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## **Duty to Consult, Honour of the Crown, Project Assessment, and Land-Use Planning in a Modern Treaty Context: More Clarity from the Supreme Court of the Yukon**

**By:** David Wright

**Matter Commented On:** *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)*, [2023 YKSC 5 \(CanLII\)](#) (*Metallic Minerals*)

The duty to consult and accommodate is now a mature area of jurisprudence, including case law that is “replete with indicia” (*Coldwater First Nation v Canada (Attorney General)*, [2020 FCA 34 \(CanLII\)](#) at para 41) of what constitutes meaningful consultation. One area that continues to evolve, however, is Crown consultation obligations and the honour of the Crown in modern treaty contexts. The landmark Supreme Court of Canada cases of *Beckman v Little Salmon/Carmacks First Nation* ([2010 SCC 53 \(CanLII\)](#)) and *First Nation of Na-Cho Nyäk Dun v Yukon* ([2017 SCC 58 \(CanLII\)](#)), both originating from lower courts in the Yukon, set out the contours of this legal landscape, but some uncertainty remains. In *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)*, [2023 YKSC 5 \(CanLII\)](#) (*Metallic Minerals*), the Supreme Court of Yukon (YKSC) provides helpful judicial interpretation and observations in this area. In particular, Chief Justice Suzanne M. Duncan clarifies the law with respect to the Honour of the Crown and the duty to consult and accommodate in context of project-level assessment and land-use planning in the Yukon. This short post provides an overview of the case, as well as brief commentary regarding key points.

### **Background**

This case was a judicial review of the Yukon Government (YG)’s February 2021 approval of a mineral exploration project in the Tse Täge (Beaver River) watershed area, located in the traditional territory of the First Nation of Na-Cho Nyäk Dun (NND). The proposed project includes prospecting, geological mapping and rock sampling, soil sampling, ground and airborne geophysics, drone aerial photography, heli-portable excavation, trenching, drilling, bedrock sampling, and construction of related roads, cutlines, trails and other basic infrastructure (at para 26). In the lead up to that approval, YG engaged in consultation with NND, primarily as part of the project-specific review process under the Yukon’s project assessment regime set out in the *Yukon Environmental and Socio-economic Assessment Act*, [SC 2003, c 7](#) (YESAA), which is administered by the Yukon Environmental and Socio-economic Assessment Board (YESAB). There was considerable back and forth between YG and NND in the assessment process; however, as discussed below, CJ Duncan ultimately found that YG did not fulfill its consultation and accommodation obligations.

Before turning to more specifics of this case, it is important to briefly set out the basics of the project-assessment and land-use planning regime in the Yukon. As summarized in the decision:

YESAA, the socio-economic and environmental assessment legislation applicable to development projects proposed in the Yukon, was created as a result of Chapter 12 in the Final Agreements...

Evaluations of a project are conducted most often by a designated office but in certain circumstances may be done by the executive committee or a panel of the YESAB, the arms-length body responsible for carrying out the assessment under the YESAA and its regulations. In this case the Project evaluation was conducted by the designated office in Mayo (at paras 28-29).

Near the end of the process, the designated office provides a recommendation to a “decision body” under YESAA (in this case, YG) that recommends whether the project be rejected or approved and, if approved, under which terms and conditions (at para 31). The decision body must then accept, reject, or vary that recommendation. As is common practice for governments across Canada, YG relies on the YESAA process to fulfill its consultation obligations with respect to Yukon First Nations (YFNs). In the present case, YESAB issued its evaluation and recommendation report on July 24, 2020, recommending that the project be allowed to proceed, subject to seven terms and conditions designed to mitigate adverse effects (at para 37). After further consultation with NND, YG issued its final decision document on February 19, 2021, which approved the project but varied the YESAB recommendation to include a total of 13 terms and conditions.

In addition to the project-specific assessment regime, YG also has a comprehensive land-use planning system, which includes the NND traditional territory at issue in this case. This land-use planning regime is a requirement of the [Yukon Umbrella Final Agreement](#), which is the overarching framework agreement implemented through the eleven constitutionally protected lands claims agreements that have been concluded by individual First Nations in the territory. In the NND context, CJ Duncan explained:

The Final Agreement (also referred to in this decision as the “Treaty”) includes several chapters addressing how the parties manage land in the traditional territory. One of them is Chapter 11, describing the land use planning process of the use of the land, water and other renewable and non-renewable resources in the traditional territory (s.11.5.1) (at para 14)

In the NND context, the land use planning provisions in Chapter 11 have not yet been implemented (at para 15); no final land-use plan is in place despite NND requests for land use planning since the 1990s (at para 19). In the interim and as an alternative to land use planning for the entire traditional territory, YG and NND entered into an Intergovernmental Agreement to develop a smaller scale, sub-regional land use plan for the Tse Tase watershed, referred to as the Beaver River Land Use Plan (BRLUP) (at para 19). This interim approach was prompted by a road in the same area proposed by a different company, ATAC, which was subsequently rejected by YG in November 2020 based in part on concerns of adverse impacts to the exercise of section 35 rights. The sub-regional planning initiative “was outside of the process described in Chapter 11 of the Treaty” (at para 19). The Intergovernmental Agreement stipulated a prohibition “on any regulatory action approving the construction of the proposed road until the completion of the BRLUP” and a prohibition on the “entry in the area of the proposed road for the purpose of locating, prospecting

or mining, until the BRLUP is approved by the parties” (at para 21). At the time of the judicial review, the BRLUP was still under negotiation (at para 23).

Following the YG final decision, it issued a letter directly to NND several days later acknowledging NND’s outstanding significant concerns, including potential impacts to NND treaty rights and NND’s position (expressed many times previously during consultations) that the project should not be allowed to proceed until after the BRLUP was completed. That YG letter also reiterated the government’s previously expressed view that the Final Agreement did not contemplate the cessation of development activities pending the completion of a land use plan, and that the process for addressing concerns in the interim was the YESAA process (at para 55). NND responded by reiterating their objections, including their view that the consultation process had been “undermined and not fulfilled by the Yukon government’s decision not to engage in direct in-person consultation” with NND citizens (at para 58).

## **Issues**

Chief Justice Duncan set out several issues. The following subset are the focus of this post:

- What is the role and effect of the Treaty in this case? (at para 61)
- Was the honour of the Crown and the duties flowing from it engaged by the decision in this case? (at para 53)
- Should the decision be set aside because it was unlawful on the basis that it breach the honour of the Crown and the duties flowing from it, including the duty to consult and accommodate, the duty to diligently implement the promises of the Treaty including the promise of land use planning in Chapter 11, the duty to act in a way that accomplishes the intended purpose of the Treaty, including with respect to land use planning under Chapter 11, and the duty to keep the promise made in the Intergovernmental Agreement to develop the BRLUP? (at para 64)

Ultimately, CJ Duncan decided to quash and set aside the YG decision on the basis that: YG breached the honour of the Crown by failing to consult properly; YG breached the honour of the Crown by failing to act in a way that accomplished the intended purpose of the Final Agreement; YG did not engage with the submissions and evidence provided by NND and did not comply with the legal constraints on the decision; and, YG failed to consider the ongoing land use planning process which constituted a breach of the duty of good faith in the performance of the Intergovernmental Agreement (at para 10).

There was, however, no finding or declaration that YG failed to diligently implement the promises of the Treaty, including the land use planning process set out in Chapter 11 of the Final Agreement. As discussed below, this leaves open the prospect that projects may be approved by YG prior to the completion of a land-use plan in any particular land-use planning region in the Yukon. This is significant because to date only two land-use plans have been finalized.

## **Role and Effect of the Treaty**

YG and NND had widely divergent views regarding how their dispute related to the land use planning regime set out in the final agreement. In NND’s view, YG’s approval of the project before

the completion of a targeted land-use plan would undermine and impact NND treaty rights (at para 76). YG took the view that Chapter 11 of the Final Agreement did not create treaty rights, that Chapter 11 was not relevant to or engaged by the YG decision, and that Chapter 11 “sets out a voluntary and collaborative process the parties may choose to follow for land use planning” (at para 77).

CJ Duncan found that “the purposes and principles emanating from Chapter 11 and the Treaty as a whole must apply” (at para 87), and that “[t]he Yukon Government’s failure in this case to recognize the role of the Treaty in informing their decision gave rise to the breaches of the honour of the Crown” (at para 88). Put succinctly, CJ Duncan found that despite the Intergovernmental Agreement for the BLRUP being outside the Chapter 11 LUP process, the Treaty was indeed relevant and engaged. Further, she rejected YG’s view that Chapter 11 does not create treaty rights. It does. As set out in paragraph 10 of the YKCA decision in *NND v Yukon* ([2015 YKCA 18 \(CanLII\)](#)), Chapter 11 sets out a “treaty right to participat[e] in the management of public resources” (at para 84), which builds on the characterization in *Beckman* (at para 36) of Chapter 11 providing the “rights [of Yukon First Nations] to representation and involvement in land use planning” (at para 84).

YG was far off the mark with its submissions on this point, and *Metallic Minerals* can be viewed as contributing clarity and consistency on the point that Chapter 11 does indeed include treaty rights.

## Honour of the Crown

Duncan CJ provides a helpful, accessible overview of the doctrine of the honour of the Crown in paras 125 – 135 before turning to this specific modern treaty context and concluding that the “honour of the Crown is engaged in this case” and that “the honour of the Crown applies to the duty to consult in this context” (at para 136). She also states, consistent with a key holding from *Beckman*, that “the duty to consult exists independently and alongside of any modern treaty” (at para 136). CJ Duncan then makes the link between the non-treaty BRLUP and Chapter 11:

Although it is not being negotiated under the Chapter 11 process, the BRLUP is a way of fulfilling one of the purposes of the Treaty [...] The implementation of the Intergovernmental Agreement is Crown conduct that helps to fulfill the Treaty purpose of meaningful participation [in] management of land and resources in the traditional territory (at para 138).

As such, *Metallic Minerals* indicates that even where an agreement between a First Nation and the government is outside of the Treaty, the Treaty may remain relevant and engaged for the purposes of interpreting the duties and obligations of the government, including with respect to what the honour of the Crown and duty to consult require. Key to CJ Duncan’s reasoning, however, was the fact that the BRLUP and associated Intergovernmental Agreement were focused on achieving the purposes of Chapter 11, albeit in a sub-region. What was less clear and must remain for another day, is whether an intergovernmental agreement and non-treaty process that is less clearly aligned with the treaty purposes would also attract application of the honour of the Crown and would also engage the Treaty. Certainly recent case law is moving in this direction, as seen for example in the ABCA case that considered the “Prentice Promise” and the honour of the Crown in relation to

Alberta Energy Regulator decision-making about oil sands projects, as discussed by my colleague Nigel Banks in [this post](#) about *Fort McKay First Nation v Propser Petroleum Ltd*, [2020 ABCA 163 \(CanLII\)](#).

## Duty to Consult

As noted above, a significant amount of Crown consultation took place in this case. Both parties agreed that the duty was triggered but disagreed about the extent and content of the duty. CJ Duncan ultimately concluded that the consultation was at the higher end of the spectrum, and that YG's consultation was "inadequate and did not meet the duty owed as a result of the honour of the Crown" (at para 141). That conclusion flowed from the finding that the consultation should have included discussion about the land-use planning process, including that taking place under the Intergovernmental Agreement (at paras 149, 151). Failure to integrate that aspect into the consultation resulted in an adverse impact on NND's "Treaty right to participate meaningfully in land and resource management of their traditional territory" (at para 149). Further, YG only "considered the project in isolation" and failed to "situate the Project [...] in the context of development pressures" (at para 151) in the BRLUP and broader traditional territory areas, which meant that YG "inappropriately minimized its potential impacts on Treaty rights" (at para 151). Though the link is not explicitly made in *Metallic Minerals*, this decision can be viewed as part of a growing body of case law (see eg *Yahey v British Columbia*, [2021 BCSC 1287 \(CanLII\)](#) as commented on by my colleague Robert Hamilton [here](#)) pertaining to the extent and content of the duty to consult in relation to landscape-scale cumulative effects and associated government decision-making.

Beyond the extent and content of the duty, *Metallic Minerals* also deals with the question of with whom the Crown must consult. NND had requested consultation at the community level, not just with NND officials. YG unilaterally decided not to do so (at para 156). Citing *Cold Lake (Cold Lake First Nations v Alberta (Tourism, Parks and Recreation))*, [2013 ABCA 443 \(CanLII\)](#) and concerns that consulting directly with the community was not feasible, YG had argued that they were not required to do so (at paras 154, 156). On this point, CJ Duncan concluded that, in this context, where consultation was at the higher end of the spectrum, the government must seriously consider the First Nation's request for government to hear directly from the rights-holder as part of understanding the First Nation's concerns more fully, and that if the government refuses then they must provide a more meaningful explanation than such consultation being "not feasible" (at paras 157, 159). Implicit in this conclusion is that the Crown need not necessarily directly consult with community members, but any request for such by a First Nation must be given serious consideration and any refusal of such must be consistent with the broader extent and content of the duty, which would logically include some kind of explanation beyond "not feasible".

In another notable duty to consult dimension, *Metallic Minerals* provides helpful clarity with respect to the link between the project-specific YESAA process and the Crown's consultation obligations. It is settled law that the Crown may rely on a regulatory or assessment agency to fulfill the duty to consult (at para 182, citing *Clyde River*). However, when doing so, the Crown must make it clear to the First Nation that it is so relying (183 citing *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, [2017 SCC 40 \(CanLII\)](#) (*Clyde River*)). As CJ Duncan explains, "[t]his is to ensure the First Nation can effectively participate in the consultation" (at para 183). Unfortunately for YG in this case, they had not communicated to NND that they intended to rely on YESAB



partially or fully to fulfill their constitutional duty to consult (at paras 181, 188). What's more, there are limits on YESAB's authority that constrain the extent to which the Crown may rely on the YESAA process (at para 187). For example, CJ Duncan found that there was an "inability of the YESAB assessment process to consider cumulative effects the way a land use plan can" and that this "restricts their ability to determine the potential impact of a proposed project" (at para 186). Further, YESAB makes factual not legal determinations and, as such, does not make findings about impacts on First Nation rights (at para 187). This led to the conclusion that, while "it is appropriate for the Yukon government to obtain information from the YESAB process to inform their consultation process, the YESAA and the policies of YESAB do not allow the Crown to delegate to YESAB its duty to consult" in this case (at para 189). This too can be seen as helpful clarity in the Yukon context that is consistent with recent case law indicating that the Crown may only rely on agencies for fulfilling consultation obligations to the extent of such agencies' legislative authority (see e.g. *Clyde River and Raincoast Conservation Foundation v Canada (Attorney General)*, [2019 FCA 224 \(CanLII\)](#)).

### **Duty to Act in a Way that Accomplishes the Purpose of the Treaty**

NND also sought a declaration that YG breached its duty to act in a way that accomplishes the intended purpose of the Treaty (at para 4) and that this was caused by YG's failure to recognize Chapter 11 Treaty rights and the principles in that Chapter, and YG's failure to engage with NND in relation to the ongoing sub-regional land use planning process contemplated in the Intergovernmental Agreement (at para 215). This declaration was granted. In doing so, CJ Duncan found that YG "had no regard to the ongoing negotiations about the land, the intentions for its use and development, or the status of the process" and that "no attempt was made by the decision maker to find out anything about the ongoing land use planning process" (at para 231). This undermined the land use planning process, given that a land use plan "becomes meaningless if development is allowed to continue without any consideration for the land use planning process, because it will result in a reduction of the amount of undeveloped land available by the time the plan is negotiated and implemented" (at para 232). However, CJ Duncan went on to clarify that "[i]t would not be appropriate for this Court to in effect impose a moratorium on development in the Tse Tse area" (at para 233); rather, the balancing of interests is "to be worked out by the parties in negotiation through the available mechanisms" (at para 233).

At a broader level, CJ Duncan pointedly notes the problematic nature of YG's approach to this matter, i.e. "an erroneous and ungenerous interpretation of the Treaty" (at para 225). In a helpful nod to the broader struggles of modern treaty implementation, she explains that "[t]he Supreme Court of Canada warned that this approach to interpretation could result in a failure to implement the treaty and thus fail to achieve reconciliation" (at para 225).

It is worth noting that this high-level statement in *Metallic Minerals* comes close in time with the federal government's release of the new [Modern Treaty Implementation Policy](#), a core focus of which is setting parameters and conditions to move away from the long-standing tendency of the government to interpret modern treaties in narrow, ungenerous ways (see a forthcoming post focused on this Policy).

### **Concluding Observations**

*Metallic Minerals* is a welcome development in the small but growing body of case law dealing with the implementation of modern treaties. It provides helpful clarity and contour at the confluence of land-use planning, project-level assessment, the honour of the Crown, and the duty to consult. To a significant extent, territorial governments are typically forced to extrapolate from case law originating in non-treaty or historical treaty contexts to surmise Crown obligations in relation to project-level assessment, land use planning, and modern treaty implementation. Going forward, *Metallic Minerals* will help territorial governments, Indigenous communities, and Indigenous governments see the legal landscape more clearly and engage accordingly. This is particularly important in the contemporary Yukon context where [pressure for resource extraction is intensifying](#), particularly given the increasing demand for critical minerals required to achieve ambitious decarbonization and electrification objectives.

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