Federal Court  Cour fédérale

Date: 20120210

Docket: T-1946-10

Citation: 2012 FC 204

Ottawa, Ontario, February 10, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SAMBAA K'E DENE BAND and
NAHANNI BUTTE DENE BAND

Applicants

and

JOHN DUNCAN, MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, GOVERNMENT OF THE NORTHWEST TERRITORIES, and ACHO DENE KOE FIRST NATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Sambaa K'e Dene Band ["SKDB"], the Nahanni Butte Dene Band ["NBDB"] and the Acho Dene Koe First Nation ["ADKFN"] have overlapping claims to land in the south-western corner of the Northwest Territories ["NWT"].

[2] The SKDB and NBDB seek judicial review of a decision of the Minister of Indian Affairs and Northern Development [“Canada” or “the Minister”] postponing consultations with them until such time as an agreement in principle is reached with the ADKFN in relation to the ongoing comprehensive land claims negotiations between Canada and the ADKFN. The SKDB and the NBDB have also named the Government of the Northwest Territories [“GNWT”] and the ADKFN as respondents in this application.

[3] The SKDB and NBDB say that by delaying consultation with them until after an agreement in principle is entered into between Canada and the ADKFN, Canada has failed to comply with its legal and constitutional duty to consult with and properly accommodate the SKDB and the NBDB

[4] For the reasons that follow, I have concluded that Canada had a duty to consult with the SKDB and the NBDB in a timely and meaningful fashion, and that it has breached that duty. As a consequence, the application for judicial review will be granted.

The Relationship between the SKDB, NBDB and ADKFN

[5] The members of the SKDB, NBDB and ADKFN are Aboriginal peoples within the meaning of section 35(1) of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, and all are parties to Treaty 11, which was signed on June 27, 1921.

[6] Treaty 11 purported to surrender vast tracts of Aboriginal lands to the Crown. These lands are described generally in the Report of the Commissioner accompanying the Treaty as being “north of the 60th parallel, along the Mackenzie river and the Arctic ocean”.

[7] In exchange for this surrender, the Crown made a number of commitments to the Aboriginal peoples. In particular, the Crown undertook to set aside a specific quantum of reserve lands. According to the Report of the Commissioner, when the Aboriginal peoples expressed the concern that they would be confined to the reserves, they were assured that the reserve lands were to be "of their own choosing, for their own use", and that they would be free to come and go at will. However, the promised reserves were never established.

[8] Treaty 11 further provided for the preservation of the right of the Aboriginal peoples to trap, hunt and fish within the Treaty boundaries. The parties agree that the SKDB and NBDB continue to enjoy these Treaty rights. There is, however, a disagreement between the First Nations and Canada as to whether Treaty 11 extinguished Aboriginal title to the lands in question, and as to the effect of the Treaty on other Aboriginal rights such as governance.

[9] The SKDB, NBDB and ADKFN all continue to assert Aboriginal title over their respective traditional lands, whereas Canada's position is that Treaty 11 extinguished the First Nations' Aboriginal title.

[10] The SKDB, NBDB and ADKFN each have traditional lands in the south-western corner of the NWT, a region known as "the Dehcho" (previously known as the "Deh Cho"). However, two-thirds of the lands claimed by the ADKFN as their traditional lands are located in the Yukon and British Columbia, whereas the majority of the lands claimed by the SKDB and the NBDB are located in the NWT.

[11] There is also a dispute between the ADKFN on the one hand, and the SKDB and the NBDB on the other, as to the boundaries of each of their traditional lands, and whether each First Nation enjoyed exclusive use of these lands.

The Comprehensive Land Claims Process

[12] Once Canada agrees to negotiate a comprehensive land claim asserted by an Aboriginal people, the process begins with the parties signing a "framework agreement" which delineates the process to be followed in the negotiations.

[13] Assuming that the initial negotiations reveal sufficient common ground, the parties will then sign an "agreement in principle" outlining the essential points of agreement. An agreement in principle is not legally binding, and terms in an agreement in principle can be the subject of further negotiation.

[14] Once agreement is reached on all of the outstanding issues, a final agreement is prepared, which may include agreements with respect to matters such as land ownership, financial benefits, governance issues and land overlaps. Should the final agreement be ratified by all of the parties, it becomes constitutionally protected, and is recognized as a Treaty under section 35 of the *Constitution Act, 1982*.

The Dehcho Process

[15] The Dehcho First Nations filed a comprehensive land claim which was accepted for negotiation by Canada in 1998. The SKDB, NBDB and ADKFN were all part of this process.

[16] In or about 1999, Canada entered into comprehensive land claims settlement negotiations with the Dehcho Tribal Council, in accordance with the provisions of the "Deh Cho Framework Agreement". These negotiations are ongoing, and are known as the "Dehcho Process". The Dehcho Process relates only to lands in the NWT.

[17] Because the ADKFN claimed that two-thirds of its traditional territory was outside of the NWT, it had originally requested that Canada establish a separate comprehensive land claims process to cover lands claimed by it in the NWT, Yukon and British Columbia. In a March, 1999, response, Canada advised the ADKFN that it was not willing to undertake community-by-community negotiations. Consequently, while the ADKFN initially participated in the Dehcho Process, it did, however, reiterate its concerns from time to time with respect to the inability of the Dehcho Process to resolve all of its outstanding issues.

[18] Amongst other things, the Deh Cho Framework Agreement provided that the Dehcho Process negotiations would not be confidential. It also identified the reaching of an agreement with respect to the use, management and conservation of land, water and other resources as one of its objectives.

[19] The Deh Cho Framework Agreement further committed the parties to "explore options and identify processes for addressing transboundary issues in respect of the Dehcho territory located outside the Northwest Territories".

[20] The Dehcho Process is coordinated by the Dehcho First Nations ["DFN"], through the Dehcho Tribal Council. The SKDB, NBDB and ADKFN are all part of the Dehcho Tribal Council, along with other First Nations in the Dehcho region. However, each retained its status as an independent First Nation, with its own Aboriginal and Treaty rights within its respective traditional use area.

[21] The Dehcho Process negotiations are ongoing, and no agreement in principle has as yet been reached.

[22] In addition to the longstanding boundary disputes between the SKDB and the ADKFN, and between the ADKFN and the NBDB, there have also been disagreements between the three First Nations with respect to oil and gas development in the region. The ADKFN has been more interested in pursuing the development of oil and gas resources than have the SKDB and the NBDB. Indeed, the SKDB is on record as having stated that it would prefer to wait until the outstanding land claims have been resolved before pursuing the development of oil and gas reserves.

[23] While the SKDB and the NBDB have sought to have portions of the lands subject to overlapping claims designated as Protected Areas within the Dehcho process, ADKFN has sought to open up this land for oil and gas exploration.

[24] A proposal by Canada in 1999 to mediate the boundary disputes between the First Nations did not proceed. Two years later, as part of the Dehcho Process, the Dehcho First Nations passed a motion requiring that there be boundary agreements between the SKDB, the NBDB and the ADKFN.

[25] While the land claims themselves remain outstanding, a number of agreements have been reached through the Dehcho Process. These include an “Interim Measures Agreement” entered into in 2001 between the Dehcho First Nations, Canada and the GNWT. Amongst other things, this Agreement clarified the role of the Dehcho First Nations in resource management decisions while negotiations are in progress. The Agreement also provides guidance to stakeholders until a final agreement is in place.

[26] The Dehcho Land Use Planning Committee [“DCLUPC”] was also established in 2001. Canada is a member of this Committee, which regulates conservation, development and utilization of the land, waters and other resources in the region.

[27] The DCLUPC developed maps for land use planning purposes, which attempted to show the boundaries between the traditional lands of the SKDB, the NBDB and the ADKFN. Correspondence was exchanged during this process, in which the SKDB and the NBDB identified each of their respective primary and traditional land use areas.

[28] An Interim Resource Development Agreement was entered into in October of 2003, which was designed to encourage oil and gas development in the Dehcho region in a way that allowed the Dehcho First Nations to benefit directly from resource development in advance of a final agreement.

[29] In 2005 and 2006, the SKDB, NBDB and ADKFN were in correspondence with the DCLUPC with respect to the boundaries between the lands of the SKDB, the ADKFN and the NBDB, for land use zoning purposes. In addition to recording the areas of disagreement between the First Nations, the correspondence from the SKDB and the NBDB also identified primary land use areas which fell squarely within the Settlement Area now being asserted by the ADKFN.

[30] In 2006, some of the primary land use areas claimed by the SKDB and the NBDB were accepted by the DCLUPC. This was reflected in the final draft Dehcho Land Use Planning zoning map, which was subsequently approved by the Dehcho First Nations.

The ADKFN Land Claims Process

[31] While Canada was initially unwilling to undertake community-by-community negotiations in relation to the land claims of individual First Nations within the Northwest Territories, this position appears to have changed sometime in 2007 or 2008, when Canada and the GNWT agreed to enter into community-based land claims discussions directly with the ADKFN. As was noted earlier, the ADKFN had felt for some time that its interests were not being adequately represented through the Dehcho Process, in part because of its extensive claims to lands outside the NWT.

[32] On July 14, 2008, the ADKFN signed its own framework agreement with Canada and the GNWT [“the ADKFN Framework Agreement”] in an effort to achieve its own comprehensive land claims agreement. The recitals to the ADKFN Framework Agreement provide that the parties to the Agreement intend to negotiate a comprehensive land claim to define and provide clarity to certain asserted lands, resources and governance rights of the ADKFN *within the NWT*.

[33] The ADKFN Framework Agreement outlines the objectives and timetables for the parties’ negotiations, the subject matters of those negotiations, and the approvals process for an eventual agreement in principle and final agreement.

[34] One of the issues identified in the ADKFN Framework Agreement as a “matter for negotiation” is the issue of “settlement area, land selection and tenure of Settlement Lands”. Section 12 of the ADKFN Framework Agreement provides that “[p]rior to concluding the Phase I Final Agreement, the Parties will finalize the Settlement Area taking into account any agreement concluded to resolve any overlap issues [in the NWT] between the Acho Dene Koe First Nation and any Aboriginal group”.

[35] Section 4.3 of the ADKFN Framework Agreement further provides that “Canada and the GNWT will offer and the Acho Dene Koe First Nation will accept a settlement offer based on their proportionate share of the offer made to the Dehcho First Nations through the Dehcho Process”.

[36] The ADKFN Framework Agreement relates to lands described as “the ADKFN Asserted Territory” which are identified on a map appended to the Agreement. Although lands in the Yukon

and British Columbia are identified as ADKFN traditional territory on this map, the ADKFN Framework Agreement makes it clear that it is only the lands claimed by the ADKFN in the NWT that are the subject of the negotiations under the Agreement. These lands include areas claimed as primary use areas by the SKDB and the NBDB – lands which had been accepted as their primary use areas by the DCLUPC (of which Canada was a member) in 2006.

[37] Section 8 of the ADKFN Framework Agreement stipulates that negotiations under the Agreement are to be confidential. The ADKFN has, however, released the contents of the agreement to the public.

[38] Canada did not notify or consult with the SKDB and the NBDB prior to entering into the ADKFN Framework Agreement.

The Overlap Negotiations

[39] Canada has long been aware of the overlapping claims to land in the Dehcho region of the NWT. Canada's policy has been that overlap issues should be resolved internally between the affected First Nations, wherever possible.

[40] To this end, Canada has encouraged the Dehcho First Nations, including the SKDB, NBDB and ADKFN, to resolve their boundary and overlap issues between themselves. The SKDB and the NBDB agree that this would be the most desirable way of resolving overlap issues.

[41] In an effort to assist the First Nations in resolving their overlap issues, Canada provided funding for negotiations between the three First Nations. Between 2008 and 2011, the SKDB and the NBDB were provided with $435,000 by Canada to support them in resolving the boundary issues. This money was used by the SKDB and NBDB to conduct research, to compile relevant documents, to hold community meetings, and to prepare for and attend meetings with the ADKFN.

[42] In July of 2008, Canada appointed Mr. Bob Overvold to act as the Minister's Special Representative, to explore options for resolving overlapping interests in the Dehcho region generally. Although part of Mr. Overvold's mandate required him to engage in discussions with Aboriginal groups regarding their interests in overlap areas, he had no mandate to engage in consultation on issues arising from the land claims negotiations processes.

[43] An information sheet provided to the SKDB and NBDB by Mr. Overvold outlines Canada's approach to First Nation overlap issues, stating that overlap issues "should be dealt with early and throughout the negotiation process".

[44] Mr. Overvold was invited to one meeting by the SKDB and NBDB. He also assembled information regarding the overlap concerns of the various First Nations and prepared a report and recommendations for the Minister. Amongst other things, his report questioned Canada's current policy regarding consultation in relation to overlap issues, suggesting that Canada may want to "look for opportunities to begin overlap discussions, if not necessarily consultation, earlier".

[45] A number of meetings were held between the three First Nations, but by June of 2010, the negotiations had broken down. Particular points of contention arose from the groups' divergent views as to the issues and different visions for the process to follow in resolving them.

[46] By way of example, the ADKFN wanted a peace treaty, whereas the SKDB and the NBDB wanted an overlap and boundary agreement. The SKDB and the NBDB insisted on a meeting with elders and harvesters in order to establish historical and contemporary land use, while the ADKFN objected to such an approach. The ADKFN wanted to negotiate a comprehensive land claims treaty jointly with the SKDB and NBDB, whereas the SKDB and NBDB preferred to remain part of the Dehcho process.

[47] After the breakdown of the overlap negotiations, the SKDB and NBDB then contacted Mr. Overvold, explaining the situation to him, and advising that the SKDB and NBDB expected direct consultations with Canada to commence.

Notice Provided to Canada of the SKDB and NBDB's Concerns

[48] In July of 2008, the SKDB notified Canada that a portion of the land identified as the ADKFN's asserted territory in the ADKFN Framework Agreement was the SKDB's "primary land use area". The SKDB advised Canada that "any proposed development or assignment of lands within this area requires consultation with and approval of the [SKDB]".

[49] The NBDB also wrote to Canada that same month, advising that the map appended to the ADKFN Framework Agreement indicating the ADKFN's asserted territory included a portion of

the NBDB's traditional territory. The NBDB also advised Canada that any proposed development or assignment of this area required consultation with and approval of the NBDB.

[50] The SKDB and the NBDB also provided Canada with substantial documentation supporting their claims to the lands in question, including a map showing the extent of the overlapping claims, land use data, archaeological reports, traditional place names maps, and traditional use studies.

[51] Peter Redvers was the Negotiation Facilitator for the joint SKDB/NBDB negotiation team. In November of 2009, Mr. Redvers came into possession of a brochure prepared by Canada entitled "Acho Dene Koe First Nation and Fort Liard Métis Community-based Land, Resource and Governance Negotiations, Agreement-in-Principle Negotiations and the Land Selection Process".

[52] Under the heading "Federal Offer", the document stated that the ADKFN "would be able to select a total of 6,474 square kilometres of land within the NWT, for which it would own both the surface and sub-surface rights" [the "ADKFN Land Quantum"].

[53] According to Mr. Redvers' affidavit, the SKDB and the NBDB have calculated that there are only 6,064 square kilometres of land in the south-west corner of the NWT that are outside of the SKDB and NBDB primary land use areas. Moreover, the surface and sub-surface rights to some of this land is currently in the hands of third parties. As a result, there is not enough land available to satisfy the ADKFN Land Quantum without infringing on the SKDB and NBDB's primary land use areas, thus infringing their Aboriginal and Treaty rights.

[54] In November of 2009, counsel to the SKDB and the NBDB wrote to the Honourable Chuck Strahl, the then-Minister of Indian and Northern Affairs, formally advising him that the SKDB and the NBDB were of the view that the ADKFN Framework Agreement contemplated an "inevitable infringement" of their Treaty 11 and Aboriginal rights. As a consequence, the SKDB and NBDB were seeking immediate formal, direct and deep consultations with Canada.

[55] Canada responded to the SKDB and NBDB by way of letter dated December 21, 2009 from Pamela McCurry, the Senior Assistant Deputy Minister for Policy and Strategic Direction. The letter stated that the settlement area for the ADKFN would not be finalized until the final agreement phase. Ms. McCurry further stated that "the Government of Canada feels that it would be premature to enter into consultation *until the outcome of these overlap discussions* [with the ADKFN] *is known*" [my emphasis].

[56] In March of 2010, the SKDB and NBDB obtained a copy of a map that had been prepared by Canada which indicated the ADKFN's asserted territory, which territory was now being called the "ADK Settlement Area". The SKDB and the NBDB immediately contacted Canada, advising that the description in the map was "inaccurate and misleading and also prejudices current [boundary] negotiations".

[57] According to the SKDB and NBDB, the ADKFN effectively terminated the overlap negotiations in a letter dated June 24, 2010, wherein ADKFN Chief Kotchea asserted that, based on the ADKFN's Traditional Use Study, the "ADK [is] the sole owner and user of lands that you [SKDB and NBDB] assert you have interests in".

[58] On May 21, 2011, the SKDB and NBDB wrote to the Minister himself, affirming their longstanding concern that negotiations carried out under the ADKFN Framework Agreement would inevitably lead to an infringement of their rights. They observed that Canada's response to date had been to refer them to direct negotiations with the ADKFN in order to resolve the overlap and boundary issues. The SKDB and NBDB advised the Minister of the difficulties that they had encountered in these discussions, noting that the overlap negotiations did not relieve Canada of its duty to consult with them.

[59] The SKDB and the NBDB advised the Minister that they had been told that the ADKFN and Canada were close to reaching an agreement in principle which was to include a draft settlement map encompassing primary traditional lands of the SKDB and NBDB. Given their belief that this agreement would have a direct impact on their Aboriginal and Treaty rights, the SKDB and the NBDB renewed their request for the establishment of "a direct and formal consultation process between Canada and the SKDB-NBDB in the immediate future".

[60] Receiving no response to their request for consultation, apart from a verbal confirmation of the receipt of their letter, the SKDB and NBDB renewed their efforts to be consulted. Counsel for the SKDB and NBDB wrote to Minister Duncan personally on August 30, 2011, stating that his letter "serve[d] as a final request of the SKDB and NBDB for Canada to fulfill its duty to consult and engage in immediate, meaningful and substantive consultations with the SKDB and the NBDB as to the potential infringements of the Treaty rights and the Aboriginal rights of the SKDB and NBDB concerning the ADKFN overlap".

[61] Counsel further asked Canada to commit that it would not enter into any further agreements with the ADKFN until such time as consultations with the SKDB and NBDB were concluded, as any future agreement between Canada and the ADKFN "may eliminate consultation options and thereby prejudice the SKDB and the NBDB".

The Decision under Review

[62] In a letter dated October 25, 2010, Minister Duncan responded to the SKDB and NBDB's May 21, 2010 correspondence. The Minister stated:

> I can assure you that the [SKDB] and the [NBDB] will be consulted. In order for such consultations to be meaningful and productive, however, they usually occur after the signing of an agreement-in-principle and no agreement-in-principle with the [ADKFN] has yet been signed.

[63] The Minister went on to explain that:

> This is done for a number of reasons. First, the parameters of the draft agreement-in-principle are still under negotiations and are undefined. Second, defining the geographic scope of the settlement areas or of settlement lands is not required at the agreement-in-principle stage. This process will be done during final agreement negotiations. Third, the confidentiality of our negotiation processes prevents the sharing of draft agreements-in-principle. They become public documents upon signature by the parties.

[64] The Minister observed that agreements in principle are not legally binding, and that Canada would therefore be able to consider and address, "where warranted", the claims and interests of other Aboriginal groups expressed through consultations occurring at that time. The Minister also noted that provisions are included in agreements in principle and final agreements that are intended

to ensure that the Aboriginal and Treaty rights of other Aboriginal peoples are not affected by the agreements.

[65] The Minister concluded his letter by encouraging the SKDB and NBDB to continue to try to resolve the overlap issues through negotiations with the ADKFN, characterizing this as “the best way forward”.

[66] It is this decision that underlies this application for judicial review.

The SKDB and NBDB’s Application for Judicial Review

[67] The SKDB and the NBDB say that by delaying consultation with them until after an agreement in principle is entered into by Canada and the ADKFN, Canada has failed to comply with its legal and constitutional duty to consult with and properly accommodate the SKDB and NBDB.

[68] The applicants seek the following remedies:

1. A declaration that Canada owes the SKDB and NBDB a legal and constitutional duty to adequately consult with them in a timely manner as to the subjects of the land claim with ADKFN that would affect or potentially affect the Aboriginal and Treaty rights of the SKDB and NBDB, including the determination of lands and resources forming the settlement area or settlement lands of the ADKFN’s land claim, the use of such lands and resources, and the regulation or management of such lands and resources;

2. A declaration that the Minister's decision to postpone consultation until after an AIP is signed with the ADKFN does not meet, fulfill or discharge the legal and constitutional duty of Canada as described above;

3. An order setting aside the Minister's decision postponing the initiation and engagement in substantive consultations with the SKDB and NBDB;

4. An order directing the Minister to promptly initiate and engage in deep, meaningful and adequate consultation with the SKDB and NBDB with the intention of developing workable accommodation measures to address their concerns about the determination of lands and resources forming the settlement area or settlement lands of the ADKFN's land claim, and the regulation or management of such lands and resources, in such a manner consistent with the reasons for judgment of this Court and subject to the following terms:

    a. The terms of consultation are as determined by agreement between the Minister and the SKDB and NBDB, and in the event of failure to agree to such terms of consultation, either party can apply to this Court to establish them; and

b. Any of the parties is at liberty to reapply to this Court for such further additional relief as is required to advance and conclude the consultations;

5. An order prohibiting the Minister from negotiating further any term or condition under the ADKFN Framework Agreement that would reasonably affect the SKDB or the NBDB and from engaging in interim land withdrawals pursuant to such negotiations, pending conclusion of adequate consultation with the SKDB and NBDB; and

6. Its costs of this application on a solicitor-client basis.

The Issues

[69] Certain matters are not in dispute in this case. In particular, Canada concedes that:

1. The SKDB and NBDB enjoy the right to hunt, trap and fish throughout much of the area covered by Treaty 11;

2. The SKDB and NBDB have Treaty rights in relation to lands within the ADKFN Asserted Territory;

3. Canada is considering changes to the Treaty regime;

4. The SKDB and NBDB also claim to have Aboriginal rights to title to the land itself that are independent of their Treaty rights;

5. Canada has a duty to consult with, and if necessary, accommodate the SKDB and NBDB; and

6. Canada’s duty to consult with the SKDB and NBDB has been triggered by the negotiation of the ADKFN Framework Agreement.

[70] While there is no issue with respect to the existence of the duty to consult, what is in dispute in this case is the timing, scope and content of that duty.

[71] The first question to be addressed is the standard of review to be applied to the Minister's decision with respect to the timing, scope and content of its consultations with the SKDB and NBDB.

Standard of Review

[72] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 61-63 [*Haida Nation*], the Supreme Court of Canada established the standard of review to be applied to Crown decisions relating to the duty to consult.

[73] *Haida Nation* teaches that on questions of law, the decision-maker must generally be correct, whereas a reviewing Court may owe a degree of deference to the decision-maker on questions of fact or mixed fact and law: above at para. 61.

[74] As noted in the preceding section of these reasons, the Crown concedes that it has a duty to consult with the SKDB and NBDB in this case. Insofar as the Minister's determination of the extent of that duty is concerned, the Supreme Court stated in *Haida Nation* that the "extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate": above at para. 61.

[75] The Court further noted that "[t]he need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal". The Court recognized that "[a]bsent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required". In such cases, "the standard of review is likely to be reasonableness": all quotes from *Haida Nation*, above at para. 61.

[76] Where "the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness". However, where the factual and legal issues are inextricably entwined, the standard will likely be reasonableness: *Haida Nation*, above at para. 61.

[77] Insofar as the consultation *process* is concerned, the Supreme Court held in *Haida Nation* that "the process itself would likely fall to be examined on a standard of reasonableness". Moreover, "[p]erfect satisfaction" is not required. According to the Supreme Court, "[t]he government is required to make reasonable efforts to inform and consult". As long as "every reasonable effort is made to inform and to consult, such efforts would suffice": all quotes from *Haida Nation* above at para. 62.

[78] Finally, the Supreme Court stated in *Haida Nation* that "[s]hould the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness". However, if the government is correct on these matters and acts on the appropriate standard "the decision will be set aside only if the government's process is

unreasonable". The focus should not be on the outcome, but rather on the process of consultation and accommodation: both quotes from *Haida Nation,* above at para. 63.

[79] It should be noted that *Haida Nation* was decided before the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. However, in *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 at para. 34, the Federal Court of Appeal confirmed that *Dunsmuir* did not change the applicable standard of review in relation to decisions regarding the duty to consult. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 74.

The Source and Function of the Duty to Consult and Accommodate

[80] In order to put the issues raised by this application into context, it is helpful to start by considering the law relating to the source and function of the duty to consult and accommodate.

[81] As the Supreme Court of Canada observed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 1, the management of the relationships between Canada's Aboriginal and non-Aboriginal peoples "takes place in the shadow of a long history of grievances and misunderstanding". The Court noted that 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": at para. 1.

[82] It was in this context that the Supreme Court stated that “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”: *Mikisew*, above at para. 1.

[83] The duty to consult and, if indicated, to accommodate, is grounded in the honour of the Crown. In order to act honourably, the Crown cannot “cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof”: *Haida Nation*, above at para. 27. Instead, the Crown must respect these potential, but as yet unproven, interests.

[84] While *Haida Nation* involved Aboriginal rights rather than Treaty rights, subsequent jurisprudence has confirmed that the same principles apply in treaty cases: see, for example, *Mikisew*, above at para. 34, and *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178 at para. 96.

[85] The duty to consult has both a legal and a constitutional character: *Rio Tinto*, above at para. 34, and *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 6. It is, moreover, “a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process”: *Rio Tinto*, above at para. 32, citing *Haida Nation* at para. 20.

[86] As the Supreme Court observed in *Rio Tinto*, “[w]hile the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their Treaty and Aboriginal rights, and to accommodate those interests in the spirit of

reconciliation": *Rio Tinto*, above at para. 32, citing *Haida Nation* at para. 20. The duty to consult requires that the Crown take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: *Rio Tinto*, above at para. 35.

[87] The Supreme Court explained that the duty to consult "derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right": *Rio Tinto*, above at para. 33. In the absence of such a duty, Aboriginal groups would have to commence litigation and seek injunctive relief in order to stop the threatening activity, a process that has often met with obstacles.

[88] The duty to consult is primarily a procedural right: *Mikisew*, above at para. 33. It is not based on the common law duty of fairness, however. Rather, it is a duty based on "a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution": *Haida Nation*, above at para. 32.

[89] While primarily procedural in nature, the duty to consult also has a substantive dimension. The duty "is not fulfilled simply by providing a process within which to exchange and discuss information": *Wii'litswx v. British Columbia (Minister of Forests*), 2008 BCSC 1139, [2008] 4 C.N.L.R. 315 at para. 178. Rather, consultation must be meaningful and conducted in good faith "with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 at para. 168; see also Arthur Pape, "The Duty to Consult and Accommodate: A Judicial Innovation

Intended to Promote Reconciliation" in *Aboriginal Law since Delgamuukw*, ed. Maria Morellato (Aurora, ON: Cartwright Group Ltd., 2009) at 317.

[90] As long as the consultation is meaningful, there is no obligation on the Crown to reach an agreement. Rather, accommodation requires that "Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process": *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 at para. 2.

[91] However, "where there is a strong Aboriginal claim that may be significantly and adversely affected by the proposed Crown action, meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringement of Aboriginal interests pending their final resolution": *Wii'litswx*, above at para. 178. See also *Haida Nation*, above at paras. 41-42, 45-50; *Taku River*, above at para. 29; *Mikisew*, above at para. 54.

[92] With this understanding of the source and function of the duty to consult and accommodate, I turn next to consider when it is that the duty to consult will arise.

When Does the Duty to Consult and Accommodate Arise?

[93] Canada is required to consult with its Aboriginal peoples where it "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": see *Haida Nation*, above at para. 35.

[94] The knowledge threshold that must be met to trigger the duty to consult and accommodate is not high: see *Mikisew*, above at para. 55. Indeed, knowledge of a credible but unproven claim is sufficient to trigger the duty: *Haida Nation*, above at para. 37. The Crown will always have knowledge of Treaty rights, as a Treaty party: *Mikisew*, above at para. 34.

[95] Although it is essential that the Aboriginal people establish the existence of a potential claim, proof that the claim will succeed is not required: see *Rio Tinto*, above at para. 40.

[96] While the threshold for triggering a duty to consult is relatively low, the content of the duty to consult will vary with the circumstances. One relevant consideration is the strength of the claim. A weak claim may only require the giving of notice whereas a stronger claim may attract more onerous obligations on the part of the Crown: see *Haida Nation*, above at para. 37. The content of the duty to consult in the circumstances of this case will be discussed in greater detail later in these reasons.

a) ***The Nature of the Claims in Question and the Crown's Knowledge of the Claims***

[97] The SKDB and NBDB claim to have both Aboriginal and Treaty rights in relation to the lands claimed by them. As the Supreme Court of Canada noted in *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] S.C.J. No. 39, Aboriginal and Treaty rights "differ in both origin and structure". Aboriginal rights "flow from the customs and traditions of the native peoples" and "embody the right of native people to continue living as their forefathers lived". In contrast, Treaty rights "are those contained in official agreements between the Crown and the native peoples": all quotes from para. 76.

[98] There is no issue in this case as to the existence of the SKDB and NBDB's Treaty rights. As was noted earlier, the Crown accepts that the SKDB and NBDB have ongoing rights under Treaty 11 to hunt, fish and trap within the lands claimed by the ADKFN as its exclusive territory.

[99] Canada also does not dispute that it has knowledge sufficient to trigger a duty to consult with the SKDB and NBDB in relation to these Treaty rights. Canada maintains, however, that this consultation should not occur until *after* Canada has reached an agreement in principle with the ADKFN.

[100] Canada does not concede that the SKDB and NBDB have Aboriginal rights to the land itself. While Canada disputes the well-foundedness of these claims, it clearly has knowledge of them by virtue of its participation in land claims negotiations with SKDB and NBDB in Dehcho Process.

[101] I am therefore satisfied that the Crown has sufficient knowledge to trigger a duty of consult in relation to both the Treaty rights and the Aboriginal claims (including rights to the land) asserted by the SKDB and NBDB.

b) ***The Government Action that may Affect the Asserted Rights***

[102] In order for the duty to consult to be triggered, there must also be a Crown decision or proposed government action that may affect the rights in question: *Rio Tinto*, above at paras. 41 and 45. It is not necessary that this decision or proposed action have an *immediate* impact on the lands or resources in question. A potential adverse impact will suffice. As a consequence, the duty to consult extends to "'strategic, higher-level decisions' that may have an impact on Aboriginal claims and rights": *Rio Tinto*, above at para. 44.

[103] Canada concedes that the conclusion of the ADKFN Framework Agreement and the commencement of negotiations with the ADKFN with respect to its comprehensive land claim may ultimately affect the SKDB and NBDB's Treaty rights. However, it says that any agreement in principle it may enter into with the ADKFN will have no impact on any potential or existing Aboriginal or Treaty rights of either the SKDB or the NBDB. As a consequence, the "seriousness of the impact" part of the *Haida Nation* test points to the low end of the consultation spectrum at this stage in the process.

[104] Given Canada's concession that its actions may affect the asserted rights of the SKDB and NBDB, I am satisfied that this part of the *Haida Nation* test has been satisfied. I will address Canada's arguments as to the content of the duty it owes to the SKDB and NBDB and when consultation should take place further on in these reasons.

c) ***The Adverse Effect of the Proposed Crown Conduct on the Aboriginal Claim or Right***

[105] The third element that is required to give rise to the duty to consult is the potential effect of the proposed Crown conduct on the Aboriginal claim or Treaty right.

[106] As the Supreme Court of Canada observed at paragraph 45 of *Rio Tinto*, above, what must be established this stage of the analysis is "the *possibility* that the Crown conduct may affect the Aboriginal claim or right" [my emphasis]. A claimant must show "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights".

[107] The Court went on in *Rio Tinto* to observe that "a generous, purposive approach to this element is in order, given that the doctrine's purpose … is 'to recognize that actions affecting unproven Aboriginal title or rights or Treaty rights can have irreversible effects that are not in keeping with the honour of the Crown'…": above at para. 46, citing Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 30.

[108] Mere speculative impact is not enough. There must an "appreciable adverse effect on the First Nations' ability to exercise their Aboriginal right" and the adverse effect "must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice": *Rio Tinto*, above at para. 46.

[109] Adverse impacts can extend to any effect that may prejudice a pending Aboriginal claim or right. Moreover, "high-level management decisions or structural changes to the resource's

management may also adversely affect Aboriginal claims or rights even if these decisions have no 'immediate impact on the lands and resources'". The reason for this is that "such structural changes may set the stage for further decisions that will have a *direct* adverse impact on land and resources": all quotes from *Rio Tinto*, above at para. 47 [emphasis in the original].

[110] Canada accepts that the conclusion of the ADKFN Framework Agreement and the commencement of comprehensive land claim negotiations with the ADKFN may ultimately affect the SKDB and NBDB's Treaty rights, although it submits that the seriousness of that impact is speculative at this stage.

[111] As will be explained below, I am not persuaded that the seriousness of that impact is speculative in light of decisions that have already been made by Canada in the context of its negotiations with the ADKFN - decisions that were made without any consultation with the SKDB and NBDB.

[112] The seriousness of the potential impact on the rights of the SKDB and NBDB is a matter that may be addressed in determining the content of the consultation required at this stage of the process. However, Canada's concession regarding the potential impact that the ADKFN Framework Agreement and the negotiations with the ADKFN may ultimately have on the SKDB and NBDB's Treaty rights is sufficient to satisfy the third element of the *Haida Nation* test and to give rise to the duty to consult on the Crown.

What is the Scope of the Duty to Consult at this Stage in the Process?

[113] The Supreme Court held in *Haida Nation*, above at para. 39, that the scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

[114] That is, the degree of impact on the rights asserted will dictate the degree of consultation that is required in a specific case: *Mikisew*, above at paras. 34, 55 and 62-3. The more serious the potential impact on asserted Aboriginal or Treaty rights, the deeper the level of consultation that will be required.

[115] The level of consultation required will vary from case to case, depending upon what is required by the honour of the Crown in a given set of circumstances: *Haida Nation*, above at para. 43. See also *Rio Tinto*, above at para. 36; *Taku River*, above at para. 32; *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, [2010] 2 C.N.L.R. 316, [2010] A.J. No. 479 (Q.L.) (Alta. C.A.) at para. 71, and *Ahousaht*, above at para. 39.

[116] Where, for example, the claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice: *Haida Nation*, above at para. 43.

[117] In contrast, where a strong *prima facie* case for the claim has been established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-

compensable damage is high, “deep consultation” aimed at finding a satisfactory interim solution, may be required: *Haida Nation*, above at para. 44.

[118] While the precise requirements of the consultative process will vary with the circumstances, the consultation required in relation to claims lying at the stronger end of the spectrum may demand the opportunity for the claimants to make submissions, to participate in the decision-making process, and to receive written reasons which demonstrate that their concerns were considered and which reveal the impact those concerns had on the decision: *Haida Nation*, above at para. 44.

[119] Other cases may fall between these two ends of the spectrum. Each case has to be examined individually in order to ascertain the content of the duty to consult in a particular set of circumstances. Moreover, the situation may have to be re-evaluated from time to time, as the level of consultation required may change as the process goes on and new information comes to light: *Haida Nation*, above at para. 45.

[120] I will first examine the strength of the Aboriginal and Treaty claims asserted by the SKDB and NBDB, and will then consider the seriousness of the potential infringement of those claims, in order to assess the scope and content of the duty to consult owed by Canada to the SKDB and NBDB at the pre-agreement in principle stage.

a) The Prima Facie Strength of the Asserted Claims or Rights

[121] There is no issue in this case as to the strength of the SKDB and NBDB's claim to Treaty rights. The Crown accepts that the SKDB and NBDB have ongoing rights under Treaty 11 to hunt, fish and trap within the lands claimed by the ADKFN as its exclusive territory.

[122] Insofar as the SKDB and NBDB's claims to Aboriginal title are concerned, Canada does not concede that they have Aboriginal rights in relation to the land itself. However, it does not appear from the record before me that Canada has as yet carried out any meaningful evaluation of the strength of the SKDB and NBDB's claims to Aboriginal rights with respect to the lands in issue. Consequently, there is no factual assessment of the strength of the applicants' Aboriginal rights to which the Court owes deference.

[123] Relying on the decision of the British Columbia Supreme Court in *Cook v. Canada (Minister of Aboriginal Relations and Reconciliation)*, 2007 BCSC 1722, 80 B.C.L.R. (4th) 138, Canada submits instead that the record before the Court is insufficient to allow for an assessment of the strength of the SKDB and NBDB's asserted Aboriginal rights or title at this stage of the process.

[124] Canada also contends that because the SKDB and NBDB's Treaty rights have been established, it is not necessary for the Court to assess the strength of the SKDB and NBDB's asserted Aboriginal rights. Rather, Canada submits that in order to determine the content of the Crown's duty to consult, the Court's focus should be on the degree to which the conduct contemplated by the Crown would adversely affect the rights of the SKDB and NBDB to hunt, fish and trap over the disputed lands.

[125] However, the nature and extent of the duty to consult is proportional to the nature and extent of the interest potentially affected. The duty is greater "where a foundational right is being extinguished than where regulations touch on rights that are admittedly subject to regulation": see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203 at para. 35.

[126] An Aboriginal claim to land is clearly a "foundational right". Indeed, the "most central interest" of Canada's Aboriginal peoples is their interest in their lands: see *Nunavik Inuit v. Canada (Minister of Canadian Heritage*), [1999] 1 F.C. 38, [1998] F.C.J. No. 1114 (QL) at para. 103, citing *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108 (QL).

[127] As a consequence, the SKDB and NBDB's claims to Aboriginal rights in the land may have a bearing on the scope and content of the Crown's duty to consult in this case. It is therefore necessary to consider the evidence regarding the strength of the SKDB and NBDB's claims to Aboriginal rights before turning to consider the seriousness of the potential adverse effect upon the rights claimed.

[128] A court's assessment of the duty to consult and accommodate prior to proof of an Aboriginal right does not amount to a prior determination of the Aboriginal claim on its merits; rather, courts are able to "differentiat[e] between tenuous claims, claims possessing a strong *prima facie* case, and established claims", even in the absence of a complete ethno-historical evidentiary record: *Haida Nation*, above at paras. 37 and 66.

[129] Indeed, in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at para. 47, Justice Binnie confirmed that an application for judicial review was an appropriate procedure through which to assess the scope and adequacy of consultation. In both *Haida Nation* and *Little Salmon*, lower courts assessed the *prima facie* strength of Aboriginal claims based upon affidavit evidence.

[130] In the *Cook* case relied upon by the Crown, the Court was faced with conflicting affidavits, and the applicants were unable to articulate a precise infringement of their interests. Contrary to what the Minister suggests, the Court in *Cook* did not decline to assess the strength of the claims, concluding instead that on the basis of the evidentiary record before it, the applicants had established only a "credible claim": see para. 151.

[131] The SKDB and the NBDB assert that in entering into Treaty 11, they did not surrender their Aboriginal rights with respect to the disputed lands, whereas I understand the Crown to argue that these Aboriginal rights were extinguished by the Treaty. The Crown acknowledges, however, that it never fulfilled a significant component of Treaty 11, namely its obligation to set aside reserve lands for the benefit of the First Nations.

[132] The legal consequences of the Crown's failure to fulfill a fundamental commitment in the Treaty in relation to the SKDB and NBDB's asserted Aboriginal title remain to be determined on a more complete record through the land claims process. However, it is appropriate for the purposes of this application to consider these underlying circumstances as material factors in assessing the

strength of the applicants' asserted Aboriginal claims: see *Ka'a'Gee Tu First Nation*, above at para. 105.

[133] Moreover, Canada has, since 1998, been involved in negotiations with the SKDB and NBDB regarding their claims to Aboriginal title through the Dehcho process. While not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the SKDB and NBDB's asserted claims: see *Ka'a'Gee Tu First Nation*, above at para. 104.

[134] Through the Dehcho process, the SKDB and NBDB have provided Canada with considerable evidence in support of their historical claims to the lands in the overlap area, including, amongst other things, traditional use studies, traditional place name maps, and reports of archaeological studies. I do not understand the ADKFN to have provided Canada with similar evidence as of yet. We do know that as of March 15, 2010, the ADKFN had not yet completed their traditional land use study. In any event, there is little evidence regarding the strength of the ADKFN's competing claims in the record before me.

[135] The SKDB and NBDB also rely on a statement made during the cross-examination of Janet Pound, a Chief Land Negotiator at the Department of Indian Affairs and Northern Development, as an admission regarding the strength of their Aboriginal claims. Counsel to the SKDB and NBDB asked Ms. Pound: "Now, is it agreed that Canada accepts the claims of Sambaa K'E and Nahanni Butte regarding overlap, that they are substantial claims and they are with merit?" to which Ms. Pound responded "I think so".

[136] In fairness, regard must be had to the entirety of Ms. Pound's answer. She went on to state: "I think any time the Aboriginal groups are asserting something, they are their assertions, right? We have got to respect their assertions. We don't always – everything you do in agreements doesn't necessarily always match with that they are asserting, but obviously we're respecting the assertions that are made." I agree with Canada that when Ms. Pound's answer is read in its entirety, it is not an admission that the SKDB and NBDB's Aboriginal claims are meritorious.

[137] While it is not easy to quantify the strength of the SKDB and NBDB's claims to Aboriginal title at this stage of the process, I am nevertheless satisfied that the claims raise a reasonably strong *prima facie* case. This finding is based upon a review of the record, the nature of the asserted claims, the language of Treaty 11, the Crown's breach of one of its fundamental obligations under Treaty 11, the paucity of evidence with respect to the strength of the ADKFN's claims to the disputed territory, and the Crown's commitment to the comprehensive land claims process.

[138] I note that my conclusion in this regard with respect to the potential significance of the Crown's breach of its obligations under Treaty 11 is consistent with the finding of this Court in relation to the Aboriginal rights asserted in another Treaty 11 case: see *Ka'a'Gee Tu First Nation*, above at para. 107.

[139] The fact that the SKDB and NBDB have established a reasonably strong *prima facie* case based upon their asserted Aboriginal rights to the land in question serves to elevate the content of

the Crown's duty to consult from what would otherwise have been the case had the duty been based exclusively on the SKDB and NBDB's claims to Treaty rights to hunt, fish and trap.

[140] With this understanding of the strength of the SKDB and NBDB's Aboriginal and Treaty claims, I will next consider the seriousness of the potential infringement that the ADKFN negotiations and an eventual agreement in principle may have for these claims.

b) The Seriousness of the Potential Infringement of the Asserted Aboriginal and Treaty Rights

[141] There is no dispute that the negotiation of the ADKFN Framework Agreement has triggered a duty on the part of Canada to consult with the SKDB and NBDB. The issue is the extent and depth of the consultations that are required at this stage of the process.

[142] Canada submits that we cannot know at this stage of the process what impact its negotiations with the ADKFN will have for the SKDB and NBDB, with the result that it is impossible to assess the seriousness of the potential infringement of the SKDB and NBDB's asserted Aboriginal and Treaty rights. The result of this is that Canada's duty to consult with the SKDB and NBDB at this point is at the lower end of the consultation spectrum and is limited to notice, disclosure or discussion.

[143] Canada points out that an agreement in principle is not a binding "decision". It does not grant any rights to the signatories, nor does it take away rights from other non-signatory First Nations. According to Canada, an agreement in principle is "merely an interim negotiating position subject to change".

[144] Consequently, Canada says that it would be premature for it to engage in deep consultation with the SKDB and NBDB at this stage of the process. Because it will not be possible to know the particulars of the contemplated Crown conduct and the seriousness of any impact on the rights of the SKDB and NBDB until such time as Canada has entered into an agreement in principle with the ADKFN, consultation with the SKDB and NBDB should not take place until then.

[145] I note, however, that Canada's position as to when consultation with the SKDB and NBDB should occur has not been consistent, and that previous representations made by Canada in this regard do not appear to have been respected.

[146] It will be recalled that in her December 21, 2009 letter to counsel for the SKDB and NBDB, the Senior Assistant Deputy Minister for Policy and Strategic Direction advised the SKDB and NBDB it would be premature for Canada to enter into consultations with them *until the outcome of the overlap discussions between the ADKFN and the SKDB and NBDB was known*. It would have been entirely reasonable for the SKDB and NBDB to understand this statement to mean that Canada would consult with them once the outcome of the overlap negotiations was known.

[147] By June of 2010, Canada was aware that the overlap discussions had failed. It did not, however, initiate any form of consultation with the SKDB and NBDB at that time. Instead, Canada's position as to when consultation with the SKDB and NBDB should take place seemed to change after the overlap negotiations broke down. This change in position is reflected in the

Minister's October 25, 2010 letter, which advised the SKDB and NBDB that consultation would now not occur until *after* Canada reached an agreement in principle with the ADKFN.

[148] Canada's position at the hearing of this application was generally consistent with the position taken by the Minister in his October 25, 2010 letter: that is, that consultation should take place after the signing of an agreement in principle with the ADKFN. However, counsel for Canada also stated that "the decision to send [the Final Agreement] to Parliament is where the duty to consult arises".

[149] Given that the decision under review commits to consultations taking place after the signing of an agreement in principle between Canada and the ADKFN, and that most of Canada's submissions focused on the conclusion of an agreement in principle with the ADKFN as being the point at which it was required to consult with the SKDB and NBDB, I will take that to be its real position.

[150] As an agreement in principle merely represents an interim negotiating position which is subject to change, Canada says that the SKDB and NBDB's argument that positions will become entrenched once an agreement in principle is concluded is without merit. In support of this contention, Canada relies on several pre-*Haida Nation* decisions, including *Paul v. Canada*, 2002 FCT 615, 219 F.T.R. 275 at para. 108, and *Pacific Fishermen's Defence Alliance v. Canada*, [1988] 1 F.C. 498, [1987] F.C.J. No. 1146 at paras. 8 and 13.

[151] Canada further submits that to consult in this context would be meaningless: citing *Cook*, above at paras. 175-77. According to Canada, it would be unproductive and premature for it to engage in further consultation with the SKDB and NBDB prior to an agreement in principle having been reached with the ADKFN because the extent of any impact on the SKDB and NBDB's rights would be speculative: *Tsuu T'ina*, above at para. 85.

[152] By way of example, Canada says that the process for negotiating land selection will not begin until *after* an agreement in principle is concluded. It is thus impossible to know the particulars of contemplated Crown conduct, or to assess its impact on third party rights prior to concluding the agreement in principle with the ADKFN: *Kruger Inc. c. Premiere Nation des Betsiamites*, 2006 QCCA 569, 149 A.C.W.S. (3d) 864 at paras. 12-13.

[153] Canada also points out that land claims treaties typically contain non-derogation clauses that protect the rights of other Aboriginal groups in a settlement area, and that any final agreement entered into with the ADKFN will contain such a provision. As a consequence, even a final agreement between the ADKFN and Canada would have no immediate impact on the Aboriginal and Treaty rights of either the SKDB or the NBDB.

[154] In support of this contention, Canada relies on the decision of the British Columbia Supreme Court in *Cook*, above, which, like this case, involved overlapping land claims by several First Nations. The Court concluded that deep consultation and accommodation with the petitioners in that case was not required by Canada until after a final agreement was signed between it and the third-party First Nation.

[155] In coming to this conclusion, the Court in *Cook* relied heavily on the presence of the non-derogation clause in the final agreement, stating that:

> 186 … I do not find there is persuasive evidence that the [Final Agreement] causes irreparable harm to the petitioners, and, more importantly, I am satisfied that there is time for the petitioners, British Columbia and Canada to engage in consultation before the [Final Agreement] is implemented […] In that consultation process, the petitioners will be able identify, with the clarity that they have so far been unable to articulate, any infringement on their title and rights claims. It is not for this Court, on the type of conflicting evidence tendered here, to draw those conclusions for them. The other factor of importance is that the non-derogation clause confirms that [Final Agreement] does not affect the Aboriginal rights or title of any other Aboriginal group.

[156] Canada also relies on *Benoanie v. Canada (Minister of Indian and Northern Affairs)*, [1993] 2 C.N.L.R. 97 (T.D.); *Tsehaht First Nation v. Huu-ay-aht First Nation*, 2007 BCSC 1141, 160 A.C.W.S. (3d) 341 at para. 25; *Paul*, above; and *Tremblay v. Pessamit First Nation*, 2008 QCCS 1536, [2008] 4 C.N.L.R. 240), to the same effect.

[157] Moreover, Canada points out that Aboriginal rights either exist or they do not exist. They are not created by agreements, treaties or the law, and have constitutional protection under section 35 of the *Constitution Act, 1982*. As a consequence, Aboriginal rights cannot be extinguished by government action: *Tremblay*, above at paras. 59-60.

[158] As a result, Canada submits that the duty to consult owed by it to the SKDB and NBDB during the pre-agreement in principle phase is at the low end of the spectrum, and should be limited to notice, disclosure or discussion: *Haida Nation*, above at para. 43; *Mikisew*, above at para. 64.

[159] I would start my analysis by observing that what *Haida Nation* actually says is required at the lower end of the consultation spectrum "may be to give notice, disclose information, *and discuss any issues raised in response to the notice*": at para. 43 [my emphasis].

[160] Citing T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49 at 61, the Court goes on in *Haida Nation* to observe that "'consultation' in its least technical definition *is talking together for mutual understanding*'": at para. 43 [my emphasis].

[161] Similarly, in *Mikisew*, where the Crown's duty to consult was found to lie at the lower end of the spectrum, it was nevertheless required to "engage directly" with the Mikisew. This "engagement" required the Crown to "solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights": above at para. 64.

[162] Canada concedes that it has not, as yet, had *any* direct discussions with the SKDB and NBDB with respect to their concerns, notwithstanding the two First Nations' repeated requests for consultation. As will be explained later in these reasons, I am satisfied that Canada has not satisfied the duty on it to consult with the SKDB and NBDB, even if that duty were only at the lower end of the spectrum.

[163] Moreover, and in any event, I am satisfied that the particular facts of this case are such that Canada has a present obligation to consult somewhat more deeply with the SKDB and NBDB.

[164] I would start by noting that the duty to consult extends to strategic, higher level decisions that may have an impact on Aboriginal claims and rights, even if that impact on the disputed lands or resources may not be immediate: *Rio Tinto*, above at para. 44.

[165] If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R. (4th) 280 at para. 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.

[166] Indeed, the case law shows that the non-binding nature of preliminary decisions does not necessarily mean that there can be no duty to consult. For example, in *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, 303 F.T.R. 106, negotiations leading to a non-binding Cooperation Plan nonetheless triggered a duty to consult that fell at the high end of the consultation spectrum.

[167] Justice Phelan described the Cooperation Plan as "a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print

from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of [the project in issue]": *Dene Tha' First Nation*, above at para. 100. Justice Phelan further noted that "the Cooperation Plan, although not written in mandatory language, functioned as a blueprint for the entire project": above at para. 107.

[168] Justice Phelan concluded that the Cooperation Plan was "a form of 'strategic planning'": at para. 108. By itself it conferred no rights, but it set up the means by which a whole process would be managed and was a process through which the rights of the Aboriginal peoples would be affected. As a consequence, Justice Phelan was satisfied that the Cooperation Plan established a process by which the rights of the Dene Tha' would be affected: above at para. 108.

[169] I recognize that for the duty to consult to be engaged, there must be an appreciable adverse effect on the First Nations' ability to exercise their Aboriginal or Treaty rights, and that merely speculative impacts will not suffice. I further recognize that the adverse effect must be on the future exercise of the rights themselves, and that an adverse effect on a First Nation's future negotiating position will not suffice: *Rio Tinto*, above at para. 46.

[170] In this case, however, decisions have already been made by Canada, without consultation with either the SKDB or the NBDB, which will likely have a significant impact on each of their Treaty rights and Aboriginal claims.

[171] One of these is the decision to limit the ADKFN's land claim to territory within the NWT. This decision is highly significant, considering that two-thirds of the ADKFN's asserted traditional territory lies outside of the NWT.

[172] Similarly, the March, 2009, offer made by Canada to the ADKFN, will, in all likelihood, have a negative effect on the SKDB and NBDB's own land claims. This offer would allow the ADKFN to select a total of 6,474 square kilometres of land within the NWT in satisfaction of its land claim.

[173] Canada's offer has been accepted by the ADKFN as a basis for the negotiation of an agreement in principle, which agreement will address the issue of land quantum. Given the dynamics of the negotiating process, it is hard to imagine that the agreement in principle will be less generous to the ADKFN than Canada's initial offer.

[174] There are, however, only 6,064 square kilometres of land in the south-west corner of the NWT that are outside of the SKDB and NBDB primary land use areas and are available to satisfy the ADKFN's claims. As a result, the acceptance by the ADKFN of Canada's offer will inevitably result in an encroachment on the SKDB and NBDB's claimed territory.

[175] This problem is compounded by the fact that the surface and sub-surface rights to some of the available land is currently in the hands of third parties. As a result, there is simply not enough land available in the NWT to satisfy the ADKFN's claims and Canada's offer without encroaching

on the primary land use areas claimed by the SKDB and NBDB, and thus infringing their Aboriginal and Treaty rights. This impact is not speculative.

[176] Moreover, Canada and the ADKFN have also already agreed, as part of the ADKFN Framework Agreement, not to create a new regulatory and land management regime for the lands in issue, but rather to adopt the regime currently operating under the *Mackenzie Valley Resource Management Act*. The SKDB and NBDB assert that the *MVRMA* resource management regime is inconsistent with the land management process advanced through the Dehcho process, namely collective co-management through a single management authority.

[177] While the adverse impact of the adoption by the ADKFN of the *MVRMA* resource management regime in relation to lands potentially falling within the SKDB and NBDB's primary land use areas may not be immediately felt by the SKDB and NBDB, courts have held that the potential for infringement need not be immediate: *Rio Tinto,* above at paras. 44, 47 and 54. The potential infringement of asserted Aboriginal governance rights resulting from the application of the *MVRMA* to the disputed lands is prospective, but nevertheless serious.

[178] Finally, the March, 2009, offer made by Canada to the ADKFN has also had immediate consequences for the SKDB and NBDB as it resulted in Canada proportionately reducing the offer that it made to the Dehcho First Nations, including the SKDB and NBDB.

[179] This clear potential for infringement distinguishes this case from the *Cook* case relied upon by the Crown. In that case, there was an absence of any obvious infringement: see *Cook*, above at para. 179.

[180] Moreover, *Cook* did not involve a situation in which overlap negotiations had broken down; none had yet been attempted: see paras. 115-18. The Court thus found that even if the applicant First Nations were later able to identify an infringement of their claims, several possibilities for accommodation remained available: at paras. 190-91.

[181] Even in these circumstances, the Court nonetheless acknowledged that the Crown had a duty to consult with the Aboriginal applicants at the agreement in principle stage, although it found that, in light of the absence of any infringement, the duty at that stage lay at the low end of the spectrum: *Cook*, above at paras. 179, 192.

[182] In contrast, the contemplated Crown action here potentially puts current claims by and the rights of the SKDB and NBDB in jeopardy: *Rio Tinto*, above at para. 49. Moreover, the threat to the rights of the SKDB and NBDB is real, and not merely hypothetical, surmised or imagined: see *Pacific Fishermen's Defence Alliance*, above at para. 8.

[183] I acknowledge that a non-derogation clause in a final agreement between Canada and the ADKFN will offer the SKDB and NBDB some measure of protection. Nevertheless, the prospect of reconciliation between the Crown and the SKDB and NBDB will inevitably be undermined if

meaningful discussions with Canada only start after it has reached an agreement in principle with the ADKFN. Indeed, counsel for the Crown himself acknowledged this reality at the hearing.

[184] Relying on the decision in *Cook*, Canada also argues that if it were required to enter into consultation with the SKDB and NBDB at this point in the process, it would then have to "ping-pong" back and forth between the SKDB and NBDB on the one hand, and the ADKFN on the other. When I suggested to counsel that this would have to occur in any negotiations taking place *after* the conclusion of an agreement in principle with the ADKFN, counsel agreed that this was indeed that case. He noted, however, that Canada would be able to enter into negotiations with the SKDB and NBDB "armed with an agreement in principle". This is, of course, precisely what the SKDB and NBDB are concerned about.

[185] While it is clear from *Rio Tinto* that an adverse effect on a First Nation's future negotiating position will not be sufficient, by itself, to affect the duty to consult, the inevitable impact that the conclusion of an agreement in principle between Canada and the ADKFN will have on ongoing negotiations within the Dehcho Process is just one of many circumstances at play in this case.

[186] Moreover, the law is clear that "[t]he Crown cannot run roughshod over one group's potential and claimed Aboriginal rights in favour of reaching a treaty with another": see *Cook*, above at para 162; *Haida Nation*, above at para. 27.

[187] Canada insists that "there is nothing lost by waiting until after the AIP to engage in further consultation with the applicants": see Canada's memorandum of fact and law at para 89. I do not

agree. Proceeding with negotiations with the ADKFN and excluding the applicants from any direct discussions despite their repeated entreaties to be consulted does little to promote reconciliation between Canada and the SKDB and NBDB, and may very well have the opposite effect.

[188] The undermining of the reconciliation process is further compounded in this case by Canada having "moved the goalposts" in relation to the consultation process. While initially representing to the SKDB and NBDB that consultation would take place after the outcome of the overlap discussions was known, no such consultation in fact took place. When the SKDB and NBDB quite reasonably pushed for consultation after the breakdown of the overlap negotiations, they were once again put off, with the Minister now informing them that consultation would only occur after the conclusion of an agreement in principle between Canada and the ADKFN. With respect, this shifting position does nothing to promote the process of reconciliation and could only serve to further alienate the SKDB and NBDB.

[189] Canada also argues that it cannot engage directly with the SKDB and NBDB until such time as it has an agreement in principle with the ADKFN as it cannot know what to discuss with the SKDB and NBDB. This of course begs the question of how it is that Canada can engage directly with the ADKFN, if it has not entered into an agreement in principle with the SKDB and NBDB?

[190] It was argued in *Haida Nation* that the Crown could not know that rights exist before Aboriginal claims are resolved, and thus it could have no duty to consult with or accommodate First Nations. While recognizing that this difficulty should not be minimized, the Supreme Court nevertheless held that "it will frequently be possible to reach an idea of the asserted rights and of

their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement": above at para. 36.

[191] In order to facilitate this determination, the Supreme Court held that claimants should clearly outline their claims, "focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements": *Haida Nation*, above at para. 36.

[192] While these comments were made in a slightly different context, the same point may be made here.

[193] The SKDB and NBDB have provided Canada with a great deal of historical and other material supporting their respective claims and have clearly articulated these claims. Indeed, Canada has not suggested that it does not understand the nature or scope of the claims being asserted by the SKDB and NBDB. This further distinguishes this case from the *Cook* case relied upon by the Crown, where one of the reasons cited by the Court for finding that consultation could be deferred in that case until after the signing of an agreement in principle with another First Nation was the inability of the petitioner First Nations to clearly articulate any infringement on their title and rights claims: *Cook*, above at para. 186.

[194] Perhaps because of the fact that the negotiations between the ADKFN and the Crown are confidential, little information has been provided to the Court as to the strength of the ADKFN's claims. However, it appears from the material filed in relation to this application that the SKDB and

NBDB have provided Canada with substantial information regarding their own claims. There is thus ample basis for discussion.

[195] Canada has also argued that because the ADKFN process is confidential, it cannot consult with the SKDB and NBDB at this stage in the process. I do not accept this argument.

[196] While the ADKFN Framework Agreement contemplates that the agreement in principle will be made public, Canada has clearly stated that the process for negotiating land selection will not begin until *after* an agreement in principle is concluded. Those negotiations between the ADKFN and Canada will themselves be confidential.

[197] To the extent that Canada's concern is the confidentiality of its negotiations with the ADKFN, I asked Crown counsel how Canada would be in any better position to consult with the SKDB and NBDB with respect to land selection issues *after* the conclusion of an agreement in principle with the ADKFN, given that the post-agreement in principle negotiations with the ADKFN would still be confidential. Counsel was unable to provide a satisfactory answer, other than to say "that's a bit of a difficult one".

Canada has not Discharged its Duty to Consult

[198] Perfect satisfaction of the duty to consult is not required. As long as the Crown "makes reasonable efforts to inform and consult the First Nations which might be affected by the Minister's intended course of action, this will normally suffice to discharge the duty": *Ahousaht*, above at para. 38.

[199] In all cases, the fundamental question is what is necessary to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake: *Haida Nation*, above at para. 45.

[200] The honour of the Crown also mandates that it balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims: *Haida Nation*, above at para. 45.

[201] Canada says that it has provided the SKDB and NBDB with notice of the ADKFN land claims process and subjects for negotiation. It has appointed a Ministerial Special Representative and supported negotiations between the First Nations with respect to overlap issues in an attempt to minimize the impact on the SKDB and NBDB's rights. It has also received information from the SKDB and NBDB in support of their claims, and has promised to engage in deeper consultation prior to land selection by the ADKFN in the post-agreement in principle phase of its negotiations with the ADKFN, and to include a non-derogation clause in an ADKFN Final Agreement.

[202] However, Ms. Pound acknowledged in her cross-examination that Canada has not, as yet, "formally engaged with [the SKDB and NBDB] on consultation". Indeed, Canada concedes that it has not, to this point, engaged in *any* direct discussions with the SKDB and NBDB with respect to their concerns. This lack of consultation is also reflected in the Ministerial letter that underlies this application for judicial review, which assures the SKDB and NBDB that consultation will occur in the future, but not until an agreement in principle is signed with the ADKFN.

[203] At the same time, Canada asserts that it has demonstrated an ongoing intention to address the SKDB and NBDB's concerns through meaningful consultation after signing an agreement in principle with the ADKFN, thereby discharging its pre-agreement in principle duty to consult.

[204] I agree with Canada that it was both reasonable and appropriate for it to encourage the ADKFN, the SKDB and the NBDB to endeavour to resolve their competing claims between themselves, and to facilitate those discussions. Indeed, encouraging overlapping claims to be worked out on a consensual basis is respectful of the First Nations involved. However, the fostering of overlap negotiations cannot, in my view, serve as a substitute for direct consultations by Canada with the affected First Nations.

[205] Different levels of consultation may be required at different stages of the process: see *Cook* above at para. 197. The particular circumstances of this case, including the strength of the applicants' Aboriginal claims and their acknowledged Treaty rights, the actions proposed by Canada and the potential impact of those actions on the claims and rights of the SKDB and NBDB, the decisions already made in relation to the ADKFN's claims, and the representation made by Canada as to when consultation with the SKDB and NBDB would take place, are such that the honour of the Crown requires that it engage directly with the SKDB and NBDB prior to concluding an agreement in principle with the ADKFN.

Conclusion

[206] For the reasons given, I am satisfied that the Minister's decision to delay consultation with the SKDB and NBDB until after the conclusion of an agreement in principle with the ADKFN was not reasonable, and the process followed was incompatible with the honour of the Crown: see *Mikisew*, above at para. 59.

[207] While deeper consultation will be required after the conclusion of an agreement in principle with the ADKFN, Canada has a duty to consult with the SKDB and NBDB at this stage of the process by engaging in immediate and substantive discussions directly with them with respect to the potential infringements of their Aboriginal and Treaty rights in relation to lands subject to overlapping claims by the ADKFN.

Remedy

[208] Although the Government of the NWT and the ADKFN have been named as respondents in this application, the decision under review in this case is an October 25, 2010 decision by the Minister of Indian Affairs and Northern Development postponing consultation with the SKDB and NBDB until after the conclusion of an agreement in principle between Canada and the ADKFN. Consequently, the remedy provided by the Court should be addressed solely to Canada. This is consistent with the relief requested in the SKDB and NBDB's Notice of Application.

[209] For the reasons given, this Court declares that Canada has breached its duty to consult with the SKDB and NBDB, with the result that the Minister's October 25, 2010 decision to postpone consultation with the SKDB and NBDB is set aside.

[210] Canada has a legal and constitutional duty to engage in immediate and substantive discussions directly with the SKDB and NBDB with respect to the subjects of the land claim with ADKFN that would affect or potentially affect the asserted Aboriginal and Treaty rights of the SKDB and NBDB, including the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, the use of such lands and resources, and the regulation or management of such lands and resources.

[211] Canada shall not enter into an agreement in principle with the ADKFN in relation to its pending land claim until such time as the consultations with the SKDB and NBDB referred to in the previous paragraph have been carried out.

[212] This Court further declares that upon the conclusion of an agreement in principle with the ADKFN, Canada will have a duty to engage in deep, meaningful and adequate consultation with the SKDB and NBDB in order to develop workable accommodation measures to address their concerns with respect to the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, and the regulation or management of such lands and resources. This process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida Nation* and *Taku River*.

[213] The SKDB and NBDB are entitled to their costs of this matter. I am not persuaded that the circumstances of this case justify an award of solicitor and client costs. As agreed by the parties, the SKDB and NBDB's costs are fixed in the amount of $15,000.

JUDGMENT

THIS COURT DECLARES, ORDERS AND ADJUDGES that:

1. Canada has breached its duty to consult with the SKDB and NBDB;

2. This application for judicial review is allowed and the October 25, 2010 decision by the Minister of Indian Affairs and Northern Development postponing consultation with the SKDB and NBDB until after the conclusion of an agreement in principle between Canada and the ADKFN is set aside;

3. Canada shall engage in immediate and substantive discussions directly with the SKDB and NBDB with respect to the subjects of the land claim with ADKFN that would affect or potentially affect the asserted Aboriginal and Treaty rights of the SKDB and NBDB, including the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, the use of such lands and resources, and the regulation or management of such lands and resources;

4. Canada is prohibited from entering into an agreement in principle with the ADKFN in relation to its pending land claim until such time as the consultations with the SKDB and NBDB referred to in the paragraph 3 of this Order have been carried out;

5. Upon the conclusion of an agreement in principle with the ADKFN, Canada shall engage in deep, meaningful and adequate consultation with the SKDB and NBDB in order to develop workable accommodation measures to address their concerns about the determination of lands and resources forming the settlement area or settlement lands of

ADKFN's land claim, and the regulation or management of such lands and resources. This process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida Nation* and *Taku River*; and

6. The SKDB and NBDB shall have their costs of this matter, fixed in the amount of $15,000.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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