SUPREME COURT OF YUKON

Citation: *Kaska Dena Council v. Yukon (Government of)*, 2019 YKSC 13

Date: 20190305
S.C. No. 16-A0161
Registry: Whitehorse

BETWEEN

KASKA DENA COUNCIL

Plaintiff/
Defendant by Counterclaim

AND

GOVERNMENT OF YUKON

Defendant/
Intervenor by Counterclaim

AND

CHIEF GEORGE MORGAN on his own behalf
and on behalf of all the members of the Liard First Nation,
and LIARD FIRST NATION

Defendants/
Plaintiffs by Counterclaim

AND

ACHO DENE KOE FIRST NATION

Intervenor

Before Chief Justice R.S. Veale

Appearances:

Claire E. Anderson	Counsel for Kaska Dena Council
Elaine Cairns and Marlaine Anderson-Lindsay	Counsel for the Government of Yukon
Caily DiPuma and Gavin Gardiner	Counsel for Liard First Nation
Hana Boye	Counsel for Acho Dene Koe First Nation

REASONS FOR JUDGMENT

INTRODUCTION

[1] Kaska Dena Council ("KDC") applies for a declaration and order that the Government of Yukon ("Yukon") has a duty to consult and accommodate KDC prior to issuing sport hunting licences and tags under the *Wildlife Act*, R.S.Y. 2002, c. 229, in the southern part of Kaska territory in Yukon. KDC also applies for a declaration that Yukon has breached its duty to consult. At the outset, it is important to understand that KDC seeks a declaration that the duty to consult and accommodate arises prior to issuing sport hunting licences and tags on an annual basis under the *Wildlife Act* and *Regulations*. Yukon states that it is consulting and is ready to continue. KDC submits that Yukon refuses to discuss the preliminary strength of claim issue.

[2] By letter dated August 11, 2017, counsel for Yukon informed Ross River Dena Council, Liard First Nation, Kwadacha First Nation, Dease River First Nation, Daylu Dena Council, Tahltan Central Council, and Acho Dene Koe First Nation of this court proceeding.

[3] Chief George Morgan and Liard First Nation ("LFN"), who claim the same Kaska territory in Yukon as KDC, were added as defendants by consent.

[4] Acho Dene Koe First Nation, which also asserts a traditional territory in southeast Yukon, was added as an intervenor by consent. KDC amended its pleading to exclude the Acho Dene Koe First Nation's traditional territory from its claim. Acho Kene Koe First Nation filed affidavits but did not appear at the hearing.

[5] No other Kaska First Nation applied to be added as a party or intervenor to the proceeding.

[6] KDC is a society incorporated in British Columbia and is made up of members who are of Kaska ancestry in northern British Columbia and Yukon. KDC does not claim to be a rights-bearing group. Rather, it submits that aboriginal rights, title and interests are held by the members of the Kaska Nation that KDC represents. KDC submits that it has been recognized, among other documents:

1. as an aboriginal group with a transboundary claim in Yukon by both Canada and Yukon in the *Umbrella Final Agreement* and various agreements, and
2. in a Consent Order filed in this Court in *Kaska Dena Council v. Government of Yukon,* S.C. No. 13-A0173 (the "KDC Consent Order").

[7] KDC submits that Yukon and LFN clearly and unequivocally represented or acknowledged that the Kaska, represented by the KDC, have aboriginal rights, title and interests in and to their traditional territory in Yukon. KDC submits it has acted to its detriment in relying upon those representations and Yukon and LFN are estopped from denying their acknowledgement. It also submits that Yukon and LFN are estopped from denying that KDC has no standing to bring this court action pursuant to s. 35 of the *Charter of Rights and Freedoms*.

[8] LFN and Yukon confirm that KDC is not a rights-bearing group, nor an authorized representative of a rights-bearing group. They submit that KDC cannot assert aboriginal rights or title on behalf of some members of the Kaska Nation. LFN counterclaimed for a declaration that it has a constitutional right to be consulted for the southern part of the Kaska territory in Yukon but withdrew its application during the hearing.

[9] Yukon further submits that in the event the Court found there was a duty to consult, there was no evidence of an adverse effect on the claimed Aboriginal title. Yukon indicates that it has and continues to reach out to KDC, such that if it has a duty to consult, that duty has been met. Yukon also claims that it does not know the precise boundaries of the Kaska traditional territory in Yukon despite agreeing to the KDC Consent Order. I reject this latter claim without further comment as precise boundaries are not required.

[10] Canada, a necessary party to a Transboundary Agreement, is not a party in this court action.

Two Separate But Related Disputes

[11] The first dispute is between LFN and KDC as to which party legally represents the Kaska people who reside in Lower Post in northern British Columbia. Yukon supports the submissions of LFN in this dispute. This issue must be determined before the second issue can be considered. LFN does not apply for a declaration that Yukon has a duty to consult and accommodate.

[12] The second dispute is KDC's claim that Yukon's duty to consult and accommodate must take place before sport hunting licences and tags are issued to hunters each year. In other words, KDC submits that the same duty to consult and accommodate prior to issuing individual quartz mining claims (See *Ross River Dena Council v. Yukon,* 2012 YKCA 14) should be applied to wildlife matters.

THE KASKA NATION

[13] This is a brief description of the Kaska Nation to provide context to this court action.

[14] The Kaska Nation refers to the Kaska aboriginal people who have resided in northern British Columbia and southeast Yukon for thousands of years. They speak the Kaska language and share similar cultural practices. They hunted and trapped in a vast territory that extended from Kwadacha (Fort Ware) in northern British Columbia to north of Ross River, Yukon. Despite the arrival of the Hudson Bay Company in the 1840s which primarily involved posts along the Dease, Liard, Pelly and Yukon rivers, the Kaska were, to a large extent, left alone by colonial governments and not organized into Indian Bands until the construction of the Alaska Highway in 1942. Although the border between Yukon and British Columbia has existed since 1866 for British Columbia and formally in 1898 when Yukon was created, it was generally not particularly relevant to the Kaska.

[15] The Alaska Highway follows the British Columbia-Yukon border for part of its journey across Kaska territory. The existence of the highway brought Indian agents into the country. These agents began to organize the Kaska into *Indian Act* bands and communities as a result of the access provided by the Alaska Highway.

[16] The communities making up the Kaska Nation in Yukon are Liard First Nation and Ross River Dena Council. Ross River Dena Council occupies the northernmost part of Kaska Territory in Yukon. Liard First Nation occupies the southern part of Kaska Territory in Yukon and covers both the north and south sides of the Alaska Highway, primarily in Yukon, but also in northern British Columbia where it holds nine *Indian Act* reserves including Liard Indian Reserve #3 at Lower Post, British Columbia.

[17] Dease River First Nation is located at Good Hope Lake, in British Columbia, in the westerly part of the Kaska territory, south of the Alaska Highway and bordering the Tahltan territory to the west.

[18] Kwadacha First Nation is located in northern British Columbia in the community of Fort Ware and occupies the southerly portion of the Kaska territory.

[19] The Kaska hunted, fished, trapped and governed themselves with little reference to the border between British Columbia and Yukon until the Alaska Highway construction in 1942 and the opening of the Lower Post Residential School in 1951 in Lower Post, British Columbia.

[20] The coming of Indian agents had the greatest impact on those Kaska who lived in proximity to the highway.

[21] There is no doubt that the Kaska lived and depended upon hunting activities for their survival in the southeast Yukon and still rely on hunting for sustenance, although that lifestyle has been significantly disrupted by the construction of the Alaska Highway and the influx of non-Kaska that both preceded and followed that construction. Considerable disruption occurred as well with the collapse of the fur trade. However, the Lower Post Residential School, operated by the Catholic Church for Yukon and British Columbia First Nation children, had a devastating negative impact on the lives of members of the Kaska Nation in both southeast Yukon and northern British Columbia.

[22] As set out by Dr. Ken Coates in his documentary research prepared on behalf of LFN, the Kaska in southeast Yukon suffered a loss of autonomy and increased dependency on and control by the Indian agents working for the Department of Indian Affairs of Canada. I should add that no objection was raised as to the expert

qualification of Dr. Coates and I am satisfied that he is well qualified to give his expert opinion based on documentary evidence. His opinion is relevant and necessary.

[23] Of considerable importance to this case is the formation of Liard First Nation whose headquarters are located in Watson Lake, Yukon. It encompasses Kaska members historically from Ross River, Frances Lake, Upper Liard River, Dease Lake, Lower Post and other areas in northern British Columbia. The amalgamation of these groups of Kaska people, on both sides of the Alaska Highway, suited the Indian Agent's desire for centralization of administration and was supported by five constituent Bands.

[24] The amalgamation of the Casca, Nelson River, Liard and Frances Lake Bands had been under consideration since 1952. W.S. Arneil, Indian Commissioner for British Columbia said, in a letter dated December 28, 1955:

> [It is] recommended that Liard and Francis Lake Band list in British Columbia be joined with the Frances Lake and Watson Lake Band list in the Yukon, the Band so formed to be known as the Liard and Francis Lake Band. This Band would then be formally amalgamated with the Casca and Nelson River Bands [to] form a new band to be known as the Liard River Band. If this proposal could be completed the five Bands living in the vicinity of Lower Post on the B.C.-Yukon border would become one Band.

[25] The written record of the Indian Agent establishes that Liard First Nation was an amalgamation of Kaska communities on both sides of the British Columbia – Yukon border:

> The members of the five Bands in question live along the Alaska Highway from Mile 750 to [Mile] 520. The largest concentrations belong at Upper Liard, Y.T., Lower Post, BC., Watson Lake, YT, [as written] and the Cassiar Road in B.C., just south of the Alaska [High]Way. These people have been inter-mixing since the Alaska Highway was built in 1942 and are unable to see any reason why they should not be joined into one Band. As they lived along the Highway which re-

> crossed the BC-Yukon boundary at several points they should not be divided merely to satisfy Provincial and Territorial boundaries. They are the same tribe of Indians and want to belong to the same Band. … These people have in the past taken very little interest in Band business but they are now becoming very interested in the possibility of having an active Council to [re]present a population of close to 300. Band members indicated strong support for the idea. Indian Superintendent Grant observed, "If at any time in future years the Liard Indian Band might wish to divide into a Yukon group and a B.C. group for reasons unforeseen at this time, it would be a simple matter to take a vote and possible [sic] rename the groups 'Upper Liard Band' and 'Lower Liard Band'. I can assure you this will not come to pass or be advisable for some years." (Grant to A/Indian Commissioner for B.C. and Superintendent Yukon Agency, 22 March 1961, file 166/1-1)

[26] The formal amalgamation into the Liard River Band took place in 1961 based on five Band Council Resolutions dated February 6 and 7, 1961, from the Frances Lake Band, the Liard and Frances Lake Band, the Watson Lake Band, the Casca Band, and the Nelson River Band.

[27] The Liard Indian Band operated under a controversial Hereditary Chieftainship and the contemplated division into a Yukon and British Columbia group was put to a referendum on March 20, 1985, for all members of the Liard Indian Band in Yukon and British Columbia to separate into three bands, namely Kechika Indian Band, Dease River Indian Band and Liard Indian Band. In 1985, the Dease River Indian Band formed its own First Nation in Good Hope Lake, British Columbia. Liard Indian Reserve #3 at Lower Post and eight other Reserves in British Columbia remained a part of the Liard Indian Band.

[28] Controversy about the election of a Chief as opposed to a Hereditary Chief for Liard Indian Band persisted until 1992, when the Simpson Lake Accord provided a

political solution by the Kaska members of the Liard First Nation which recognized the Yukon – British Columbia origin of the Liard First Nation, or what Dr. Coates calls "the trans-border reality of the Liard First Nation". The Accord provides for an elected Chief resident in British Columbia or Yukon with four councillors resident in Yukon and a Deputy Chief from Lower Post and two councillors from British Columbia. As described by Dr. Coates:

> The Simpson Lake Accord, ratified by the membership of the Liard First Nation, recognized the historic and cultural ties between the Kaska at Upper Liard and Lower Post and established a formal assurance that Lower Post would be recognized with senior positions within the Liard First Nation, including the opportunity to run for Chief, an assurance of a Deputy Chief position, and two out of six councillors' positions.

[29] At the present time, the *Indian Act* Bands in the Kaska Nation are Liard First Nation, Ross River Dena Council, Dease River First Nation and Kwadacha First Nation. Liard First Nation has a registered population of 1,209. Ross River Dena Council has a registered population of approximately 550. Dease River First Nation has a registered population of approximately 183. Kwadacha First Nation has a registered population of 562.

[30] Daylu Dena Council consists of Kaska members in the Lower Post area. The Deputy Chief of the Daylu Dena Council, Fred Lutz, is also the Deputy Chief of LFN. Fred Lutz describes the Daylu Dena Council as a sub-council of LFN that is the band under the *Indian Act*, R.S.C. 1985, c. I-5, having jurisdiction over land claims. Daylu Dena Council is not an *Indian Act* Band.

[31] Lower Post, although in British Columbia, is a short distance of 20 kilometres by the Alaska Highway to Watson Lake, Yukon, where LFN has its headquarters and the majority of its 1,212 members reside.

THE KASKA DENA COUNCIL

The KDC 1984 Constitution

[32] KDC is a society incorporated on May 31, 1984, under the laws of British Columbia. It was first incorporated in Yukon in 1981. I will address the 1984 Constitution. KDC's purpose is:

> (a) to represent the interests of all Kaska Dena people, especially with respect to the negotiation and settlement of the Kaska Dena land claims;
>
> (b) to promote and protect respect for the land and cultural heritage of the Kaska Dena people;
>
> (c) to assist in the delivery of services including social, economic, cultural and educational programs to Kaska Dena communities;
>
> (d) to promote a community environment wherein all Kaska people can enjoy physical and spiritual health and live with dignity and pride;
>
> (e) to work toward the recognition and protection of the aboriginal rights of all Canadian Native people;
>
> (f) to do all things necessary to achieve the foregoing objectives.

[33] Unlike the Council for Yukon First Nations whose constituent members are Yukon First Nations, the KDC directors in the 1984 Constitution admitted members by application and were subject to acceptance by the directors. Eligibility for membership in KDC was as follows:

> 7. Any Individual person is eligible to become a member of the Kaska Dena Council who:
>
> a) is a person entitled to benefit from the Kaska Dena land claim, as described in Schedule One of the attached, whether that person actually chooses to become a beneficiary under the Kaska Dena Land claim, or a beneficiary under the land claim of the Council for Yukon Indians; or
>
> b) is an aboriginal person who is not entitled to benefit from the Kaska Dena land claim, as described in Schedule One, attached, but who has applied in writing to become a member of the Kaska Dena Council and has been accepted by a three-quarters (3/4) majority vote at any Annual General Meeting of the Grand Council of the Kaska Dena Council.

[34] The geographical jurisdiction of the Society is set out in s. 11:

> 11. The geographical jurisdiction of the Society is that area known as the Kaska Dena land claim area and marked on the attached Schedule Two. This area comprises the five Kaska Dena communities of Fort Ware, Muncho Lake, Good Hope Lake, Fireside, and Lower Post.

[35] An Administrative Board was established in s. 56 consisting of :

> a) each of the five (5) Executive Officers of the Kaska Dena Council; and
>
> b) one (1) representative from each of the five (5) communities represented in the Council, each to be selected by that band or district,
>
> for a total of ten (10) representatives on the Administrative Board.

The KDC 1997 Constitution

[36] On June 18, 1997, KDC amended its Constitution and Bylaws. The only addition to its purpose is in s. 2(c) as follows:

> (c) to promote unity and sharing among all Kaska;

[37] As to membership, the Bylaws state:

> 2. The directors shall admit as a member upon application to the Kaska Dena Council each and every individual who,
>
> (a) is of Kaska ancestry and prior to 1940 was ordinarily resident in or used and occupied the Kaska Dena traditional territory in British Columbia; or
>
> (b) is the descendant of a person described in sub-paragraph 2(a) above regardless of any intervening adoptions of an aboriginal child.

[38] A member of KDC can also be expelled by special resolution if they have not complied with the bylaws or acted in a manner inconsistent with the goals and objectives of KDC after a hearing.

[39] Section 22 describes the KDC directors and there are two versions. KDC's version is as follows:

> 22 a) There shall be 9 directors of the Kaska Dena Council as follows:
>
> i) the Chief of the Fort Ware Indian Band;
>
> ii) the Chief of the Dease River Indian Band;
>
> iii) the Deputy Chief of the L.I.R. #3;
>
> iv) the Hereditary Chief of the Liard First Nation appointed by the Kaska Members from the Yukon and B.C. regions who abide by the Hereditary system;
>
> v) an eligible representative appointed by the Kaska from the Fireside region;
>
> vi) an eligible representative appointed by the Kaska from the Muncho region; and

viii) the Chairperson and two (2) Vice-Chairpersons:

b) in the event an individual referred to in sub-paragraphs 22(a)(i),(ii) or (iii) does not meet the criteria for membership referred to in paragraph 2 then an eligible member shall be appointed as a director from and by the appropriate Chief and Council;

c) A quorum for a directors meeting shall be six (6) directors.

[40] Yukon conducted a Society search in British Columbia and its version of s. 22(a) is as follows:

22 a) There shall be 9 directors of the Kaska Dena Council as follows:

i) an eligible representative appointed by the Chief of the Fort Ware Indian Band;

ii) an eligible representative appointed by the Chief of the Dease River Indian Band;

iii) an eligible representative appointed by the Deputy Chief of the L.I.R. #3;

iv) an eligible representative appointed by the Kaska from the Fireside region;

v) an eligible representative appointed by the Kaska from the Muncho region; and

vi) the Chairperson and two (2) Vice-Chairpersons;

b) In the event an individual referred to in sub-paragraphs 22(a)(i),(ii), or (iii) does not meet the criteria for membership referred to in paragraph 2 then an eligible member shall be appointed as a director from and by the appropriate Chief and Council;

> c) A quorum for a directors meeting shall be six (6) directors.

[41] It appears that KDC is operating on its own version which is slightly different than the registered version. The KDC version appoints the Chief or Deputy Chief, whereas the Yukon version indicates that the director is an eligible representative appointed by the Chief or Deputy Chief. Both versions include the Deputy Chief of the Liard Indian Reserve #3 but only the KDC version includes the Hereditary Chief appointed by the Kaska members from the Yukon and British Columbia regions. The balance of the sections of the 1997 Constitution are the same in both versions. It appears that the Yukon version of KDC's Constitution represents the way that KDC actually operates without any Board of Directors representation for Liard First Nation, other than the Deputy Chief of the Liard Indian Reserve #3, who is a Deputy Chief of Liard First Nation.

[42] There are five communities that must have members present to make a quorum for any general meeting:

> 19 c) A quorum for any general meeting is twenty-five (25) members, provided that there must be a least three (3) members present from each of the Fort Ware, Muncho Lake, Good Hope Lake, Lower Post and Fireside regions.

[43] Section 50 provides the requirement for notice to members:

> A notice may be given to a member either personally or by mail to him at his registered address and such notice shall also be publicized and delivered to the communities represented by the Fort Ware Indian Band, the Deputy Chief and Council of L.I.R. #3, the Dease River Indian and the Kaska people of the Fireside and Muncho Lake regions.

KDC Membership

[44] In its Statement of Claim, KDC states it is suing on its own behalf and on behalf of its members who are part of the people known as Kaska or Kaska Nation. In the 1984 Constitution, a Kaska person had to submit an application and be accepted by the Directors. In the 1997 Constitution, the Directors "shall admit" Kaska persons who apply.

[45] The membership form letter sent to KDC is as follows:

> Please accept this letter as formal notification of my decision to participate as a beneficiary of the Kaska Land Claims in British Columbia and the Yukon Territory.
>
> I would appreciate having the Kaska Dena Council register my name as a member and beneficiary to these claims. Attached to this letter is the Kaska Dena Council Enrollment Form which I understand to be kept in "Confidence" and not available to the general public.

[46] The attached Enrollment Form asks for a Band number followed by this statement:

> I believe I am eligible to enroll in the KDC Claim as I have Kaska Ancestry.

[47] There is no mention of Aboriginal title or any transfer of authority to KDC.

[48] KDC states that it had approximately 769 members on March 24, 2014, when it commenced this court action. KDC has produced applications confirming 524 members.

[49] There are KDC members from Liard First Nation, Dease River First Nation, Kwadacha First Nation, Tahltan First Nation, Fort Nelson First Nation, Soda Creek Band Council, Tl'Azt'En First Nation, Iskut First Nation, Ross River First Nation and Kwanlin Dun First Nation. The vast majority of KDC members are from Kwadacha First Nation, Lower Post, and Dease River First Nation but KDC membership does not purport to be

all potential beneficiaries of Kwadacha First Nation, Dease River First Nation or Daylu Dena Council.

[50] The principals involved in this court action are members of both First Nations and KDC. For example, George Miller, the Chair of KDC is a member of LFN and KDC. George Morgan, the Chief of LFN is a member of KDC and LFN. Fred Lutz, Deputy Chief of Daylu Dena Council and LFN is a member of LFN and KDC.

[51] LFN has taken issue with KDC in the past. The General Assembly of LFN passed the following resolution on April 19, 2009:

> **WHEREAS:**
>
> A. Kaska Dena Council has proceeded to engage with the British Columbia treaty process;
>
> B. The terms available under the British Columbia Treaty Process are not satisfactory to the Citizens of Liard First Nation;
>
> C. Our Elders have instructed us to protect the land and not to trade it away through any treaty process; and
>
> D. Liard First Nation includes the Citizens at Lower Post, B.C.
>
> **THEREFORE, BE IT RESOLVED THAT:**
>
> 1. The Kaska Dena Council be notified that it does not have a mandate to negotiate a treaty on behalf of Liard First Nation; and
>
> 2. The Kaska Dena Council be requested to acknowledge in writing that it does not represent Liard First Nation Citizens for the purpose of pursing [as written] a treaty; and
>
> 3. The Kaska Dena Council be invited to report to LFN Citizens at the next LFN General

> Assembly about Kaska Dena Council negotiations in British Columbia and the Yukon.

[52] The Government of Liard First Nation (Chief and Council of Liard First Nation) passed the following resolution on November 6, 2009:

> 1. KDC is not authorized to engage in consultation or accommodation with the governments of Canada, British Columbia, Yukon Territory, North West Territory [as written], or with industry respecting the Kaska Aboriginal rights, title and interests of any LFN community or Citizen;
>
> 2. KDC is not authorized to enter into any agreements that purport to impact, abandon, cede, surrender, or consent to infringement of, the Kaska Aboriginal rights, title and interests of any LFN community or Citizen; and
>
> 3. KDC is not authorized to negotiate a treaty respecting the Kaska Aboriginal rights, title and interests of any LFN community or Citizen.

KDC Authorization

[53] KDC does not claim to be a rights-bearing group or that it represents Kwadacha First Nation, Dease River First Nation, Ross River Dena Council or LFN. KDC claims to represent its Kaska members who are communal aboriginal rights holders as members of the Kaska Nation. KDC acts on the direction of its Board of Directors which has representation from each Kaska community in northern British Columbia. KDC acknowledges that it has, with prior consent, entered into agreements with Yukon on behalf of certain First Nations as a collective but the First Nations are not members of KDC. The membership of KDC did not authorize this court action. Counsel for KDC submits that "strictly speaking" KDC does not require any authorization to bring this court action as the protection of rights is consistent with the objectives of its

Constitution. The decision to file the court action was made by the Board of Directors of KDC and specifically in Resolution #8, which is undated, and states as follows:

> **THEREFORE BE IT RESOLVED THAT:**
>
> 1. The leadership of the Kaska Dena Council is hereby authorized and directed to inform the Governments of Canada and Yukon that the Kaska Dena Council wishes to enter into negotiations towards an agreement or agreements to protect the outstanding rights and interests of the Kaska Dena in the Yukon portion of the Kaska traditional territory.
>
> 2. The Kaska Dena Council leadership are hereby authorized to take any steps they consider necessary, including the resumption of the two lawsuits currently in abeyance (or the commencement of new lawsuits) in order to protect the rights and interests of the Kaska Dena.

[54] The Board of Directors then reported back to the Kaska Dena Council Assembly where the mandates came from. KDC produced Minutes of a Board of Directors and Governance Workshop dated October 19 – 21, 2016, which included the following:

> The board agreed to have Steve Walsh file but not serve a case regarding the issuance of big game hunting tags in KTT after the Yukon Election.
> Passed by quorum of the KDC Board of Directors on October 19, 2016.
> Upon further discussion, they changed the timing of the filing to following the YT elections.

[55] There is no evidence purporting to be approval from the membership of the Kaska Dena Council Assembly.

THE DOCUMENTARY RECORD

[56] The following are agreements in which KDC submits Yukon and LFN have acknowledged KDC's aboriginal title in various agreements to Kaska traditional territory in southeast Yukon.

The 1989 Framework Agreement

[57] Prior to the signing of the Umbrella Final Agreement, KDC was party to a Framework Agreement dated September 21, 1989, with Ross River Dena Council, Liard River Indian Band, Council for Yukon Indian, Canada and Yukon to provide a process to negotiate a land claims agreements with KDC.

[58] In the 1989 Framework Agreement:

> "Kaska Agreement" means a Yukon First Nation Final Agreement entered into by the Government of Canada and the Government of Yukon with the Ross River Dena Council or the Liard River Indian Band, or a Kaska Transboundary Agreement entered into by the Government of Canada and the Government of Yukon with the Kaska Dena Council;

[59] Section 8 of the 1989 Framework Agreement made reference to the negotiation of a Kaska Transboundary Agreement with KDC for Kaska members who were deemed not to be "Yukon Indian People."

The Umbrella Final Agreement

[60] The Umbrella Final Agreement in the Yukon Land Claim, dated May 29, 1993, plays a role in this judgment for three reasons. Firstly, because it is an agreement between Canada, Yukon and the Council for Yukon Indians, representing Yukon First Nations. The Umbrella Final Agreement is not recognized by the LFN, Ross River Dena Council or White River Fist Nation who have not signed a Yukon First Nation Final Agreement.

[61] Secondly, it is not legally binding but it creates a template for transboundary negotiations between Canada, Yukon and the Council for Yukon First Nations, the affected Yukon First Nation and a claimant like KDC. Section 2.1.2 states that the

Umbrella Final Agreement does not create or affect any legal rights. It becomes binding on the adoption of a First Nation Final Agreement.

[62] Thirdly, KDC, although not a signatory to the Umbrella Final Agreement, is included in the definition of Transboundary Agreement:

> "Transboundary Agreement" means a land claims agreement with respect to:
>
> 1. any aboriginal claims in a Yukon First Nation's Traditional Territory by the Kaska Dena Council, Tahltan Tribal Council or Taku River Tlingits of British Columbia and the Dene/Metis of the Northwest Territories; and
>
> 2. any aboriginal claims in the Northwest Territories or British Columbia by Yukon Indian People.

[63] The definition of Transboundary Agreement has been incorporated into each of the eleven First Nation Final Agreements. There is no Transboundary Agreement with the KDC.

[64] The Council for Yukon Indians, now the Council for Yukon First Nations, is the body that represented Yukon First Nations in negotiations but is not a rights-bearing entity. The Umbrella Final Agreement signalled, among other things, the intention of the parties to negotiate Yukon First Nation Final Agreements and provided the framework for settlement of individual Yukon First Nation land claims and self-government agreements. Negotiations between Canada, Yukon and LFN have not succeeded in the past and in 2002, Canada declared that its mandate to negotiate has expired.

[65] The Umbrella Final Agreement did not set a framework for transboundary agreements, except for the following:

> **25.2.0 Transboundary Negotiations**
>
> 25.2.1 Government, the Council for Yukon Indians and Yukon First Nations whose Traditional Territories are affected by a transboundary aboriginal claim shall work together in respect of each transboundary aboriginal claim to negotiate a Transboundary Agreement.
>
> 25.2.2 Government, the Council for Yukon Indians and the affected Yukon First Nations shall make best efforts to settle the transboundary aboriginal claims of Yukon Indian People in the Northwest Territories and British Columbia based upon reciprocity for traditional use and occupancy.
>
> 25.2.3 Canada shall make adequate resources available for Yukon First Nations to negotiate Transboundary Agreements in accordance with federal comprehensive claims funding policies.
>
> 25.2.4 The negotiations shall be based on traditional use and occupancy.

The 1997 MOA

[66] A Memorandum of Agreement dated January 1997 (the "1997 MOA"), between Yukon, the Council of Yukon First Nations, Yukon First Nations, KDC and Kaska Tribal Council included the following:

> WHEREAS
>
> [T]he Kaska represented by the Kaska Dena Council have aboriginal rights, titles and interests in and to their traditional territory in the Yukon, and the Yukon and the Kaska Dena Council have entered into a bilateral agreement dated January 20, 1997, to expeditiously negotiate a Transboundary Agreement in respect of those rights, titles and interests;

[67] However, s. 2.1, a non-derogation clause, confirmed that the 1997 MOA did not identify or define any aboriginal rights, titles or interests or treaty rights as follows:

> 2.1 Nothing in this Agreement shall be construed so as to abrogate or derogate from, nor identify or define, any

> aboriginal rights, titles, interests or treaty rights of Yukon Indian People or any other aboriginal people of Canada.

The 1997 KDC – LFN MOA

[68] A Memorandum of Agreement dated July 4, 1997, between KDC and LFN (the "1997 KDC - LFN MOA") committed the parties to developing common negotiating positions and, where agreed, to set out mechanisms for the sharing of lands, resources and rights for the benefit of all Kaska.

[69] The 1997 KDC - LFN MOA began with the following:

> WHEREAS:
>
> A. The Elders and other members of the Kaska Nation have consistently directed the leaders of the Kaska people to work together to promote and strengthen the Kaska Nation throughout our traditional territory in British Columbia, the Yukon and the NWT.
>
> B. LFN and KDC are now involved in land claim, treaty, self-government and other related negotiations, and wish to coordinate and work together in relation to those negotiations so as to produce agreements which will help to unify and strengthen the Kaska Nation.
>
> C. The leaders of KDC and LFN also wish to work together and coordinate negotiations with the Ross River Dena Council for the purpose of unifying and strengthening the Kaska Nation.

[70] The following clause is relied upon in this case by KDC:

> 3.4 LFN and KDC agree to the orderly transfer of the "reserves", or the lands comprising the "reserves", located in British Columbia, to Lower Post First Nation and Dease River First Nation. However, the Chief Negotiators shall first undertake a comprehensive review and recommend to the Leadership the most beneficial options to accomplish the transfer.

> 3.5 Prior to the conclusion of Final Treaty, Self-Government and Land Claims Agreements the Chief Negotiators shall investigate and make recommendations to the Leadership regarding the best means and methods for the establishment of the Lower Post First Nation including the necessary transfer of assets, rights, benefits and membership.
>
> …
>
> 3.7 The Parties acknowledge that the KDC has commenced negotiations of its Transboundary Claim in the Yukon and having regard for maximizing benefits for all Kaska, LFN will support KDC"s efforts to negotiate the full range of rights and benefits which may be acquired by a Yukon First Nation under the Umbrella Final Agreement.

[71] Similarly, KDC agreed to cooperate with LFN to negotiate LFN's transboundary claim in British Columbia. There is no entity called Lower Post First Nation and the transfer of Reserves in British Columbia has not taken place.

[72] There is no termination date in the 1997 KDC – LFN MOA.

The 2001 Devolution Transfer Agreement

[73] In addition, the Yukon Northern Affairs Program Devolution Transfer Agreement, dated October 29, 2001, between Canada and Yukon (the "2001 Devolution Transfer Agreement"), contains the following definitions:

> First Nation: means any Yukon First Nation or any aboriginal group with a Transboundary Agreement or transboundary land claim into the Yukon.
>
> …
>
> Transboundary Agreement: means … or any land claims agreement with respect to any aboriginal land claims into the Yukon by the Kaska Dena Council …

[74] There has been no Transboundary Agreement with KDC.

The 2003 Bi-Lateral Agreement

[75] Canada formally withdrew from treaty negotiations in Yukon with LFN and KDC in 2002. On May 9, 2003, Yukon signed the Bi-Lateral Agreement with the Kaska (the 2003 Bi-Lateral Agreement"), as represented by the Liard First Nation, the Ross River Dena Council, the Daylu Dena Council, the Dease River First Nation, the Kwadacha First Nation, the Kaska Dena Council and the Kaska Tribal Council. The first Whereas is the following:

> Yukon acknowledged, in agreements entered into with the Kaska in January 1997, that the Kaska have aboriginal rights, titles and interest in and to the Kaska Traditional Territory in the Yukon,

[76] The 2003 Bi-Lateral Agreement contains the following clauses, amongst others:

> 1.3 "Kaska" means those individual Kaska who are eligible to be enrolled as a beneficiary under a Kaska Agreement.
>
> 1.4 "Kaska Agreement" means a Yukon First Nation Final Agreement with the Ross River Dena Council, a Yukon First Nation Final Agreement with the Liard First Nation, or a Transboundary Agreement with the Kaska Dena Council, and also includes any associated Self-Government Agreements.
>
> …
>
> 1.6 "Kaska Traditional Territory" means that portion of the Kaska's traditional territory located in the Yukon Territory as shown on the map attached to this Agreement and marked as Schedule "B", and as shown in more detail on the maps entitled "Kaska Dena Nation Traditional Territory" which were signed by the leaders of the Kaska and submitted to government in or about November 1988.
>
> …
>
> 3.0 KASKA CONSENT

> 3.1 As soon as possible following the signing of this agreement, Yukon and the Kaska Dena Council shall enter into negotiations with a view to finalizing an agreement on the elements of a fair and equitable Transboundary Agreement particularly as concerns matters [as written] of primary concern to Yukon and the Kaska Dena Council. The Parties recognize that to complete a Kaska Dena Transboundary Agreement requires the participation of Canada.
>
> …
>
> 6.1 This Agreement:
>
> (a) shall not be construed so as to abrogate or derogate from, or define the content of, Kaska aboriginal rights, titles and interests in and to the Kaska Traditional Territory,
>
> (b) shall not be construed so as to abrogate from any fiduciary duties or other obligations owed to the Kaska by either the Crown in right of Canada or the Yukon in respect Kaska of [sic] aboriginal rights, titles and interest in and to the Kaska Traditional Territory, and
>
> (c) shall, be construed to be without prejudice to the Kaska's right to challenge the validity of devolution prior to the achievement of Kaska Agreements, except as expressly provided otherwise in this Agreement.

[77] The 2003 Bi-Lateral Agreement could be terminated by either party by 60 days' notice in writing and was effective until May 8, 2005, when it terminated pursuant to clause 7.1.

Liard First Nation 2007 Election Regulations

[78] The Liard First Nation Election Regulations, September 2007, contain the following definitions:

> (p) "Kaska Dena Council" means a society, incorporated in British Columbia for the purpose of, among other things, representing the interest of all Kaska Dena

> people with respect to the negotiation and settlement of the Kaska Dena comprehensive land claim;
>
> (q) "Kaska traditional territory" means all of the lands Kaska people customarily reside on, as shown in the map entitled "Kaska Dena Nation Traditional Territory" which was signed by the leaders of the Kaska and submitted to government on or about November 1988;
>
> (r) "Liard First Nation" means the government for the group of members registered as the Liard First Nation in accordance with the provisions of the Indian Act, and includes the branch of the Liard First Nation government known as the Daylu Dena Council whose members live in Kaska traditional territory in British Columbia;

[79] By letter dated February 4, 2008, LFN advised Yukon that KDC did not represent LFN unless specifically directed by the elected government of LFN.

[80] Again, by letter dated July 6, 2010, LFN expressed its concern that British Columbia had failed to recognize LFN in its traditional territory in British Columbia. That letter specifically advised the British Columbia government that Kaska Dena Council was a treaty negotiating body that did not hold Aboriginal rights, title or interests. In its reply dated October 5, 2010, British Columbia stated it would continue to consult Daylu Dena Council as part of Liard First Nation and KDC until the LFN and KDC reached an understanding on their respective responsibilities at the Kaska Dena treaty table.

[81] Again, in a letter dated March 11, 2011, LFN advised the British Columbia government that LFN's membership is made up of Kaska in Yukon and British Columbia. LFN stated that the Crown's duty was to consult with LFN on their lands and members' interests in British Columbia rather than the KDC.

The British Columbia Treaty and Transboundary Representation Protocol

[82] On September 1, 2011, Liard First Nation, Dease River First Nation, Daylu Dena Council, Kwadacha First Nation, Ross River Dena Council and Kaska Dena Council (the same parties that signed the 2003 Bi-Lateral Agreement) entered into the British Columbia Treaty & Trans Boundary Representation Protocol (the "2011 Protocol"). In the Provisions section, the following is stated:

> 3. KDC will have sole conduct of all negotiations and related talks with B.C. and Canada, and with Yukon with respect to the Trans Boundary negotiations, including Interim Measures, Incremental Treaty Agreement, negotiation of Strategy Engagement Agreement ("SEA"), Reconciliation Agreements, and related agreements.
>
> 4. Prior to any agreements set out in paragraph 3 being finalized, it will be necessary for the negotiator(s) of any such agreements to consult with LFN with respect to all aspects of such agreements. It is further agreed that LFN will receive all information and documents pertaining to all negotiations and related talks contemplated in paragraph 3.
>
> …
>
> 10. <u>There is an outstanding issue between Liard First Nation ("LFN") and the Kaska Dena Council ("KDC") concerning the question of which of them has the legal right to speak for and represent those Kaska citizens living in British Columbia who are members of the Liard First Nation ("the Representation Issue")</u>.
>
> 11. <u>It is not the intention of the Treaty Representation Protocol to address the Representation Issue</u>. This protocol and its implementation and other measures set out herein are:
>
> a. without prejudice to positions that any Kaska Community of KDC may currently have, or may take, with respect to the Representation Issue; and

> b. do not, and are not intended to, recognize, authorize or confirm by a Kaska Community, any position or action that may be taken by another Kaska Community concerning the Representation Issue.
>
> 12. For greater certainly, neither LFN, KDC nor the B.C. Kaska Communities in B.C. will use or in any way rely on this Protocol, or the KCA or the KGA or the SE Yukon Oil and Gas Land Disposition Agreement Protocol regardless of whether they are Party to these agreements, to argue or otherwise contend now, nor in the future, that LFN, by entering into the KCA, this Protocol, the KGA ~~or the SE Yukon Oil and Gas Land Disposition Agreement Protocol~~ agrees to or accepts that the KDC may represent the rights and interests of LFN members in British Columbia except as may be set out in those agreements, or that the Daylu Dena Council is a recognized First Nation separate and apart from the LFN. (as written) (my emphasis)

Past Court Actions

***Kaska Dena Council v. Government of Yukon*, S.C. No. 13-A0173**

[83] The Court of Appeal of Yukon decided the issue of the duty to consult a Yukon First Nation without a Final Agreement before registering quartz mining claims in *Ross River Dena Council v. Yukon*, 2012 YKCA 14 (the "*RRDC* mineral case"). On December 27, 2012, the Court of Appeal of Yukon made the following declarations:

> a) the Government of Yukon has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands compromising the Ross River Area are to be made available to third parties under the provisions of the *Quartz Mining Act*.
>
> b) the Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the Ross River Area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff.

[84] On March 25, 2014, in a resolution entitled *Resolution of the Chiefs of the Kaska Nation*, the Chiefs of the Liard First Nation, Dease River First Nation, Daylu Dena Council, Ross River Dena Council and Kwadacha First Nation (the "2014 Kaska Chiefs Resolution") signed the following resolution:

> **WHEREAS**
>
> A. We, the Chiefs and leaders of the Kaska Nation, are deeply concerned by the Government of Yukon's refusal to take steps to apply the Yukon Court of Appeal's decision in the *Ross River Dena Council* case to the other members of the Kaska Nation and to the portion of the Kaska Territory outside of the Ross River Area.
>
> B We, the Chiefs and leaders of the Kaska Nation, have discussed this matter at our leadership meeting in Whitehorse on March 20th, 2014, and, following that discussion, have unanimously decided to lend our full support to the Kaska Dena Council in respect of its desire to commence legal proceedings against the Government of Yukon because of its failure to consult and accommodate the Kaska Dena Council prior to recording quartz mineral claims and allowing mining exploration activities to occur in the portion of the Kaska Territory outside of the Ross River Area.
>
> C. We, the Chiefs and leaders of the Kaska Nation, also wish to confirm that we consent to and wholeheartedly agree with the Kaska Dena Council's desire to retain Stephen Walsh to handle its lawsuit against the Government of Yukon.
>
> **THEREFORE BE IT RESOLVED THAT:**
>
> We, the Chiefs and leaders of the Kaska Nation, hereby confirm that we fully support the Kaska Dena Council in respect of its desire to commence legal proceedings against the Government of Yukon in relation to the recording of

> quartz mineral claims in the portion of the Kaska Territory outside of the Ross River Area without first discharging its duty to consult; and
>
> Each of the undersigned Chiefs also hereby confirms our consent and unqualified support for the Kaska Dena Council's desire to retain Stephen Walsh to act as counsel in the proposed lawsuit against the Government of Yukon. (my emphasis)

[85] I note that Deputy Chief Walter Carlick of Daylu Dena Council and Liard First Nation signed the 2014 Kaska Chiefs Resolution.

[86] KDC filed its Statement of Claim in *Kaska Dena Council v. Government of Yukon*, S.C. No. 13-A0173, (the "*KDC* mineral claim case") on March 25, 2014, claiming the same relief as granted in *RRDC* mineral case with respect to mineral claims in the southern part of the Kaska Territory outside the Ross River area.

[87] On August 3, 2015, this Court made the following Consent Order without a hearing (the "2015 KDC – Yukon Consent Order"):

> THIS COURT ORDERS AND DECLARES that:
>
> 1. The Government of Yukon has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands compromising the southern part of the Kaska territory are to be made available to third parties under the provisions of the *Quartz Mining Act*; and
>
> 2. The Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the southern part of the Kaska territory, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff

> THIS COURT ORDERS that:
>
> 3. The defendant shall pay the plaintiff's costs in the amount Sixty Thousand ($60,000) Dollars; and
>
> 4. The declarations set out in paragraphs 1 and 2 of this Order are suspended from coming into effect until September 18, 2015.

[88] The 2015 KDC – Yukon Consent Order did not define the "lands compromising the southern part of the Kaska territory".

[89] However, the Amended Statement of Claim referred to a map entitled "Traditional Territory of the Kaska Nation in British Columbia, Yukon and the Northwest Territories" attached to the Amended Statement of Claim. To further delineate the Kaska traditional territory in Yukon, the Amended Statement of Claim referred to a Government of Yukon map dated April 1998 entitled "Kaska Dena and Overlapping First Nations Traditional Territories Registered Trapping Concession". The Amended Statement of Claim further delineated the KDC traditional territory as not including the "Ross River Area" referred to in *RRDC* mineral case.

[90] The Government of Yukon stated in its Statement of Defence:

> 9. In answer to the Statement of Claim as a whole, the Defendant says that it:
>
> a) is aware that the Plaintiff [KDC] has asserted Aboriginal rights and title within the area of what the Plaintiff refers to as "the southern part of the Kaska territory" <u>but says that the strength of claim and the nature and scope of those affected Aboriginal rights and title have not yet been determined</u>;
>
> b<u>) is aware that other groups or entities have also asserted Aboriginal rights in and to all or part of the lands which comprise the southern part of the Kaska territory</u>; and

> ...
>
> 10. In answer to paragraphs 10 and 11, the Defendant admits that it has, from time to time, entered into agreements with the Plaintiff, either as one of the representatives of a group or entity referred to as "the Kaska" or "the Kaska Nation" or, alternatively, as represented by such group or entity. The Defendant further states that those agreements did not determine the extent, location or nature of the Aboriginal title, rights or interests of the Plaintiff, nor did they identify or define the Aboriginal title, rights and interests of the Plaintiff in and to lands within Yukon. (my emphasis)

[91] In its Amended Amended Statement of Claim in the case at bar, KDC has defined the Kaska traditional territory in Yukon as that which is not included in the Ross River Area nor in the Acho Dene Koe First Nation's asserted territory in Yukon.

FINDINGS OF FACT

1. KDC is a British Columbia society that negotiates land claims on behalf of its Kaska membership in northern British Columbia and a Transboundary claim in Yukon;
2. The Yukon Transboundary claim involves the Kaska members of KDC, Kwadacha First Nation, Dease River First Nation, LFN and the Daylu Dena Council and Ross River Dena Council;
3. LFN holds nine *Indian Act* Reserves in northern British Columbia including Liard Indian Reserve #3, at Lower Post, British Columbia;
4. The Kaska members of Lower Post are part of Liard First Nation;
5. Daylu Dena Council represents the Kaska people of Lower Post and is a sub-council of LFN, as represented by the Deputy Chief;

6. The Kaska Nation is made up of four rights-bearing groups: Ross River Dena Council, Liard First Nation, Dease River First Nation and Kwadacha First Nation. This is confirmed by the documentary record opinion of Dr. Coates, and the KDC version of its 1997 Constitution;
7. There has been no transfer of aboriginal rights, title and interests of the Kaska Nation members of the KDC to the KDC and the KDC members remain members of their First Nation;
8. The authority to bring the *KDC* mineral claim case in Yukon was granted to KDC in the 2014 Kaska Chiefs Resolution signed by the Chiefs of Liard First Nation, Ross River Dena Council, Dease River First Nation and Kwadacha First Nation and the Deputy Chief of Daylu Dena Council;
9. There is no authorization by Ross River Dena Council, LFN and Daylu Dena Council, Dease River First Nation and Kwadacha First Nation granting KDC the right to bring this action;

ISSUES

[92] This judgment will address the following Issues:

Issue 1: Is KDC authorized to legally represent its Kaska members as the aboriginal rights holders of the Kaska First Nations of northern British Columbia that it purports to represent?

Issue 2: Is KDC entitled to bring a representative action on behalf of its Kaska members pursuant to Rule 5(11) of the *Rules of Court*?

Issue 3: Has Yukon represented or acknowledged in agreements that KDC has aboriginal rights, title and interests to the Kaska traditional

territory in southeast Yukon and are estopped from denying its representation or acknowledgement?

Issue 4: Has LFN represented or acknowledged in agreements that KDC has the right to bring this court action?

Issue 5: Is Yukon, by the 2015 KDC – Yukon Consent Order, estopped from denying that a duty to consult and accommodate should be declared or granted in this action?

Issue 6: Is there a duty to consult and, where appropriate, to accommodate KDC prior to issuing sport hunting licences and tags under the *Wildlife Act* and Regulations?

Issue 1: Is KDC authorized to legally represent its Kaska members as the aboriginal rights holders of the Kaska First Nations of northern British Columbia that it purports to represent?

[93] It appears that KDC does not purport to be an aboriginal rights bearing group like a First Nation, nor is it authorized to act on behalf of aboriginal rights-bearing groups as it was in the 2014 Kaska Chiefs Resolution. KDC does submit that it represents its Kaska membership by virtue of two resolutions of its Board of Directors. In most cases, court applications claiming a duty to consult are brought by First Nations rather than individual members of the First Nation, unless the latter were authorized by the First Nation. This case is unique in that a Society incorporated for the purpose of negotiating Kaska land claims in northern British Columbia and a Transboundary Agreement in Kaska traditional territory in southern Yukon purports to be entitled to bring an application for a declaration that Yukon has a duty to consult with KDC. The Kaska First

Nations of northern British Columbia, i.e. Dease River First Nation and Kwadacha First Nation did not consent or object to KDC bringing the court action. However, Liard First Nation does not consent to KDC's court action and submits KDC has no authority to bring it.

[94] I am going to briefly review the duty to consult and case precedents on the resolution of disputes within a First Nation as to who is entitled to bring court applications to establish a duty to consult.

[95] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida Nation*"), at para. 35, the court stated that the duty to consult is founded on the honour of the Crown and the goal of reconciliation which arises when the Crown has real or constructive knowledge of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it.

[96] Difficulties with the absence of proof and definition of claims are addressed in the content of the duty, rather than by a denial of the existence of a duty (*Haida Nation*, para. 37).

[97] The Supreme Court of Canada commented on the requirement of good faith consultation at para. 42:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: … Mere hard

> bargaining, however, will not offend an Aboriginal people's right to be consulted. [citations omitted]

[98] In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, the Supreme Court of Canada set out the duty of consult again at para. 78:

> The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right. (my emphasis)

[99] When there are competing Aboriginal groups claiming a duty to consult, the question may be determined by identifying the rights-bearing group.

[100] In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 ("*Behn*"), the Supreme Court of Canada addressed the specific issue as to who the duty to consult is owed. In that case, the British Columbia government granted two timber sales licences to a logging company to harvest timber in two areas on the territory of the Fort Nelson First Nation ("FNFN"). Both licences were within the Behn family trapline. The Ministry of Forests had consulted the First Nation and contacted the individual Behn family about its forest development plan. When the logging company started moving its equipment on to one of the licensed areas, the Behns erected a camp and blocked access to the land that the logging company was licensed to harvest. The logging company filed a statement of claim for damages against the Behns and the First Nation. In their defence, the Behns pleaded that the licences were unlawful as the government failed its duty to consult the Behns.

[101] In answer to the duty to consult issue, LeBel J. stated the following at paras. 30 and 31:

> 30 The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; Woodward, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: …
>
> 31 In this appeal, it does not appear from the pleadings that the FNFN authorized George Behn or any other person to represent it for the purpose of contesting the legality of the Authorizations. I note, though, that it is alleged in the pleadings of other parties before this Court that the FNFN had implicitly authorized the Behns to represent it. As a matter of fact, the FNFN was a party in the proceedings in the courts below, because Moulton was arguing that it had combined or conspired with others to block access to Moulton's logging sites. The FNFN is also an intervener in this Court. But, given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community, the FNFN. Even if it were assumed that such a claim by individuals is possible, the allegations in the pleadings provide no basis for one in the context of this appeal. [citation omitted] (my emphasis)

[102] The Behns also challenged the legality of the licences on the basis that they breached their right to hunt and trap under Treaty 8. Justice LeBel declined to rule on this issue but stated at para. 35:

> … It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.

[103] In the case at bar, there is no suggestion by KDC that it has been assigned collective rights but rather that the Kaska members of KDC have authorized KDC to bring the legal claim for a duty to consult and accommodate.

[104] *Enge v. Canada (Minister of Indian Affairs and Northern Development)*, 2017 FC 932 (the "*Enge* case"), is a case in which the Federal Court considered whether Mr. Enge satisfied the standing requirements of Rule 114 of the Federal Court in the context of Métis rights in the Northwest Territories.

[105] Mr. Enge brought the application for judicial review as a Métis person and the President of the North Slave Métis Alliance ("NSMA"). He challenged the adequacy of the consultation by the Minister of Indian Affairs and Northern Development with members of the Northwest Territory Metis Nation ("NWTMN") with respect to the Northwest Territory Métis Nation Land and Resources Agreement-in-Principle approved July 31, 2015. Mr. Enge alleged that Canada essentially excluded the NSMA from the consultation.

[106] Canada submitted that Mr. Enge did not satisfy Federal Court Rule 114(1)(b) that he was authorized to act on behalf the NSMA. Canada also submitted that Mr. Enge did not satisfy Rule 114(1)(c) that he could fairly represent the interests of the NSMA.

[107] With respect to the Rule 114(1)(b) and the authorized representation issue, the parties agreed that Mr. Enge was a member of a rights-bearing group (para. 80), the NSMA, but that did not give him standing to bring the application. The issue was whether Mr. Enge had been properly authorized to assert collective Aboriginal rights on behalf of the members of the NSMA. Mactavish J. found the following:

> 1. the NSMA Constitution stated its purpose was "to advance the interests of its members by whatever

> means are appropriate" and to promote and support the recognition and advancement of Aboriginal Rights of Métis in the North Slave area.
>
> 2. the objects of the NSMA include advancing and supporting the constitutional, legal, political, social and economic rights of the Indigenous Métis including negotiating, ratifying and implementing agreements to support the inherent right of self-government.
>
> 3. that the NSMA membership application includes a provision whereby applicants confirm that they have voluntarily chosen the NSMA as their sole representative for the purpose of pursuing any Aboriginal rights that they may have.
>
> 4. there was an after-the fact resolution giving the NSMA Board of Directors the authority to pursue all necessary legal and political actions to preserve NSMA members' Aboriginal rights as Métis.

[108] The trial judge concluded that Mr. Enge satisfied the Rule 114(1)(b) and had sufficient authorization.

[109] Counsel for KDC, in oral argument, submits that the *Enge* case supports its authority to represent its Kaska membership for the purpose of establishing that a duty to consult is owed to KDC. Counsel submits that KDC was incorporated for the express purpose of negotiating and settling the claims of its Kaska membership. It does not submit that KDC is the collective rights holder, nor that it represents any Bands or First Nations, but rather that its Kaska members have the aboriginal title and KDC represents their aboriginal rights.

[110] LFN and Yukon submit that the First Nations registered as Indian Bands represent the collective aboriginal rights of the Kaska and that KDC may have the right to negotiate on behalf of the Kaska of British Columbia but it does not have the right to legally represent the aboriginal rights of its membership in this court action since neither

the Kaska members of KDC, nor the rights-bearing First Nations have granted that authorization.

[111] It is important to recognize that First Nations or collective groups holding aboriginal title may organize themselves into a society for the purpose of negotiating and settling their aboriginal land claims. There is no doubt that KDC has been negotiating both the British Columbia land claim and the Yukon transboundary claim, notwithstanding its dispute with LFN. However, in my view, there has not been an authorization from the individual Kaska members who are members of the KDC nor the constituent First Nations to bring this court action and establish that the duty to consult is owed to the KDC.

[112] The *Enge* case does not support the KDC claim for the following reasons:

1. It was agreed in the *Enge* case that Mr. Enge was a member of the NSMA, a rights-bearing group;
2. The KDC does not purport to be a rights-bearing group;
3. The KDC Constitution and Bylaws do not clearly state that it will use constitutional and legal means to negotiate, ratify and implement agreements;
4. The KDC membership letter and Enrollment Form do not state that the Kaska members have voluntarily chosen KDC as their sole representative for the purpose of pursuing their Aboriginal rights;
5. The KDC Constitution, before the 1997 amendments, permitted aboriginal persons not entitled to benefit from the Kaska Dena land claim to be members of KDC;

6. Some members of KDC come from communities that are not part of the Kaska Dena land claim;
7. The KDC membership does not purport to include all members of the Kaska Nation in northern British Columbia;
8. In the case at bar, there has been no resolution authorizing this court action as stated in the 2014 Kaska Chiefs Resolution authorizing KDC to commence legal proceedings against Yukon.

[113] I will address this Resolution again in this judgment.

[114] I conclude that KDC does not have the authorization to bring this court action for its members as there has been no transfer of aboriginal title by the members of the Kaska Nation in northern British Columbia nor an authorization from the rights-bearing First Nations. I am also of the view that this conclusion renders it unnecessary to address the KDC claim pursuant to the United Nations Declaration of the Rights of Indigenous People ("UNDRIP"). In addition, Canada would be a necessary party before addressing UNDRIP.

Issue 2: Is KDC entitled to bring a representative action on behalf of its Kaska members pursuant to Rule 5(11) of the *Rules of Court*?

[115] This issue was not specifically addressed by counsel for KDC but I address it as it is a possbile way to bring s. 35 rights applications not based on the colonial *Indian Act* band status. Rule 5(11) permits one person to represent all persons who have the same interest in a proceeding, often referred to as a class action.

[116] In *Campbell v. British Columbia (Minister of Forests and Range),* 2011 BCSC 448, Willcock J. addressed the issue of whether the Sinixt Nation Society could apply

pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, to quash a Crown licence on the grounds that the Crown had breached the duty to consult prior to issuing the licence. It was common ground that the rights asserted by the society were collective rights pursuant to s. 35 of the *Constitution Act*, *1982*.

[117] In discussing the characteristics of a rights-bearing group, Willcock J. stated, at paras. 96 and 98, as follows:

> 96 It is settled law that the definition of "Indians" and "bands" in the *Indian Act* is not an exhaustive definition of the aboriginals who may assert rights that are protected by s. 35 of the *Constitution Act*. The *Constitution Act* affords protection to a broader range of people, to groups identified in relation to the continuous exercise of rights existing at the time of contact or sovereignty.
>
> …
>
> 98 In order to establish that they are entitled to be consulted before the issuance of permits, the Sinixt will have to establish that they have a plausible claim to aboriginal rights or title in the land. Proof of the underlying claim will require them to establish that a historic rights-bearing community existed, that they currently exercise communal rights by virtue of their ancestrally-based membership in the present community, which is a successor to the historic rights-bearing community, and that the right claimed is integral to their distinctive culture.

[118] Willcock J. applied the objective criteria test that membership in a class must be determinable by stated objective criteria in *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 (*Western Canadian Shopping Centres*"), modified in the context of Aboriginal representative claims:

1. whether the collective of rights-bearers on behalf of whom they purport to act is capable of clear definition;

2. whether there are issues of law or fact common to all members of the collective so defined;
3. whether success on the petition means success for the whole collective so defined; and
4. whether the proposed representatives adequately represent the interests of the collective.

[119] He found among other things:

1. that there was no bar to seeking membership on the basis of remote ancestry (para. 147);
2. there was no criteria to be considered by the board in exercising its discretion to grant admission (para. 148);
3. the Sinixt Nation Society is not the only group among rival representative groups that is open to every member of the nation, as membership is at the discretion of the directors (para. 149); and
4. the petitioners represent only one segment of the Sinixt (para. 160).

[120] More recently, in *Hwlitsum First Nation v. Canada (Attorney General)*, 2017 BCSC 475, found to be moot in 2018 BCCA 276, the trial judge decided that British Columbia Rule 20-3 (similar to Rule 5(11) in this Court) applied to determine whether the Hwlitsum First Nation was an appropriate collective to bring a representative action. In that case, Canada, supported by the Tsawwassen First Nation, the Penelakut Tribe and the Musqueam Indian Band, applied to strike the Hwlitsum First Nation claim on the ground it did not have standing to advance the communal rights at issue in the proceeding. The trial judge struck the claim for reasons in paras. 103 – 105 and 108,

which included, among other things, that it was not until May 2000 that the Hwlitsum First Nation appeared in any formal sense; that it was really one family asserting s. 35 Aboriginal title claims; that some of the descendants are from other First Nations making it impossible to ascertain which entity the member supported and that membership depended upon the exercise of discretion of the Chief and Council of Hwlitsum First Nation.

[121] The Court of Appeal reiterated that it is settled law that Aboriginal title cannot be held by individual Aboriginal persons. As the Hwlitsum First Nation claimed to represent only one historical member, it could not represent the collective. In my view, the application of Rule 5(11) would only be appropriate in the exceptional case where there is no collective aboriginal rights holder.

[122] I conclude that KDC does not satisfy Rule 5(11) for the same reasons that it failed to meet the test in the *Enge* case.

Issue 3: Has Yukon represented or acknowledged in agreements that KDC has aboriginal rights, title and interests to the Kaska traditional territory in southeast Yukon and are estopped from denying its representation or acknowledgement?

[123] This issue involves two questions. Firstly, whether there has been a recognition or acknowledgment by Yukon that KDC has such aboriginal rights, title and interests and secondly, if that is correct, does it estop Yukon from raising it in this proceeding to challenge KDC's authority to bring this court action.

Yukon Recognition of KDC Rights in Agreements.

[124] There are a number of agreements that KDC relies upon to establish that Yukon has recognized KDC as the legal entity to negotiate a Yukon transboundary agreement for the Kaska in British Columbia. However, as I understood the KDC submission in this case, that recognition is sufficient to permit KDC to bring this action for declaration of a duty to consult. Although it has not been clearly articulated by KDC, I take it to mean that Yukon has, by express agreement, agreed that KDC has the authority to bring this duty to consult action.

The Umbrella Final Agreement

[125] There is no doubt that the Umbrella Final Agreement identifies KDC as a party seeking a transboundary land claim agreement based on aboriginal claims in a Yukon First Nation's Traditional Territory. However, the Umbrella Final Agreement is a template for negotiations and does not create legally binding rights. The Umbrella Final Agreement does not assist KDC in its claim to have the right to bring this action for a duty to consult. I add that LFN and Ross River Dena Council, the two Yukon Kaska First Nations have not entered into Final Agreements which are constitutionally protected.

The 1997 KDC – LFN MOA

[126] Section 2.1 of this MOA is an express clause (the non-derogation clause) that says that the 1997 KDC – LFN MOA does not abrogate or derogate, nor identify or define, any aboriginal rights, titles, interests, or treaty rights. Thus, it cannot be interpreted to establish that KDC or its membership have been granted aboriginal title by Canada and Yukon.

[127] The 1997 KDC - LFN MOA is an agreement to negotiate. KDC, in effect, submits that the wording of the Whereas clause which says "the Kaska represented by the Kaska Dena Council have aboriginal rights, titles and interests to their traditional territories in Yukon …" support their estoppel argument. However, these words do not create a Final Agreement signed by Yukon and Canada. It does indicate a willingness of Yukon and other First Nations to negotiate with KDC the acknowledged Kaska aboriginal title and interests to their traditional territory in Yukon. However, that agreement to negotiate with KDC requires the participation of the affected Yukon First Nations, in this case LFN and Ross River Dena Council.

[128] I am also of the view that recitals in a Whereas clause cannot be elevated to be evidence of a mutual promise particularly when it contradicts the non-derogation clause in the contract. See *PUC Distribution Inc. v. Brascan Energy Marketing Inc.*, 2008 ONCA 176, at para. 31; and *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2018 BCSC 605.

[129] This Court is alive to the fact that commercial contract principles should not be applied to the interpretation of land claims agreements. However, the 1997 KDC – LFN MOA cannot be elevated to the status of a land claim agreement.

The 2003 Bi-Lateral Agreement

[130] Once again, this is Yukon's agreement with KDC to negotiate a Transboundary Agreement. The 2003 Bi-Lateral Agreement did not include Canada but it did include Liard First Nation, Ross River Dena Council, Daylu Dena Council, Dease River First Nation, Kaska Dena Council and Kaska Tribal Council.

[131] KDC submits that the Whereas "Yukon acknowledged, in agreements entered into with the Kaska in January 1997, that the Kaska have aboriginal rights, titles and interests in and to the Kaska Traditional Territory in the Yukon" is a formal admission that Yukon cannot deny.

[132] The flaw in this KDC submission is that the 2003 Bi-Lateral Agreement contains a non-derogation clause as previously discussed and a termination date of May 3, 2005. In my view, the Whereas clause cannot be elevated to an agreement. Further, the aboriginal title of the Kaska has not been transferred to KDC by the rights-bearing Kaska First Nations.

[133] With respect to the above-mentioned agreements, similar submissions of KDC have been dismissed. See *Kaska Dena Council v. British Columbia (Attorney General)*, 2007 BCSC 422, confirmed in 2008 BCCA 455; and *The Kaska Dena Council v. Her Majesty the Queen,* 2018 FC 218.

[134] Similar arguments to those raised by KDC have been advanced and dismissed in this Court in *Ross River Dena Council v. Government of Yukon*, 2011 YKSC 84, at para. 46, and in *Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 59, at para. 34. I conclude that the above-mentioned Agreements do not confer KDC with the rights-bearing aboriginal authority to bring this action. There is no basis for the application of the principle of estoppel.

Issue 4: Has LFN represented or acknowledged in agreements that KDC has the right to bring this court action?

The 1997 KDC – LFN MOA

[135] The 1997 KDC-LFN MOA is a significant agreement without an express termination date. In the aspirational recitals, LFN and KDC are directed by Kaska Elders to pursue their respective land clams negotiations by working together and coordinating negotiations with each other and Ross River Dena Council.

[136] In Clause 3.7 of the 1997 KDC – LFN MOA, LFN agrees to "support KDC's efforts to negotiate the full range of rights and benefits which may be acquired by a Yukon First Nation under the Umbrella Final Agreement". These words arguably support KDC's authority to negotiate an agreement but go no further. They do not support an interpretation that KDC can take any legal action particularly where it involves the traditional territory of LFN and the Lower Post members of LFN.

The 2011 Protocol

[137] The 2011 Protocol provides further agreement between KDC and LFN as follows:

1. KDC will have sole conduct of the Yukon Transboundary negotiations.
2. That there is an issue between LFN and KDC as to which of them has the legal right to speak for and represent those Kaska living in British Columbia who are members of the Liard First Nation (the "Representation issue").
3. The Protocol states that KDC will not use the Protocol to argue that LFN agrees or accepts the rights and interests of LFN members in British

> Columbia except as set out in this Protocol or that Daylu Dena Council is a recognized First Nation separate and apart from the LFN.

[138] I conclude that nothing in the 2011 Protocol prevents the LFN from opposing this KDC court action. The 2011 Protocol confirms that there is disagreement as to whether KDC or LFN represents the Kaska members in Lower Post, British Columbia. However, notwithstanding the 1997 KDC – LFN MOA, LFN retains the nine *Indian Ac*t reserves in British Columbia, including Liard Indian Reserve #3 and Daylu Dena Council is a sub-council of LFN. While it is entirely possible that disagreements arising out of the 1997 KDC – LFN MOA and the 2011 Protocol are driving this LFN – KDC dispute, I conclude that neither the 1997 KDC – LFN MOA nor the 2011 Protocol estop LFN from raising the representation issue in this court action.

Issue 5: Is Yukon, by the 2015 KDC – Yukon Consent Order, estopped from denying that a duty to consult and accommodate should be declared or granted in this action?

[139] Counsel for KDC submits that the 2015 KDC – Yukon Consent Order establishes that the issue of the duty to consult and accommodate on mineral matters in this Court has been litigated and finalized and must therefore be adopted in the case at bar. This submission is based upon the well-known principle of finality in litigation in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 ("*Danyluk*"), at paras. 18 - 20, which stated the remedies of issue estoppel or course of action estoppel to ensure finality in litigation. The three preconditions for the operation of issue estoppel to be applied are:

1. That the same question has been decided;

2. That the judicial decision which is said to create the estoppel was final; and

3. That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[140] It is important to note at para. 63, of *Danyluk* that even if the three preconditions are met, the court has the discretion to refuse to give effect to issue estoppel if there were something in the circumstances of the case such that the usual operation of the doctrine of issue estoppel "would work an injustice".

[141] In my view, precondition 2 has been met because the 2015 KDC – Yukon Consent Order is a final order.

[142] As to precondition 1, that the same question has been decided in the 2015 KDC – Yukon Consent Order, there are undoubtedly similarities in the legal basis in that the remedy applied is exactly the same sought in this court action, i.e. that Yukon has a duty to consult and accommodate KDC prior to issuing sport hunting licences and tags under the *Wildlife Act*. However, the factual basis for the claim is not the same in that different facts may arise where the issue is hunting wildlife as opposed to filing mining claims. For example, in this action the role of the Fish and Wildlife Management Board which involves Yukon and the eleven First Nations who have Final Agreements, is a fact to be considered that did not apply to the 2015 KDC – Yukon Consent Order. Thus, I do not conclude the same question has necessarily been decided and that different considerations will apply.

[143] As to precondition 3, that the parties are the same persons in each proceeding, that precondition has not been met. In the 2015 KDC – Yukon Consent Order, there were only KDC and Yukon involved. In the case at bar, LFN is a party and opposes the KDC application, among other things, on the grounds that KDC has no authority to bring this action as it is not a rights-bearing group or authorized to bring this action as it was in the 2014 Chiefs Resolution. In this case, LFN is a new party and challenges KDC's authority to bring the application.

[144] I conclude that preconditions 1 and 3 have not been met and therefore issue estoppel cannot be applied to the case at bar.

[145] I am also of the view that the doctrine of estoppel, if applied in this case, would work an injustice for LFN.

Issue 6: Is there a duty to consult and, where appropriate, to accommodate KDC prior to issuing sport hunting licences and tags under the *Wildlife Act* and Regulations?

[146] Counsel for KDC has claimed for both a declaration and an order that Yukon has a duty to consult and where appropriate to accommodate KDC prior to issuing sport hunting licences and tags. Its claim is based upon the acknowledged aboriginal title of the Kaska represented by the KDC which is disputed by both Yukon and LFN. I have concluded that KDC is not an aboriginal rights-bearing group and that it is not authorized to act on behalf of its individual Kaska members of the Kaska First Nations who do hold the collective aboriginal rights of the Kaska Nation. Further, I have concluded that the claim for aboriginal title by virtue of purported acknowledgments by Yukon does not establish aboriginal title.

[147] The dispute between Yukon and KDC has never actually been about the duty to consult and accommodate. Rather, the dispute is about the strength of claim to be consulted about.

[148] In a Framework for a Government-to-Government Agreement, dated January 15, 2016 (the "2016 Framework Agreement"), Yukon and all the Kaska First Nations, the parties agreed to:

(a) Define their relationship;

(b) Facilitate economic development and capacity building;

(c) Establish collaborative land and resource management; and

(d) Address the social and cultural impacts from land and resource development.

[149] However, the Whereas clauses in the 2016 Framework Agreement set out the differing views of the parties about sovereignty, jurisdiction, title and ownership of the Kaska traditional territory in the southern Yukon as follows:

> The position of the Kaska is that Kaska territory including the lands, waters and resources, are subject to Kaska rights, sovereignty, ownership, jurisdiction and title, and are managed in accordance with Kaska laws, policies, customs and traditions. The Kaska maintain that Yukon's land and resource laws are inconsistent with their constitutionally protected rights in and to the Kaska territory, and are therefore of no force and effect.
>
> The position of Yukon is that the lands and resources of Yukon are Crown lands, water and resources subject to certain private rights and interests, and subject to the sovereignty of Her Majesty The Queen and the legislative jurisdiction of the Parliament of Canada and the Yukon Legislature.

> While the Kaska and Yukon do not agree on the specifics or extent of their respective rights, titles, responsibilities or interests, they are committed to reconciling and clarifying their relationship on a government to government basis and to building effective and respectful partnerships to achieve their respective objectives based on mutual recognition and shared responsibilities.

[150] The 2016 Framework Agreement terminated on March 31, 2017, the agreed-upon termination date. KDC commenced this court action on January 26, 2017.

[151] In my view, neither a declaration nor a court order that Yukon has a duty to consult and, where appropriate to, accommodate the KDC brings any resolution to the fundamentally differing views about sovereignty, jurisdiction, title and ownership as set out above.

[152] The principles governing declaratory relief set out recently in *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3, at para. 53, are relevant:

> 1. There must be utility in granting the declaration based on a real dispute and not a hypothetical one (*Canada v. Solosky*, [1980] 1 S.C.R. 821; *Ross River Dena Council v. Yukon*, 2012 YKCA 14).
>
> 2. There must be a cognizable threat to a legal interest before the courts will entertain the use of a declaration as a preventive measure (*Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441; *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539; and *Kaska Dena v. British Columbia (Attorney General)*, 2008 BCCA 455, at para. 13).
>
> 3. Courts have a long-standing preference for negotiated settlements and avoiding court intervention. See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 14. Recently, in *Nacho Nyak Dun,* the Supreme Court reiterated both the principle of judicial forbearance and appropriate court scrutiny of Crown conduct as follows:

> 33 … It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of [page593] the treaty relationship. This approach recognizes the *sui generis* nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship.
>
> 34 That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

[153] It appears that the 2016 Framework Agreement was an attempt to negotiate a settlement of the disputed issues that unfortunately failed.

CONCLUSION

[154] The record in this case does not provide any basis for the legal dispute as I conclude that KDC does not have the authority to bring such a court action, nor is there a sufficient record to address the real and fundamental dispute between KDC and Yukon.

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VEALE C.J.