



SUPREME COURT OF CANADA

CITATION: Beckman v. Little Salmon/Carmacks First Nation,
2010 SCC 53, [2010] 3 S.C.R. 103

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BETWEEN:

**David Beckman, in his capacity as Director, Agriculture Branch,
Department of Energy, Mines and Resources,
Minister of Energy, Mines and Resources,
and Government of Yukon**

Appellants / Respondents on cross-appeal
and

**Little Salmon/Carmacks First Nation and Johnny Sam and
Eddie Skookum, on behalf of themselves and all other members
of the Little Salmon/Carmacks First Nation**

Respondents / Appellants on cross-appeal
- and -

**Attorney General of Canada, Attorney General of Quebec,
Attorney General of Newfoundland and Labrador,
Gwich'in Tribal Council, Sahtu Secretariat Inc.,
Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority,
Council of Yukon First Nations, Kwanlin Dün First Nation,
Nunavut Tunngavik Inc., Tlicho Government,
Te'Mexw Nations and Assembly of First Nations**
Intervenors

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 89)

Binnie J. (McLachlin C.J. and Fish, Abella, Charron,
Rothstein and Cromwell JJ. concurring)

CONCURRING REASONS:
(paras. 90 to 206)

Deschamps J. (LeBel J. concurring)

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103

**David Beckman, in his capacity as Director,
Agriculture Branch, Department of Energy,
Mines and Resources, Minister of Energy,
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v.

**Little Salmon/Carmacks First Nation and
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Indexed as: Beckman v. Little Salmon/Carmacks First Nation

2010 SCC 53

File No.: 32850.

2009: November 12; 2010: November 19.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

Constitutional law — Aboriginal peoples — Aboriginal rights — Land claims — Duty of Crown to consult and accommodate in the context of a modern comprehensive land claims treaty — Treaty provides Aboriginal right of access for hunting and fishing for subsistence in their traditional territory — Application by non-Aboriginal for an agricultural land grant within territory approved by Crown — Whether Crown had duty to consult and accommodate Aboriginal peoples — If so, whether Crown discharged its duty — Constitution Act, 1982, s. 35.

Crown law — Honour of the Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate prior to making decisions that might adversely affect Aboriginal rights and title claims.

Administrative law — Judicial review — Standard of review — Whether decision maker had duty to consult and accommodate — If so, whether decision maker discharged this duty — Lands Act, R.S.Y. 2002, c. 132; Territorial Lands (Yukon) Act, S.Y. 2003, c. 17.

Little Salmon/Carmacks entered into a land claims agreement with the governments of Canada and the Yukon Territory in 1997, after 20 years of negotiations. Under the treaty, Little Salmon/Carmacks members have a right of access for hunting and fishing for subsistence in their traditional territory, which includes a parcel of 65 hectares for which P submitted an application for an agricultural land grant in November 2001. The land applied for by P is within the trapline of S, who is a member of Little Salmon/Carmacks.

Little Salmon/Carmacks disclaim any allegation that a grant to P would violate the treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of Little Salmon/Carmacks attach importance to their ongoing treaty interest in surrendered Crown lands (of which the 65 acres forms a small part). Little Salmon/Carmacks contend that in considering the grant to P the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns.

The Yukon government's Land Application Review Committee ("LARC") considered P's application at a meeting to which it invited Little Salmon/Carmacks. The latter submitted a letter of opposition to P's application prior to the meeting, but did not attend. At the meeting, LARC recommended approval of the application and, in October 2004, the Director, Agriculture Branch, Yukon Department of Energy, Mines and Resources, approved it. Little Salmon/Carmacks appealed the decision to the Assistant Deputy Minister, who rejected its review request. On judicial review, however, the Director's decision was quashed and set aside. The chambers judge held that the Yukon failed to comply with the duty to consult and accommodate. The Court of Appeal allowed the Yukon's appeal.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ.: When a modern land claim treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. While consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people — it is a doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself.

In this case, a continuing duty to consult existed. Members of Little Salmon/Carmacks possessed an express treaty right to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the Treaty did not prevent the government from making land grants out of the Crown's holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic and cultural activities of Little Salmon/Carmacks, and the Yukon was required to consult with Little Salmon/Carmacks to determine the nature and extent of such adverse effects.

The treaty itself set out the elements the parties regarded as an appropriate level of consultation (where the treaty requires consultation) including proper notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and full and fair consideration by the party obliged to consult of any views presented.

The actual treaty provisions themselves did not govern the process for agricultural grants at the time. However, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more elaborate consultation process in the Treaty itself, the scope of the duty of consultation in this situation was at the lower end of the spectrum.

Accordingly, the Director was required, as a matter of compliance with the legal duty to consult based on the honour of the Crown, to be informed about and consider the nature and severity of any adverse impact of the proposed grant before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to re-open the Treaty or to re-negotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown and promoted the objective of reconciliation.

In this case, the duty of consultation was discharged. Little Salmon/Carmacks acknowledges that it received appropriate notice and information. The Little Salmon/Carmacks objections were made in writing and they were dealt with at a meeting at which Little Salmon/Carmacks was entitled to be present (but failed to attend). Both Little Salmon/Carmacks' objections and the response of those who attended the meeting were before the Director when, in the exercise of his delegated authority, he approved P's application. Neither the honour of the Crown nor the duty to consult required more.

Nor was there any breach of procedural fairness. While procedural fairness is a flexible concept, and takes into account the Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of

administrative law to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal.

While the Yukon had a duty to consult, there was no further duty of accommodation on the facts of this case. Nothing in the treaty itself or in the surrounding circumstances gave rise to such a requirement.

In exercising his discretion in this case, as in all others, the Director was required to respect legal and constitutional limits. The constitutional limits included the honour of the Crown and its supporting doctrine of the duty to consult. The standard of review in that respect, including the adequacy of the consultation, is correctness. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness.

In this case, the Director did not err in law in concluding that the level of consultation that had taken place was adequate. The advice the Director received from his officials after consultation is that the impact of the grant of 65 hectares would not be significant. There is no evidence that he failed to give full and fair consideration to the concerns of Little Salmon/Carmacks. The material filed by the parties on the judicial review application does not demonstrate any palpable error of fact in his conclusion. Whether or not a court would have reached a different conclusion is not relevant. The decision to approve or not to approve the grant was

given by the legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was reasonable in the circumstances.

Per LeBel and Deschamps JJ.: Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, in the case at bar, the parties have moved on to another stage. Formal consultation processes are now a permanent feature of treaty law, and the Little Salmon/Carmacks Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with Aboriginal peoples. It is a way to recognize that Aboriginal peoples have full legal capacity. To disregard the provisions of such a treaty can only encourage litigation, hinder future negotiations and threaten the ultimate objective of reconciliation.

To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights. Nor does the Crown act dishonourably if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.

Legal certainty cannot be attained if one of the parties to a treaty can unilaterally renege on its undertakings with respect to a matter provided for in the treaty where there is no provision for its doing so in the treaty. This does not rule out the possibility of there being matters not covered by a treaty with respect to which the Aboriginal party has not surrendered possible Aboriginal rights. Nor does legal certainty imply that an equitable review mechanism cannot be provided for in a treaty.

Thus, it should be obvious that the best way for a court to contribute to ensuring that a treaty fosters a positive long relationship between Aboriginal and non-Aboriginal communities consists in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it cannot become a one-way proposition at the stage of implementation of the treaty. On the contrary, certainty with respect to one party's rights implies that the party in question must discharge its obligations and

respect the other party's rights. Having laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.

It is in fact because the agreement in issue does provide that the Aboriginal party has a right to various forms of consultation with respect to the rights the Crown wishes to exercise in this case that rights and obligations foreign to the mechanism provided for in the treaty must not be superimposed on it, and not simply because this is a "modern" treaty constituting a land claims agreement.

Even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party. Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

The consultation that must take place if a right of the Aboriginal party is impaired will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework.

Where a treaty provides for a mechanism for consultation, what it does is to override the common law duty to consult Aboriginal peoples; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually.

The courts are not blind to omissions, or gaps left in the treaty, by the parties with respect to consultation, and the common law duty to consult could always be applied to fill such a gap. But no such gap can be found in this case.

These general considerations alone would form a sufficient basis for dismissing the appeal.

But the provisions of the Final Agreement also confirm this conclusion. The Final Agreement includes general and interpretive provisions that are reproduced from the Umbrella Agreement. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

These general and interpretive provisions also establish certain rules with respect to the relationships of the Umbrella Agreement and any final agreement

concluded under it, not only the relationship between them, but also that with the law in general. These rules can be summarized in the principle that the Final Agreement prevails over any other non-constitutional legal rule, subject to the requirement that its provisions not be so construed as to affect the rights of “Yukon Indian people” as Canadian citizens and their entitlement to all the rights, benefits and protections of other citizens. In short, therefore, with certain exceptions, the treaty overrides Aboriginal rights related to the matters to which it applies, and in cases of conflict or inconsistency, it prevails over all other non-constitutional law.

Regarding the relationship between the treaty in issue and the rest of our constitutional law other than the case law on Aboriginal rights, such a treaty clearly cannot on its own amend the Constitution of Canada. In other words, the Final Agreement contains no provisions that affect the general principle that the common law duty to consult will apply only where the parties have failed to address the issue of consultation. This will depend on whether the parties have come to an agreement on this issue, and if they have, the treaty will — unless, of course, the treaty itself provides otherwise — override the application to the parties of any parallel framework, including the common law framework.

In this case, the parties included provisions in the treaty that deal with consultation on the very question of the Crown’s right to transfer Crown land upon an application like the one made by P.

P's application constituted a project to which the assessment process provided for in Chapter 12 of the Final Agreement applied. Although that process had not yet been implemented, Chapter 12, including the transitional legal rules it contains, had been. Under those rules, any existing development assessment process would remain applicable. The requirements of the processes in question included not only consultation with the First Nation concerned, but also its participation in the assessment of the project. Any such participation would involve a more extensive consultation than would be required by the common law duty in that regard. Therefore, nothing in this case can justify resorting to a duty other than the one provided for in the Final Agreement.

Moreover, the provisions of Chapter 16 on fish and wildlife management establish a framework under which the First Nations are generally invited to participate in the management of those resources at the pre-decision stage. In particular, the invitation they receive to propose fish and wildlife management plans can be regarded as consultation.

The territorial government's conduct raises questions in some respects. In particular, there is the fact that the Director did not notify the First Nation of his decision of October 18, 2004 until July 27, 2005. Under s. 81(1) of the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("YESAA"), the "designated office" and, if applicable, the executive committee of the Yukon Development Assessment Board would have been entitled to receive copies of that

decision and, one can only assume, to receive them within a reasonable time. Here, the functional equivalent of the designated office is the Land Application Review Committee (“LARC”). Even if representatives of the First Nation did not attend the August 13, 2004 meeting, it would be expected that the Director would inform that First Nation of his decision within a reasonable time. Nonetheless, the time elapsed after the decision did not affect the quality of the prior consultation.

The territorial government’s decision to proceed with P’s application at the “prescreening” stage despite the requirement of consultation in the context of the First Nation’s fish and wildlife management plan was not an exemplary practice either. However, the First Nation did not express concern about this in its letter of July 27, 2004 to Yukon’s Lands Branch. And as can be seen from the minutes of the August 13, 2004 meeting, the concerns of the First Nation with respect to resource conservation were taken into consideration. Also, the required consultation in the context of the fish and wildlife management plan was far more limited than the consultation to which the First Nation was entitled in participating in LARC, which was responsible for assessing the specific project in issue in this appeal. Finally, the First Nation, the renewable resources council and the Minister had not agreed on a provisional suspension of the processing of applications for land in the area in question.

Despite these aspects of the handling of P’s application that are open to criticism, it can be seen from the facts as a whole that the respondents received what

they were entitled to receive from the appellants where consultation as a First Nation is concerned. In fact, in some respects they were consulted to an even greater extent than they would have been under the *YESAA*.

The only right the First Nation would have had under the *YESAA* was to be heard by the assessment district office as a stakeholder. That consultation would have been minimal, whereas the First Nation was invited to participate directly in the assessment of P's application as a member of LARC.

It is true that the First Nation's representatives did not attend the August 13, 2004 meeting. They did not notify the other members of LARC that they would be absent and did not request that the meeting be adjourned, but they had already submitted comments in a letter.

Thus, the process that led to the October 18, 2004 decision on P's application was consistent with the transitional law provisions of Chapter 12 of the Final Agreement. There is no legal basis for finding that the Crown breached its duty to consult.

Cases Cited

By Binnie J.

Considered: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Badger*, [1996] 1 S.C.R. 771; **applied:** *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; **referred to:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227, leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

By Deschamps J.

Considered: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; **referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. White* (1964), 50 D.L.R. (2d) 613, aff'd (1965), 52 D.L.R. (2d) 481; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746.

Statutes and Regulations Cited

Assessable Activities, Exceptions and Executive Committee Projects Regulations, SOR/2005-379, ss. 2, 5, Sch. 1, Part 13, item 27.

Canadian Charter of Rights and Freedoms.

Canadian Environmental Assessment Act, S.C. 1992, c. 37.

Constitution Act, 1867, Part VI.

Constitution Act, 1982, ss. 25, 35, 52, Part V.

Environmental Assessment Act, S.Y. 2003, c. 2 [rep. O.I.C. 2005/202, (2006) 25 Y. Gaz. II, 32].

Indian Act, R.S.C. 1985, c. I-5.

Lands Act, R.S.Y. 2002, c. 132, s. 7(1)(a).

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Territorial Lands (Yukon) Act, S.Y. 2003, c. 17.

Wildlife Act, R.S.Y. 2002, c. 229, ss. 13(1), 82, 187.

Yukon Environmental and Socio-economic Assessment Act, S.C. 2003, c. 7, ss. 2(1) “territory”, 5, 8, 20(1), 23(1), 47(2), 50(1), 55(1)(b), 55(4), 60, 63, 81(1), 82(1), 83(1), 84(1), 122(c), 134.

Yukon First Nations Land Claims Settlement Act, S.C. 1994, c. 34, ss. 5, 6(2), 13.

Treaties and Agreements

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Little Salmon/Carmacks First Nation Final Agreement, July 1, 1997 (online: http://www.eco.gov.yk.ca/pdf/little_salmon_carmacks_fa.pdf).

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Yukon. *Agriculture for the 90s: A Yukon Policy*. Whitehorse: Yukon Government, 1991.

APPEAL and CROSS-APPEAL from a judgment of the Yukon Court of Appeal (Newbury, Kirkpatrick and Tysoe J.J.A.), 2008 YKCA 13, 296 D.L.R. (4th) 99, 258 B.C.A.C. 160, 434 W.A.C. 160, [2008] 4 C.N.L.R. 25, 71 R.P.R. (4th) 162, [2008] Y.J. No. 55 (QL), 2008 CarswellYukon 62, setting aside the decision of Veale J., 2007 YKSC 28, [2007] 3 C.N.L.R. 42, [2007] Y.J. No. 24 (QL), 2007 CarswellYukon 18, quashing the approval of application for land grant. Appeal and cross-appeal dismissed.

Brad Armstrong, Q.C., Keith Bergner, Penelope Gawn and Lesley McCullough, for the appellants/respondents on cross-appeal.

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Peter W. Hutchins and Julie Corry, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

[1] BINNIE J. — This appeal raises important questions about the interpretation and implementation of modern comprehensive land claims treaties between the Crown and First Nations and other levels of government.

[2] The treaty at issue here is the Little Salmon/Carmacks First Nation Final Agreement (the “LSCFN Treaty”), which was finalized in 1996 and ratified by members of the First Nation in 1997. The LSCFN Treaty is one of 11 that arose out

of and implement an umbrella agreement signed in 1993 after 20 years of negotiations between representatives of all of the Yukon First Nations and the federal and territorial governments. It was a monumental achievement. These treaties fall within the protection of s. 35 of the *Constitution Act, 1982*, which gives constitutional protection to existing Aboriginal and treaty rights.

[3] The present dispute relates to an application for judicial review of a decision by the Yukon territorial government dated October 18, 2004, to approve the grant of 65 hectares of surrendered land to a Yukon resident named Larry Paulsen. The plot borders on the settlement lands of the Little Salmon/Carmacks First Nation, and forms part of its traditional territory, to which its members have a treaty right of access for hunting and fishing for subsistence. In the result, Mr. Paulsen still awaits the outcome of the grant application he submitted on November 5, 2001.

[4] The First Nation disclaims any allegation that the Paulsen grant would violate the LSCFN Treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of the LSCFN have an ongoing treaty interest in surrendered Crown lands (of which the 65 hectares form a small part), to which they have a treaty right of access for hunting and fishing for subsistence. The LSCFN contends that the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns. They say the decision of October 18, 2004, to approve the Paulsen grant should be quashed.

[5] The territorial government responds that no consultation was required. The LSCFN Treaty, it says, is a complete code. The treaty refers to consultation in over 60 different places but a land grant application is not one of them. Where not specifically included, the duty to consult, the government says, is excluded.

[6] The important context of this appeal, therefore, is an application for judicial review of a decision that was required to be made by the territorial government having regard to relevant constitutional as well as administrative law constraints. The Yukon Court of Appeal held, as had the trial judge, that the LSCFN Treaty did not exclude the duty of consultation, although in this case the content of that duty was at the lower end of the spectrum (2007 YKSC 28; 2008 YKCA 13). The Court of Appeal went on to hold, disagreeing in this respect with the trial judge, that on the facts the government's duty of consultation had been fulfilled.

[7] I agree that the duty of consultation was not excluded by the LSCFN Treaty, although its terms were relevant to the exercise of the territorial government discretion, as were other principles of administrative and Aboriginal law, as will be discussed. On the facts of the Paulsen application, however, I agree with the conclusion of the Court of Appeal that the First Nation did not make out its case. The First Nation received ample notice of the Paulsen application, an adequate information package, and the means to make known its concerns to the decision maker. The LSCFN's objections were made in writing and they were dealt with at a meeting at which the First Nation was entitled to be present (but failed to show up).

Both the First Nation's objections and the response of those who attended the meeting were before the appellant when, in the exercise of his delegated authority, he approved the Paulsen application. In light of the consultation provisions contained in the treaty, neither the honour of the Crown nor the duty to consult were breached. Nor was there any breach of procedural fairness. Nor can it be said that the appellant acted unreasonably in making the decision that he did. I would dismiss the appeal and cross-appeal.

I. Overview

[8] Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations. The objective was not only to build alliances with First Nations but to keep the peace and to open up the major part of those territories to colonization and settlement. No treaties were signed with the Yukon First Nations until modern times.

[9] Unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties. The negotiation costs to Yukon First Nations of their various treaties, financed by the federal government through reimbursable loans, were enormous. The LSCFN share alone exceeded seven million dollars. Under the Yukon treaties, the Yukon First Nations surrendered their Aboriginal rights in almost 484,000 square kilometres,

roughly the size of Spain, in exchange for defined treaty rights in respect of land tenure and a quantum of settlement land (41,595 square kilometres), access to Crown lands, fish and wildlife harvesting, heritage resources, financial compensation, and participation in the management of public resources. To this end, the LSCFN Treaty creates important institutions of self-government and authorities such as the Yukon Environmental and Socio-economic Assessment Board and the Carmacks Renewable Resources Council, whose members are jointly nominated by the First Nation and the territorial government.

[10] The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[11] Equally, however, the LSCFN is bound to recognize that the \$34 million and other treaty benefits it received in exchange for the surrender has earned the territorial government a measure of flexibility in taking up surrendered lands for other purposes.

[12] The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties such as the 1760-61 Treaty at issue in *R. v. Marshall*, [1999] 3 S.C.R. 456, and post-Confederation treaties such as Treaty No. 8 (1899) at issue in *R. v. Badger*, [1996] 1 S.C.R. 771, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way. To the extent the Yukon territorial government

argues that the Yukon treaties represent a new departure and not just an elaboration of the *status quo*, I think it is correct. However, as the trial judge Veale J. aptly remarked, the new departure represents but a step — albeit a very important step — in the long journey of reconciliation (para. 69).

[13] There was in this case, as mentioned, an express treaty right of members of the First Nation to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the LSCFN Treaty did not prevent the government from making land grants out of the Crown's land holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic activities of the LSCFN, and the territorial government was required to consult with the LSCFN to determine the nature and extent of such adverse effects.

[14] The delegated statutory decision maker was the appellant David Beckman, the Director of the Agriculture Branch of the territorial Department of Energy, Mines and Resources. He was authorized, subject to the treaty provisions, to issue land grants to non-settlement lands under the *Lands Act*, R.S.Y. 2002, c. 132, and the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17. The First Nation argues that in exercising his discretion to approve the grant the Director was required to have regard to First Nation's concerns and to engage in consultation. This is true. The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of

accommodation. The First Nation protests that its concerns were not taken seriously — if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise. The Paulsen application had been pending almost three years before it was eventually approved. It was a relatively minor parcel of 65 hectares whose agricultural use, according to the advice received by the Director (and which he was entitled to accept), would not have any significant adverse effect on First Nation's interests.

[15] Unlike *Mikisew Cree* where some accommodation was possible through a rerouting of the proposed winter road, in this case, the stark decision before the appellant Director was to grant or refuse the modified Paulsen application. He had before him the relevant information. Face-to-face consultation between the First Nation and the Director (as decision maker) was not required. In my view, the decision was reasonable having regard to the terms of the treaty, and in reaching it the Director did not breach the requirements of the duty to consult, natural justice, or procedural fairness. There was no *constitutional* impediment to approval of the Paulsen application and from an *administrative* law perspective the outcome fell within a range of reasonable outcomes.

II. Facts

[16] On November 5, 2001, Larry Paulsen submitted his application for an agricultural land grant of 65 hectares. He planned to grow hay, put up some buildings and raise livestock. The procedure governing such grant applications was set out in a pre-treaty territorial government policy, *Agriculture for the 90s: A Yukon Policy* (1991) (the “1991 Agriculture Policy”).

[17] The Paulsen application (eventually in the form of a “Farm Development Plan”) was pre-screened by the Agriculture Branch and the Lands Branch as well as the Land Claims and Implementation Secretariat (all staffed by territorial civil servants) for completeness and compliance with current government policies.

[18] The Paulsen application was then sent to the Agriculture Land Application Review Committee (“ALARC”) for a more in-depth technical review by various Yukon government officials. ALARC was established under the 1991 Agriculture Policy. It predates and is completely independent from the treaty. The civil servants on ALARC recommended that Mr. Paulsen reconfigure his parcel to include only the “bench” of land set back from the Yukon River for reasons related to the suitability of the soil and unspecified environmental, wildlife, and trapping concerns. Mr. Paulsen complied.

[19] On February 24, 2004, ALARC recommended that the Paulsen application for the parcel, as reconfigured, proceed to the next level of review, namely, the Land Application Review Committee (“LARC”), which includes First

Nation's representatives. LARC also functioned under the 1991 Agriculture Policy and, as well, existed entirely independently of the treaties.

[20] Reference should also be made at this point to the Fish and Wildlife Management Board — a treaty body composed of persons nominated by the First Nation and Yukon government — which in August 2004 (i.e. while the Paulsen application was pending) adopted a Fish and Wildlife Management Plan (“FWMP”) that identified a need to protect wildlife and habitat in the area of the Yukon River, which includes the Paulsen lands. It proposed that an area in the order of some 10,000 hectares be designated as a Habitat Protection Area under the *Wildlife Act*, R.S.Y. 2002, c. 229. The FWMP also recognized the need to preserve the First Nation's ability to transfer its culture and traditions to its youth through opportunities to participate in traditional activities. The FWMP did not, however, call for a freeze on approval of agricultural land grants in the area pending action on the FWMP proposals.

[21] Trapline #143 was registered to Johnny Sam, a member of the LSCFN. His trapline is in a category administered by the Yukon government, not the First Nation. It helps him to earn a livelihood as well as to provide a training ground for his grandchildren and other First Nation youth in the ways of trapping and living off the land. The trapline covers an area of approximately 21,435 hectares. As noted by the Court of Appeal, the 65 hectares applied for by Mr. Paulsen is approximately one-third of one percent of the trapline. A portion of the trapline had already been

damaged by forest fire, which, in the LSCFN view, added to the significance of the loss of a further 65 hectares. The severity of the impact of land grants, whether taken individually or cumulatively, properly constituted an important element of the consultation with LARC and, ultimately, a relevant consideration to be taken into account by the Director in reaching his decision.

[22] The LARC meeting to discuss the Paulsen application was scheduled for August 13, 2004. The First Nation received notice and was invited to provide comments prior to the meeting and to participate in the discussion as a member of LARC.

[23] On July 27, 2004, the First Nation submitted a letter of opposition to the Paulsen application. The letter identified concerns about impacts on Trapline #143, nearby timber harvesting, the loss of animals to hunt in the area, and adjacent cultural and heritage sites. No reference was made in the First Nation's letter to Johnny Sam's concerns about cultural transfer or to the FWMP. The letter simply states that "[t]he combination of agricultural and timber harvesting impacts on this already-damaged trapline would certainly be a significant deterrent to the ability of the trapper to continue his traditional pursuits" (A.R., vol. II, at p. 22).

[24] Nobody from the LSCFN attended the August 13, 2004 meeting. Susan Davis, its usual representative, was unable to attend for undisclosed reasons. The meeting went on as planned.

[25] The members of LARC who were present (mainly territorial government officials) considered the Paulsen application and recommended approval in principle. The minutes of the August 13 meeting show that LARC *did* consider the concerns voiced by the LSCFN in its July 27, 2004 letter. Those present at the meeting concluded that the impact of the loss of 65 hectares on Trapline #143 would be minimal as the Paulsen application covered a very small portion of the trapline's overall area and noted that Johnny Sam could apply under Chapter 16 of the LSCFN Treaty for compensation for any diminution in its value. LARC recommended an archaeological survey to address potential heritage and cultural sites. (An archaeological assessment was later conducted and reported on September 2, 2004, that it was unable to identify any sites that would be impacted adversely by the grant.)

[26] On September 8, 2004, the First Nation representatives met with Agriculture Branch staff who were conducting an agricultural policy review. The meeting did not focus specifically on the Paulsen application. Nevertheless, the First Nation made the general point that its concerns were not being taken seriously. Agriculture Branch officials replied that they consult on such matters through LARC but they were not required by the Final Agreement to consult on such issues. Meetings and discussions with the First Nation had been conducted, they said, only as a courtesy.

[27] On October 18, 2004, the Director approved the Paulsen application and sent a letter to Larry Paulsen, informing him of that fact. He did not notify the LSCFN of his decision, as he ought to have done.

[28] Apparently unaware that the Paulsen application had been approved, the First Nation continued to express its opposition by way of a series of letters from Chief Eddie Skookum to the Yukon government. Johnny Sam also wrote letters expressing his opposition. It seems the government officials failed to disclose that the Director's decision to approve the grant had already been made. This had the unfortunate effect of undermining appropriate communication between the parties.

[29] In the summer of 2005, Susan Davis, representing the First Nation, made enquiries of the Agriculture Branch and obtained confirmation that the Paulsen application had already been approved. She was sent a copy of the October 18, 2004 approval letter.

[30] In response, by letter dated August 24, 2005, the First Nation launched an administrative appeal of the Paulsen grant to the Assistant Deputy Minister.

[31] On December 12, 2005, the request to review the decision was rejected on the basis that the First Nation had no right of appeal because it was a member of LARC, and not just an intervener under the LARC Terms of Reference. The Terms of Reference specify that only applicants or interveners may initiate an appeal. The

Terms of Reference had no legislative or treaty basis whatsoever, but the Yukon government nevertheless treated them as binding both on the government and on the First Nation.

[32] Frustrated by the territorial government's approach, which it believed broadly misconceived and undermined relations between the territorial government and the LSCFN, the First Nation initiated the present application for judicial review.

III. Analysis

[33] The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance. This duality is particularly striking in the Yukon, where about 25 percent of the population identify themselves as Aboriginal. The territorial government, elected in part by Aboriginal people, represents Aboriginal people as much as it does non-Aboriginal people, even though Aboriginal culture and tradition are and will remain distinctive.

[34] Underlying the present appeal is not only the need to respect the rights and reasonable expectations of Johnny Sam and other members of his community, but

the rights and expectations of other Yukon residents, including both Aboriginal people *and* Larry Paulsen, to good government. The Yukon treaties are intended, in part, to replace expensive and time-consuming *ad hoc* procedures with mutually agreed upon legal mechanisms that are efficient but fair.

[35] I believe the existence of Larry Paulsen's stake in this situation is of considerable importance. Unlike *Mikisew Cree*, which involved a dispute between the Federal government and the Mikisew Cree First Nation over the route of a winter road, Mr. Paulsen made his application as an ordinary citizen who was entitled to a government decision reached with procedural fairness within a reasonable time. On the other hand, the entitlement of the trapper Johnny Sam was a derivative benefit based on the collective interest of the First Nation of which he was a member. I agree with the Court of Appeal that he was not, as an individual, a necessary party to the consultation.

A. *The LSCFN Treaty Reflects a Balance of Interests*

[36] Under the treaty, the LSCFN surrendered all undefined Aboriginal rights, title, and interests in its traditional territory in return for which it received:

- title to 2,589 square kilometres of "settlement land" [Chapters 9 and 15];
- financial compensation of \$34,179,210 [Chapter 19];

- potential for royalty sharing [Chapter 23];
- economic development measures [Chapter 22];
- rights of access to Crown land (except that disposed of by agreement for sale, surface licence, or lease) [Chapter 6];
- special management areas [Chapter 10];
- protection of access to settlement land [s. 6.2.7];
- rights to harvest fish and wildlife [Chapter 16];
- rights to harvest forest resources [Chapter 17];
- rights to representation and involvement in land use planning [Chapter 11] and resource management [Chapters 14, 16-18].

(C.A. reasons, para. 41)

These are substantial benefits, especially when compared to the sparse offerings of earlier treaties such as those provided to the Mikisew Cree in Treaty No. 8. With the substantive benefits, however, came not only rights but duties and obligations. It is obvious that the long-term interdependent relationship thus created will require work and good will on both sides for its success.

[37] The reason for the government's tight-lipped reaction to the unfolding Paulsen situation, as explained to us at the hearing by its counsel, was the fear that if the duty of consultation applies, "these parties will be in court like parties are in areas

where there are no treaties, and there will be litigation over whether the consultation applies; what is the appropriate level of the consultation? Is accommodation required? It is all under court supervision” (transcript, at p. 18). The history of this appeal shows, however, that taking a hard line does not necessarily speed matters up or make litigation go away.

[38] The denial by the Yukon territorial government of any duty to consult except as specifically listed in the LSCFN Treaty complicated the Paulsen situation because at the time the Director dealt with the application the treaty implementation provision contemplated in Chapter 12 had itself not yet been implemented. I do not believe the Yukon Treaty was intended to be a “complete code”. Be that as it may, the duty to consult is derived from the honour of the Crown which applies independently of the expressed or implied intention of the parties (see below, at para. 61). In any event, the procedural gap created by the failure to implement Chapter 12 had to be addressed, and the First Nation, in my view, was quite correct in calling in aid the duty of consultation in putting together an appropriate procedural framework.

[39] Nevertheless, consultation *was* made available and *did* take place through the LARC process under the 1991 Agriculture Policy, and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfilment of a legal obligation) was sufficient. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, the Court held that

participation in a forum created for other purposes may nevertheless satisfy the duty to consult if *in substance* an appropriate level of consultation is provided.

B. *The Relationship Between Section 35 and the Duty to Consult*

[40] The First Nation relies in particular on the following statements in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20:

It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

Further, at para. 32:

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. [Emphasis added.]

[41] Reference should also be made to *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6, where the Court said:

The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups

in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. [Emphasis added.]

[42] The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. The honour of the Crown has since become an important anchor in this area of the law: see *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; as well as *Badger*, *Marshall* and *Mikisew Cree*, previously referred to. The honour of the Crown has thus been confirmed in its status as a constitutional principle.

[43] However, this is not to say that every policy and procedure of the law adopted to uphold the honour of the Crown is itself to be treated as if inscribed in s. 35. As the Chief Justice noted in *Haida Nation*, “[t]he honour of the Crown gives rise to different duties in different circumstances” (para. 18). This appeal considers its application in the modern treaty context; its application where no treaty has yet been signed was recently the subject of this Court’s decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650.

[44] The respondents' submission, if I may put it broadly, is that because the *duty* to consult is "constitutional", therefore there must be a reciprocal constitutional *right* of the First Nation to be consulted, and constitutional rights of Aboriginal peoples are not subject to abrogation or derogation except as can be justified under the high test set out in *Sparrow*. On this view, more or less every case dealing with consultation in the interpretation and implementation of treaties becomes a constitutional case. The trouble with this argument is that the content of the duty to consult varies with the circumstances. In relation to what *Haida Nation* called a "spectrum" of consultation (para. 43), it cannot be said that consultation at the lower end of the spectrum instead of at the higher end must be justified under the *Sparrow* doctrine. The minimal content of the consultation imposed in *Mikisew Cree* (para. 64), for example, did not have to be "justified" as a limitation on what would otherwise be a right to "deep" consultation. The circumstances in *Mikisew Cree* never gave rise to anything more than minimal consultation. The concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.

[45] The LSCFN invited us to draw a bright line between the duty to consult (which it labelled constitutional) and administrative law principles such as procedural fairness (which it labelled unsuitable). At the hearing, counsel for the LSCFN was dismissive of resort in this context to administrative law principles:

[A]dministrative law principles are not designed to address the very unique circumstance of the Crown-Aboriginal history, the Crown-Aboriginal relationship. Administrative law principles, for all their tremendous value, are not tools toward reconciliation of Aboriginal people and other Canadians. They are not instruments to reflect the honour of the Crown principles. [transcript, at p. 62]

However, as Lamer C.J. observed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, “aboriginal rights exist within the general legal system of Canada” (para. 49). Administrative decision makers regularly have to confine their decisions within constitutional limits: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; and *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256. In this case, the constitutional limits include the honour of the Crown and its supporting doctrine of the duty to consult.

[46] The link between constitutional doctrine and administrative law remedies was already noted in *Haida Nation*, at the outset of our Court’s duty to consult jurisprudence:

In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law. [Emphasis added; para. 41.]

The relevant “procedural safeguards” mandated by administrative law include not only natural justice but the broader notion of procedural fairness. And the content of meaningful consultation “appropriate to the circumstances” will be shaped, and in some cases determined, by the terms of the modern land claims agreement. Indeed, the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.

[47] The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new “constitutional remedy”. Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant.

C. *Standard of Review*

[48] In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the

Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

D. *The Role and Function of the LSCFN Treaty*

[49] The territorial government and the LSCFN have very different views on this point. This difference lies at the heart of their opposing arguments on the appeal.

[50] The territorial government regards the role of the LSCFN Treaty as having nailed down and forever settled the rights and obligations of the First Nation community as Aboriginal people. The treaty recognized and affirmed the Aboriginal rights surrendered in the land claim. From 1997 onwards, the rights of the Aboriginal communities of the LSCFN, in the government's view, were limited to the treaty. To put the government's position simplistically, what the First Nations negotiated as terms of the treaty is what they get. Period.

[51] The LSCFN, on the other hand, considers as applicable to the Yukon what was said by the Court in *Mikisew Cree*, at para. 54:

Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

And so it is, according to the First Nation, with the treaty-making process in the Yukon that led in 1997 to the ratification of the LSCFN Treaty.

[52] I agree with the territorial government that the LSCFN Treaty is a major advance over what happened in Fort Chipewyan in 1899, both in the modern treaty's scope and comprehensiveness, and in the fairness of the procedure that led up to it. The eight pages of generalities in Treaty No. 8 in 1899 is not the equivalent of the 435 pages of the LSCFN Treaty almost a century later. The LSCFN Treaty provides a solid foundation for reconciliation, and the territorial government is quite correct that the LSCFN Treaty should not simply set the stage for further negotiations from ground zero. Nor is that the First Nation's position. It simply relies on the principle noted in *Haida Nation* that "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples" (para. 16 (emphasis added)). Reconciliation in the Yukon, as elsewhere, is not an accomplished fact. It is a work in progress. The "complete code" position advocated by the territorial government is, with respect, misconceived. As the Court noted in *Mikisew Cree*: "The duty to consult is grounded

in the honour of the Crown The honour of the Crown exists as a source of obligation independently of treaties as well, of course” (para. 51).

[53] On this point, *Haida Nation* represented a shift in focus from *Sparrow*. Whereas the Court in *Sparrow* had been concerned about sorting out the consequences of infringement, *Haida Nation* attempted to head off such confrontations by imposing on the parties a duty to consult and (if appropriate) accommodate in circumstances where development might have a significant impact on Aboriginal rights when and if established. In *Mikisew Cree*, the duty to consult was applied to the management of an 1899 treaty process to “take up” (as in the present case) ceded Crown lands for “other purposes”. The treaty itself was silent on the process. The Court held that on the facts of that case the content of the duty to consult was at “the lower end of the spectrum” (para. 64), but that nevertheless the Crown was wrong to act unilaterally.

[54] The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a “modern comprehensive treaty” and the latter is more than a century old. Today’s modern treaty will become tomorrow’s historic treaty. The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive

to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.

[55] However, the territorial government presses this position too far when it asserts that unless consultation is specifically required by the Treaty it is excluded by negative inference. Consultation in some meaningful form is the necessary foundation of a successful relationship with Aboriginal people. As the trial judge observed, consultation works “to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address” (para. 82).

[56] The territorial government would have been wrong to act unilaterally. The LSCFN had existing treaty rights in relation to the land Paulsen applied for, as set out in s. 16.4.2 of the LSCFN Treaty:

Yukon Indian People shall have the right to harvest for Subsistence within their 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 Crown land was subject to being taken up for other purposes (as in *Mikisew Cree*), including agriculture, but in the meantime the First Nation had a continuing treaty interest in Crown lands to which their members continued to have a treaty right

of access (including but not limited to the Paulsen plot). It was no less a treaty interest because it was defeasible.

[57] The decision maker was required to take into account the impact of allowing the Paulsen application on the concerns and interests of members of the First Nation. He could not take these into account unless the First Nation was consulted as to the nature and extent of its concerns. Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation. Nevertheless, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum. It was not burdensome. But nor was it a mere courtesy.

E. *The Source of the Duty to Consult Is External to the LSCFN Treaty*

[58] The LSCFN Treaty dated July 21, 1997, is a comprehensive lawyerly document. The territorial government argues that the document refers to the duty to consult in over 60 different places but points out that none of them is applicable here (although the implementation of Chapter 12, which was left to subsequent legislative action, did not foreclose the possibility of such a requirement).

[59] There was considerable discussion at the bar about whether the duty to consult, if it applies at all, should be considered an implied term of the LSCFN Treaty or a duty externally imposed as a matter of law.

[60] The territorial government takes the view that terms cannot be implied where the intention of the parties is plainly inconsistent with such an outcome. In this case, it says, the implied term is negated by the parties' treatment of consultation throughout the treaty and its significant absence in the case of land grants. The necessary "negative inference", argues the territorial government, is that failure to include it was intentional.

[61] I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.

[62] The argument that the LSCFN Treaty is a "complete code" is untenable. For one thing, as the territorial government acknowledges, nothing in the text of the LSCFN Treaty authorizes the making of land grants on Crown lands to which the First Nation continues to have treaty access for subsistence hunting and fishing. The territorial government points out that authority to alienate Crown land exists in the

general law. This is true, but the general law exists outside the treaty. The territorial government cannot select from the general law only those elements that suit its purpose. The treaty sets out rights and obligations of the parties, but the treaty is part of a special relationship: “In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably” (*Haida Nation*, at para. 17 (emphasis added)). As the text of s. 35(3) makes clear, a modern comprehensive land claims agreement is as much a treaty in the eyes of the Constitution as are the earlier pre- and post-Confederation treaties.

[63] At the time the Paulsen application was pending, the implementation of the LSCFN Treaty was in transition. It contemplates in Chapter 12 the enactment of a “development assessment process” to implement the treaty provisions. This was ultimately carried into effect in the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 (“YESAA”). The territorial government acknowledges that the YESAA would have applied to the Paulsen application. Part 2 of the Act (regarding the assessment process) did not come into force until after the Paulsen application was approved (s. 134). The treaty required the government to introduce the law within two years of the date of the settlement legislation (s. 12.3.4). This was not done. The subsequent legislative delay did not empower the territorial government to proceed without consultation.

[64] The purpose of the *YESAA* is broadly stated to “[give] effect to the provisions of Umbrella Final Agreement respecting assessment of environmental and socio-economic effects” by way of a “comprehensive, neutrally conducted assessment process” (s. 5) where “an authorization or the grant of an interest in land” would be required (s. 47(2)(c)). The neutral assessor is the Yukon Environmental and Socio-economic Assessment Board, to which (excluding the chair) the Council for Yukon Indians would nominate half the members and the territorial government the other half. The Minister, after consultation, would appoint the chair.

[65] The territorial government contends that this new arrangement is intended to satisfy the requirement of consultation on land grants in a way that is fair both to First Nations and to the other people of the Yukon. Assuming (without deciding) this to be so, the fact remains that no such arrangement was in place at the relevant time.

[66] In the absence of the agreed arrangement, consultation was necessary in this case to uphold the honour of the Crown. It was therefore imposed as a matter of law.

F. The LSCFN Treaty Does Not Exclude the Duty to Consult and, if Appropriate, Accommodate

[67] When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties’ respective obligations, and whether there

is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions.

[68] The territorial government argues that a mutual objective of the parties to the LSCFN Treaty was to achieve certainty, as is set out in the preamble:

. . . 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;

the parties wish to achieve certainty with respect to their relationships to each other

Moreover the treaty contains an “entire agreement” clause. Section 2.2.15 provides that

Settlement Agreements shall be the entire agreement between the parties thereto and there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them.

[69] However, as stated, the duty to consult is not a “collateral agreement or condition”. The LSCFN Treaty *is* the “entire agreement”, but it does not exist in isolation. The duty to consult is imposed as a matter of law, irrespective of the parties’ “agreement”. It does not “affect” the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed.

[70] The First Nation points out that there is an express exception to the “entire agreement” clause in the case of “existing or future constitutional rights”, at s. 2.2.4:

Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

Section 2.2.4 applies, the LSCFN argues, because the duty of consultation is a new constitutional duty and should therefore be considered a “future” constitutional right within the scope of the section.

[71] As discussed, the applicable “existing or future *constitutional* right” is the right of the Aboriginal parties to have the treaty performed in a way that upholds the honour of the Crown. That principle is readily conceded by the territorial government. However, the honour of the Crown may not *always require consultation*. The parties may, in their treaty, negotiate a different mechanism which, nevertheless, in the result, upholds the honour of the Crown. In this case, the duty applies, the content of which will now be discussed.

G. *The Content of the Duty to Consult*

[72] The adequacy of the consultation was the subject of the First Nation’s cross-appeal. The adequacy of what passed (or failed to pass) between the parties

must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied.

[73] The Yukon *Lands Act* and the *Territorial Lands (Yukon) Act* created a discretionary authority to make grants but do not specify the basis on which the discretion is to be exercised. It was clear that the Paulsen application might *potentially* have an adverse impact on the LSCFN Treaty right to have access to the 65 hectares for subsistence “harvesting” of fish and wildlife, and that such impact would include the First Nation’s beneficial use of the surrounding Crown lands to which its members have a continuing treaty right of access. There was at least the possibility that the impact would be significant in economic and cultural terms. The Director was then required, as a matter of both compliance with the legal duty to consult based on the honour of the Crown *and* procedural fairness to be informed about the nature and severity of such impacts before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to reopen the LSCFN Treaty or to renegotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown.

[74] This “lower end of the spectrum” approach is consistent with the LSCFN Treaty itself which sets out the elements the parties themselves regarded as appropriate regarding consultation (where consultation is required) as follows:

“Consult” or “Consultation” means to provide:

- (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
- (c) full and fair consideration by the party obliged to consult of any views presented.

(LSCFN Treaty, Chapter 1)

At the hearing of this appeal, counsel for the First Nation contended that the territorial government has “to work with the Aboriginal people to understand what the effect will be, and then they have to try and minimize it” (transcript, at p. 48 (emphasis added)). It is true that these treaties were negotiated prior to *Haida Nation* and *Mikisew Cree*, but it must have been obvious to the negotiators that there is a substantial difference between imposing on a decision maker a duty to provide “full and fair consideration” of the First Nation’s “views” and (on the other hand) an obligation to try “to understand what the effect will be, and then . . . to try and minimize it”. It is the former formulation which the parties considered sufficient and

appropriate. Even in the absence of treaty language, the application of *Haida Nation* and *Mikisew Cree* would have produced a similar result.

[75] In my view, the negotiated definition is a reasonable statement of the content of consultation “at the lower end of the spectrum”. The treaty does not apply directly to the land grant approval process, which is not a treaty process, but it is a useful indication of what the parties themselves considered fair, and is consistent with the jurisprudence from *Haida Nation* to *Mikisew Cree*.

H. *There Was Adequate Consultation in This Case*

[76] The First Nation acknowledges that it received appropriate notice and information. Its letter of objection dated July 27, 2004, set out its concerns about the impact on Trapline #143, a cabin belonging to Roger Rondeau (who was said in the letter to have “no concerns with the application”) as well as Johnny Sam’s cabin, and “potential areas of heritage and cultural interest” that had not however “been researched or identified”. The letter recommended an archaeological survey for this purpose (this was subsequently performed *before* the Paulsen application was considered and approved by the Director). Nothing was said in the First Nation’s letter of objection about possible inconsistency with the FWMP, or the need to preserve the 65 hectares for educational purposes.

[77] The concerns raised in the First Nation's letter of objection dated July 27, 2004, were put before the August 13, 2004 meeting of LARC (which the First Nation did not attend) and, for the benefit of those not attending, were essentially reproduced in the minutes of that meeting. The minutes noted that "[t]here will be some loss of wildlife habitat in the area, but it is not significant." The minutes pointed out that Johnny Sam was entitled to compensation under the LSCFN Treaty to the extent the value of Trapline #143 was diminished. The minutes were available to the LSCFN as a member of LARC.

[78] The First Nation complains that its concerns were not taken seriously. It says, for example, the fact that Johnny Sam is eligible for compensation ignores the cultural and educational importance of Trapline #143. He wants the undiminished trapline, not compensation. However, Larry Paulsen also had an important stake in the outcome. The Director had a discretion to approve or not to approve and he was not obliged to decide this issue in favour of the position of the First Nation. Nor was he obliged as a matter of law to await the outcome of the FWMP. The Director had before him the First Nation's concerns and the response of other members of LARC. He was entitled to conclude that the impact of the Paulsen grant on First Nation's interests was not significant.

[79] It is important to stress that the First Nation does not deny that it had full notice of the Paulsen application, and an opportunity to state its concerns through the LARC process to the ultimate decision maker in whatever scope and detail it

considered appropriate. Moreover, unlike the situation in *Mikisew Cree*, the First Nation here was consulted *as a First Nation* through LARC and not as members of the general public. While procedural fairness is a flexible concept and takes into account the Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of administrative law to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal, Mr. Paulsen as well as the First Nation. On the record, and for the reasons already stated, the requirements of procedural fairness were met, as were the requirements of the duty to consult.

[80] It is impossible to read the record in this case without concluding that the Paulsen application was simply a flashpoint for the pent-up frustration of the First Nation with the territorial government bureaucracy. However, the result of disallowing the application would simply be to let the weight of this cumulative problem fall on the head of the hapless Larry Paulsen (who still awaits the outcome of an application filed more than eight years ago). This would be unfair.

I. *The Duty to Accommodate*

[81] The First Nation's argument is that in this case the legal requirement was not only procedural consultation but substantive accommodation. *Haida Nation* and *Mikisew Cree* affirm that the duty to consult *may* require, in an appropriate case, accommodation. The test is not, as sometimes seemed to be suggested in argument, a

duty to accommodate to the point of undue hardship for the non-Aboriginal population. Adequate consultation having occurred, the task of the Court is to review the exercise of the Director's discretion taking into account all of the relevant interests and circumstances, including the First Nation entitlement and the nature and seriousness of the impact on that entitlement of the proposed measure which the First Nation opposes.

[82] The 65-hectare plot had already been reconfigured at government insistence to accommodate various concerns. The First Nation did not suggest any alternative configuration that would be more acceptable (although it suggested at one point that any farming should be organic in nature). In this case, in its view, accommodation must inevitably lead to rejection of the Paulsen application. However, with respect, nothing in the treaty itself or in the surrounding circumstances gave rise to a requirement of accommodation. The government was "taking up" surrendered Crown land for agricultural purposes as contemplated in the treaty.

[83] The concerns raised by the First Nation were important, but the question before the Director was in some measure a policy decision related to the 1991 Agricultural Policy as well as to whether, on the facts, the impact on the First Nation interests were as serious as claimed. He then had to weigh those concerns against the interest of Larry Paulsen in light of the government's treaty and other legal obligations to Aboriginal people. It is likely that many, if not most, applications for grants of remote land suitable for raising livestock will raise issues of wildlife habitat,

and many grants that interfere with traplines and traditional economic activities will also have a cultural and educational dimension. The First Nation points out that the Paulsen proposed building would trigger a “no-shooting zone” that would affect Johnny Sam’s use of his cabin (as well as his trapline). However, where development occurs, shooting is necessarily restricted, and the LSCFN Treaty is not an anti-development document.

[84] *Somebody* has to bring consultation to an end and to weigh up the respective interests, having in mind the Yukon public policy favouring agricultural development where the rigorous climate of the Yukon permits. The Director is the person with the delegated authority to make the decision whether to approve a grant of land already surrendered by the First Nation. The purpose of the consultation was to ensure that the Director’s decision was properly informed.

[85] The Director did not err in law in concluding that the consultation in this case with the First Nation was adequate.

[86] The advice the Director received from his officials after consultation is that the impact would not be significant. There is no evidence that he failed to give the concerns of the First Nation “full and fair consideration”. The material filed by the parties on the judicial review application does not demonstrate any palpable error of fact in his conclusion.

[87] It seems the Director was simply not content to put Mr. Paulsen's interest on the back burner while the government and the First Nation attempted to work out some transitional rough spots in their relationship. He was entitled to proceed as he did.

[88] Whether or not a court would have reached a different conclusion on the facts is not relevant. The decision to approve or not to approve the grant was given by the Legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was not unreasonable.

IV. Conclusion

[89] I would dismiss the appeal and cross-appeal, with costs.

English version of the reasons of LeBel and Deschamps JJ. delivered by

[90] DESCHAMPS J. — The Court has on numerous occasions invited governments and Aboriginal peoples to negotiate the precise definitions of Aboriginal rights and the means of exercising them. To protect the integrity of the negotiation process, the Court developed, on the basis of what was originally just one step in the test for determining whether infringements of Aboriginal rights are justifiable, a duty to consult that must be discharged before taking any action that might infringe as-yet-undefined rights. It later expanded the minimum obligational content of a treaty that

is silent regarding how the Crown might exercise those of its rights under the treaty that affect rights granted to the Aboriginal party in the same treaty.

[91] In Yukon, the parties sat down to negotiate. An umbrella agreement and 11 specific agreements were reached between certain First Nations, the Yukon government and the Government of Canada. Through these agreements, the First Nations concerned have taken control of their destiny. The agreements, which deal in particular with land and resources, are of course not exhaustive, but they are binding on the parties with respect to the matters they cover. The Crown's exercise of its rights under the treaty is subject to provisions on consultation. To add a further duty to consult to these provisions would be to defeat the very purpose of negotiating a treaty. Such an approach would be a step backward that would undermine both the parties' mutual undertakings and the objective of reconciliation through negotiation. This would jeopardize the negotiation processes currently under way across the country. Although I agree with Binnie J. that the appeal and cross-appeal should be dismissed, my reasons for doing so are very different.

[92] Mr. Paulsen's application constituted a project to which the assessment process provided for in Chapter 12 of the Little Salmon/Carmacks First Nation Final Agreement ("Final Agreement") applied. Although that process had not yet been implemented, Chapter 12, including the transitional legal rules it contains, had been. Under those rules, any existing development assessment process would remain applicable. The requirements of the processes in question included not only

consultation with the First Nation concerned, but also its participation in the assessment of the project. Any such participation would involve a more extensive consultation than would be required by the common law duty in that regard. Therefore, nothing in this case can justify resorting to a duty other than the one provided for in the Final Agreement.

[93] The Crown's constitutional duty to specifically consult Aboriginal peoples was initially recognized as a factor going to the determination of whether an Aboriginal right was infringed (*Guerin v. The Queen*, [1984] 2 S.C.R. 335), and was later established as one component of the test for determining whether infringements of Aboriginal rights by the Crown were justified: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The Court was subsequently asked in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, whether such a duty to consult could apply even before an Aboriginal or treaty right is proven to exist. The Court's affirmative answer was based on a desire to encourage the Crown and Aboriginal peoples to negotiate treaties rather than resorting to litigation.

[94] I disagree with Binnie J.'s view that the common law constitutional duty to consult applies in every case, regardless of the terms of the treaty in question. And I also disagree with the appellants' assertion that an external duty to consult can never apply to parties to modern comprehensive land claims agreements and that the Final

Agreement constitutes a complete code. In my view, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, stands for the proposition that the common law constitutional duty to consult Aboriginal peoples applies to the parties to a treaty only if they have said nothing about consultation in respect of the right the Crown seeks to exercise under the treaty. Moreover, it is essential to understand that in this context, the signature of the treaty entails a change in the nature of the consultation. When consultation is provided for in a treaty, it ceases to be a measure to prevent the infringement of one or more rights, as in *Haida Nation*, and becomes a duty that applies to the Crown's exercise of rights granted to it in the treaty by the Aboriginal party. This means that where, as in *Mikisew*, the common law duty to consult applies to treaty rights despite the existence of the treaty — because the parties to the treaty included no provisions in this regard — it represents the minimum obligational content.

[95] Binnie J. has set out the facts. I will return to them only to make some clarifications I consider necessary. For now, I will simply mention that the appellants' position is based on the fact that this case concerns a modern treaty. The appellants argue that in a case involving a modern treaty, the duty to consult is strictly limited to the terms expressly agreed on by the parties and there is no such duty if none has been provided for. In their view, a duty to consult can be found to exist only if the parties have expressly provided for one. The appellants seek not a reversal of the Court of Appeal's ultimate conclusion, but a declaration on the scope of the duty to consult. The respondents, who are also cross-appellants, are asking us to overturn

the Court of Appeal's decision and affirm the judgment of the Supreme Court of the Yukon Territory quashing the decision to approve the grant of land to Mr. Paulsen. The respondents submit that the source of the Crown's duty to consult them lies outside the treaty, that is, that the duty derives exclusively from constitutional values and common law principles. According to the respondents, the treaty does not purport to define their constitutional relationship with the Crown, nor does the constitutional duty apply in order to fill a gap in the treaty (R.F., at para. 11). They submit that the common law duty to consult applies because Mr. Paulsen's application would affect their interests. They invoke three interests: a right of access for subsistence harvesting purposes to the land in question in the application, their interest under the treaty in fish and wildlife management, and the reduced value of the trapline of the respondent Johnny Sam.

[96] In my view, the answers to the questions before the Court can be found first in the general principles of Aboriginal law and then in the terms of the treaty. To explain my conclusion, I must review the origin, the nature, the function and the specific purpose of the duty being relied on, after which I will discuss what can be learned from a careful review of the treaty.

I. General Principles

[97] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 48-82, this Court identified four principles that underlie the whole of our

constitution and of its evolution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a "federal compact" between the provinces. The compact that is of particular interest in the instant case is the second one, which, as we will see, actually incorporates a fifth principle underlying our Constitution: the honour of the Crown.

[98] The Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*. The framers of the Constitution also considered it advisable to specify in s. 25 of that same Act that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary. Finally, s. 35(4) provides that, notwithstanding any other provision of the *Constitution Act, 1982*, the Aboriginal and treaty rights recognized and affirmed in s. 35(1) "are guaranteed equally to male and female persons". The compact relating to the special rights of Aboriginal peoples is therefore in harmony with the other two basic compacts and with the four organizing principles of our constitutional system.

[99] In the case at bar, all the parties are, in one way or another, bound by the Final Agreement, which settles the comprehensive land claim of the Little Salmon/Carmacks First Nation. Section 35(3) of the *Constitution Act, 1982* provides that “in subsection (1)” the expression “treaty rights” includes “rights that now exist by way of land claims agreements or may be so acquired”. The appellants’ position is based on one such agreement.

[100] The respondents, intending to rely on *Mikisew*, invoke only the Crown’s common law duty to consult Aboriginal peoples, and not the agreement, which, as can be seen from the transcript of the hearing (at p. 46), they do not allege has been breached; they submit that the purpose of the agreement in the instant case was not to define the parties’ constitutional duties.

[101] Prior consultation was used originally as a criterion to be applied in determining whether an Aboriginal right had been infringed (*Guerin*, at p. 389), and then as one factor in favour of finding that a limit on a constitutional right — whether an Aboriginal or a treaty right — of the Aboriginal peoples in question was justified (*Sparrow*, at p. 1119). The Crown failed to consult Aboriginal peoples at its own risk, so to speak, if it took measures that, should Aboriginal title or an Aboriginal or treaty right be proven to exist, infringed that right.

[102] Then, in *Haida Nation* and *Taku River*, it was asked whether such a duty to consult exists even though the existence of an Aboriginal right has not been fully

and definitively established in a court proceeding or the framework for exercising such a right has not been established in a treaty. Had the answer to this question been no, this would have amounted, in particular, to denying that under s. 35 of the *Constitution Act, 1982*, the rights of Aboriginal peoples are protected by the Constitution even if no court has yet declared that those rights exist and no undertaking has yet been given to exercise them only in accordance with a treaty. A negative answer would also have had the effect of increasing the recourse to litigation rather than to negotiation, and the interlocutory injunction would have been left as the only remedy against threats to Aboriginal rights where the framework for exercising those rights has yet to be formally defined. It was just such a scenario that the Court strove to avoid in *Haida Nation* and *Taku River*, as the Chief Justice made clear in her reasons in *Haida Nation* (paras. 14 and 26).

[103] Thus, the constitutional duty to consult Aboriginal peoples involves three objectives: in the short term, to provide “interim” or “interlocutory” protection for the constitutional rights of those peoples; in the medium term, to favour negotiation of the framework for exercising such rights over having that framework defined by the courts; and, in the longer term, to assist in reconciling the interests of Aboriginal peoples with those of other stakeholders. As one author recently noted, the *raison d’être* of the constitutional duty to consult Aboriginal peoples is to some extent, if not primarily, to contribute to attaining the ultimate objective of reconciliation through the negotiation of treaties, and in particular of comprehensive land claims agreements (D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples*

(2009), at pp. 18 and 41). This objective of reconciliation of course presupposes active participation by Aboriginal peoples in the negotiation of treaties, as opposed to a necessarily more passive role and an antagonistic attitude in the context of constitutional litigation (*Haida Nation*, at para. 14; S. Grammond, *Aménager la coexistence: Les peuples autochtones et le droit canadien* (2003), at p. 247). The duty to consult can be enforced in different ways. However, the courts must ensure that this duty is not distorted and invoked in a way that compromises rather than fostering negotiation. That, in my view, would be the outcome if we were to accept the respondents' argument that the treaties, and the Final Agreement in particular, do not purport to define the parties' constitutional duties, including what the Crown party must do to consult the Aboriginal party before exercising its rights under the treaty.

[104] The short-, medium- and long-term objectives of the constitutional duty to consult Aboriginal peoples are all rooted in the same fundamental principle with respect to the rights of Aboriginal peoples, namely the honour of the Crown, which is always at stake in relations between the Crown and Aboriginal peoples (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 24). Obviously, when these relations involve the special constitutional rights of Aboriginal peoples, the honour of the Crown becomes a source of constitutional duties and rights, such as the Crown's duty to consult Aboriginal peoples with respect to their Aboriginal or treaty rights (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6).

[105] This Court has, over time, substituted the principle of the honour of the Crown for a concept — the fiduciary duty — that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones (*St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at p. 219; *Guerin; Sparrow; Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 183; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation; Taku River Tlingit First Nation; Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9, *per* McLachlin C.J.; *Mikisew*, at para. 51). Before being raised to the status of a constitutional principle, the honour of the Crown was originally referred to as the “sanctity” of the “word of the white man” (*R. v. White* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 649, *aff'd* (1965), 52 D.L.R. (2d) 481 (S.C.C.); see also *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1041, and *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12, *per* Gwynne J. (dissenting)). The honour of the Crown thus became a key principle for the interpretation of treaties with Aboriginal peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 24 and 46; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78, *per* McLachlin J. (as she then was), dissenting, but not on this issue; *Mikisew*, at para. 51).

[106] Associating the honour of the Crown with the observance of duly negotiated treaties implies that some value is placed on the treaty negotiation process. But for the treaty to have legal value, its force must be such that neither of the parties

can disregard it. The principle of the honour of the Crown does not exempt the Aboriginal party from honouring its own undertakings. What is in question here is respect for the ability of Aboriginal peoples to participate actively in defining their special constitutional rights, and for their autonomy of judgment.

[107] To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to me to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

[108] The Crown does indeed act honourably when it negotiates in good faith with an Aboriginal nation to conclude a treaty establishing how that nation is to exercise its special rights in its traditional territory. Adhering to the principle of the honour of the Crown also requires that in the course of negotiations the Crown consult the Aboriginal party, to an extent that can vary, and in some cases find ways to “accommodate” it, before taking steps or making decisions that could infringe special constitutional rights in respect of which the Crown has already agreed to negotiate a framework for exercising them (*Haida Nation; Taku River*). Since the honour of the Crown is more a normative legal concept than a description of the Crown’s actual conduct, it implies a duty on the part of the Crown to consult

Aboriginal peoples not only with respect to the Aboriginal rights to which the negotiations actually relate, but also with respect to any Aboriginal right the potential existence of which the Crown can be found to have constructive knowledge, provided, of course, that what it plans to do might adversely affect such rights (*Haida Nation*, at para. 35). As we have seen, this principle also requires that the Crown keep its word and honour its undertakings after a treaty has been signed.

[109] In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights: consultation in the strict sense, participation in environmental and socio-economic assessments, co-management, etc. Nor, in such cases — which are the norm since the signing of the *James Bay and Northern Québec Agreement* in 1975 — does the Crown act dishonourably in concluding a land claim agreement based on Aboriginal rights if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.

[110] It has sometimes been asserted, incorrectly in my opinion, that in treaty negotiations, the Crown and Aboriginal parties have deeply divergent points of view respecting this objective of legal certainty, which only the Crown is really interested in pursuing. Excessive weight should not be given to the arguments of the parties to

this case, as their positions have clearly become polarized as a result of the adversarial context of this proceeding.

[111] In fact, according to studies commissioned by the United Nations, (1) lack of precision with respect to their special rights continues to be the most serious problem faced by Aboriginal peoples, and (2) Aboriginal peoples attach capital importance to the conclusion of treaties with the Crown (M. Saint-Hilaire, “La proposition d’entente de principe avec les Innus: vers une nouvelle génération de traités?” (2003), 44 *C. de D.* 395, at pp. 397-98). It is also wrong, in my opinion, to say that Aboriginal peoples’ relational understanding of the treaty is incompatible with the pursuit of the objective of legal certainty. On this understanding, that of “treaty making”, the primary purpose of these instruments is to establish a relationship that will have to evolve (M. L. Stevenson, “Visions of Certainty: Challenging Assumptions”, in Law Commission of Canada, ed., *Speaking Truth to Power: A Treaty Forum* (2001), 113, at p. 121; R. A. Williams, *Linking Arms Together* (1997)). The concept of an agreement that provides certainty is not synonymous with that of a “final agreement”, or even with that of an “entire agreement”. Legal certainty cannot be attained if one of the parties to a treaty can unilaterally renege on its undertakings with respect to a matter provided for in the treaty where there is no provision for its doing so in the treaty. This does not rule out the possibility of there being matters not covered by a treaty with respect to which the Aboriginal party has not surrendered possible Aboriginal rights. Nor does legal

certainty imply that an equitable review mechanism cannot be provided for in a treaty.

[112] Thus, it should be obvious that the best way for a court to contribute to ensuring that a treaty fosters, in the words of Binnie J., “a positive long-term relationship between Aboriginal and non-Aboriginal communities” (at para. 10) consists first and foremost in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it cannot become a one-way proposition at the stage of implementation of the treaty. On the contrary, certainty with respect to one party’s rights implies that the party in question must discharge its obligations and respect the other party’s rights. Having laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.

[113] Except where actions are taken that are likely to unilaterally infringe treaty rights of an Aboriginal people, it is counterproductive to assert, as the respondents do, that the common law duty to consult continues to apply in all cases, even where a treaty exists. However, the appellants’ argument goes much too far. As I explain more fully below, the fact that a treaty has been signed and that it is the entire agreement on some aspects of the relationship between an Aboriginal people and the non-Aboriginal population does not imply that it is a complete code that covers every aspect of that relationship. It is in fact because the agreement in issue

does provide that the Aboriginal party has a right to various forms of consultation with respect to the rights the Crown wishes to exercise in this case that rights and obligations foreign to the mechanism provided for in the treaty must not be superimposed on it, and not simply, as the appellants submit, because this is a “modern” treaty constituting a land claims agreement.

[114] It is true that s. 35(3) of the *Constitution Act, 1982* recognizes the existence of a category of treaties, called “land claims agreements”, which, in constitutional law, create “treaty” rights within the meaning of s. 35(1). Thus, although the courts will certainly take the context of the negotiation of each treaty into consideration, they will avoid, for example, developing rules specific to each category of treaty identified in the legal literature or by the government (e.g., “peace and friendship” treaties, “pre-Confederation” treaties, “numbered” treaties and “modern” treaties).

[115] In *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, LeBel J. and I rejected the date of signature as the criterion for determining the rules of interpretation applicable to treaties entered into with Aboriginal peoples: “. . . the issue relates to the context in which an agreement was negotiated and signed, not to the date of its signature” (para. 114). We arrived at that conclusion because we did not believe that distinct legal meanings flowed from the identification in the legal literature and by the government of various categories of treaties on the basis of the historical periods in which the treaties were signed. This approach was also taken by

McLachlin J., dissenting on a different issue, in *Marshall*, as she said that “each treaty must be considered in its unique historical and cultural context”, which “suggests” that the practice of “slot[ting] treaties into different categories, each with its own rules of interpretation . . . should be avoided” (para. 80).

[116] If, in a given case, a court feels freer to maintain a certain critical distance from the words of a treaty and can as a result interpret them in a manner favourable to the Aboriginal party, this will be because it has been established on the evidence, including historical and oral evidence, that the written version of the exchange of promises probably does not constitute an accurate record of all the rights of the Aboriginal party and all the duties of the Crown that were created in that exchange. It is true that, where certain time periods are concerned, the context in which the agreements were reached will more readily suggest that the words are not faithful. But this is a question that relates more to the facts than to the applicable law, which is, in the final analysis, concerned with the common intention of the parties. From a legal standpoint, a comprehensive land claim agreement is still a treaty, and nothing, not even the fact that the treaty belongs to a given “category”, exempts the court from reading and interpreting the treaty in light of the context in which it was concluded in order to identify the parties’ common intention. This Court has had occasion to mention that, even where the oldest of treaties are involved, the interpretation “must be realistic and reflect the intention of both parties, not just that of the [First Nation]” (*Sioui*, at p. 1069). I would even say that it would be wrong to think that the negotiating power of Aboriginal peoples is directly related to the time period in which

the treaty was concluded, as certain Aboriginal nations were very powerful in the early years of colonization, and the European newcomers had no choice but to enter into alliances with them.

[117] My finding with regard to the interpretation of treaties is equally applicable to the relationship between treaties and the law external to them or, in other words, to the application to treaties of the rules relating to conflicting legislation: the mere fact that a treaty belongs to one “category” or another cannot mean that a different set of rules applies to it in this regard. The appellants’ invitation must therefore be declined: even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party.

[118] Thus, the basis for distinguishing this case from *Mikisew* is not the mere fact that the treaty in issue belongs to the category of modern land claims agreements. As Binnie J. mentions in the case at bar (at para. 53), the treaty in issue in *Mikisew* was silent on how the Crown was to exercise its right under the treaty to require or take up tracts “from time to time for settlement, mining, lumbering, trading or other purposes”. This constituted an omission, as, without guidance, the exercise of such a right by the Crown might have the effect of nullifying the right of the Mikisew under the same treaty “to pursue their usual vocations of hunting, trapping and fishing”.

Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

[119] Moreover, where, as in *Mikisew*, the common law duty to consult must be discharged to remedy a gap in the treaty, the duty undergoes a transformation. Where there is a treaty, the function of the common law duty to consult is so different from that of the duty to consult in issue in *Haida Nation* and *Taku River* that it would be misleading to consider these two duties to be one and the same. It is true that both of them are constitutional duties based on the principle of the honour of the Crown that applies to relations between the Crown and Aboriginal peoples whose constitutional — Aboriginal or treaty — rights are at stake. However, it is important to make a clear distinction between, on the one hand, the Crown's duty to consult before taking actions or making decisions that might infringe Aboriginal rights and, on the other hand, the minimum duty to consult the Aboriginal party that necessarily applies to the Crown with regard to its exercise of rights granted to it by the Aboriginal party in a treaty. This, in my opinion, is the exact and real meaning of the comment in *Mikisew* that the "honour of the Crown exists as a source of obligation independently of treaties as well" (para. 51). This is also the exact meaning of the comment in *Haida Nation* that the "jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (para. 32).

[120] Where the Crown unilaterally limits a right granted to an Aboriginal people in a treaty in taking an action that does not amount to an exercise of one of its own rights under that treaty, the infringement is necessarily a serious one, and the Crown's duty is one of reasonable accommodation. This principle is very similar to that of minimal impairment, with respect to which a duty to consult was held to exist in *Sparrow*.

[121] The consultation that must take place if the Crown's exercise of its own rights under a treaty impairs a right of the Aboriginal party will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework, which varies with the circumstances, and in particular with the seriousness of any potential effects on the Aboriginal party's rights under the treaty (*Haida Nation*, at para. 39; *Mikisew*).

[122] One thing must be made clear at this point, however. Where a treaty provides for a mechanism for consulting the Aboriginal party when the Crown exercises its rights under the treaty — one example would be the participation of the Aboriginal party in environmental and socio-economic assessments with respect to development projects — what the treaty does is to override the common law duty to consult the Aboriginal people; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually. The constitutional duty to consult Aboriginal peoples is rooted

in the principle of the honour of the Crown, which concerns the special relationship between the Crown and Aboriginal peoples as peoples (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paras. 59-60). It is as a result of this special relationship, originally based on the recognition of Aboriginal institutions that existed before the Crown asserted its sovereignty, that Aboriginal peoples, as peoples, can enter into treaties with the Crown. The general rules of administrative law do not normally form part of the matters provided for in comprehensive land claims agreements.

[123] When all is said and done, the fatal flaw in the appellants' argument that the duty to consult can never apply in the case of a modern treaty is that they confuse the concept of an agreement that provides certainty with that of an "entire agreement". The imperative of legal certainty that is central to the negotiation of a modern treaty and that requires a court to defer to the will of the parties must not blind the courts to omissions by the parties. That an agreement is complete cannot be presumed; it must be found to be complete.

[124] The Court obviously cannot bind itself in future cases by assuming that every modern treaty is free of omissions or other gaps with respect to consultation. The possibility of so important a matter being omitted from a modern treaty may at first blush seem unlikely, but as can be seen from the instant case, it is very real. Were it not for the transitional law provisions in Chapter 12, there would probably have been a gap in this case and, on an exceptional basis, in the legal context of the

modern treaty, the common law duty to consult could duly have been applied to fill that gap. But no such gap can be found in this case. Yet it is in fact just such a “procedural gap” that Binnie J. finds (at para. 38) to be confirmed here, but he reaches this conclusion without considering the treaty’s transitional law provisions, which, in my view, contain the answers to the questions raised in this case. I disagree with the argument that such a procedural gap exists in this case, and I also disagree with superimposing the common law duty to consult on the treaty. These, therefore, are the basic differences between us.

[125] Yukon also submits that the existence of a duty to consult may be inferred from a treaty only in accordance with its express terms. Once again, this is an argument that goes too far and is in no way consistent with the general principles of interpretation of treaties with Aboriginal peoples, even when those principles are applied to modern treaties. As we will see, the treaty itself contains interpretive provisions to the effect that an interpretation should not be limited to the express terms of the treaty, and in particular that its provisions must be read together and that any ambiguities should be resolved in light of the objectives set out at the beginning of each chapter.

[126] These general considerations alone would form a sufficient basis for dismissing the appeal. But the provisions of the Final Agreement also confirm this conclusion, and they must, in any event, be reviewed in order to assess the respondents’ argument.

II. Treaty in Issue

[127] The analysis of the treaty that must be conducted in this case has three steps. To begin, it will be necessary to review the general framework of the treaty and highlight its key concepts. The next step will be to identify the substantive treaty rights that are in issue here, namely, on the one hand, the Crown's right the exercise of which raises the issue of consultation and, on the other hand, the right or rights of the Aboriginal party, which could be limited by the exercise of the Crown's right. Finally, and this is the determining factor, it will be necessary to discuss the formal rights and duties that result from the consultation process provided for in the treaty.

A. *General Framework*

[128] "Comprehensive" Aboriginal land claims agreements form part of the corpus of our constitutional law. And the effect of the implementing legislation of such agreements is that they are usually binding on third parties. The agreements are most often the fruit of many years of intense negotiations. The documents in which they are set out therefore command the utmost respect.

[129] This Court was recently asked to interpret the *James Bay and Northern Québec Agreement* for the first time, some 35 years after it was signed in 1975. Since that year, 19 other similar agreements have been concluded across the country. Subsequently, to take the most striking example, although only one comprehensive

claim in British Columbia has resulted in a final settlement and only seven others in that province are currently at relatively advanced stages of negotiation, no fewer than 52 other claims there have been accepted for negotiation by the Treaty Commission.

[130] It was after 20 years of negotiations that the Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon (“Umbrella Agreement”) was signed on May 29, 1993. At that time, the Little Salmon/Carmacks First Nation was a member of the Council for Yukon Indians, and it still is today, along with nine other First Nations. The Umbrella Agreement provided for the conclusion, in accordance with its terms, of specific agreements with the various Yukon First Nations (s. 2.1.1).

[131] Although the Umbrella Agreement “does not create or affect any legal rights” (s. 2.1.2), it provides that “Settlement Agreements shall be land claims agreements within the meaning of section 35 of the *Constitution Act, 1982*” (s. 2.2.1). Moreover, according to the Umbrella Agreement, “[a] Yukon First Nation Final Agreement shall include the provisions of the Umbrella Final Agreement and the specific provisions applicable to that Yukon First Nation” (s. 2.1.3). It can be seen from the final agreements in question that the parties have given effect to this undertaking. Even the numbering of the Umbrella Agreement’s provisions has been reproduced in the 11 final agreements that have been concluded under it so far. These 11 final agreements represent over half of all the “comprehensive” land claims agreements (that is, agreements resulting from claims that Aboriginal rights exist)

signed across the country. The Final Agreement in issue here was signed near Carmacks on July 21, 1997 and was subsequently ratified and implemented by enacting legislation; this last step was a condition of validity (ss. 2.2.11 and 2.2.12).

[132] The Umbrella Agreement, as a whole, is founded on a few basic concepts. It should be noted from the outset that this agreement applies to a larger territory than the land claims settlement concluded under it actually does. The agreement refers to “Settlement Land”, which is defined as “Category A Settlement Land, Category B Settlement Land or Fee Simple Settlement Land”, and to “Non-Settlement Land”, which is defined as “all land and water in the Yukon other than Settlement Land” and as including “Mines and Minerals in Category B Settlement Land and Fee Simple Settlement Land, other than Specified Substances” (Chapter 1). The nature of this distinction will be helpful in our analysis of the provisions relating to legal certainty (Division 2.5.0). But one point that should be made here is that the framework provided for in the agreement varies considerably depending on which of these two broad categories the land in question belongs to. It should also be pointed out that, under the agreement, “Crown land” — such as the land in issue here that was transferred to Mr. Paulsen on October 18, 2004 — is land that, as defined, is not settlement land. Another concept used in the Umbrella Agreement is that of “traditional territory”, which transcends the distinction between settlement land and non-settlement land (Chapter 1 and Division 2.9.0). This concept of “traditional territory” is relevant not only to the possibility of overlapping claims of various Yukon First Nations, but also to the extension of claims beyond the limits

of Yukon and to the negotiation of transboundary agreements (Division 2.9.0). As we will see, it is also central to the fish and wildlife co-management system established in Chapter 16 of the Final Agreement. The land that was in question in the decision of the Director of Agriculture dated October 18, 2004 in respect of Mr. Paulsen's application is located within the traditional territory of the Little Salmon/Carmacks First Nation, and more specifically in the northern part of that territory, in a portion that overlaps with the traditional territory of the Selkirk First Nation.

[133] The appellants' argument is based entirely on the principle that the agreement provides certainty. More precisely, it is based on an interpretation according to which that principle is indistinguishable from the principle of the "entire agreement". As a result, they have detached a key general provision of the Final Agreement from its context and interpreted it in a way that I do not find convincing. The "entire agreement" clause (s. 2.2.15), the actual source of which is the Umbrella Agreement and on which the appellants rely, provides that "Settlement Agreements shall be the entire agreement between the parties thereto and [that] there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them." This clause is consistent with the "out-of-court settlement" aspect of comprehensive land claims agreements. But it is not the only one, which means that such clauses must be considered in the broader context of the Final Agreement, and in particular of the provisions respecting legal certainty, which are set out under the heading "Certainty" (Division 2.5.0).

[134] On this key issue of legal certainty, the Umbrella Agreement and, later, all the final agreements negotiated under it were entered into in accordance with the 1986 federal policy on comprehensive claims (Saint-Hilaire, at pp. 407-8, note 45). It is actually possible to refer to the 1993 policy, as the 1986 policy was not modified on this point. Since 1986, the official federal policy has stated in this respect that rights with respect to land that are consistent with the agreement and “Aboriginal rights which are not related to land and resources or to other subjects under negotiation will not be affected by the exchange” (Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (1993), at p. 9). In short, in the 1986 policy, the government announced that its conduct would be honourable in that it would aim for equitable, or [TRANSLATION] “orthodox”, exchanges (Saint-Hilaire, at p. 407). In other words, the principle endorsed in the federal policy since 1986 has involved a distinction between the agreement that provides certainty and the “entire agreement”. So much for the general principle behind the division of the agreement in issue entitled “Certainty”. Let us now consider in greater detail the specific provisions applicable to the exchange of rights established in the Final Agreement.

[135] The Umbrella Agreement provides (in s. 2.5.1) that, in consideration of the promises, terms, conditions and provisos in a Yukon First Nation’s final agreement,

- 2.5.1.1 subject to 5.14.0 [which sets out a procedure for designating “Site Specific Settlement Land” to which s. 2.5.0 will not apply], that Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation’s Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada, all their aboriginal claims, rights, titles, and interests, in and to,
- (a) Non-Settlement Land and all other land and water including the Mines and Minerals within the sovereignty or jurisdiction of Canada, except the Northwest Territories, British Columbia and Settlement Land,
 - (b) the Mines and Minerals within all Settlement Land, and
 - (c) Fee Simple Settlement Land; [and]
- 2.5.1.2 that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation’s Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement . . .

According to the agreement settling its comprehensive land claim, the Little Salmon/Carmacks First Nation therefore “surrender[ed]” any Aboriginal rights it might have *in respect of land, water, mines and minerals*, (1) subject to the procedure for designating “site specific settlement land” (of which two parcels were located near the land in question in Mr. Paulsen’s application), (2) except insofar as those rights extended into the Northwest Territories or British Columbia, and (3) except for those relating to settlement land and waters therein, but only to the extent that the rights in question were not inconsistent with the settlement and provided that they extended

neither to land held in fee simple nor to mines and minerals — as is specified in the definition of non-settlement lands. For greater certainty, the Final Agreement accordingly adds that

- 2.5.1.4 neither that Yukon First Nation nor any person eligible to be a Yukon Indian Person it represents, their heirs, descendants and successors, shall, after the Effective Date of that Yukon First Nation's Final Agreement, assert any cause of action, action for declaration, claim or demand of whatever kind or nature, which they ever had, now have, or may hereafter have against Her Majesty the Queen in Right of Canada, the Government of any Territory or Province, or any person based on,
- (a) any aboriginal claim, right, title or interest ceded, released or surrendered pursuant to 2.5.1.1 and 2.5.1.2; [or]
 - (b) any aboriginal claim, right, title or interest in and to Settlement Land, lost or surrendered in the past, present or future . . .

[136] It is also important to consider general provision 2.2.4, which reflects the new orthodox exchange principle introduced by the 1986 federal policy that applied to the negotiation of the Umbrella Agreement:

Subject to 2.5.0, 5.9.0 [effects of the registration, granting, declaration or expropriation of any interest in a Parcel of Settlement Land less than the entire interest], 5.10.1 [effects of the registration, granting or expropriation of the fee simple title in a Parcel of Settlement Land] and 25.2.0 [negotiation of the transboundary aspect of claims], Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

[137] The spirit of the Final Agreement is apparent on the very face of these provisions respecting legal certainty: except where otherwise provided in the agreement itself, the agreement replaces the common law Aboriginal rights framework with the one it establishes for the matters it covers. But that is not all.

[138] The Final Agreement also includes general and interpretive provisions, such as general provision 2.2.5, which, like so many others, is reproduced from the Umbrella Agreement. This provision states that “Settlement Agreements shall not affect the rights of Yukon Indian People as Canadian citizens and their entitlement to all of the rights, benefits and protection of other citizens applicable from time to time.” There are also relevant provisions in Division 2.6.0 of the Umbrella Agreement:

2.6.1 The provisions of the Umbrella Final Agreement, the specific provisions of the Yukon First Nation Final Agreement and Transboundary Agreement applicable to each Yukon First Nation shall be read together.

2.6.2 Settlement Legislation shall provide that:

2.6.2.1 subject to 2.6.2.2 to 2.6.2.5, all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land;

2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;

2.6.2.3 where there is any inconsistency or conflict between the provisions of the Umbrella Final Agreement and the specific provisions applicable to a Yukon First Nation, the provisions of the Umbrella Final Agreement shall

prevail to the extent of the inconsistency or conflict;
[and]

2.6.2.4 where there is any inconsistency or conflict between Settlement Legislation and any other Legislation, the Settlement Legislation shall prevail to the extent of the inconsistency or conflict;

...

2.6.3 There shall not be any presumption that doubtful expressions in a Settlement Agreement be resolved in favour of any party to a Settlement Agreement or any beneficiary of a Settlement Agreement.

...

2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.

2.6.6 Settlement Agreements shall be interpreted according to the *Interpretation Act*, R.S.C. 1985, c. I-21, with such modifications as the circumstances require.

2.6.7 Objectives in Settlement Agreements are statements of the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.

2.6.8 Capitalized words or phrases shall have the meaning assigned in the Umbrella Final Agreement.

These interpretive provisions establish, *inter alia*, a principle of equality between the parties (s. 2.6.3) and a principle of contextual interpretation based on the general scheme of the provisions, divisions and chapters and of the treaty as a whole in accordance with its systematic nature (s. 2.6.1). The latter principle is confirmed by the rule that in the event of ambiguity, the provisions of the treaty are to be

interpreted in light of the objectives stated at the beginning of certain chapters of the treaty (s. 2.6.7). The systematic nature of the treaty is also confirmed by the rule that when defined words and phrases are used, they have the meanings assigned to them in the definitions (s. 2.6.8). In other cases, the rules set out in the federal *Interpretation Act* apply (s. 2.6.6). This, then, is the framework for interpretation agreed on by the parties to the treaty. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

[139] These general and interpretive provisions also establish certain rules with respect to the relationships of the Umbrella Agreement and any final agreement concluded under it, not only the relationship between them, but also that with the law in general. One of these rules is that in the event of inconsistency or conflict, the Umbrella Agreement prevails over the agreements concluded under it (s. 2.6.2.3). At first glance, this rule is surprising, since the parties to the Umbrella Agreement were very careful to specify that, on its own, that agreement “does not create or affect any legal rights” (s. 2.1.2). Section 2.6.2.3 is therefore somewhat imprecise. It can only refer to the provisions of the final agreement whose substance (and not form) derives from the Umbrella Agreement, and which prevail over the “specific” provisions. The implementing legislation, the *Yukon First Nations Land Claims Settlement Act*, S.C.

1994, c. 34, provides that “[i]n the event of a conflict or inconsistency between provisions of the Umbrella Final Agreement incorporated in a final agreement that is in effect and provisions of the final agreement that are specific to the first nation, the provisions of the Umbrella Final Agreement prevail to the extent of the conflict or inconsistency” (s. 13(4)). The other provisions of the treaty that relate to this issue of conflicting legislation have also been drawn from the federal implementing legislation (s. 13) and from its territorial equivalent (s. 5). The rules can therefore be summarized in the principle that the Final Agreement prevails over any other non-constitutional legal rule, subject to the requirement that its provisions not be so construed as to affect the rights of “Yukon Indian people” as Canadian citizens and their entitlement to all the rights, benefits and protections of other citizens (s. 2.2.5). In short, therefore, with certain exceptions, the treaty overrides Aboriginal rights related to the matters to which it applies, and in cases of conflict or inconsistency, it prevails over all other non-constitutional law.

[140] It should be noted that in certain circumstances, the principle applied in the treaty with respect to particular non-constitutional legislation — the *Indian Act*, R.S.C. 1985, c. I-5, where reserves are concerned — is that the treaty replaces that legislation rather than prevailing over it (s. 4.1.2).

[141] Regarding the relationship between the treaty in issue and the rest of our constitutional law other than the case law on Aboriginal rights, such a treaty clearly cannot on its own amend the “Constitution of Canada” within the meaning of s. 52

and Part V of the *Constitution Act, 1982*. Thus, to give one example, it cannot on its own alter either the protections of rights and freedoms provided for in Part I of that Act, the *Canadian Charter of Rights and Freedoms* (support for this can be found in s. 2.2.5 of the Final Agreement, which was discussed above), or the constitutional division of powers established in Part VI of the *Constitution Act, 1867*. Next, on the specific issue before us in the instant case, since the right to be consulted that corresponds to the common law duty to consult (1) transcends the distinction between Aboriginal rights and treaty rights, (2) is therefore not an Aboriginal right and even less so an Aboriginal right related to land and resources, and (3) accordingly cannot be surrendered under Division 2.5.0, it must be asked whether there is anything explicit in the treaty in issue about how the parties intended to deal with this duty. In other words, does the Final Agreement contain provisions that affect the general principle discussed above that the common law duty to consult will apply only where the parties have failed to address this issue? I see none.

[142] It should be borne in mind that an Aboriginal people cannot, by treaty, surrender its constitutional right to be consulted before the Crown takes measures in a manner not provided for in the treaty that might violate, infringe or limit a right that Aboriginal people is recognized as having in the same treaty. By analogy, in contract law, such a surrender would constitute an unconscionable term. But it is not this rule that is in issue here so much as the minimum required content of the duty in the context of treaties with Aboriginal peoples. As set out above, s. 2.6.5 of the Final Agreement, which was reproduced from the Umbrella Agreement, provides that

“[n]othing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations”. However, the fiduciary duty is not always constitutional in nature. Nor is it equivalent to the duty to consult implied by the principle of the honour of the Crown that the Crown must maintain in its relations with Aboriginal peoples as holders of special constitutional rights. The fiduciary duty may arise, for example, from relations the Crown maintains with Indians in managing reserve lands and, more generally, in administering the *Indian Act* (*Guerin; Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746).

[143] In actual fact, two points are made in s. 2.6.5. First, the settlement of an Aboriginal nation’s comprehensive claim does not automatically entail the settlement of any specific claim — based not on Aboriginal rights but rather on the *Indian Act* — that this nation might have, generally on the strength of the Crown’s fiduciary duty. A specific claim could also be based on a “historical” treaty. In the instant case, however, the Little Salmon/Carmacks First Nation expressly ceded, released and surrendered, in the agreement to settle its comprehensive land claim, namely the Final Agreement, any “claims, rights or causes of action which they may ever have had, may now have or may have hereafter” as a result of Treaty 11 (ss. 2.5.1.3, 2.5.1.4(c) and 2.5.2). Finally, unlike a comprehensive claim, a specific claim is not necessarily limited to land or resources. It was therefore quite natural to specify that the mere existence of a settlement of a Yukon First Nation’s comprehensive land

claim did not, without further verification, support a conclusion that any specific claim the First Nation might have had been settled.

[144] Second, s. 2.6.5 also evokes a more general principle. It provides that a final agreement does not preclude any party from advocating before the courts the existence of not only fiduciary, but also “other”, relationships between the Crown and the Yukon First Nations. This, in reality, is but one manifestation of the equitable principle involving a higher standard for exchanges of rights between Aboriginal peoples and the Crown — which the Crown aimed to make more orthodox — that was first mentioned in the federal policy of 1986.

[145] Thus, s. 2.6.5 of the Final Agreement is not at all inconsistent with the general principle discussed above that the common law duty to consult, in its minimum required obligational form, will apply — despite the existence of a treaty — only if the parties to the treaty have clearly failed to provide for it. This will depend on whether the parties have come to an agreement on the issue, and if they have, the treaty will — unless, of course, the treaty itself provides otherwise — override the application to the parties of any parallel framework, including the common law framework.

[146] In short, in providing in s. 2.2.4 that, subject to certain restrictions, “Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal

people that may be applicable to them”, the parties could only have had an orthodox exchange of rights in mind. They most certainly did not intend that a consultation framework would apply in parallel with the one they were in the process of establishing in the treaty. If the treaty in issue establishes how the Crown is to exercise its rights under the treaty by providing for a given form of consultation with the Aboriginal party, then the effect of the entire agreement clause in s. 2.2.15 will be to override any parallel framework, including the one developed by this Court.

B. *Substantive Rights in Issue*

(1) Right to Transfer and Right of Access to Crown Land

[147] In the case at bar, it is Chapter 6 on rights of access that must be considered first in respect of the right of the Crown the exercise of which could affect the exercise of rights of the Aboriginal party. As I mentioned above, the agreement in issue establishes two broad categories of land: settlement land and non-settlement land. The category of non-settlement land includes Crown land, and the land in question in Mr. Paulsen’s application was Crown land. Chapter 6 is structured on the basis of the principle that the Aboriginal party and third parties have rights of access to unoccupied Crown land, on the one hand, and that the Crown and third parties have rights of access to undeveloped settlement land, on the other. This is a general principle to which there may, of course, be exceptions.

[148] It is in Division 6.2.0 that the parties to the Umbrella Agreement — Canada, Yukon and the Council for Yukon Indians — provided for the right of access to Crown land — to be confirmed in the final agreements — of every Yukon Indian person and Yukon First Nation. The effect of the reproduction of that provision in the various final agreements was to grant every Yukon Indian person and Yukon First Nation to which those agreements applied a right of access for non-commercial purposes (s. 6.2.1), which is the right being relied on in this case. However, a review of that right leads to the right of the Crown the exercise of which is in issue here and which constitutes an exception to the right of access.

[149] The right of access of First Nations to Crown land for non-commercial purposes is subject to strict limits, and also to conditions and exceptions. It is limited in that the access in question is only “casual and insignificant” (s. 6.2.1.1), or “is for the purpose of Harvesting Fish and Wildlife in accordance with Chapter 16 — Fish and Wildlife” (s. 6.2.1.2), which is a chapter I will discuss below. The applicable conditions are set out in s. 6.2.4 — one example is a prohibition against significant interference with the use and peaceful enjoyment of the land by other persons. Finally, regarding the exceptions that are relevant here, the right of access in issue does not apply to Crown land “where access or use by the public is limited or prohibited” (s. 6.2.3.2), or “which is subject to an agreement for sale or a surface licence or lease”, except “to the extent the surface licence or lease permits public access” or “where the holder of the interest allows access” (s. 6.2.3.1 (emphasis added)).

[150] This last provision is the very one on which the decision on Mr. Paulsen's application was based. It must therefore be determined whether the treaty requires the Crown to consult the Aboriginal party before exercising its right to transfer land belonging to it in a way that could limit one or more rights granted to the Aboriginal party in the treaty. As I explain below, there are provisions in the treaty in question that govern this very issue.

[151] The Crown's right is clear, however. This exception to the right of access of First Nations to Crown land obviously implies that the Crown's general right to transfer land belonging to it continues to exist. Crown land, in respect of which Yukon's Aboriginal peoples have surrendered all Aboriginal rights and all rights arising out of Treaty No. 11, and which is not included in the land covered by the settlement of their comprehensive land claims, is defined in the agreement itself as land "vested from time to time in Her Majesty in Right of Canada, whether the administration and control thereof is appropriated to the Commissioner of the Yukon or not" (Chapter 1). Ownership of property implies, with some exceptions, the right to dispose of the property. The Crown's right to transfer land belonging to it is confirmed not only by s. 6.2.3.1 of the treaty, but also by s. 6.2.7, which limits that right by indicating that "Government shall not alienate Crown Land abutting any block of Settlement Land so as to deprive that block of Settlement Land of access from adjacent Crown Land or from a highway or public road." The treaty right being specifically invoked by the Little Salmon/Carmacks First Nation in respect of access to Crown land clearly ends where the Crown's right to transfer such land begins.

[152] Moreover, in invoking the right granted in s. 6.2.1.2 to every Yukon Indian person and Yukon First Nation, that of access to Crown land for the purpose of “Harvesting Fish and Wildlife in accordance with Chapter 16”, the respondents are also engaging that chapter on fish and wildlife management. They further submit that the transfer of the land in question would reduce the value of the trapline held by one of them, Johnny Sam, under the *Wildlife Act*, R.S.Y. 2002, c. 229, and — in a more direct, but certainly no less significant, manner — under the same Chapter 16 of the Final Agreement. Chapter 16 is accordingly in issue in this case and will have to be considered in greater detail.

(2) Fish and Wildlife Management

[153] Chapter 16 of the Final Agreement establishes a co-management framework with respect to fish and wildlife. It generally confirms the right of Yukon Indian people

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 [s. 16.4.2]

However, the actual scope of this general principle is limited in that the same provision concludes with the following words: “. . . subject only to limitations prescribed pursuant to Settlement Agreements” (s. 16.4.2). Those limitations are

significant and they go beyond the exception to the right of access granted in Division 6.2.0, namely the Crown's exercise of its right to transfer land belonging to it. The exercise of the rights granted to the Aboriginal party in Chapter 16 is subject to limitations provided for not only in the final agreements, but also in "Legislation enacted for purposes of Conservation, public health or public safety" (s. 16.3.3); limitations provided for in legislation "must be consistent with this chapter, reasonably required to achieve those purposes and may only limit those rights to the extent necessary to achieve those purposes" (s. 16.3.3.1).

[154] There are other provisions in Chapter 16 of the Final Agreement, aside from s. 16.3.3, that regulate, in various ways, the right of Yukon Indian people to harvest fish and wildlife by, in particular, authorizing the fixing of quotas — referred to as "total allowable harvest[s]" — "[w]hen opportunities to harvest Freshwater Fish or Wildlife are limited for Conservation, public health or public safety" (s. 16.9.1.1). Chapter 16 also establishes principles for sharing such harvests "between Yukon Indian People and other harvesters" (s. 16.9.1). Overall, the logic behind the principles used to allocate quotas is to "give priority to the Subsistence needs of Yukon Indian People while providing for the reasonable needs of other harvesters" (s. 16.9.1.1).

[155] Another goal of Chapter 16 of each of the final agreements, in addition to the simple fixing and allocation of quotas, is to regulate the exercise by Yukon Indian people of their rights to harvest fish and wildlife by setting up a multi-level

management framework that combines the principle of participation of the First Nations in question and that of decentralization. Those with responsibilities in the context of that framework are, in each case, the First Nation in question, the renewable resources council (“council”), which has jurisdiction in respect of that First Nation’s traditional territory, the Fish and Wildlife Management Board (“Board”) (and its Salmon Sub-Committee), which has jurisdiction throughout the Yukon Territory, and, finally, the Minister responsible for the matter in issue. There is equal representation on the councils and the Board: thus, “[s]ubject to Transboundary Agreements and Yukon First Nation Final Agreements, each Council shall be comprised of six members consisting of three nominees of the Yukon First Nation and three nominees of the Minister” (s. 16.6.2), and “[t]he Board shall be comprised of six nominees of Yukon First Nations and six nominees of Government” (s. 16.7.2). Regarding the composition of the councils, the specific provisions of the final agreements add only that the First Nation and the Minister may each nominate one additional member as an alternate member (ss. 16.6.2.1 to 16.6.2.3). The chairperson of each council, and of the Board, is selected from the membership of the body in question in accordance with procedures it has established for itself (ss. 16.6.3 and 16.7.3). If no chairperson is selected within 30 days in the case of a council, or 60 days in the case of the Board, the Minister must, after consulting the council or the Board, as the case may be, appoint one from its membership (ss. 16.6.3.1 and 16.7.3.1).

[156] There are very few instances in which the organs referred to in Chapter 16, other than the Minister, are given decision-making powers. In one of the rare cases, the First Nation is given, “for Category 1 Traplines, the final allocation authority” (ss. 16.11.10.6 and 16.5.1.2) — I should mention that this is not the category to which Johnny Sam’s trapline belongs. The First Nation also has sole authority to “align, realign or group Category 1 Traplines where such alignments, realignments or groupings do not affect Category 2 Traplines” (s. 16.5.1.3).

[157] More generally, the First Nation also has the following decision-making powers:

... [to] manage, administer, allocate or otherwise regulate the exercise of the rights of Yukon Indian People under 16.4.0 [concerning the harvesting of fish and wildlife] within the geographical jurisdiction of the Council established for that Yukon First Nation’s Traditional Territory by,

- (a) Yukon Indian People enrolled pursuant to that Yukon First Nation Final Agreement,
- (b) other Yukon Indian People who are exercising rights pursuant to 16.4.2, and
- (c) except as otherwise provided in a Transboundary Agreement, members of a transboundary claimant group who are Harvesting pursuant to that Transboundary Agreement in that Yukon First Nation’s Traditional Territory ... [s. 16.5.1.1]

However, the final paragraph of this provision contains the following clarification: “... where not inconsistent with the regulation of those rights by Government in accordance with 16.3.3 and other provisions of this chapter” (s. 16.5.1.1, final portion). The reality is that, aside from the allocation of individual rights from a group harvesting allocation, Chapter 16 mainly concerns management activities that ultimately fall under the Minister’s authority. The organs mentioned in Chapter 16 other than the Minister have in most cases — with some exceptions where they are given a form of decision-making authority — a power limited to holding consultations before a decision is made.

[158] It is in this context that the respondents’ argument regarding the *Community-based Fish and Wildlife Management Plan: Little Salmon/Carmacks First Nation Traditional Territory, 2004-2009* (2004) must be considered. Management plans such as this one are referred to in Chapter 16 of the various final agreements and more specifically, for our purposes, in ss. 16.6.10 and 16.6.10.1, which read as follows:

Subject to Yukon First Nation Final Agreements, and without restricting 16.6.9 [on the Councils’ general powers], each Council:

16.6.10.1 may make recommendations to the Minister on the need for and the content and timing of Freshwater Fish and Wildlife management plans, including Harvesting plans, Total Allowable Harvests and the allocation of the remaining Total Allowable Harvest [under 16.9.4], for species other than the species referred to in 16.7.12.2 [species included in international agreements, threatened species declared by the Minister as being of territorial, national or international

interest, and Transplanted Populations and Exotic Species] . . .

[159] A management plan such as the one relied on by the respondents is a policy statement regarding proposed legal acts, in particular decision making and the making of regulations under statutory authority. As its title indicates, therefore, this plan only sets out an administrative agreement on how the partners plan to exercise their legal powers.

[160] The passage from the management plan to which the respondents refer reads as follows:

Concern: There is a need to protect the Yukon River from Tatchun Creek to Minto as important habitat for moose, salmon, and other wildlife.

This section of the Yukon River contains a number of sloughs and islands, and was identified as important habitat for moose during calving, summer and winter. Moose were commonly seen in this area back in the 1960s, but fewer have been seen in recent years. “Dog Salmon Slough” was one area noted in particular as an important habitat area. Bears use Dog Salmon Slough for fishing. Moose might be staying away from river corridors now with the increased river travel traffic during summer. The review process for land applications in this area needs to consider the importance of these habitat areas to fish and wildlife.

Solution: Conserve the important moose and salmon habitat along the Yukon River from Tatchun Creek to Minto.

Pursue designating the area between Tatchun Creek and Minto along the Yukon River as a Habitat Protection Area under the *Wildlife Act*.

The community and governments need to get together to decide what kind of activities should happen in this important wildlife habitat. This is an overlap area with Selkirk First Nation, and the CRRC [Carmacks

Renewable Resource Council] needs to consult with them. A [Little Salmon/Carmacks First Nation] Game Guardian could also assist in evaluating the area for designation and providing management guidelines. [pp. 32-33]

[161] Two concerns can therefore be identified: the protection of fish and wildlife and the designation of areas. As I will explain below, the protection of fish and wildlife could be, and in fact was, taken into consideration in the process leading to the transfer of land. As for the designation of a protected area, which could have prevented any transfer of the land in question in Mr. Paulsen's application from occurring, it was a complex process. Such a designation would have required that three steps be completed successfully: (1) the Little Salmon/Carmacks First Nation would have to recommend the designation after consulting the Selkirk First Nation and the renewable resources council, in accordance with the relevant provisions of the management plan; (2) the Commissioner in Executive Council would have to designate the area by making a regulation under s. 187 of the *Wildlife Act*, the effect of which would simply be to make it possible to withdraw the lands in question from disposition; and (3) the Commissioner in Executive Council would have to actually withdraw the lands from disposition by making an order under s. 7(1)(a) of the *Yukon Lands Act*, R.S.Y. 2002, c. 132, which would be done if the Commissioner in Executive Council considered it advisable to do so in the public interest. These steps had not yet been taken, and in the meantime no provisional suspension of the processing of applications for land in the area in question had been agreed upon, despite the fact that such a suspension had been suggested in September 2004, a few

weeks before the decision on Mr. Paulsen's application, at a meeting concerning an agricultural policy review that was attended by representatives from the First Nation and the Agriculture Branch.

[162] In sum, the provisions of Chapter 16 on fish and wildlife management establish a framework under which the First Nations are generally invited to participate in fish and wildlife management at the pre-decision stage. In particular, the invitation they receive to propose fish and wildlife management plans can be regarded as consultation.

(3) Trapline

[163] The respondents submit that the land transfer in issue will reduce the value of the trapline held by Johnny Sam under the *Wildlife Act*, to which Division 16.11.0 of the Final Agreement on trapline management and use applies. In addition to the principles on the allocation of possible quotas between the First Nations and other harvesters, Chapter 16 of the Yukon final agreements includes specific rules for the trapping of furbearers. Division 16.11.0 incorporates, with necessary changes, the framework for granting individual traplines, or "concessions", established in the *Wildlife Act*. The changes made to that general framework in the final agreements relate primarily to the allocation of traplines in the First Nations' traditional territory.

[164] Section 16.11.2 of the final agreements concluded with the Yukon First Nations under the Umbrella Agreement reads as follows:

In establishing local criteria for the management and Use of Furbearers in accordance with 16.6.10.6 [which delegates the authority to adopt bylaws under the *Wildlife Act*] and 16.6.10.7 [which grants the authority to make recommendations to the Minister and the First Nation], the Councils shall provide for:

- 16.11.2.1 the maintenance and enhancement of the Yukon's wild fur industry and the Conservation of the fur resource; and
- 16.11.2.2 the maintenance of the integrity of the management system based upon individual trapline identity, including individual traplines within group trapping areas.

[165] The Final Agreement contains a specific provision concerning the allocation of traplines between Aboriginal and non-Aboriginal people in the traditional territory of the Little Salmon/Carmacks First Nation, namely s. 16.11.4.1, which provides that “[t]he overall allocation of traplines which have more than 50 percent of their area in that portion of the Traditional Territory of the Little Salmon/Carmacks First Nation which is not overlapped by another Yukon First Nation’s Traditional Territory is 11 traplines held by Yukon Indian People and three traplines held by other Yukon residents.” This allocation does not apply to Johnny Sam’s trapline, since it is located entirely within the portion of the traditional territory of the Little Salmon/Carmacks First Nation that overlaps the traditional territory of the Selkirk First Nation.

[166] Furthermore, as I mentioned above, the Final Agreement establishes two categories of traplines. After being granted to an individual, a trapline located in the traditional territory of a First Nation may, with the written consent of its registered holder, be designated a Category 1 trapline (s. 16.11.8). Otherwise, it will be a Category 2 trapline. Such a designation gives the First Nation the authority — particularly if the trapline is vacant or underused — to reallocate it (ss. 16.5.1.2 and 16.11.10.6), or to align it, realign it or group it with another line “where such alignments, realignments or groupings do not affect Category 2 Traplines” (s. 16.5.1.3). Authority over Category 2 lines rests not with the First Nation, but with the Minister (ss. 16.3.1 and 16.11.10.7 and Division 16.8.0). In their decisions, the courts below indicated that Johnny Sam’s trapline is a Category 2 trapline.

[167] Section 16.11.13 establishes the right of “Yukon Indian People holding traplines whose Furbearer Harvesting opportunities will be diminished due to other resource development activities [to] be compensated”. This right is broader than the right to compensation the holder of a trapline has under s. 82 of the *Wildlife Act*, which is limited to situations in which a concession is revoked or the re-issuance of a concession is refused for purposes related to the conservation of wildlife or to protection of the public interest, but without giving two years’ notice. Regarding the consequences the transfer of land to one person might have on another person’s right to trap, I would point out that the *Wildlife Act* (s. 13(1)) provides that “[a] person shall not hunt or trap wildlife within one kilometre of a building which is a residence,

whether or not the occupants are present in the building at the time, unless the person has the permission of the occupants to do so.”

[168] Having discussed the granting of rights and establishment of duties in Chapter 16 of the Final Agreement, on which the respondents are relying, I must now ask whether this chapter establishes a specific procedure to be followed by the Yukon government to consult the signatory First Nation before exercising its right to transfer Crown land under the (Yukon) territory’s jurisdiction. The answer is no. The consultation provided for in ss. 16.3.3.2, 16.5.4 and 16.7.16 relates to the management of fish and wildlife, not to the impact an action might have in relation to fish and wildlife. However, ss. 16.5.3, 16.6.11 and 16.7.13 provide that the First Nation, the renewable resources council and the Fish and Wildlife Management Board, respectively, have standing as interested parties to participate in the public proceedings of any agency, board or commission on matters that affect the management and conservation of fish and wildlife and their habitats in the particular traditional territory. But the terms “agency”, “board” or “commission” refer, in particular, to the bodies in question in Chapter 12 of the Final Agreement, which establishes a procedure for consulting the First Nations signatories by ensuring their participation in the environmental and socio-economic assessment of development activities such as the one that resulted from the approval of Mr. Paulsen’s application.

[169] I would nevertheless like to point out that Johnny Sam had rights as the holder of the trapline. He had the same rights as anyone else where procedural

fairness is concerned. He also had the right to be compensated in accordance with s. 16.11.13. But the respondents are neither arguing that there has been a breach of procedural fairness nor asserting their right to compensation. What they are seeking is to have the decision on Mr. Paulsen's application quashed on the ground that the Crown had a common law duty to consult them (R.F. on cross-appeal, at para. 86). It is my view, therefore, that a review of the rights granted in the Final Agreement with respect to consultation prior to a decision such as the one in issue in this case is indispensable.

C. Formal Rights and Duties in Issue

[170] The appellants argue that Chapter 12 is not applicable on the ground that it had not yet been implemented at the relevant time. According to the respondents, the process provided for in Chapter 12 would have been applicable had it been implemented, but it is only one form of consultation among all those that would be applicable — in their view, the common law duty is not excluded. Binnie J. also proposes that the common law duty to consult should apply where the Crown exercises a right granted to it in the treaty, even if the treaty provides for consultation in relation to that right. I disagree with him on this point. As I mentioned above, respect for the autonomy of the parties implies that effect must be given to the provisions they have agreed on in finalizing the relationship between them on a given matter. I cannot therefore agree with disregarding provisions adopted by the parties with respect to the transitional law.

[171] The Umbrella Agreement and the Final Agreement in issue here state that the settlement legislation must provide that a settlement agreement is binding on third parties (s. 2.4.2.3), and the *Yukon First Nations Land Claims Settlement Act* provides that “[a final agreement or transboundary agreement that is in effect] is binding on all persons and bodies that are not parties to it” (s. 6(2)). Both these agreements are binding not only on the parties, but also on third parties. Therefore, in my opinion, it is necessary for this Court to review the provisions of Chapter 12.

[172] Chapter 12 of the Umbrella Agreement, which can also be found in the final agreements, did not simply lay the foundations for an environmental and socio-economic assessment process that was to be implemented by means of a statute other than the general implementing legislation for those agreements — which was done by enacting the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 (“*YESAA*”) — it also contains transitional law provisions regarding the duties of the parties to the Umbrella Agreement and the final agreements that would apply even before the enactment of that statute implementing the process in question.

[173] In reality, the Yukon final agreements provided that they would be implemented and would come into effect by way of legislation or of an order-in-council, as the case may be, and that their coming into effect was a condition precedent to their validity (ss. 2.2.11 and 2.2.12). This could be understood to mean that, since Chapter 12 required the enactment of specific implementing legislation, it

constituted an exception to the general implementation of a final agreement and created no legal rights or duties until that legislation was enacted. But that is not what the Final Agreement says.

[174] In Division 12.2.0 of the Final Agreement, the expression “Development Assessment Legislation” is defined as “Legislation enacted to implement the development assessment process set out in this chapter” (emphasis added). This definition therefore does not concern special implementing legislation for Chapter 12 as a whole, but legislation to implement the *process* provided for in that chapter. This is confirmed by s. 12.3.1, which provides that “Government shall implement a development assessment process consistent with this chapter by Legislation”. Logically, therefore, when a final agreement concluded under the Umbrella Agreement with the Yukon First Nations comes into effect, the result, even if the assessment process has not yet been implemented, is to give effect to several provisions of Chapter 12 that are common to all the final agreements, including those that establish the applicable transitional law.

[175] Section 12.19.5 provides that “[n]othing in [Chapter 12] shall be construed to affect any existing development assessment process in the Yukon prior to the Development Assessment Legislation coming into effect.” This provision sets out the transitional law that would apply until the *YESAA* came into force, establishing that until then, existing statutes and regulations with respect to development assessment would constitute the minimum to which Yukon First Nations

were entitled, which meant that those statutes and regulations could not be amended so as to reduce the level of protection enjoyed by the First Nations. Chapter 12 does not require that any amendments be made to that existing law in the meantime.

[176] In addition, s. 12.3.4 provides that “Government shall recommend to Parliament or the Legislative Assembly, as the case may be, the Development Assessment Legislation consistent with this chapter as soon as practicable and in any event no later than two years after the effective date of Settlement Legislation.” The “settlement legislation” referred to here is clearly not the implementing legislation for the process contemplated in Chapter 12, but the “settlement legislation” provided for in Division 2.4.0 — the legislation to implement the particular final agreement. Both the territorial settlement legislation and the corresponding federal legislation came into force in 1995. As for the specific process contemplated in Chapter 12, it was ultimately implemented by Parliament by means of the *YESAA*.

[177] The transitional law, that is, the law that applied before the *YESAA* came into force, included, in addition to s. 12.19.5, which was discussed above, s. 12.3.6 of the Final Agreement, which read as follows:

Prior to the enactment of Development Assessment Legislation, the parties to the Umbrella Final Agreement shall make best efforts to develop and incorporate in the implementation plan provided for in 12.19.1, interim measures for assessing a Project which shall be consistent with the spirit of this chapter and within the existing framework of Law and regulatory agencies. [Emphasis added.]

No implementation plan of the type provided for in s. 12.19.1 was produced in this case. Moreover, s. 12.19.4 provided that Chapter 12 was not to “be construed to prevent Government, in Consultation with Yukon First Nations, from acting to improve or enhance socio-economic or environmental procedures in the Yukon in the absence of any approved detailed design of the development assessment process”. No evidence of any such action was adduced in the case at bar. By virtue of s. 12.19.5, therefore, the applicable interim framework corresponded to the “existing development assessment process in the Yukon prior to the Development Assessment Legislation coming into effect”.

[178] However, it should be mentioned that the interim framework, which was intended to apply for only a relatively short period, was ultimately in effect longer than planned. This is because the bill that became the implementing legislation for the process contemplated in Chapter 12 was not introduced until October 3, 2002, that is, over five and a half years after the February 14, 1997 deadline provided for in s. 12.3.4 of the Final Agreement. In fact, that deadline had already passed when the Final Agreement was signed in 1997. Since it is clear from the provisions of Chapter 12 that before the *YESAA* came into force, the parties to the Umbrella Agreement were required to make best efforts to ensure that the Yukon First Nations received the benefit of the spirit of that chapter as soon as was practicable, it is important to begin — not in order to apply the *letter* of the *YESAA*, but in order to clearly understand the *spirit* of Chapter 12, of which certain other provisions that were applicable expressly stated that, in the interim, best efforts were to be made to

honour that spirit — by determining what the Little Salmon/Carmacks First Nation would have been entitled to under the *YESAA* if the process implemented in that Act had applied to Mr. Paulsen’s application.

(1) Permanent Process: *YESAA*

[179] One objective of Chapter 12 of the final agreements concluded with the Yukon First Nations is to ensure the implementation of a development assessment process that “provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process” (s. 12.1.1.2). This framework was designed to incorporate both the participation of the First Nations and a certain degree, if not of decentralization, at least of administrative deconcentration. These objectives are achieved through the membership of the bodies established in Chapter 12 of the final agreements and the *YESAA*, and through the oversight by those bodies of development activities planned for the territory in question. This integrated mechanism was intended, with some exceptions, to become Yukon’s default assessment procedure. The relationship between the process established in Chapter 12 and the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, is made clear in s. 63 of the *YESAA*. In addition to the principle of a *single* assessment, Chapter 12 (ss. 12.14.1.2 and 12.14.3.2) and its implementing legislation (ss. 82(1), 83(1) and 84(1)) confirm the principle of *prior* assessment (prior to the authorization of any project).

[180] The process for which Chapter 12 lays the foundations involves two main organs: the Yukon Development Assessment Board and all the “designated offices” at the local level. The *YESAA* also refers to them as the “Board” and the “designated offices”. The membership of the Board is established in s. 8 of the *YESAA*. The basis for its membership is equal representation. The Board’s Executive Committee consists of one member nominated by the Council for Yukon Indians, one member nominated by the government and a chairperson appointed by the Minister after consultation with the first two members. The Minister then appoints additional members such that, excluding the chairperson, half the members are nominees of the Council for Yukon Indians and the other half are nominees of the government. As for the designated offices, they are, pursuant to the *YESAA*, outposts of the Board. Their staff “shall be composed of employees of the Board assigned to that office by the Board” (s. 23(1)).

[181] Chapter 12 establishes two broad categories of assessments — mandatory assessments and optional assessments — which are conducted upon request by the government or by a First Nation, but when the request is made by a First Nation, the government’s consent is required, with some exceptions that are subject to specific conditions (ss. 12.8.1.4, 12.8.1.5, 12.8.1.8, 12.8.1.9 and 12.8.1.10 of the Final Agreement, and s. 60 of the *YESAA*). The Board is responsible for optional assessments. It is possible to simply exempt a project from assessment (s. 47(2) *YESAA*). As for mandatory assessments, they are the responsibility of the designated office for the assessment district in which the project is to be undertaken, or of the

Board if the assessment district office refers the assessment to it (s. 50(1) *YESAA*) or if such projects have been classified by way of regulations as requiring submission to the Board (s. 122(c) *YESAA*). In short, if a project (1) is not excepted from assessment, (2) is not the subject of an accepted optional assessment, or (3) is not one that is required by regulations to be assessed by the Board or that has been referred to the Board by the office for the project's assessment district, it will be assessed by the assessment district office.

[182] If the environmental and socio-economic assessment process provided for in Chapter 12 — and in fact in the *YESAA*, which implements the process — had applied at the time of the events in this case, Mr. Paulsen's application would have had to be assessed by the designated office for the Mayo assessment district, which was established along with five others (for a total of six) by order of the Minister under s. 20(1) of the *YESAA*. Projects like the one in question in Mr. Paulsen's application were neither excepted by regulations nor required to be assessed by the Board. Section 2 of the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, SOR/2005-379, refers to Schedule 1 to those regulations concerning "activities that may . . . be made subject to assessment" within the meaning of s. 47 of the *YESAA*. The following activity is listed as Item 27 of Part 13 — entitled "Miscellaneous" — of Schedule 1:

On land under the administration and control of the Commissioner of Yukon or on settlement land, the construction, establishment, modification, decommissioning or abandonment of a structure, facility or

installation for the purpose of agriculture, commercial recreation, public recreation, tourist accommodation, telecommunications, trapping or guiding persons hunting members of a species prescribed as a species of big game animal by a regulation made under the *Wildlife Act*, R.S.Y. 2002, c. 229.

[183] Finally, s. 5 of the *Assessable Activities, Exceptions and Executive Committee Projects Regulations* provides that “[p]rojects for which proposals are to be submitted to the executive committee under paragraph 50(1)(a) of the [YESAA] are specified in Schedule 3.” Since nothing in that schedule corresponds to Mr. Paulsen’s application, it must be concluded that the assessment would have been the responsibility of the Mayo designated office, although that office could have referred the project to the Board.

[184] Since Mr. Paulsen’s project falls into the category of projects for which an assessment by an assessment district office is mandatory, it is possible to give a precise answer to the question of what measures the respondents would have been entitled to had the letter of the process provided for in Chapter 12 of the Final Agreement applied in the case of Mr. Paulsen’s application.

[185] It should first be observed that neither the Final Agreement nor the YESAA provides for direct participation by the First Nation in the assessment itself. It is only through the Council for Yukon Indians, or more precisely through those of the Board’s members assigned to the Mayo office who were appointed after being nominated by the Council, that the First Nation would have *participated* in the

assessment of Mr. Paulsen's application. Furthermore, no provisions regarding the proportion of Aboriginal assessors required for assessments by the designated offices can be found either in the final agreements or in the *YESAA*. All that we know in this respect is that the Final Agreement and the *YESAA* require equal representation in the Board's *overall* membership.

[186] Regarding the right of interested parties, not to actively take part in the assessment itself, but to be heard, the Final Agreement provides that “[i]n accordance with the Development Assessment Legislation, a Designated Office . . . shall ensure that interested parties have the opportunity to participate in the assessment process” (s. 12.6.1.3). Moreover, as I mentioned above, the organs — the First Nations, the renewable resources council and the Fish and Wildlife Management Board — that make up the co-management framework for fish and wildlife established in Chapter 16 of the Final Agreement have standing as interested parties to participate in public proceedings of any agency, board or commission on matters that affect the management and conservation of fish and wildlife and their habitats in the traditional territory in question (ss. 16.5.3, 16.6.11 and 16.7.13). Also, s. 55(1)(b) of the *YESAA* provides that “[w]here a proposal for a project is submitted to a designated office under paragraph 50(1)(b), the designated office shall . . . determine whether the project will be located, or might have significant environmental or socio-economic effects, in the territory of a first nation.” The word “territory” is defined as follows in s. 2(1) of the *YESAA*: “in relation to a first nation for which a final agreement is in effect, that first nation's traditional territory and any of its settlement lands within

Yukon that are not part of that traditional territory”. After it has been determined under s. 55(1)(b) that the project will be so located or that it might have such effects, s. 55(4) of the *YESAA* applies. It reads as follows:

Before making a recommendation . . . a designated office shall seek views about the project, and information that it believes relevant to the evaluation, from any first nation identified under paragraph (1)(b) and from any government agency, independent regulatory agency or first nation that has notified the designated office of its interest in the project or in projects of that kind.

Therefore, under the process provided for in Chapter 12 of the Final Agreement and in the *YESAA*, the Little Salmon/Carmacks First Nation would have had the right only to be heard in the assessment of Mr. Paulsen’s application, and not to actively take part in it by delegating assessors.

[187] This, therefore, is the collective consultation measure to which the respondents would have been entitled in the case of Mr. Paulsen’s application had the process provided for in Chapter 12 of the Final Agreement and implemented by the *YESAA* applied to it. This should enable us now to answer the ultimate question in the case at bar: whether, given that the letter of that process does not apply, the respondents could receive the benefit of the spirit of the process, as was their right under the transitional provisions of Chapter 12 of the Final Agreement. For this purpose, we must reiterate that although those transitional provisions did impose a particular responsibility on the Crown party, they were nevertheless not silent with respect to the participation of the Aboriginal party. Thus, s. 12.3.6 refers in this

regard to efforts on the part not only of “government”, but of the parties to the Umbrella Agreement.

(2) Transitional Law: Any “Existing Process” Before the Coming Into Force of the YESAA

[188] As far as Mr. Paulsen’s application is concerned, the “existing process” within the meaning of the transitional law provisions, that is, of ss. 12.3.6 and 12.19.5 of the Final Agreement, was the process provided for in the *Environmental Assessment Act*, S.Y. 2003, c. 2, and Yukon’s 1991 agriculture policy, which, moreover, also referred to the environmental legislation (*Agriculture for the 90s: A Yukon Policy* (1991) (the “agriculture policy”), Section II, at para. 6(1)). Since the parties did not rely on that Act, I will merely mention that the assessment provided for in it was completed, but more than five months after the date of the decision on Mr. Paulsen’s application, despite the fact that it was a mandatory prior assessment.

[189] Under the 1991 agriculture policy, Mr. Paulsen’s application first had to undergo a “prescreening” by the Land Claims and Implementation Secretariat, the Lands Branch and the Agriculture Branch. The prescreening process involved determining whether the application was eligible for consideration, and in particular whether the application was complete, whether the land in question was available, whether that land was under territorial jurisdiction, whether there was a possibility that the land would be subject to Aboriginal land claims, whether the land had

agronomic capability and, more specifically, whether the application was, at first glance, consistent with the policy then in effect.

[190] Mr. Paulsen's application then had to undergo a more technical review by the Agriculture Land Application Review Committee ("ALARC"). ALARC is a cross-sector, interdepartmental committee that, among other things, reviews the farm development plan that every applicant for agricultural land must submit (agriculture policy, Section II, at subpara. 9(1)(c)). ALARC's review of Mr. Paulsen's application was originally scheduled for June 26, 2002, but it could not proceed on that date because the applicant had not yet submitted a farm development plan.

[191] On June 10, 2002, an analysis by the Agriculture Branch showed that if Mr. Paulsen's application were accepted as configured, it would not represent the most efficient use of the land. On October 20, 2003, Mr. Paulsen reconfigured the parcel in question in his application. On February 24, 2004, ALARC recommended that his application proceed to an assessment by the Land Application Review Committee ("LARC").

[192] LARC is a body whose membership consists of representatives of the Yukon government and, depending on the case, of Yukon First Nations, Yukon municipalities and/or the federal Department of Fisheries and Oceans (*Land Application Review Committee (LARC): Terms of Reference*, Section 4.0: Membership/Public Participation, A.R., vol. II, at p. 29). It is chaired by a territorial

government official. A First Nation will be represented on LARC if, as was the case here, the application to be reviewed has potential consequences for the management of its “traditional territory”.

[193] LARC’s mandate is, in particular, to “review matters concerning land applications from a technical land-management perspective, in accordance with legislation, First Nation Final & Self Government Agreements and criteria in specific land application policies” (*Land Application Review Committee (LARC): Terms of Reference*, Section 6.0: Land Application & Policy Development Procedures — Mandate, A.R., vol. II, at p. 32).

[194] A notice concerning Mr. Paulsen’s application was published on March 26, 2004, and the public were invited to submit written comments within 20 days. On April 28, 2004, the Agriculture Branch sent a summarized version of the application to the Little Salmon/Carmacks First Nation (A.R., vol. II, at p. 6) together with a letter notifying the First Nation that the application was to be reviewed by LARC and asking it to submit its written comments within 30 days. The First Nation was also sent an information package, which included notice that the LARC meeting was scheduled for August 13, 2004.

[195] On July 27, 2004, Susan Davis, the Director of Land and Resources of the Little Salmon/Carmacks First Nation, sent Yukon’s Lands Branch a letter in which she expressed the First Nations’ concerns about Mr. Paulsen’s application

(A.R., vol. II, at p. 22). Those concerns were threefold. First of all, the First Nation was concerned about the impact of the application on the trapline. It was also concerned about the anticipated impact on settlement land under its comprehensive land claim agreement, and in particular on two parcels of site specific settlement land (a concept referred to above) as well as on the cabin of the holder of the trapline concession, which was located on one of those parcels. Finally, the First Nation asked the Yukon government to take into consideration the fact that there might be sites of heritage or archaeological interest, including a historical trail, on the land in question in the agriculture land application.

[196] LARC met to review Mr. Paulsen's application on August 13, 2004. For reasons that are not explained in the record of this case, the Little Salmon/Carmacks First Nation, without notifying the other members in advance, did not attend the meeting and did not request an adjournment of the August 13, 2004 review, to which it had been invited as a member of LARC. However, it can be seen from the minutes of that meeting that even though no representatives of the First Nation attended, its concerns had been taken into account even before the meeting. The following passages are relevant:

The original rectangular parcel was reconfigured in October, 2003. The NRO [Natural Resources Officer] inspection report in April this year recommended it be reconfigured again to remove a portion, which is a potential timber allocation area for point source permits [*sic*]. Opposition from the First Nation has caused the abandonment of that plan.

...

Little Salmon Carmacks First Nation [LSCFN] express concern that the application is within Trapline Concession Number 143, held by an elder [Johnny Sam]. Forestfire burns have impacted this trapline, and the only area left is a small strip of land between the Klondike Highway and the Yukon River, which is considered to be suitable land for farming. As a result of the report, there have been several agriculture land applications requesting land in the area for raising livestock and building houses. The combination of agriculture and timber harvesting impacts on this already damaged trapline would be a significant deterrent to the ability of the trapper to continue his traditional pursuits. There are two site specifics, personal/traditional use areas considered to be LSCFN settlement lands in the area in question, S-4B and S-127B. Both of these locations are in close proximity to the point source timber permit application. The impact on these sites and users would be the loss of animals to hunt in the area. S-4B is also the site of Concession 143's base camp and trapper cabin.

...

Other LSCFN concerns related [*sic*] to cultural sites: There are potential areas of heritage and cultural interests which may be impacted by point source timber harvesting. An historic First Nation trail follows the ridge in the area. [A]t present these sites have not been researched or identified, and there would need to be an archaeological survey carried out in order to confirm the presence [*sic*] or lack thereof of any such sites.

Environment advised they walked the site and discovered an old trap on top of the bluff, facing the Yukon River. The owner of Trapline #143 will have the right to seek compensation. An appropriate 30-metre setback is recommended from the bluff. There was evidence of bears and moose. There will be some loss of wildlife habitat in the area, but it is not significant.

...

Recommendation: Approval in principle. Setback from the bluff 30 meters Subdivision approval will be required. Trapper, based on reduced trapping opportunities, has opportunity to seek compensation.

[197] On September 2, 2004, the territorial government's archaeologist reported that no evidence of prehistoric artifacts had been found on the land in question in the agriculture land application, but as a precaution he also recommended a 30-metre buffer between the bluff and the land that was to be transferred.

[198] The territorial government's conduct raises questions in some respects. In particular, there is the fact that the appellant David Beckman, in his capacity as Director of Agriculture, did not notify the respondent First Nation of his decision of October 18, 2004 until July 27, 2005. Under s. 81(1) of the *YESAA*, the designated office and, if applicable, the executive committee of the Board would have been entitled to receive copies of that decision and, one can only assume, to receive them within a reasonable time. Here, the functional equivalent of the designated office is LARC. Even if representatives of the respondent First Nation did not attend the August 13 meeting, it would be expected that the Director of Agriculture would inform that First Nation of his decision within a reasonable time. Nonetheless, the time elapsed after the decision did not affect the quality of the prior consultation.

[199] The territorial government's decision to proceed with Mr. Paulsen's application at the prescreening stage despite the requirement of consultation in the context of the respondent First Nation's fish and wildlife management plan was not an exemplary practice either. In that respect, Yukon's 1991 agriculture policy provided that "[a]pplications to acquire land for agriculture will be reviewed by the Fish and Wildlife Branch to safeguard wildlife interests", that "[m]easures will be

taken to avoid overlap between allocation of lands for agriculture and key wildlife habitat” and that, in particular, all “key wildlife habitat will be excluded from agricultural disposition except where the Fish and Wildlife Branch determines that adverse effects upon wildlife interests can be successfully mitigated” (Section II, subpara. 6(3)(b)). As we have seen, however, Susan Davis did not express concern about this in her letter of July 27, 2004 to Yukon’s Lands Branch. And as can be seen from the minutes of the August 13, 2004 meeting, the concerns of the Little Salmon/Carmacks First Nation with respect to resource conservation were taken into consideration. Also, the required consultation in the context of the fish and wildlife management plan was far more limited than the consultation to which the First Nation was entitled in participating in LARC, which was responsible for assessing the specific project in issue in this appeal. Finally, the First Nation, the renewable resources council and the Minister had not agreed on a provisional suspension of the processing of applications for land in the area in question.

[200] Despite these aspects of the handling of Mr. Paulsen’s application that are open to criticism, it can be seen from the facts as a whole that the respondents received what they were entitled to receive from the appellants where consultation as a First Nation is concerned. In fact, in some respects they were consulted to an even greater extent than they would have been under the *YESAA*. As we saw above, the only right the First Nation would have had under the *YESAA* was to be heard by the assessment district office as a stakeholder (s. 55(4)). That consultation would have been minimal, whereas in the context of the 1991 agriculture policy, the First Nation

was invited to participate directly in the assessment of Mr. Paulsen's application as a member of LARC.

[201] It is true that the First Nation's representatives did not attend the August 13, 2004 meeting. They did not notify the other members of LARC that they would be absent and did not request that the meeting be adjourned, but they had nonetheless already submitted comments in a letter.

[202] Thus, the process that led to the October 18, 2004 decision on Mr. Paulsen's application was consistent with the transitional law provisions of Chapter 12 of the Final Agreement. There is no legal basis for finding that the Crown breached its duty to consult.

III. Conclusion

[203] Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, in the case at bar, as in the Court's recent decision regarding the *James Bay and Northern Québec Agreement*, the parties have moved on to another stage. Formal consultation processes are now a permanent feature of treaty law, and the Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with Aboriginal peoples. It is a way to recognize that Aboriginal peoples have full legal capacity. To

disregard the provisions of such a treaty can only encourage litigation, hinder future negotiations and threaten the ultimate objective of reconciliation.

[204] The appellants seek a declaration that the Crown did not have a duty to consult under the Final Agreement with respect to Mr. Paulsen's application. Their interpretation of the Final Agreement is supported neither by the applicable principles of interpretation nor by either the context or the provisions of the Final Agreement. The cross-appellants argue that the common law duty to consult continued to apply despite the coming into effect of the Final Agreement. As I explained above, it is my view that there is no gap in the Final Agreement as regards the duty to consult. Its provisions on consultation in relation to the management of fish and wildlife were in effect. And the Little Salmon/Carmacks First Nation had in fact submitted comments in the process provided for in that respect. Moreover, the administrative law rights of Johnny Sam are governed neither by the common law duty to consult nor by the Final Agreement. Although the Little Salmon/Carmacks First Nation's argument that it had a right to be consulted with respect to Mr. Paulsen's application is valid, the source of that right is not the common law framework. The fact is that the transfer to Mr. Paulsen constituted an agricultural development project that was subject to Chapter 12 of the Final Agreement and that that chapter's transitional provisions established the applicable framework.

[205] In this case, given that Mr. Paulsen's application would have been subject to a mandatory assessment by the local assessment district office, the fact that

recourse was had to the existing process to assess the application supports a conclusion that the actual consultation with the respondents was more extensive than the consultation to which they would have been entitled under the *YESAA*.

[206] For these reasons, I would dismiss the appeal and the cross-appeal, both with costs.

Appeal and cross-appeal dismissed with costs.

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