrangements.”

[103] I conclude that the common law duty to consult and accommodate is triggered because the Crown always has notice of the contents of the Final Agreement. There are significant treaty rights of the First Nation in the Final Agreement that may be adversely affected. The treaty rights are not "remote or insubstantial". They may be categorized by some as “smaller grievances” in the context of grand schemes, but they go to the heart of this Final Agreement as the Yukon Government pursues its agriculture policy in the First Nation's Traditional Territory. The 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.

Issue 3: If so, what is the scope of that duty?

[104] In *Mikisew Cree*, at paragraph 59, Binnie J. said that the court must first consider the *process* by which the transfer of land is approved and then whether that process is compatible with the honour of the Crown. In *Haida Nation*, a pre-proof claim, McLachlin C.J. stated at paragraphs 43 to 45:

> “At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. ...
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the

> opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. ...
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake." (emphasis added)

[105] In the context of a modern land claims settlement, Binnie J. discussed one variable in determining the content of the duty to consult, namely "the specificity of the promises made" at paragraph 63 in *Mikisew Cree*:

> "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. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation." (emphasis added)

[106] He concluded in *Mikisew Cree* that the proposal "to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights" was

clearly subject to the Crown's right to take up land, that “the Crown's duty lies at the lower end of the spectrum.” He stated in paragraph 64:

> “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.”

[107] Binnie J. quoted with approval the comments of Finch J.A. (now C.J.B.C.) in *Halfway River First Nation* v. *British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 at paragraphs 159-160:

> “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.” (emphasis added.

[108] It goes without saying that the First Nation must actively engage in the consultation.

[109] In the Paulsen application, the specific impacts may be small in terms of the amount of land affected. However, the impacts may be permanent and they clearly have a negative impact on the right to harvest for subsistence and to pursue the renewable resources planning process for the area. In my view, the duty to consult in this case is no less strong than the duty in *Mikisew Cree*. In fact, a deep consultation is required as

the Paulsen 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.

[110] I conclude that the duty to consult in this agricultural land application involves providing notice, a complete informational package and the results of whatever environmental screening is required not only to the First Nation but to the affected trapper. The consultation aspect requires a direct consultation with Johnny Sam and the First Nation to discuss their treaty rights and interests, to listen carefully and determine whether any of those rights and interests can be accommodated. There is no obligation to obtain the consent of the First Nation, but rather to determine in an honourable way if their interests can be accommodated.

Issue 4: Was the duty met in this case?

[111] The Yukon Government submits that, notwithstanding that it was not legally obligated to consult, it did in fact consult and make reasonable efforts to accommodate the First Nation's concerns and interests. It is the Government’s view that LARC is the mechanism to implement the consultation.

[112] The Yukon Government submits that the LARC process meets the requirements of the Crown's duty to consult and accommodate in the same way that occurred in the *Taku River Tlingit* case. In that pre-claim case, Redfern Resources sought to open an old mine and build a 160 kilometre road through a portion of the Taku River Tlingit Traditional Territory. The proposal was assessed in accordance with the British Columbia *Environmental Assessment Act*. That Act specifically provided for "first nation"

participation. The Taku River Tlingit participated in a formally constituted Project Committee. They participated in technical subcommittees, one to deal with aboriginal concerns and another with issues about transportation options. The Project Committee became the primary engine driving the assessment process and commissioned two studies to address Taku River Tlingit concerns. The Chief Justice concluded as follows:

> "40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.
>
> 41 . . . The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult."

[113] The Yukon Government also relies on the *Haida Nation* case (at paragraph 49) which stated that:

> "A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them".

[114] There are a number of points to be considered in assessing whether the Yukon Government met its duty.

[115] Firstly, to a certain extent, the Yukon Government did meet the informational requirement of the duty. Unfortunately, that did not take place until June 2004, while it had been considering the Paulsen application since November 5, 2001. It also did not

include Johnny Sam except indirectly through his First Nation. Nevertheless, some credit must certainly be given for the early reconfiguration before the First Nation was consulted. However, that reconfiguration was as much for agricultural incompatibility of the lower bench as an accommodation in the consultative sense with the First Nation who were not formally notified about the Paulsen application for two more years.

[116] Secondly, it is difficult to conclude that a duty has been met when the legal requirement of the duty is denied. It is much less rigorous to listen politely to a person as a courtesy than it is to engage in a discussion of when or where accommodation can be made. The courtesy concept of consultation often amounts to nothing more than, to use the words of Binnie J., giving someone “the opportunity to blow off steam” before doing what you intended to do all along.

[117] There is the further difficulty that the LARC process is a pre-decision process that provides advice to the Director who makes the final decision. In the words of its own Terms of Reference, “LARC is not constituted by statute and there is no legislative requirement for LARC to consider any lands matter.” The LARC process is more akin to an information gathering process combined with a recommendation. In my view, it would not meet the test that was met in the *Taku River Tlingit* case where the process was mandated by statute. There 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. The LARC process was designed to be a public consultation which included First Nations. It was never treated as a process for achieving the common law duty of consulting and accommodating First Nation rights under the Final Agreement.

[118] Thirdly, the decision of the Director to approve the Paulsen application on October 18, 2004, is devoid of any reference to the First Nation or its treaty rights. Indeed, the decision was not even communicated to the First Nation until July 27, 2005. Presumably, the Director would say that the consultation with the First Nation took place at LARC and his decision was based on the LARC recommendation. To be fair, the LARC minutes referenced the loss and negative impacts on the trapper and the First Nation but not in the context of any legal obligation to engage the First Nation. The fact that the First Nation did not appear at the LARC hearing was not a matter of concern to LARC because it had no legal obligation. The First Nation raised the issue of its concerns not being properly addressed at the September 8, 2004 meeting with Branch officials which included the Director, but was advised that the LARC process was the consultation. 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.

[119] Fourthly, the First Nation wrote a lengthy submission to the Director when it learned of his decision in July 2005. The letter stated that it was an appeal of the Director's decision and sought to engage the common law duty to consult and accommodate. The Agriculture Branch responded on December 12, 2005, denying the right of the First Nation to appeal the LARC recommendation. The response did not refer to the Director's decision. The denial of the appeal was based upon the LARC Terms of Reference which provide that the First Nation is a member of LARC but not an intervenor. Only an intervenor can appeal a LARC recommendation. It is interesting to

note that the First Nation is a member of LARC only for applications in its Traditional Territory. I point out that, unlike the *Taku River Tlingit* case, where more than one extension of statutory time limits was granted (paragraph 41), the LARC Terms of Reference for appeals were followed rigorously resulting in no meaningful consultation for the First Nation. This causes me to question the privilege of a temporary membership that provides no appeal, with the result that an intervenor has greater rights than the First Nation. 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.

[120] Fifthly, more than six months after the LARC recommendation and five months after the Director’s decision to approve the Paulsen application, the Director authorized an environmental screening report of the application. Pursuant to section 7(1) of the *Environmental Assessment Act*, the territorial authority in relation to the project "shall ensure that the environmental assessment is conducted as early as practicable in the planning stages of the project and before irrevocable decisions are made . . .".

[121] The Yukon Government submits that it is in compliance with the *Environmental Assessment Act* because the decision of the Director was not an “irrevocable decision”, contrary to the impression that was given to the First Nation when its right to appeal was denied. It is very obvious that the environmental screening report should have been completed at a much earlier date and provided to the First Nation as part of the duty to consult. I assume that the environmental screening report, being required by statute “as early as practicable in the planning stage”, is 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.

[122] I conclude that the duty to consult and, where appropriate, accommodate, was not met because the Yukon Government never engaged the First Nation or Johnny Sam in direct consultation to address the First Nation's rights in the Final Agreement. The unfortunate result was that the impact of the Paulsen application on the right to harvest for Subsistence, the Settlement Lands and on the jointly established Fish and Wildlife Management plan was never addressed.

[123] In the *Haida* decision, the Chief Justice, at paragraphs 60 to 63, stated that the question as to the existence of a duty to consult and accommodate is one of law and therefore the appropriate standard of review is one of correctness. The question as to whether the duty to consult has been met attracts the standard of review of reasonableness. The Government has the burden of establishing that its process was reasonable. The process does not have to be perfect.

[124] With respect to the Paulsen application, I have concluded that the Yukon Government has a duty to consult, and, where appropriate, to accommodate First Nation rights and interests based on the honour of the Crown and section 35 of the *Constitution Act, 1982*.

[125] With respect to the question of whether the duty has been met, I conclude that the Government failed to meet the standard of reasonableness. It 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 Director’s decision to approve the Paulsen application was made.

Issue 5: Should the Court exercise its discretion to quash the decision to approve the Paulsen application for agricultural land?

[126] A decision to quash the Director's decision to approve the Paulsen application should be exercised with care.

[127] This case is not one of the grand schemes that have permanent impacts over large areas of Traditional Territory. It is a small project, whose impacts may be permanent. The applicant is a citizen who has invested considerable funds on a personal basis. Nevertheless, 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.

[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.

[129] I do not consider it necessary to set aside the environmental screening and conduct another environmental screening under the *YESA Act*. Any further environmental matters to be considered could be addressed in the consultation process.

SUMMARY

[130] To summarize, I have decided that the duty to consult and accommodate does apply to the Final Agreement and that it is triggered in this case. The Yukon Government has not complied with the duty. I therefore quash and set aside the decision of the Director on October 18, 2004, approving the Paulsen application. Counsel may speak to costs, if necessary, and any other matters that may arise.

VEALE J.