IN THE SUPREME COURT OF YUKON

Citation: *Ta'an Kwach'an Council* v. *Government of Yukon et al.*, 2008 YKSC 60

Date: 20080905
S.C. No. 08-A0052
Registry: Whitehorse

Between:

TA'AN KWACH'AN COUNCIL

Petitioner

And

DENNIS FENTIE, PREMIER and GOVERNMENT OF YUKON

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Roger S. Watts	Counsel for the petitioner
Mike Winstanley and Monica Leask	Counsel for the respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ta'an Kwach'an Council, a Yukon First Nation situated near Whitehorse, seeks a declaration and substantive relief against the Premier and the Yukon Government arising out of several letters in which the Premier said he would "meet to discuss various available disposal options" with respect to two commercial lots on the Whitehorse waterfront (the "waterfront land") which are in the traditional territory of the First Nation.

[2] The Premier did not meet with the First Nation to have the discussion and proceeded, with notice to the First Nation, to advertise the waterfront land for sale by

public tender. On July 28, 2008, this Court, in a judgment cited as *Ta'an Kwach'an Council* v. *Government of Yukon et al.,* 2008 YKSC 54, granted an interlocutory injunction suspending the tendering process until this hearing. The court ordered that the two tendered bids be opened. Ta'an Kwach'an Council was the low bidder and Vuntut Gwitchin First Nation was the highest bidder.

[3] The Ta'an Kwach'an Council and the Yukon Government have a "government to government" relationship, as the First Nation signed a Final Agreement on January 13, 2002, releasing its aboriginal title against all Non-Settlement Land in exchange for Settlement Land and other treaty rights. It is noteworthy that the Yukon Government and Yukon First Nations are on the leading edge in Canada in establishing these new and respectful relationships in the continuing process of reconciliation mandated by s. 35 of the *Constitution Act, 1982.*

[4] This dispute arises in the context of waterfront land that is Non-Settlement Land that was transferred to the Yukon Government from the City of Whitehorse (the "City") after the treaty was signed.

[5] The first issue to be determined is whether a constitutional duty to consult is triggered in this modern treaty as recently established in *Little Salmon/Carmacks First Nation* v. *Yukon (Minister of Energy, Mines and Resources*), 2008 YKCA 13 (referred to as "*Little Salmon/Carmarks*").

[6] The second issue is whether the principle of the honour of the Crown standing alone triggers the duty to consult based upon the correspondence between the Yukon Government and the Ta'an Kwach'an Council with respect to this commercial waterfront land.

FACTS

[7] The Ta’an Kwach’an Council signed a Final Agreement with Canada and Yukon on January 13, 2002. By the agreement, Ta’an Kwach’an Council received Settlement Land, financial compensation and other rights in exchange for surrendering its aboriginal claims, rights, titles and interests.

[8] Also on January 13, 2002, the Ta’an Kwach’an Council signed a Self-Government Agreement giving the Ta’an Kwach’an Council legal status and certain legislative powers.

[9] On October 17, 2003, the Ta’an Kwach’an Council and Yukon Government signed a Consultation Protocol “to maintain respectful relations”, described as “government-to-government relations.” The Consultation Protocol explicitly states it is not a binding contract and it was never engaged with respect to this waterfront land.

[10] The waterfront land in question consists of Lot 23 and Lot 40. Lot 40 is the larger parcel and it fronts on the Yukon River. Lot 23, a smaller parcel, is behind Lot 40. The waterfront land is valuable commercial land. It is situated north of a large block of Settlement Land owned by Kwanlin Dun First Nation and described as C-192B. To the north, there is a smaller piece of Crown land entitled C-97FS, that has been selected by Ta’an Kwach’an Council as Settlement Land, subject to the condition that Kwanlin Dun First Nation consents to the parcel becoming Ta’an Kwach’an Council Settlement Land. There is no evidence that Kwanlin Dun First Nation has consented and as a result, by the terms of the Final Agreement, parcel C-97FS is not Settlement Land and remains Crown land. However, a nearby island in the Yukon River, called Kishwoot Island is Ta’an Kwach’an Council Settlement Land.

[11] The waterfront land has been held privately since the early 1900s and was never available for selection during the land claims settlement process. The City of Whitehorse purchased the waterfront land in the 1990s.

[12] In 2004, the City of Whitehorse announced that it would host the 2007 Canada Winter Games, which required funding from Canada, the Yukon Government and the City. On June 18, 2004, the Mayor of Whitehorse confirmed in writing that the Ta'an Kwach'an Council had expressed an interest in buying the waterfront land. The City advised that it was not ready for discussions at that time.

[13] On February 14, 2005, the City and the Yukon Government entered into a funding agreement for the construction of the Athlete's Village for the Canada Winter Games. As part of that arrangement, the City agreed to sell the waterfront land to the Yukon Government for two million dollars.

[14] On April 6, 2005, the Chiefs of the Ta'an Kwach'an Council and Kwanlin Dun First Nation met with the Premier of Yukon regarding the waterfront land which was then being purchased by the Yukon Government from the City.

[15] The Kwanlin Dun First Nation is situated in the City of Whitehorse and has a similar and overlapping traditional territory to Ta'an Kwach'an Council. Although its name appears from time to time in the factual circumstances of this case, Kwanlin Dun First Nation is not a party to, nor a participant in, these proceedings.

[16] The Premier confirmed by letter dated April 26, 2005:

> "As I indicated at [the meeting], the Yukon Government is prepared to discuss the various options available for these two properties, including the possible sale of these lots, with the Kwanlin Dun First Nation and the Ta'an Kwach'an

> Council once the Canada Winter Games have been completed in 2007."

[17] The Chief of Kwanlin Dun First Nation replied by letter dated July 20, 2005 confirming their interest in purchasing the waterfront land. He stated:

> "As you are aware, KDFN is planning for the construction of our Cultural Centre on parcel C-192B. The Cultural Centre is the first phase of our waterfront development. Future developments will include an urban neighbourhood with a mixture of commercial, retail, and office space, with a high-end country inn. Acquiring Lots 8 and 9 will allow KDFN to continue our development process that will complement the waterfront plan and provide continuity within the revitalized waterfront neighbourhood."

[18] The Premier of Yukon replied by letter dated September 6, 2005, that:

> "As was contemplated in my letter of April 26, 2005, the Yukon Government is prepared to discuss the various options available for these two properties with the Kwanlin Dun First Nation and the Ta'an Kwach'an Council, once the Canada Winter Games have been completed in 2007."

[19] The Ta'an Kwach'an Council was similarly interested in the waterfront land to realize their plans for new community facilities within Whitehorse.

[20] By letter dated January 9, 2007, the Chief of Kwanlin Dun First Nation again wrote the Premier confirming their interest in purchasing the waterfront land and their desire to discuss the options available for purchase of the properties. The Premier of Yukon replied by letter dated January 24, 2007, that the Yukon Government accepted their letter "as notice of interest of Kwanlin Dun First Nation in purchasing the properties." He concluded:

> "… As these are public lands, the Government of Yukon must act in the public interest regarding the future disposition of these lots."

[21] On March 19, 2007, the Chief of Ta'an Kwach'an Council wrote the Premier stating:

> "Now that the Canada Winter Games have come and gone, our attention is once again focussed on the above two properties. We once again express our interest in purchasing the above mentioned properties and are prepared to meet with you regarding the lots on the waterfront. We also need to review the terms of the Memorandum of Agreement including roles and responsibilities and management of future waterfront development projects and ensure the ongoing communication between the parties concerned.
>
> I look forward to an amiable and mutually beneficial working relationship and suggest a meeting at your earliest convenience."

[22] By letter dated June 6, 2007, the Premier of Yukon replied that he acknowledged the notice of interest of both First Nations in the waterfront land and stated:

> "Canada Winter Games have now concluded, however the noted lots have not yet been transferred to the Government of Yukon from City of Whitehorse. Once this transfer is finalized, and the lands are held by the Commissioner, we will be in a position to meet to discuss this matter. As outlined in the April 28, 2005 letter, Yukon is prepared to discuss various available disposal options for the properties. As these are to become public lands, the Government of Yukon must act in the public interest regarding future disposition of the lots."

[23] Also in early 2007, the Grand Chief of the Council of Yukon First Nations, the umbrella organization of Yukon First Nations, met with the Premier to discuss the possible acquisition of the waterfront land and adjacent properties by the Council for a new administration building. The Premier advised the Grand Chief that future transactions would have to wait for the conclusion of the Canada Winter Games.

[24] The Grand Chief met with the Premier following the conclusion of the Canada Winter Games and attempted to secure a commitment to purchase the waterfront land. The Premier advised the Grand Chief that before the waterfront land was to be transferred to any party, he would have to meet with representatives of the Ta'an Kwach'an Council and Kwanlin Dun First Nation as he was committed to have discussions with them first concerning disposition of the waterfront land.

[25] The next communication of any kind from the Premier to the Chief of the Ta'an Kwach'an Council was a telephone call on June 19, 2008, one year after his last correspondence dated June 6, 2007. The Chief stated in her affidavit that "the Premier advised me that the Government intended to unilaterally advertise the Lands for sale by public tender within the coming days". She had received no warning that this would occur, rather than the purchase discussions she had previously understood would occur with the Ta'an Kwach'an Council and the Kwanlin Dun First Nation. By letter dated June 20, 2008, the Premier confirmed the waterfront land would be publicly tendered for sale as of June 25, 2008, with bids to be received by 5 p.m. on July 16, 2008.

[26] The Yukon Government's Director of Constituency Services, who sat in on the Premier's conference call said that the Chief seemed surprised by the short time frame and that the Chief did not refer to the previous letters or any aboriginal or treaty rights. The Director of Constituency Services also confirmed that the Chief of the Ta'an Kwach'an Council made two further calls on July 4 and July 8, requesting to meet with the Premier. She advised the Chief that the Premier was out of the office. The Premier left on July 14, 2008, for Quebec City meetings.

[27] By letter to the Premier dated July 15, 2008, the Chief of the Ta'an Kwach'an Council set out the history of the verbal and written commitments of the Premier since April 2005 to "discuss various options available for [the waterfront land], including the possible sale of these lots, with the Kwanlin Dun First Nation and the Ta'an Kwach'an Council once the Canada Winter Games have been completed in 2007".

[28] Ta'an Kwach'an Council filed its petition in court on July 16, 2008 and the Premier, by letter dated July 22, 2008, stated among other things, that:

> "In previous correspondence (appended to your Affidavit as Evidence) to both you and to Chief Smith, I have noted that the Yukon Government must act in the public interest in any possible disposition of these properties. The public interest includes ensuring a fair and reasonable return for the public. As both First Nations had indicated an interest in these lots, it was determined by Yukon that the fairest, and most open and transparent option, was to put the lots out for public tender."

[29] The Ta'an Kwach'an Council and Vuntut Gwitchin Limited Partnership submitted bids under numbered companies. The Vuntut Gwitchin Limited Partnership submitted the highest bids for the waterfront land, being $621,001 for Lot 23 and $2,617,000 for Lot 40.

[30] The Premier did not file affidavit evidence. The Manager of Lands Branch filed an affidavit but did not refer to the exchange of letters between the Premier and the two First Nations. The Manager of Lands Branch stated that the *Lands Act*, R.S.Y. 2002, c. 122, did not apply but the spirit and intent of the *Lands Act* was adhered to. The *Lands Act* provides that the Minister may dispose of Yukon lands only after receiving an application or by public tender. The Manager of Lands Branch said that "it was determined that Lots 23 and 40 should be sold for not less than the appraised value".

The City of Whitehorse established June 17, 2008, as the date it would announce that its lots, which were nearby the waterfront lands, would be offered for sale by public tender. The Manager of Lands Branch decided that it would be beneficial to coordinate tender deadlines with the City of Whitehorse tender deadlines.

[31] There was no cross-examination on the affidavits filed by each party.

[32] I conclude the following from the facts:

1. The Premier made an unambiguous commitment to “discuss the various options available for these two properties, including the possible sale of these lots, with the Kwanlin Dun First Nation and the Ta’an Kwach’an Council once the 2007 Canada Winter Games had been completed”, subject to the public interest.

2. The Ta’an Kwach’an Council did not specifically notify the Premier that a treaty right was involved or being relied upon prior to this litigation. Indeed, the correspondence suggested only an interest in purchasing the waterfront land.

3. The Premier did notify the Chief of Ta’an Kwach’an Council of the decision to make the lands available for sale by public tender immediately prior to notifying the public.

4. No discussion ever took place about “the various available disposal options” with the Ta’an Kwach’an Council.

THE CONSTITUTIONAL DUTY TO CONSULT

[33] The constitutional duty of government to consult and where possible to accommodate First Nations arose in the context of pre-treaty aboriginal claims in the cases of *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, and *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74, (hereafter "*Haida Nation*" and "*Taku River*"). It is a duty based upon s. 35 of the *Constitution Act, 1982*, which states as follows:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> …
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

[34] In *Haida Nation*, McLachlin C.J. set out the sources of a duty to consult and accommodate in paras. 16 – 19:

> "[16] The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> [17] The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. 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. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with

> the sovereignty of the Crown": *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra*, at para. 31.
>
> [18] The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. …
>
> [19] The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall, supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship ...". (my emphasis)

[35] The Chief Justice puts the duty to consult and accommodate in its historical context as follows, at para. 25:

> “Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.”

[36] In *Haida Nation*, the Supreme Court of Canada clearly stated that the duty to consult and accommodate arises at the outset of the government – First Nation relationship and continues as a process under s. 35(1) of the *Constitution Act*, *1982,* and wrote at paras. 32 and 35:

> "[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*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).
>
> …
>
> [35] But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J."

[37] In the companion *Taku River* judgment, also a pre-treaty case, Chief Justice McLachlin stated in para. 24:

> "… In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)." (my emphasis)

[38] Despite these strong statements from the Court, the Government of Canada continued to assert that the duty to consult and accommodate did not apply to government – First Nation relationships after the signing of treaties.

[39] That issue was laid to rest in the case of *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage),* 2005 SCC 69, ("*Mikisew Cree*").

[40] The *Mikisew Cree* case concerned a treaty made in 1899 and whether a government decision in 2000 to construct a winter road through the Mikisew's reserve constituted a breach of the duty of consultation. The Supreme Court of Canada concluded that the duty to consult and accommodate under s. 35 of the *Constitution Act, 1982,* applied and was breached, resulting in the decision to construct the winter road being returned to the Minister for consultation and consideration of the Mikisew Cree. In so doing, Binnie J. stated at para. 1 of the introduction:

> "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case."

[41] Binnie J. made it clear that the principle of consultation concerns not just the Mikisew "but other First Nations and non-aboriginal government as well" (para. 3).

[42] In responding to the Crown's submission that the treaty represented the accommodation of aboriginal interests, Binnie J. stated at para. 54:

> "This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. 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."

[43] The Supreme Court of Canada went on to say that the 1899 negotiations in *Mikisew Cree* "were the first step in a long journey that is unlikely to end any time soon" and that the Crown's right to take up lands under treaty is subject to the duty to consult and accommodate "before reducing the area over which [Mikisew Cree] may continue to pursue their hunting, trapping and fishing rights" (para. 56).

[44] However, the Mikisew's 1899 treaty gives both procedural and substantive rights. As stated by Binnie J. at para. 57 of *Mikisew Cree*:

> "As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well."

[45] The question of the application of the duty to consult and accommodate has arisen in Yukon in the case of *Little Salmon/Carmacks*. In that case, the Little Salmon/Carmacks First Nation signed a Final Agreement on July 21, 1997. The central issue for the Yukon Court of Appeal was whether the duty to consult and accommodate applies in the context of a modern comprehensive land claims agreement.

[46] In *Little Salmon/Carmacks*, the Yukon Court of Appeal reviewed the *Mikisew Cree*, *Haida Nation* and *Taku River* judgments. Kirkpatrick J.A. stated at paras. 63 and 67:

> "[63] … These cases do not presume the duty to consult arises in all aspects of a Crown-First Nations relationship. Rather, *Haida Nation* and *Taku River Tlingit* assist in articulating the question at hand: what is required in the circumstances of the case at bar to fulfill the honour of the Crown in its dealings with the First Nation and in the implementation of the Final Agreement? (my emphasis)
>
> …
>
> [67] The inescapable conclusion to be drawn from the reasons of Binnie J. is that the honour of the Crown and a duty to consult and accommodate applies in the interpretation of treaties and exists independent of treaties." (my emphasis)

[47] Kirkpatrick J.A. went on to state in para. 90:

> "[90] However, as I have noted, the honour of the Crown and the correlative duty to consult are constitutional duties for the reasons expressed in *Haida Nation*, *Taku River Tlingit*, and *Mikisew*. They exist outside and infuse the treaty and govern Yukon's dealings with Yukon First Nations. In my opinion, the duty to consult does apply to the interpretation and implementation of the Final Agreement and is not precluded from application by the terms of the treaty. In my view, such a finding does not render the Final Agreement uncertain or open to unending renegotiation. It simply means that Yukon must be cognizant of potential adverse impacts on First Nations' treaty rights when Yukon proposes to dispose of Crown lands, and, when treaty rights may be affected, Yukon must seek consultation with First Nations. The degree of consultation will be a function of potential impact. (my emphasis)

[48] I wish to comment on the wording of Binnie J. and Kirkpatrick J. that the honour of the Crown "exists independent of treaties" and "exists outside" treaties. Arguably, if

one were to avoid a “narrowly and technically” based interpretation, it could be argued, as counsel for Ta’an Kwach’an Council does in the case at bar, that the honour of the Crown exists independently of a s. 35 interpretation and is not based upon an existing aboriginal or treaty right. I will return to this below.

[49] The precise issue in *Little Salmon/Carmacks* was whether the Yukon Government, in granting Crown land in the traditional territory of the First Nation where its members held a right of access for the purpose of non-commercial harvesting of fish and wildlife, had the legal duty to consult and accommodate the First Nation.

[50] In concluding that there was a duty to consult and that the Yukon Government had satisfied the duty in the circumstances of that case, the Yukon Court of Appeal stated at paras. 95 and 97:

> “[95] The duty to consult arises whenever Yukon proposes to take action that may have potential adverse effects on treaty rights. The threshold is obviously low because, until a First Nation is informed of the proposed action, it is unable to provide input as to the extent of any impact the proposed action may have on its treaty rights. Yukon will know whether the proposed disposition may potentially affect a First Nation's treaty right, at which point the duty to consult will be triggered. …
>
> …
>
> [97] In my opinion, Yukon's recognition that consultation was "good practice" was coincident with the point at which a duty to consult was triggered in this case. As the Supreme Court of Canada has observed on several occasions, the existence and scope of the duty must be determined on a case by case basis. Here, it is clear that there existed potential infringement of treaty rights, thereby triggering the duty to consult. The more difficult issue is the scope of the duty and whether it was satisfied in this case.” (my emphasis)

[51] The low threshold referred to is the threshold of knowing that government action may have potential adverse effects on treaty rights. The input of the First Nation about any adverse impact on their rights may be important to have before concluding that the duty to consult may be triggered.

ANALYSIS

[52] The question in the case at bar is not whether the duty to consult and accommodate applies to this Final Agreement signed on January 13, 2002. It does. The question is whether the duty is triggered on the facts of this case.

[53] Ta'an Kwach'an Council relies upon three interests in the Final Agreement and one in the Self-Government Agreement that it says are affected by the action of the Yukon Government to put the waterfront land up for sale by public tender. The terms of the Final Agreement alleged to be affected are:

> "9.1.1 Settlement Land Amount;
> The objective of this chapter is to recognize the fundamental importance of land in protecting and enhancing a Yukon First Nation's cultural identity, traditional values and life style, and in providing a foundation for a Yukon First Nation's self-government arrangements.
>
> 9.6.1 Crown and Settlement Land Exchange
> A Yukon First Nation and Government may agree to exchange Crown Land for Settlement Land and may agree that Crown Land exchanged for Settlement Land will be Settlement Land provided that any such agreement shall not affect the cession, release and surrender of any aboriginal claim, right, title or interest in respect of that Crown Land.
>
> 22.1.1 Economic Development Measures
> The objectives of this chapter are as follows:

> 22.1.1.1
> to provide Yukon Indian People with opportunities to participate in the Yukon economy;
>
> 22.1.1.2
> to develop economic self-reliance for Yukon Indian People; and
>
> 22.1.1.3
> to ensure that Yukon Indian People obtain economic benefits that flow directly from the Settlement Agreements."

[54] The Self-Government Agreement contains the following paragraph under the heading Compatible Land Use:

> "25.1.2
> where a proposed land use of Non-Settlement Land may have significant impact on the use of adjacent Settlement Land, the Yukon or the affected municipality, as the case may be, shall Consult with the Ta'an Kwach'an Council for the purpose of resolving an actual or potential incompatibility in land use of the Non-Settlement Land and adjacent Settlement Land"

[55] However, the land in question, parcel C-97FS, even if it were Settlement Land, is not included in the list of Settlement Land subject to the compatible Land Use paragraph.

[56] Counsel for Ta'an Kwach'an Council submits that the First Nation is not able to achieve the objectives included in the Final Agreement because the Yukon Government's decision to sell the waterfront land adversely affects each one of them. He advocates for a broad interpretation of the Final Agreement to achieve true reconciliation. He also submits that Ta'an Kwach'an Council selected C-97FS and, despite its technical status as Crown land because of the lack of consent of Kwanlin

Dun First Nation, they have an interest that will be affected by the sale of the waterfront land.

[57] The Yukon Government submits simply that the duty to consult does not arise because the Ta'an Kwach'an Council does not have any aboriginal or treaty rights that would be affected by the sale. The waterfront land is Non-Settlement Land and the Ta'an Kwach'an Council has surrendered its rights to it. The only treaty "rights" that could be affected are objectives as opposed to rights, and not capable of triggering the duty to consult and accommodate.

[58] I have concluded that although the threshold to trigger a duty to consult and accommodate is a low one, there is no duty to consult in these factual circumstances.

[59] Firstly, these facts are quite distinct from those in *Little Salmon/Carmacks*. In that case, the land being disposed was Crown land in the traditional territory of the First Nation and subject to the treaty right to harvest fish and wildlife. In the Ta'an Kwach'an facts, the waterfront land is not Crown land as defined in the Final Agreement which provides:

> ""Crown Land" means 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, but does not include Settlement Land.
>
> "Settlement Land" means Category A Settlement Land, Category B Settlement Land or Fee Simple Settlement Land.
>
> "Non-Settlement Land" means all land and water in the Yukon other than Settlement Land and includes Mines and Minerals in Category B Settlement Land and Fee Simple Settlement Land, other than Specified Substances."

[60] The waterfront land is legally held by the Commissioner of Yukon for the Yukon Government and not by Her Majesty in Right of Canada. Before the signing of the Final Agreement, it was held by a third party. It cannot be brought into the Final Agreement as it is not Crown land by the terms of the Final Agreement. Ta'an Kwach'an Council has specifically surrendered its aboriginal claims, rights, title and interests, in and to Non-Settlement Land, which includes the waterfront land. This somewhat technical analysis does not resolve the issue as it does not address the question of whether there are nevertheless, treaty rights in the Final Agreement adversely impacted.

[61] I am of the view that objectives in the Final Agreement cannot be elevated to the status of treaty rights. As a matter of policy, if the court were to interpret all of the objectives or interests referred to in the Final Agreement as treaty rights, the result would be that every action of the Yukon Government in the traditional territory of a First Nation would trigger the duty to consult. Neither *Mikisew Cree* nor *Little Salmon/Carmacks* indicate that such an interpretation can be made. The treaty right must be sufficiently precise in the wording of the Final Agreement so as to be identifiable by the Yukon Government at the outset.

[62] The fact that the parcel C-97FS may be impacted by the sale of the waterfront lots does not raise a treaty right. It is not Settlement Land and its lack of status as Settlement Land is not due to any act or omission of the Yukon Government. Further, even if it were Settlement Land, it is not included in the list of Settlement Land subject to the right to consultation under the Compatible Land Use duty to consult.

[63] In any event, I do not find that the commercial nature of the sale of the waterfront lots, at least from the Yukon Government's perspective, is the determining feature or

factor in this case. The focus on whether a constitutional duty to consult and accommodate arises must focus on the Final Agreement or the Self Government Agreement. In other words, the critical question is not to determine whether the First Nation surrendered its aboriginal title to the waterfront land but whether the action of the Yukon Government could have a potential adverse impact on the First Nation's treaty rights.

[64] In my view, there is no potential adverse impact on a treaty right in the facts of this case that would trigger the duty to consult.

THE HONOUR OF THE CROWN

[65] The honour of the Crown is "a core precept" or constitutional principle that the Supreme Court of Canada applies in its interpretation of s. 35 of the *Constitution Act, 1982*. It is worth repeating some of the hallmarks of this principle that have already been stated:

1. It is not a mere incantation, but rather a core precept that finds its application in concrete practices (*Haida Nation*, para. 16).
2. The honour of the Crown is always at stake in its [the Crown's] dealings with Aboriginal peoples (*Haida Nation*, para. 16).
3. 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 to achieve the reconciliation of the sovereignty of the Crown with the pre-existence of aboriginal societies. (*Haida Nation*, para. 17).

4. The honour of the Crown infuses the process of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity avoiding even the appearance of “sharp dealing” (*Haida Nation*, para. 19).

[66] In *Mikisew Cree*, Binnie J. gave a further explanation of the honour of the Crown at para. 51:

> “The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation of 1763*, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.” (my emphasis)

[67] Counsel for Ta’an Kwach’an Council submits that all of these remarks suggest that the honour of the Crown has an independent or free-standing status through which the words of the Premier in his letters must be filtered. The result sought by Ta’an Kwach’an Council is that there be, at the very least, a declaration that the honour of the Crown has been breached by the Premier’s failure to meet with them after giving the

assurance that he would and that a substantive remedy be granted to set aside or suspend the public tender until the contemplated discussion of the various options takes place.

[68] The Yukon Government responds that the contemplated transaction was commercial in nature and that the commitment was a “political” one to which a legal obligation does not attach. It submits that the triggering event is the potential adverse impact on an aboriginal claim or treaty which it says does not arise on these facts. Counsel for the Yukon Government went as far as saying that this situation was analogous to a verbal promise between individuals with respect to land that could not be legally enforced.

ANALYSIS

[69] There can be no doubt that despite the broad wording used to described the honour of the Crown, it has always been applied when there is either aboriginal claims pre-treaty or treaty rights post-treaty at issue. In this sense, the honour of the Crown is a principle that is applied to ensure that the process of reconciling those aboriginal claims or treaty rights between First Nations and government is honoured. It has not been applied as an independent or free-standing cause of action between government and First Nations. The remedy sought by the Ta’an Kwach’an Council, raises the honour of the Crown to the status of a constitutional duty whether or not there is a potential adverse impact on an aboriginal claim or treaty right. In my view, the honour of the Crown is a principle that does not apply on these facts. However, I wish to make it clear that the analogy of a verbal promise between two individuals regarding a piece of property is not apt. Had there been treaty rights engaged on these facts, it would result

in a remedy based upon a breach of the honour of the Crown. The honour of the Crown is engaged whenever aboriginal claims or treaty rights may be adversely affected.

[70] I do not subscribe to the view that the honour of the Crown disappears simply because the post-event analysis determines that a treaty right is not at issue. Rather, in my view, the honour of the Crown is a principle that could in some circumstances apply to the determination of whether a treaty right is at stake. For example, where there is a potential adverse impact on a treaty right, it may trigger an obligation based on the honour of the Crown to at least discuss the matter before action is taken that destroys the opportunity to assert the right. In other words, it would apply to a government act that foreclosed consideration of a potential adverse impact on a treaty right that leaves the First Nation with no alternative but to bring a court action that challenges newly-created third party rights. In that circumstance, based upon the possible existence of a treaty right, the Crown is honourably bound to consult.

[71] That, however, is not the factual situation that presents in this case. In my view, prior to the filing of this court action, there was no mention of a treaty right but rather a proposed discussion to purchase the waterfront lots, by implication, on a commercial basis. There is absolutely no doubt that First Nation government interests or objectives were involved, whether as a cultural development or on a purely commercial basis. But that interest or objective does not trigger the application of the honour of the Crown unless there is a clear treaty right at issue.

[72] This does not imply that a First Nation must always, when dealing with non-aboriginal government, allege that an adverse impact on a treaty right is involved. The Yukon Government has actual knowledge of its treaty obligations and it cannot take an

action that adversely impacts treaty rights without consulting and accommodating the First Nation.

[73] What is distressing in this case is that a commitment was made, whether moral or political, to discuss the various options available for the waterfront lots. That commitment, which could have so easily been satisfied, was not. Be that as it may, it is not a breach of a duty to consult or a breach of the honour of the Crown that would give rise to a legal remedy for the Ta'an Kwach'an Council.

[74] I have considered the remedy of a declaration which does not involve a substantive remedy. As I have indicated there may be circumstances where a declaration of breach of the honour of the Crown may be appropriate. But this is not such a case for the reasons stated above.

[75] I note that the First Nation has requested substantive remedies which would involve the suspension or setting aside of the tender process. I dismiss that claim because there is no legal or treaty obligation that arises.

DECISION

[76] The petition of the Ta'an Kwach'an Council is dismissed. The interlocutory injunction suspending the tender process is terminated.

[77] Counsel may speak to costs, if necessary.

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Veale J.