SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v Yukon (Government of)*, 2015 YKSC 45

Date: 20151126
S.C. No. 14-A0055
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

GOVERNMENT OF YUKON

Defendant

And

YUKON FISH AND GAME ASSOCIATION

Intervener

Before Mr. Justice R.S. Veale

Appearances:

Stephen Walsh	Counsel for the Plaintiff
Thomas Isaac and Mark Radke	Counsel for the Defendant
Gordon Zealand	Appearing for Yukon Fish and Game Association

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ross River Dena Council ("RRDC") applies in summary trial for a declaration that the Government of Yukon ("Yukon") has a duty to consult with and, if appropriate, accommodate RRDC prior to issuing hunting licences and seals under the *Wildlife Act*, R.S.Y. 2002, c. 229, and *Regulations* that would allow persons to hunt in the Ross River

Area. The application is not directed to individual hunting licences and seals but rather the annual issuance of hunting licences and seals for the hunting season between August 1 and October 31.

[2] RRDC is a Yukon First Nation located around the community of Ross River. Its members are part of the Kaska Nation. The Ross River Area is an area of RRDC's Traditional Territory that is of particular importance to the First Nation because of traplines and subsistence hunting, among other resources.

[3] RRDC also sought a declaration that the failure to consult is inconsistent with the honour of the Crown. As the plaintiff did not pursue it, I will dismiss that application.

[4] Yukon admits that it has a general duty to consult the First Nation and does so regularly on hunting, trapping and related matters as part of its overall management of wildlife and wildlife habitat. However, Yukon opposes a declaration specifically requiring it to consult before issuing hunting licences and seals, which occurs on an annual basis.

[5] Yukon's opposition is based on a number of grounds:

1. Pursuant to Rule 19(9)(b)(i) and (ii) of the *Rules of Court*, the First Nation's application should be dismissed as the issues are not suitable for disposition under summary trial and the application will not assist the efficient resolution of the proceedings;
2. The First Nation has failed to provide the evidence necessary to satisfy the *Haida* test; and
3. The First Nation applies for a major constitutional declaration without a basis in law; or alternatively the declaration sought requires evidence of hardship or some breach of Yukon's duty to consult.

[6] The ultimate issue is whether a declaratory remedy is appropriate or necessary in this case.

[7] Yukon also submits, in the alternative to dismissal, that the Court should order a full trial with evidence pursuant to Rule 19(14).

[8] While submissions have relied on many cases, the main ones for consideration, in my view, are *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, ("*Haida*") and *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, leave to appeal to SCC refused, 35236 (September 19, 2013) ("*RRDC #1*"). In *RRDC #1,* the Court of Appeal of Yukon granted a declaration to RRDC stating that the duty to consult arises at the point of Yukon's determination about whether mineral rights on Crown lands within the Ross River Area are to be made available to third parties under the *Quartz Mining Act*.

[9] RRDC has not signed a Final Agreement under the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34. Thus, the question of the duty to consult arises under the *Haida* constitutional framework.

Yukon Wildlife Management

[10] Yukon has provided a substantial amount of evidence in the 219-paragraph affidavit of Dan Lindsey, the Director of the Fish and Wildlife Branch ("the Director"), Department of the Environment, Government of Yukon ("Environment Yukon"). The following is a brief summary of that two-volume affidavit which attaches extensive exhibits consisting of reports, letters and emails.

[11] Under the *Wildlife Act*, a Yukon resident who meets the residency requirements may acquire a hunting licence to hunt big game in any area in Yukon permitted under

the *Wildlife Act* and *Regulations*. The hunter must also obtain a seal or seals for the specific big game that the resident wishes to hunt. A permit to hunt under the *Wildlife Act* or permit hunt authorization may also be required if the licenced hunter wishes to hunt a particular species in a specific game management sub-zone, as hunting may be limited in certain subzones for conservation reasons. A person must have a hunting licence before applying for a permit. A seal is also required for a specific big game animal. Once the specific animal is harvested, the seal is cancelled and attached to the carcass, followed by reporting requirements and compulsory submissions.

[12] The same regime does not apply to RRDC members. Section 22(2) of the *Yukon Act*, S.C. 2002, c. 7, provides that Yukon legislation in relation to the conservation of wildlife applies to Indians, except for the hunting of food on unoccupied public real property, unless the species is declared to be in danger of becoming extinct. Unlike other hunters, RRDC members do not need to meet the residential requirements of the *Wildlife Act* or obtain a licence and a seal to hunt big game. Nor are they generally required to comply with the limits set by permit hunts. A member of RRDC does not require a licence, permit or seal to hunt for subsistence purposes in the Ross River Area or elsewhere in the territory. Although it is not pertinent to this case, once a final agreement is given effect under the *Yukon First Nations Land Claims Settlement Act*, the right of an Indian person enrolled in the agreement to hunt for food under s. 22(2) does not apply and the First Nation hunter may hunt within their traditional territory for subsistence purposes, or in another First Nation's traditional territory with permission from that First Nation. If permission is denied or not sought, the First Nation hunter

could apply for a licence under the *Wildlife Act* and follow the rules applicable to resident hunters in order to hunt within another First Nation's traditional territory.

[13] Non-resident hunters may also hunt in Yukon, but they must be accompanied by a guide. Only outfitters can take non-resident hunters on a permit hunt. The number of animals hunted by an outfitter's clients may be limited by quotas established by Environment Yukon.

[14] The Director states that the Yukon Fish and Wildlife Management Board ("YFWMB") is the primary instrument for fish and wildlife management in Yukon. It was established pursuant to Chapter 16 of the *Umbrella Final Agreement*. Eleven of the fourteen Yukon First Nations have signed Final Agreements but RRDC has not. The YFWMB is comprised of six nominees from the Council for Yukon First Nations ("CYFN") and six from the Governments of Canada and Yukon. RRDC is not a member of the CYFN and has never sat on the YFWMB.

[15] Environment Yukon has a head Regional Biologist and staff who are based in Watson Lake and are the frontline representatives to address concerns and issues raised by the RRDC and other members of the community about hunting in the Ross River Area.

[16] Over the period from 1995 - 2013, an average of 680 moose, 432 woodland caribou and 243 sheep were harvested annually throughout the Yukon. These numbers refer to the actual harvest of animals, not the number of licences and seals, and a 2010 survey found only one hunter in five was successful. The harvest numbers do not include the harvest by RRDC members.

[17] Since 1995, on average the Wildlife Branch has issued 4,200 big game hunting licences, 3,355 moose seals, 3,010 caribou seals and 1,310 sheep seals per year. There are typically more seals issued than licences, since one licenced hunter is likely to obtain seals for more than one type of big game animal. In order to determine sustainable hunting levels, Environment Yukon collects information on hunting by licenced hunters. This does not include information from (unlicenced) First Nations hunters. Environment Yukon states that one of the greatest challenges when managing wildlife is the lack of information from First Nations hunters.

[18] All licenced big game hunters are required to report their harvest including the kill date and subzone where the harvest occurred. This is crucial data in determining if and where conservation measures are required.

[19] Sustainable harvest rates for most North American big game species fall in the 2-5% of the population size in a given management unit. The current maximum harvest rates are:

(a) 2-5% for moose;

(b) 2-3% for caribou;

(c) Not more than 4% for tinhorn sheep when the zone level population is considered sustainable;

(d) No harvest for mountain goat population with less than 50 animals and not more than 2% for population over 50 animals.

[20] These harvest rates are for males only and hunting of female ungulates is prohibited for licenced hunters.

The Ross River Area

[21] The Director is familiar with the Ross River Area and states that it encompasses 63,095 square kilometres. Eighty-three of the 443 game management subzones in Yukon are at least partially within the Ross River Area.

[22] There are seven mountain caribou herds that are migratory and found within the Ross River Area during some portion of the year. The Finlayson Caribou Herd is the only one that remains entirely within the Ross River Area. The other herds spend part of the year in areas outside the Ross River Area. The Director states that Environment Yukon establishes a total harvest for caribou within the Ross River Area although it cannot be specific for those herds that move in and out of the Area. Moose, tinhorn sheep, mountain goats, grizzly bears, black bears and wolves are all located in the Ross River Area.

[23] The hunting season for big game in Yukon for licenced hunters is August 1 to October 31. Between 1995 - 2013, an average of 164 moose, 69 caribou and 29 sheep were harvested annually in the Ross River Area. These statistics represent 24% of the Yukon harvest for moose, 30% for caribou and 12% for sheep. These populations are generally healthy and the harvest rates are below the sustainable harvest rates. The high percentages indicate that wildlife harvesting by licenced hunters in the Ross River Area is popular, presumably because of road access from the Campbell Highway and the North and South Canol roads.

[24] Since 1975, Environment Yukon has conducted numerous composition/classification surveys, censuses and radio collaring programs to assess the populations of caribou. There have also been regular aerial surveys of moose, caribou,

sheep and goat populations and habitat. RRDC members are invited to participate in aerial surveys as “Observers”.

[25] In 1997, a Ross River Integrated Fish and Wildlife Management Plan was completed by Yukon in response to issues identified by RRDC, but never adopted due to concerns raised by RRDC.

The Finlayson Caribou Herd

[26] The Finlayson Caribou Herd is located southeast of Ross River in and around the Caribou Lakes and Finlayson Lake. The herd has been an important resource for Kaska hunters for many generations and has been hunted by resident hunters and big game outfitters.

[27] The construction of the Campbell Highway from Watson Lake to Ross River in the 1960s greatly increased access to the main Finlayson caribou winter range in addition to increasing hunting opportunities in the fall.

[28] The declining population of the Finlayson Caribou Herd has been a source of concern since the 1980s. In response in 1983, Environment Yukon restricted licenced hunting to male caribou only, encouraged First Nations hunters to do the same, and reduced the wolf population. The herd grew from 2,000 in 1982 to almost 6,000 in 1990. Conservation efforts continue.

[29] The Game Guardian Program was established in 1995. It was a cooperative program established between RRDC and Yukon to monitor First Nations winter harvest of caribou and moose in the Finlayson Caribou Herd range. The Game Guardian Program operated until 2004.

[30] Environment Yukon implemented a permit hunt for the Finlayson Caribou Herd starting in 1998. RRDC wanted a harvest of 15 caribou a year. Initially, Environment Yukon did not agree and felt that a harvest of 120 bulls was sustainable. Environment Yukon eventually agreed with an annual permit harvest of 15 caribou. Between 1998 and 2001, 30 permits were issued annually, anticipating that no more than half the hunters would be successful. The restrictions did not apply to First Nations hunters, and Environment Yukon estimates that the RRDC hunter harvest was between fifty and eighty caribou per year, primarily cows.

[31] In 2006 – 2007, Environment Yukon and the YFWMB sought to establish the Yukon Community Stewardship Program ("YCSP") in Ross River to facilitate a caribou management consultation process with RRDC. An aerial survey of the Finlayson Caribou Herd in March 2007 indicated a decline of 1,000 caribou to an estimated 3,077 caribou, putting the sustainability of the harvest in question.

[32] The Director indicates that population and composition surveys of the Finlayson Caribou Herd have continued since 2007. Composition surveys completed within the past ten years have indicated a stable population, however Environment Yukon has recommended that a population census be considered and that annual surveys continue.

Other Wildlife Conservation Efforts and Consultation

[33] RRDC has been consulted during the negotiation of outfitter quotas for non-resident hunter management. Consultations have also taken place with respect to the South Nahanni caribou herd, the Itsi mountain goats and the Faro uplands moose, and attempted with respect to wolf populations.

[34] The Director points to overall difficulties in the consultation processes attempted with RRDC. Specifically:

a) Environment Yukon attempted to finalize and implement the 1997 Ross River Integrated Fish and Wildlife Management Plan. This involved unsuccessful attempts between 1999 and 2001 by the Liard Regional Biologist, Jan Adamczewski ("Adamczewski"), to set up meetings with RRDC to discuss wildlife issues. His correspondence to RRDC was often unanswered.

b) RRDC did not initially respond to Environment Yukon's efforts to establish a wolf trapping workshop in 1998. The trapping workshop was established after months of unanswered correspondence by Adamczewski to RRDC. Trapping workshops were held until 2003 when the interest from the Ross River community declined.

c) Since 1996, RRDC has been invited to participate on committees negotiating outfitter quotas within the Ross River Area but have not participated.

d) RRDC was invited by the review committee to participate in a wolf conservation and management workshop in 2011 which was associated with a review of the Wolf Conservation Management Plan. It was also invited to participate in a community meeting in Ross River. Representatives from RRDC did not attend either meeting.

[35] I accept these submissions by the Director but do not find any evidence of a concerted evidence to thwart the consultation process. It is also clear from his affidavit

that RRDC has often made its members available for consultation on various wildlife monitoring and management initiatives.

Environment Yukon's impacts on RRDC hunting activity within the Ross River Area

[36] The Director concludes his affidavit with the opinion that Environment Yukon has not impeded RRDC hunting within the Ross River Area. To support this view, he sets out the following six points, to which I have added my observations:

1. Yukon has worked with RRDC to establish wildlife schemes in the Ross River Area that have not impeded the ability of members of RRDC to hunt in the Ross River Area. This is a fact on the evidence before me and is not contested by RRDC in this action.
2. The issuance of individual hunting licences alone to resident and non-resident hunters pursuant to the *Wildlife Act* does not impact RRDC hunters. This assertion may be correct but it oversimplifies RRDC's application. It is not really the issuance of hunting licences and seals that is of concern, but rather the hunting activity in the Ross River Area that these licences and seals could result in.
3. Issuing hunting licences is an administrative task and not related to restrictive measures or wildlife sustainability. I agree that may be the case with licences viewed in isolation, but RRDC is concerned about the result of licences and seals allowing people to hunt in the Ross River Area. Licence and seal issuance assumes the hunting of wildlife has the potential to impact wildlife sustainability. In fact, Yukon admits in response

to the RRDC Notice to Admit dated August 17, 2014, that the issuance of licences and seals is part of its management of wildlife and wildlife habitat.

4. Yukon has made consistent efforts to discuss wildlife management with RRDC. I accept this as a fact.

5. RRDC has the ability to bring forward regulation change proposals to the YFWMB to effect such regulatory change. This may be correct but it ignores the fact that RRDC has not signed a final agreement, and is not formally part of the YFWMB or its activities.

LAW

The *Haida Test*

[37] The question of when the duty to consult arises was summarized from *Haida* in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para. 31, as follows:

> 31 The Court in *Haida Nation* answered this question as follows: the duty to consult 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" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. …

[38] The duty to consult is grounded in the honour of the Crown and “derives from the need to protect Aboriginal interests while land and resources claims are ongoing or where proposed action may infringe on an Aboriginal right” (*Rio Tinto*, para. 33).

[39] In *RRDC #1*, the Court found that a duty to consult RRDC arose prior to the registration of quartz mining claims.

[40] Because of the similarities between that case and this application, I will address *RRDC #1* and relate it to the facts before me in this application.

[41] *RRDC #1* provided a useful overview of the *Haida* duty to consult at paras. 17, 18 and 19:

> 17 In *Haida*, the Supreme Court of Canada considered the extent to which the Crown must recognize credible though unproven claims to Aboriginal title and rights in its management of resources. It held that the duty of the Crown to act honourably in its dealings with First Nations requires that it engage in a process of consultation where proposed Crown conduct may adversely affect claims to Aboriginal interests in land. While the Crown is entitled to manage resources, it must do so only with due consideration of the effect of that management on Aboriginal rights claims.
>
> 18 To this end, the Crown must engage in bona fide consultation with First Nations with a view to accommodating, where appropriate, claimed interests before authorizing any activities that may adversely affect those interests.
>
> 19 Where the duty to consult is triggered, the nature of the consultation required will depend on the apparent strength of the First Nation's claim to Aboriginal title or rights, and on the degree to which the proposed Crown activity will adversely affect the claimed title or rights. Where the claim is a weak one, or where the potential adverse effect of Crown activity is minimal, the duty of consultation may require only that the Crown notify the First Nation of the proposed activity. Where the claim is a strong one, or the effect of the proposed Crown activity is significant, however, deeper consultation will be required, and it is more likely that accommodation will be required. (my emphasis)

Application of the *Haida* Test

1) *Does Yukon have knowledge of RRDC's asserted Aboriginal right?*

[42] There does not appear to be a serious doubt that RRDC has met the first part of the *Haida* test. RRDC has pled that Yukon entered into agreements with RRDC and the

Kaska acknowledging that the Kaska and RRDC have Aboriginal title, rights and interest in the Ross River Area. Yukon acknowledges these agreements. The Yukon has a long history of negotiating land and other claims with RRDC.

[43] In *RRDC #1*, the Court of Appeal of Yukon stated at para. 28:

> 28 There can be no doubt that the first element of the test described in Rio Tinto is present when a mineral claim is recorded within the Ross River Area. The parties have a long history of land claims negotiations and interim agreements in respect of the area. Yukon concedes that it has knowledge of the plaintiff's asserted Aboriginal rights.

[44] As in *RRDC #1*, Yukon does not admit that RRDC has aboriginal title but as stated at para. 31:

> 31 …Whether or not Yukon has acknowledged that some unparticularized part of the plaintiff's land claim is valid, it does not dispute that the claim is a serious one with sufficient credibility to satisfy the first element of the *Haida* test.

[45] Yukon also does not dispute that it has knowledge of the asserted rights of RRDC but says that RRDC has failed to present any particulars. RRDC explicitly asserted that its Aboriginal rights include the right to harvest big game in response to Yukon's demand for particulars. The importance of the right to harvest is recognized by the fact that it has been enshrined in law in s. 22 of the *Yukon Act*.

[46] Given the *RRDC #1* precedent on this issue and Yukon's admitted knowledge of the RRDC claim, this part of the test is met.

2) *Is there Crown conduct or a Crown decision?*

[47] Yukon submits that RRDC has failed to properly identify any Crown conduct or decision which engages an asserted Aboriginal right that triggers the duty to consult.

[48] While Yukon acknowledges that conduct caught by this second part of the *Haida* test occurs at the "higher wildlife management level" such as permit hunts, threshold hunts and closure of licenced hunting or early hunting season closures, Yukon says that licence and seal decisions do not meet the level of a "decision" or "conduct". As it did in *RRDC #1*, Yukon submits that the issuance of licences and seals is simply an administrative activity carried out without the exercise of discretion.

[49] The Court in *RRDC #1* rejected the absence of statutory discretion argument at paras. 36 and 37:

> 36 I do not, in any event, accept the Crown's argument that the absence of statutory discretion in relation to the recording of claims under the Quartz Mining Act absolves the Crown of its duty to consult.
>
> 37 The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown's right to manage resources. Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist. (my emphasis)

[50] I do not accept the Yukon submission that the annual issuance of licences and seals is simply an administrative task and that therefore Yukon is absolved from its duty to consult. The RRDC submission is that the duty arises prior to this task. The issuance of licences and seals may be the last step in a longer process, but when considered in the context of that process, it is nonetheless conduct capable of triggering a duty to consult.

[51] Yukon's submission that conduct capable of satisfying the second element of the *Haida* test occurs at the "higher wildlife management level" is somewhat novel, but it

could also have been made in *RRDC #1* to the extent that mineral exploration and mining policy do not occur at the level of issuing quartz claims. In my view, this submission misses the point because the issue is really whether there is Crown conduct or decision and whether the duty to consult should occur before that conduct.

[52] I find that the contemplated Crown conduct element has been met.

3) *Is there potential that the issuance of hunting licences may adversely affect an Aboriginal claim or right?*

[53] In *RRDC #1*, the Court of Appeal stated at paras. 32 and 33:

> 32 There can also be no doubt that the third element of the Haida test is made out where the Crown registers a quartz mining claim within the plaintiff's claimed territory. Aboriginal title includes mineral rights (see Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at para. 122). In transferring mineral rights to quartz mining claim holders, the Crown engages in conduct that is inconsistent with the recognition of Aboriginal title.
>
> 33 As well, the claimholder's right to engage in Class 1 exploration programs may adversely affect claimed Aboriginal rights. While Class 1 exploration programs are limited, they may still seriously impede or prevent the enjoyment of some Aboriginal rights in more than a transient or trivial manner.

[54] Possession of a licence and seal with, in some cases, a permit as well, gives a hunter the right to hunt and kill wildlife in the Ross River Area. This conduct potentially impacts the amount of wildlife available for the subsistence hunt of members of the RRDC. Arguably, the actions of a single hunter may not be comparable in consequence to the rights and activities that a quartz claim holder may hold and engage in. But, once an animal is harvested it is gone forever, like minerals once they are removed from the ground.

[55] What is different about harvesting wildlife is that the resource is renewable, which is why wildlife management exists, i.e. to ensure sustainable wildlife populations and harvests. However, the wildlife population of the Ross River Area, including the Finlayson Caribou Herd, fluctuates depending on a variety of factors, and the conduct of Yukon in issuing licences and seals can obviously impact the availability of these caribou and other big game resources for harvest. That harvest is included in the RRDC asserted Aboriginal right or claim. Hunting has an obvious impact on wildlife resources, in that the annual harvest leads to wildlife being depleted, subject to wildlife management conservation measures.

[56] It could also be said that the grant of mineral rights in a quartz claim has a more significant impact because it obviously affects Aboriginal title. However, the issuance of hunting licences and seals that permit hunting in the Ross River Area also affects the RRDC claim to underlying title, in the sense that the hunting activity infringes on both exclusive occupation and resource use. As stated in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, "Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it." To some extent, Yukon's issuance of hunting licences and seals can be said to permit conduct inconsistent with claimed Aboriginal title.

[57] Counsel for Yukon submits that there must be "material evidence of a causal connection between the consultation prior to the issuance of hunting licences and seals and a potential adverse impact on its asserted aboriginal rights." (my emphasis) While I do not find that paras. 32 and 33 of *RRDC #1* can be read that way, the *Haida* test does not require "material evidence" but rather the potential for adverse effects. If the harvest

by licenced hunters increases generally in the Ross River Area, it is not hard to imagine the potential adverse impact on First Nation subsistence hunters exercising their rights. The fact that a permit hunt was implemented for conservation reasons with the Finlayson Caribou Herd demonstrates that adverse effects can flow from the distribution of hunting licences and seals.

[58] I conclude that Yukon's annual issuance of licences and seals, insofar as it allows licenced hunters to harvest wildlife in the Ross River Area, has the potential to adversely affect Aboriginal title and the right to hunt in the Ross River Area. The Crown's duty to consult is triggered in these circumstances.

Summary Trial Procedure

[59] Yukon objects to the summary trial procedure being used under Rule 19.

[60] I note that no issue was raised by Yukon in *RRDC #1* that the summary trial procedure on affidavit evidence was not appropriate or suitable.

[61] In the case at bar, there were no examination for discoveries and no cross-examination on the affidavits filed. In other words, it has been a "just, speedy and inexpensive determination" of the proceeding on its merits. The procedure has been expeditious being heard in two days rather than days or weeks of discovery and oral evidence at trial. It is the same procedure as used in *RRDC #1* and *Beckman v. Little Salmon/Carmacks First* Nation, 2010 SCC 53.

[62] Throughout the hearing, counsel for Yukon claimed that there was insufficient evidence to support the claim for a duty to consult. I do not agree in the context of meeting the *Haida* test.

[63] Counsel for RRDC relies upon admissions made by Yukon to make its application for judgment. Rule 31(6) states as follows:

> (6) An application for judgment or any other application may be made to the court using as evidence
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> (a) admissions of the truth of a fact or the authenticity of a document made
>
> (i) in an affidavit or pleading filed by a party,
>
> (ii) in an examination for discovery of a party or a person examined for discovery on behalf of a party, or
>
> (iii) in response to a notice to admit, or
>
> (b) admissions of the truth of a fact or the authenticity of a document deemed to be made under subrule (2),
>
> and the court may, without waiting for the determination of any other question between the parties, make any order it thinks just.

[64] In its pleadings, Yukon admits the asserted claim to Aboriginal title, rights or interests of RRDC in its traditional territory in the Ross River Area, although there is not yet agreement on the extent, location or nature of the claim.

[65] Yukon also admits that it regularly consults with RRDC on hunting, trapping and related matters as part of its overall management of wildlife and wildlife habitat, although it does not regularly consult prior to issuing individual hunting licences and seals. I note again that RRDC does not claim a duty to consult before the issuance of individual licences and seals.

[66] Further, in response to the RRDC Notice to Admit dated August 7, 2014, Yukon stated:

(a) That Yukon has entered into agreement with the Kaska, which includes RRDC, acknowledging the asserted Kaska traditional territory, and the asserted claims to aboriginal title, rights and interests therein, such acknowledgment being for the purpose of negotiation;

(b) That Yukon issues licences and seals in the Ross River Area as part of its management of wildlife and wildlife habitat pursuant to the *Wildlife Act*, *Regulations* and the management regime established by the Umbrella Final Agreement.

(c) That it regularly consults with the RRDC on hunting, trapping and related harvesting matters as part of its overall management of wildlife in Yukon.

[67] In my view, these admissions can be used as evidence pursuant to Rule 31(6) to establish the first two factors in the *Haida* test.

[68] As to the third factor, the potential that the issuance of hunting licences and seals will adversely affect the RRDC claimed right to hunt wildlife can certainly be inferred, but the affidavit of Dan Lindsey clearly sets out the wildlife management and conservation measures implemented to avoid potential adverse impacts flowing from hunting activity in the Ross River Area.

[69] I conclude that the admissions and evidence of Yukon are sufficient to establish the existence of a duty to consult in this context without the necessity of a full trial.

[70] The recent Supreme Court of Canada judgment in *Hryniak v. Mauldin*, 2014 SCC 7, is also supportive of the use of summary trials even in circumstances that require the weighing of evidence, evaluating inferences and drawing inferences. While referring to the Ontario summary judgment practice, Karakatsanis J., speaking for the Court, stated:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[71] I note that at para. 24 in discussing access to justice, Karakatsanis J. observed that the traditional full trial has become largely illusory because, except where government funding is available, ordinary Canadians cannot afford to access the adjudication of civil disputes. This comment is very apt for the present application. In my view, a full trial in this matter is unnecessary and, given the disparity in financial resources of RRDC and Yukon, would prevent the fair and just resolution of this dispute.

DECLARATORY RELIEF

[72] As stated in *Canada v. Solosky*, [1980] 1 S.C.R. 821, at p. 832, declaratory relief is discretionary. There are two factors to be considered: the utility of granting the declaration and whether it will settle the questions at issue between the parties.

[73] As to the utility of a declaration, the Court of Appeal of Yukon has indicated its reluctance to exercise its discretion for what is really an advisory opinion. See *Tr'ondëk Hwëch'in v. Canada,* 2004 YKCA 2, at para. 11.

[74] Again in *Tr'ondëk Hwëch'in v. Yukon*, 2007 YKCA 1, the Court of Appeal agreed with the trial judge that the declarations sought were hypothetical and should not be granted.

[75] In the case of *RRDC #1*, the declaration granted had utility as there was ongoing mineral activity in the Ross River Area and the Crown was required to engage in

consultations before opening up the area for quartz claims and before certain exploration activities were allowed to take place. In *RRDC #1*:

1. The duty to consult was directed at claims issued in the Ross River Area.
2. Although the location and recording of a quartz claim would interfere with Aboriginal title, it was the actual performance of work on the claim that might affect other rights;
3. The current mining and environmental regime exercised no oversight over Class 1 exploration activities which could have serious and long-lasting adverse effects on claimed Aboriginal rights.

[76] In the recent case of *Kwakiutl First Nation v. North Island Central Coast Forest District*, 2015 BCCA 345, the British Columbia Court of Appeal addressed the appropriateness of a declaration of an ongoing duty to consult. The case dealt with the Crown removal of private land from a Tree Farm Licence and the extension of a Forest Stewardship Plan. In that case, the Chambers judge issued a declaration that was not applied for.

[77] The Court of Appeal set aside the declaration order and cited para. 33 of *Operation Dismantle*, [1985] 1 S.C.R. 441, where Dickson J. stated that there must be a "cognizable threat to a legal interest" before the courts will entertain the use of a declaration as a "preventive measure". He further stated that a declaration could issue to affect future rights "but not where the dispute in issue was merely speculative."

[78] Willcock J.A. concluded with the following at para. 62 of *Kwakiutl First Nation*:

> In my view, the declaration goes much further than addressing the present dispute between the parties. It does not address a cognizable threat to a legal interest. I agree with the Crown's submission that the Court ought not to

> make a declaration intended to describe the duty to consult in relation to decisions that are not before the Court. To the extent the declaration made in this case describes the law, it is unnecessary. To the extent it does more, it is inappropriate, because it addresses questions that were not before the Court, which was called upon to consider specific issues on a preliminary basis on limited evidence. (my emphasis)

Has Yukon Satisfied the Duty to Consult?

[79] This is a relevant consideration, because, if the duty to consult has been satisfied by government conduct to date, it may cast doubt on the utility in declaring the duty.

[80] The Declaration sought is that the duty to consult arises "prior to issuing hunting licenses and seals … which allow the persons … to hunt big game animals in the Ross River Area". Counsel for Yukon submits that a Declaration is unnecessary as Yukon has demonstrated a history of consultation on "higher wildlife management decisions", which generally occur prior to the issuance of hunting licences and seals. Unlike in *RRDC #1,* where there had been no consultation in the context of mining claims and Class 1 mineral exploration activities, Yukon has provided unchallenged evidence of extensive consultations about wildlife management. Moreover, as in the case of the Finlayson Caribou Herd permit hunt, the restrictions on the hunting of the Itsi Mountain Goats and the implementation of a threshold hunt for the Faro Upland Moose, the consultations, when they take place, do occur before the annual issuance of hunting licences and seals. There is no doubt that Environment Yukon has made continuing and extensive efforts to consult RRDC about wildlife management in the Ross River Area, although the evidence does not establish that this consultation occurs on a regular and predictive basis.

[81] Counsel for Yukon also opposes the Declaration in part because, in its submission, there has been a lack of participation of RRDC in past consultations, citing *R. v. Douglas*, 2007 BCCA 265. In *Douglas*, the Department of Fisheries and Oceans held consultations to finalize the plan for the annual migration of sockeye salmon from the Pacific Ocean through the Fraser River Watershed to their spawning grounds. The case focussed on the consultation with the Cheam First Nation, one group among 93 Aboriginal groups or Bands encompassing 30,000 people to be consulted. The Cheam First Nation refused to participate in the consultative efforts of the Department of Fisheries and Oceans.

[82] The *Douglas* case is not applicable to the case at bar in this respect, as I cannot find that RRDC has deliberately frustrated or refused the consultations in the manner of the Cheam First Nation. Nevertheless, the oft-quoted statement from *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, is worth repeating:

> 160 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: see R. v. Sampson (1995), 16 B.C.L.R. (3d) 226 at 251 (C.A.); R. v. Noel, [1995] 4 C.N.L.R. 78 (Y.T.T.C.) at 94-95; R. v. Jack (1995), 16 B.C.L.R. (3d) 201 at 222-223 (C.A.); Eastmain Band v. Robinson (1992), 99 D.L.R. (4th) 16 at 27 (F.C.A.); and R. v. Nikal, supra.
>
> 161 There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation

> process by refusing to meet or participate, or by imposing unreasonable conditions: see Ryan et al v. Fort St. James Forest District (District Manager), [1994] B.C.J. No. 2642, (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

[83] The *Douglas* case is also noteworthy for the fact that the Department of Fisheries and Oceans consulted widely on an annual basis before implementing its plan for the annual sockeye salmon migration.

[84] In addition, RRDC and Yukon would do well in future consultations to follow the general direction of Groberman J.A., in *RRDC #1*, at para. 45

> 45 It is not necessary or appropriate for the Court, in this proceeding, to specify precisely how the Yukon regime can be brought into conformity with the requirements of Haida. Those requirements are themselves flexible. What is required is that consultations be meaningful, and that the system allow for accommodation to take place, where required, before claimed Aboriginal title or rights are adversely affected.

[85] In my view, it intuitively makes sense to consult on an annual basis before the hunting season and the determination of which areas will require permits in addition to the seals and licences, or be subject to hunting restrictions, as considerations about wildlife management precede each hunting season. However, RRDC provided no evidence that there has been a failure to consult or breach of the duty to consult, despite the fact that annual consultations have not been the adopted practice.

[86] I conclude that Environment Yukon has generally satisfied the duty to consult and where appropriate accommodate RRDC. The declaration applied for would have marginal value when there has already been consultation.

Is the Mechanism Appropriate?

[87] Counsel for RRDC submits that the duty arises before the annual issuance of licences and seals. This position is not without merit to the extent that it is the act of licensing and issuing seals that authorizes non-First Nations hunters to harvest wildlife in the Ross River Area.

[88] Counsel for Yukon submits that the permit hunt is the more appropriate trigger for a duty to consult. However, only some of the Ross River Area requires that hunters have permits in addition to licences and seals.

[89] In my view, to the extent that RRDC is seeking to establish that the issuance of licences and seals is the trigger for the duty to consult, it is of concern that licencing takes place on a Yukon-wide basis without any stipulations about where the hunter will hunt. I take Yukon's point that licencing establishes *who* can hunt, not *where* they can hunt. Granting the Declaration as it is worded would in effect appear to place a duty on Yukon to consult RRDC before the issuance of any licence to hunt in Yukon, despite the fact that a majority of licenced hunters likely hunt outside the Ross River Area.

Is Material Evidence Required for a Declaration?

[90] Counsel for Yukon did not have any direct authority for his submission that a declaration of a constitutional duty to consult requires evidence of hardship or some breach of the duty to consult. I add that no breach has been claimed in the application nor any hardship but simply a declaration for the duty to consult and if necessary accommodate RRDC in wildlife management. In my view, hardship or a breach is only required in circumstances where the duty to consult is established and a breach must be considered in the context of a remedy such as setting aside a past decision. That is

not the case before me. Counsel for RRDC only seeks the declaration on a "going forward" basis.

[91] Counsel for Yukon relied upon the following quotation from *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73, at paras. 11 and 12 to establish the material evidence requirement:

> [11] As we understand his argument, counsel suggests that the constitutional duty to consult is triggered by an existing Aboriginal or Treaty right of which the Crown had actual or constructive notice and that the duty requires that an inquiry be made as to whether proposed action might adversely affect the right.
>
> [12] In our view, this is not the law. A duty to consult only arises when there is evidence of a possibility that the proposed action may harm an Aboriginal or Treaty right. The Commission found no such evidence in this case and, like the Judge, we can see no error in this conclusion. The brief discussion between Commission members and witnesses during the Commission hearing to which counsel referred us does not constitute evidence of potential harm that triggers a duty to consult.

[92] In *Fond du Lac*, the issue was the renewal of a uranium mining and mill operating licence issued by the Canadian Nuclear Safety Commission years earlier. Although the trial judge found there was a treaty right to hunt and fish for food there was no evidence that the treaty would be harmed in some non-trivial way. The case is not applicable to the case at bar because *Fond du Lac* was an application to establish a specific duty to consult on a licence renewal and there was no evidence that the proposed action could potentially harm a treaty right. In that case, the Crown conduct did not meet the third factor in the *Haida* test. In the case at bar, the evidence supports such a potential adverse effect, although there is no allegation of a breach and this case was brought to determine whether the duty to consult arises and should be declared. In effect, the

submission of counsel for Yukon seeks to change the nature of the RRDC application to one of establishing a breach of the duty to consult when the issue before the Court is only whether the duty to consult arises prior to the issuance of hunting licences and seals. This is akin to the situation in *RRDC #1*, where there was no onus on RRDC to present evidence of a specific harm caused by the registration of a specific quartz claim or multiple quartz claims but rather the potential that the issuance of licences and seals may adversely affect an Aboriginal claim or right.

[93] Similarly, the Federal Court in *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484, considered the situation where the First Nation was seeking to establish a breach and declaratory relief to remedy it.

[94] If, as counsel for Yukon submits, *Brokenhead Ojibway* stands for the proposition that there is no duty to consult at large and that it applies to the case at bar, then in my view, it is in direct conflict with *RRDC #1* which is binding on this Court. *RRDC #1* established that it was appropriate to declare a duty to consult prior to making Ross River Area land available to third parties, based upon an obvious potential, but not yet realized, impact of that Crown conduct.

DISPOSITION

[95] I have found that Environment Yukon has substantially consulted and accommodated RRDC in the Ross River Area in the past, and should continue to do so without the necessity of a Declaration from the Court.

[96] In addition, the proposed mechanism of requiring that consultation precede the Yukon-wide issuance of licence and seals is far-reaching in its application unlike the

declaration in *RRDC #1* which was limited geographically and therefore an effective trigger for the Ross River Area.

[97] This case is also distinguishable from *RRDC #1* as that case involved a denial of the duty to consult in addition to the timing issue. Here, the duty to consult is acknowledged and performed.

[98] For these reasons and the fact that declarations should be used sparingly, I exercise my discretion not to make a declaration that the duty to consult in the Ross River Area arises before the issuance of Yukon-wide licences and seals.

[99] Having so found though, I do want to observe that in my view there would be benefit to convening regular and predictable, i.e. annual, consultations with RRDC at the time that Yukon considers its annual hunting regulations. It strikes me that this would be an effective and reliable way of ensuring that RRDC's claims to title and hunting rights within the Ross River Area are recognized.

_____
VEALE J.