LITTLE SALMON/CARMACKS FIRST NATION V YUKON (MINISTER OF ENERGY, MINES AND RESOURCES)

Court of Appeal for the Yukon Territory (Newbury, Kirkpatrick and Tysoe JJ)
15 August 2008
2008 YKCA 13

Canada – treaties – duty to consult – modern treaty between Little Salmon/Carmacks First Nation, Yukon and Canadian governments – right to access Crown land in traditional territory for subsistence harvesting – application for land grant of Crown land on traditional territory – whether duty to consult applies to treaty – whether distinction should be made between historic and modern treaties – whether duty to consult is an implied term of treaty – whether duty to consult is a constitutional duty – when duty to consult triggered – scope of duty to consult – relationship between Crown's duty to act honourably and reconciliation

Facts:

On 5 November 2001, Larry Paulsen submitted an application for an agricultural grant of Crown land, which was located in the traditional territory of the Little Salmon/Carmacks First Nation and the trapline of a member of that First Nation, Johnny Sam. Following a lengthy process, Little Salmon/Carmacks had in 1997 negotiated and finalised a modern land claim treaty ('Final Agreement') over their traditional territory in Yukon with the Yukon and Canadian governments. Under the Final Agreement, Little Salmon/Carmacks surrendered all undefined Aboriginal rights in exchange for defined treaty rights. Amongst other things, the Final Agreement grants all members of Little Salmon/Carmacks a right to access Crown land in their traditional territory for subsistence harvesting, except where the Crown land is subject to an agreement for sale, as would be the case if Mr Paulsen's grant application was approved. In addition to his access rights under the Final Agreement to the Crown land subject of Mr Paulsen's application, Mr Sam held a trapping concession under the *Wildlife Act*, RSY 2002, c 229 ('*Wildlife Act*') over a large area of land, which included the Crown land in question. While the Agreement has certainty as one of its primary aims and contains an 'entire agreement' clause, it does not specifically address Yukon's right to transfer land subject to the Agreement.

Following Mr Paulsen's application, and pursuant to the Yukon Government's agriculture policy, the application was to subject to several levels of review. The application passed the first level of review in 2004, though for reasons unknown Little Salmon/Carmacks was not notified of the review and had no opportunity to raise any concerns. As Mr Paulsen's application proceeded to the next level of review, Little Salmon/Carmacks was notified on 28 April 2004 of the application and of a meeting on 13 August 2004 at which stakeholders would review the application. The First Nation was also invited to comment on the application within 30 days. Mr Sam learned of this and asked Little Salmon/Carmacks to act on his behalf. Representatives of the First Nation were unable to attend the review meeting, though a letter expressing strong concerns about the application was sent by Little Salmon/Carmacks on 27 July 2004. The review meeting, which its minutes show discussed Little Salmon/Carmacks' concerns, approved in principle Mr Paulsen's application. Following sustained but unsuccessful attempts to have its concerns accommodated, Little Salmon/Carmacks sought a declaration requiring the Yukon Government to consult with and make all reasonable efforts to accommodate their rights and interests. No transfer of land had taken place.

In the Yukon Supreme Court, it was found that a duty to consult and accommodate applied to the Final Agreement. That decision was appealed by the Yukon Minister of Energy, Mines and Resources and several other parties.

The main issue on appeal was whether a duty to consult and accommodate applied to the Final Agreement and to the right of Yukon to transfer Crown land. In the event that such a duty existed, it had to be determined what the scope of that duty was, and whether the duty was met in the circumstances.

Held, allowing the appeal, per Kirkpatrick J, Newbury and Tysoe JJ agreeing:

1. In respect of a modern land claims and fish and wildlife treaty, the determination of whether the duty to consult and, where possible, accommodate First Nations' rights and interests must necessarily begin with an examination of the treaty itself: [37]–[38]; *R v Badger* [1996] 1 SCR 771 considered.

2. The principles articulated in *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 regarding the duty to consult and accommodate apply to the present case of a modern negotiated land claims agreement. The honour of the Crown is a core precept that must guide the relationship between Aboriginal peoples and the Crown. The honour of the Crown and a duty to consult and accommodate apply in the interpretation of treaties and exist independent of treaties: [60]–[61], [67]; *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 followed, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550 considered, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 considered.

3. A sufficiently broad and purposive understanding of the Crown's constitutional duty to act honourably, in combination with the language of s 35 of the *Constitution Act, 1982*, requires that no distinction be made between historic and modern treaty agreements. Rather, the modern nature of a land claims agreement is a contextual factor to be taken into account in determining the duty to consult: [69]–[71]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 considered.

4. While, in the present case, the Final Agreement gives structure to the relationship between the Crown and the First Nation, the relationship is a continuing one that remains subject to common law and constitutional principles. The principle of consultation is a matter of broad general importance to the relations between Aboriginal and non-Aboriginal peoples: [71]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 considered.

5. The duty to consult is not an implied term of the Final Agreement. None of the traditional bases on which terms may be implied in a contract are readily applied in the context of the Final Agreement: [73]; *Canadian Pacific Hotels Ltd v Bank of Montreal* [1987] 1 SCR 711 considered.

6. The duty to consult is not a constitutional right. The duty of the Crown to act honourably and the duty to consult are constitutional duties. Those duties exist outside of and infuse treaties, and govern the Yukon Government's dealings with Yukon First Nations. The duty to consult applies to the interpretation and implementation of the Final Agreement and is not precluded from application by the terms of the treaty: [88]–[90]; *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 considered, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550 considered, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 considered.

7. The honour of the Crown is not fully satisfied by the conclusion of treaties but rather continues to apply to their implementation. Treaty-making does not achieve reconciliation; it is just one step towards it: [91]; *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 considered, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550 considered, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 considered.

8. Yukon must be cognisant of potential adverse impacts on First Nations' treaty rights when Yukon proposes to dispose of Crown lands, and it must consult with First Nations when treaty rights may be affected. The threshold at which the duty is triggered is low because, until a First Nation is informed of the proposed action, it is unable to provide input as to the extent of any impact the proposed action may have on its treaty rights. The degree of consultation will be a function of potential impact: [90], [95]–[96], [98]; *Haida Nation v British Columbia and Weyerhaeuser* (2002) 99 BCLR (3d) 209 considered, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 considered.

9. The scope of the duty to consult will depend on the terms of the treaty and the rights granted thereunder that may be adversely affected. In the present appeal, the duty to consult lay at the lower end of the spectrum. In light of the low level of consultation required, the duty to consult was met in the present case: [98], [101], [111], [115]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 followed.