

Aboriginal Law Bulletin

September 2008

Fasken Martineau DuMoulin LLP

Modern Treaties and the Duty to Consult: *Little Salmon Revisited*

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On August 15, 2008 the Yukon Court of Appeal issued its decision in *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13. This is the first appellate level court to consider the duty to consult described by the Supreme Court of Canada in *Haida* and *Mikisew* in the context of a modern treaty. The Court's finding that the duty to consult applies in the context of modern treaties means that there is almost no place left in Canada where the Crown does not have the duty to consult – from Nova Scotia to British Columbia and north to Nunavut.

At issue was a decision to transfer lands located within Traditional Territory, but outside of the Settlement Lands under the treaty. The treaty did not provide for such decisions or set out the required level of consultation.

Little Salmon/Carmacks First Nation (the "Little Salmon") applied for judicial review of a decision by the Director of the Agriculture Branch (the "Director") to grant an agricultural land application in the Traditional Territory of the Little Salmon and the trapline of Johnny

Sam, a member. The Little Salmon sought to set aside the Director's decision for failing to comply with the legal duty to consult and, where possible, to accommodate the Little Salmon, a duty based upon the honour of the Crown. The Little Salmon/Carmacks First Nation Final Agreement (the "Final Agreement") with Canada and Yukon was signed on July 21, 1997. The Supreme Court of the Yukon held that a duty to consult existed and was not met by Yukon, and so quashed the decision.

Madam Justice Kirkpatrick, for the Court of Appeal, held that although a duty to consult did survive the execution of a modern treaty, that duty was met by Yukon in the course of the process that led to the decision to transfer these lands.

Background

The Final Agreement is a modern comprehensive land claim agreement. The Little Salmon signed its Final Agreement and its Self-Government Agreement after an intensive ratification process.

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The 369-page Final Agreement is described as comprehensive because it is much more than a land and money exchange. The Final Agreement includes the following provisions:

Whereas Clauses

. . . the parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Little Salmon/Carmacks First Nation Traditional Territory;

Certainty

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

Harvesting Rights

16.4.2 Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory, and with the consent of another Yukon First Nation in that Yukon First Nation's Traditional Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.

The decision in question was made pursuant to the 1991 Yukon Agriculture Policy. Paulsen submitted an application to the Director for an agricultural land grant of some 65 hectares,

about 40 km north of Carmacks, near McGregor Creek, between the North Klondike Highway and the Yukon River (the "Application").

An applicant must first prepare a Farm Development Plan, which is subjected to a technical review. Applications then proceed to the Land Application Review Committee ("LARC"). Its membership includes the Yukon government, Yukon First Nations, Municipal and Federal Government agencies. First Nation Governments participate as members of LARC when land applications may affect land management "within their respective traditional territories".

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The Application was for land within Trapline #143 and the Little Salmon's Traditional Territory and amounts to one-half of one percent of the trapline area. It is adjacent to the trapline cabin of Sam and Little Salmon Settlement Lands are also located in the vicinity. The Traditional Territory of the Little Salmon is an area where the members of the First Nation continue to exercise subsistence harvesting rights.

The express policy of the Yukon government with respect to the obligation to consult is that "[i]n the case of dispositions of Crown land in the Traditional Territory of a First Nation with Final and Self-Government Agreements, there is

no legal obligation to consult with the First Nation.”¹

The Director posted a Public Notice of the Application on March 26, 2004, inviting written comments within 20 days. On April 28, 2004, the Director also notified the Little Salmon directly of the application to LARC, provided an information package and invited comments within 30 days. The Little Salmon wrote to the Branch almost 90 days later, on July 27, 2004, stating that they opposed the application due to its effects on trapping, its impact on two parcels of the Settlement Lands, and the existence of heritage and archaeological sites in areas proposed for timber harvesting, including an historic Little Salmon trail.

The Court also noted that in 2004 the Little Salmon had met with the Yukon government and expressed the view that their interests were not being seriously considered in the context of agricultural land applications. Branch officials said that they consult on such applications through LARC, that they were not required to formally consult the Little Salmon on such matters under the Land Claims Agreement.

The Little Salmon, therefore, brought this judicial review.

The Decision

The Court held that the central issue in this appeal is whether a duty to consult and, where possible, accommodate First Nations’ concerns and interests applies in the context of a modern comprehensive land claims agreement.

Yukon argued that there was no such duty, but that if such a duty existed, it was met by the process followed under the circumstances.

The Court reviewed the facts and the legal foundation for the duty to consult in *Haida*, *Taku* and *Mikisew* and then rejected the argument that some distinction could be drawn between modern and ancient treaties, concluding that: “The inescapable conclusion to be drawn from the reasons of [the SCC in *Mikisew*] is that the honour of the Crown and a duty to consult and accommodate applies in the interpretation of treaties and exists independent of treaties.”² The “modern nature” of more recent treaties, however, would be relevant to the determination of the extent of consultation required.³

Yukon and Canada argued that since the Final Agreement did not require consultation in the context of a transfer of lands, and did provide for consultation elsewhere, then no consultation was required in the context of such a transfer of lands. The Court rejected this argument, as the terms of the Final Agreement are silent on both the ability of Yukon to transfer land and on whether consultation is required.

The core of the Court’s decision is well summed up in para. 90:

[90] ...the honour of the Crown and the correlative duty to consult are constitutional duties for the reasons expressed in *Haida Nation*, *Taku River Tlingit*, and *Mikisew*. They exist outside and infuse the treaty and govern Yukon's dealings with

¹ at para 20

² *Little Salmon*, YCA, para 67

³ *Little Salmon*, YCA, para 71

Yukon First Nations. In my opinion, the duty to consult does apply to the interpretation and implementation of the Final Agreement and is not precluded from application by the terms of the treaty. In my view, such a finding does not render the Final Agreement uncertain or open to unending renegotiation. It simply means that Yukon must be cognizant of potential adverse impacts on First Nations' treaty rights when Yukon proposes to dispose of Crown lands, and, when treaty rights may be affected, Yukon must seek consultation with First Nations. The degree of consultation will be a function of potential impact.

Finding that there was no language in the Final Agreement to preclude the duty to consult from applying to the decision to transfer the lands, the Court held that the duty applied as a result of the honour of the Crown.

The Court held that the submissions of Yukon and Canada suggested that the Final Agreement was the end to the process of reconciliation that consultation was meant to foster. The Court rejected this idea and held that reconciliation does not end with the signing of a treaty, adopting Mr. Justice Binnie's words from *Mikisew*: "[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage."⁴ Madam Justice Kirkpatrick added that, "Reconciliation will inevitably be a long and sometimes difficult process, which will require the good faith efforts of all levels of

government – federal, territorial, and First Nations."⁵

After concluding that the duty to consult did apply to modern treaties, the Court examined whether that duty was met by Yukon in this case. Following *Mikisew*, the Court held that the duty to consult, in such a context where a treaty right might (not would) be affected, was at the low end of the spectrum.⁶ The Court reviewed the process undertaken by the LARC in the context of a general denial that there was a duty to consult, and held that: "LARC identified and considered Little Salmon/Carmacks' concerns and it cannot reasonably be said that the meeting was simply an exercise in allowing the First Nation to "blow off steam" while permitting Yukon to "run roughshod" over the First Nation's treaty rights."⁷ Given the low level of consultation required, the Court held that the duty to consult was met.

As a side-bar, the Court also dealt with the decision of the lower court that Sam as an individual was owed a duty to consult, finding that: "the duty to consult, as an adjunct to the implementation of the Final Agreement, can only apply between the parties to the agreement – Yukon and the First Nation – and not to individual members of the First Nation."⁸

In the result, the Yukon Court of Appeal set aside the order of the Supreme Court of the Yukon which had quashed the decision to transfer these lands.

Conclusion

Although many believed that the modern treaties, made after the *Constitution Act, 1982*

⁴ *Mikisew* SCC, para. 54

⁵ *Little Salmon YCA*, para 91

⁶ *Little Salmon YCA*, para 101

⁷ *Little Salmon YCA*, para. 114

⁸ *Little Salmon YCA*, para. 116

and in light of the multitude of cases from the Supreme Court of Canada dealing with the need for consultation, were drafted such that all processes of consultation and accommodation, were dealt with directly in the treaties, this case makes clear that the honour of the Crown and the duty to consult “exist outside and infuse” all modern treaties, unless they specifically say otherwise. Although leave to appeal from this decision is likely to be sought, this is very likely to become an issue at the treaty tables presently underway as the Crown seeks greater certainty.

The concept of the duty to consult originally was thought to apply only in areas without treaties, as was the case in the *Haida* decision. The Supreme Court of Canada clarified in *Mikisew* that the duty to consult also applied in the interpretation of ancient treaties. This decision clarifies that the duty to consult applies in respect of land subject to any treaty. As a result there is no part of Canada that is not subject to the duty to consult with, and were necessary accommodate, First Nations, Inuit or Métis.

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