



## The Right to Consultation in the Disposal of lands affecting Treaty Rights

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Can the terms of a modern treaty abrogate the duty of the Crown to consult with First Nations?

In *Little Salmon/Carmacks First Nation*, the Yukon Court of Appeal found on August 15, 2008 that the Yukon government had a constitutionally entrenched duty to consult with Little Salmon/Carmacks. The Court found that the duty to consult was not extinguished by the Little Salmon/Carmacks First Nation when they signed *the Yukon Final Agreement*, because the duty to consult informed all aspects of treaty relationships, including modern treaties and lands claims agreements.

At issue in the case was the protection of rights of Little Salmon/Carmacks members to be consulted about government disposals of Crown lands which affect trapping rights (which the Court held to be commercial rights) that were not protected by the Final Agreement. At issue was also the significance of the local resource-use plan which was facilitated by the Final Agreement, but which the Court held did not form part of the Final Agreement.

The Final Agreement's sections on consultation did not specify a requirement to consult on the disposal of Crown lands, but this did not preclude the Yukon government from having a duty to consult on the disposal of Crown lands. The Yukon government had argued (prior to the Supreme Court of Canada's decisions in *Haida Nation*, *Taku River Tlingit*, and *Mikisew Cree*) that negotiating the provisions of the Final Agreement regarding consultation, terminated the rights to be consulted.

The difficult issue that confronted the Court was whether the provisions on consultation in the Final Agreement, noting that there is a non-derogation clause in the Final Agreement which protects Aboriginal and Treaty rights, do not override the constitutional right to be consulted on the disposal of Crown lands, a right subsequently upheld by the Supreme Court of Canada in *Mikisew Cree*. In other words, the question was whether the inclusion of specific consultation provisions in the Final Agreement indicated that the Little Salmon/Carmacks had surrendered their constitutional rights to be consulted. So, did the modern treaty cancel out a pre-existing right to be consulted?

In finding that the duty to consult continues to apply in the implementation of treaties, the Court held:

“The honour of the Crown and the correlative duty to consult are constitutional duties . . . They exist outside and infuse the treaty . . . 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. “

The Court also found:

“In my view, such a finding does not render the Final Agreement uncertain or open to unending renegotiation . . . Yukon must be cognizant of potential adverse impacts on First Nations' treaty rights when Yukon proposes to dispose of Crown lands . . . when treaty rights may be affected, Yukon must seek consultation with First Nations.”

The Court concluded that:

1. The duty to consult is triggered at a low threshold whenever the Crown proposes to take action that may have potential adverse effects on treaty rights.
2. The onus is on the Crown to inform the First Nation of a proposed action by the Crown that has the potential to impact treaty rights.
3. The content of the duty will be at a low level when treaty rights are only “minimally” affected. (The Court ruled that a commercial trapping licence issued by the Yukon government did not amount to the traditional harvesting rights protected under the modern treaty, and therefore an infringement upon a registered trapline would be considered a “minimal” impact).
4. The duty to consult was satisfied by attendance before a Final Agreement implementation committee meeting.
5. The duty to consult does not apply to individual First Nations members but only to the First Nation government.

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