SUPREME COURT OF YUKON

Citation: *Taku River Tlingit First Nation v Canada (Attorney General)* 2016 YKSC 7

SUPREME COURT OF YUKON
COUR SUPRÊME DU YUKON
JAN 28 2016
FILED / DÉPOSÉ

Date: 20160128
S.C. No. 13-A0159
Registry: Whitehorse

Between:

TAKU RIVER TLINGIT FIRST NATION

Plaintiff

And

ATTORNEY GENERAL OF CANADA

Defendant

Before Mr. Justice R.S. Veale

Appearances:
Stephen Walsh — Counsel for the plaintiff
Suzanne Duncan and Jonathan Gorton — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] In this summary trial, the Taku River Tlingit First Nation ("Taku River Tlingit") applies for two declarations against the Attorney General of Canada ("Canada"): the first is a declaration that Canada, having officially accepted for negotiation the Taku River Tlingit comprehensive land claim, which includes traditional territory in Yukon, is required, acting honourably, to participate in processes of negotiation towards a just settlement of the transboundary claim in Yukon. The second is a declaration that the honour of the Crown requires Canada to take steps within its power to protect and

preserve Taku River Tlingit rights and interests in and to its claimed territory in Yukon, pending settlement.

[2] Canada opposes the application on several grounds. Firstly, that Canada is negotiating with the Taku River Tlingit in British Columbia and the honour of the Crown is met; secondly, that the honour of the Crown does not give rise to a duty to negotiate; thirdly, that the Crown prerogative permits Canada to decide when and how to negotiate; and fourthly, that ss. 49 and 50 of the *Yukon Act* do not apply to this case. Counsel for the Taku River Tlingit argued that these sections, which allow the federal Minister to regain control of public real property for the settlement of an Aboriginal land claim, apply and should be used.

[3] Canada officially accepted the comprehensive claim of Taku River Tlingit for negotiation by letter dated November 5, 1984. British Columbia accepted the Taku River Tlingit claim into its treaty negotiation process in December 1993. In terms of the territory claimed, 92% is in British Columbia and 8% in Yukon. This case focuses on the 8% of the Taku River Tlingit claim which is in Yukon.

[4] This court action was precipitated by the proposed development of a Government of Yukon campground at the north end of Atlin Lake in the traditional territory claimed by the Taku River Tlingit. It has since been put on hold after the commencement of this claim against Canada and a separate action against the Government of Yukon.

[5] The thrust of the position of Canada is that they are not refusing to negotiate, but rather are saying "not now", and that they will when an Agreement in Principle is reached in the British Columbia treaty process. During the course of the hearing,

Canada indicated that it had received instructions to engage in "exploratory discussions" with the Taku River Tlingit but the Taku River Tlingit declined to pursue that offer.

BACKGROUND

[6] The Taku River Tlingit are situated around Atlin Lake and the Taku River in northwest British Columbia. The First Nation headquarters are located in Atlin, British Columbia. A great deal of the background included here arises from documents created by Canada and correspondence between Canada and the Taku River Tlingit during the land claims process from 1973 to date.

Taku River Tlingit Negotiations with Canada Prior to Entry into the B.C. Treaty Process

[7] Following the decision in *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, on January 31, 1973, Canada considered a Memorandum dated June 28, 1973 regarding Indian and Inuit Title and claims and, on July 19, 1973, the Cabinet decided, among other things, as follows:

> (1) the government should immediately and publicly declare a policy of recognizing the Indian title where its surrender by the Indians has not yet taken place in the Territories, northern Quebec and British Columbia, and accept the principle of compensating them for loss of traditional use and occupancy, but making clear its view that, while responsibility for compensation regarding lands in the territories is that of the federal government, responsibility for compensation regarding lands in a province is primarily that of the province;
>
> (2) the federal government will inform Quebec and British Columbia of its intentions shortly before the announcement of the policy, inviting them to participate in the negotiations and advising them that if they do not agree to do so the federal government will be obliged to enter into negotiations with the Indians directly and, if necessary, to assist them in the courts in asserting their title;

> (3) if the agreement of Quebec and British Columbia to participate in the negotiation is not forth-coming, the government should proceed with the negotiations with the Indians in those provinces, making it clear that no agreement can be finalized without the participation of the provinces;
>
> (4) any public announcement concerning Indian and Inuit title and claims in the above-mentioned regions will have to take account of the fact that in Quebec, the matter is presently "sub-judice";
>
> (5) as part of the announcement mentioned in recommendation (1), the government should express its willingness to negotiate with the native people in the Yukon and with Indians and Inuit in those parts of the Northwest Territories not covered by treaties, when they are ready to do so; (my emphasis)
>
> ...

[8] The Cabinet decision was made public in a Statement of the Minister of Indian Affairs dated August 8, 1973 (the "1973 Claims Policy")

[9] In 1981, Canada published *In All Fairness: A Native Claims Policy – Comprehensive Claims* (the "1981 Claims Policy") which updated the 1973 Claims Policy. The 1981 Claims Policy recognized that First Nations were pressed by demands for natural resources to present their claims and stated at p. 8

> ... Development has only served to make the settlement of these claims more urgent to some native groups. The government recognizes the urgency to settle land claims as quickly and effectively as possible in order that the interests of Native people be protected in the wake of development, in a way that offers them a choice of lifestyles. (my emphasis)

[10] And then at p. 23, with respect to overlapping claims:

> Even where jurisdictions are not at issue, some lands are used by more than one native group. Where this sort of overlapping exists and where there appears to be no ready

> agreement among the different users, some appropriate and timely means must be found to resolve the differences. Until this is done, no land in these areas will be granted. (my emphasis)

[11] On February 10, 1983, the Taku River Tlingit passed a Band Council Resolution claiming its traditional territory, referred to in this decision as the "Taku River Tlingit Land Claim", as set out on the attached Schedule A map.

[12] By letter dated November 5, 1984, from the Minister of Indian and Northern Affairs, Canada officially accepted the Taku River Tlingit Land Claim for negotiation stating, among other things, as follows:

> I am pleased to inform you that as a result of reviews completed by the Office of Native Claims and the Department of Justice, I have, on behalf of the Government of Canada, pursuant to the policy on comprehensive claims, officially accepted for negotiation the comprehensive claim which was submitted by the Atlin Indian Band in February 1983.
>
> The federal government's resolve to negotiate your claims is [contingent] upon the Province of British Columbia agreeing to participate in tripartite negotiations. While your claim meets the federal policy criteria of acceptance for negotiation purposes, I must advise you that this should not be construed as an admission of legal obligation or liability on the part of the federal government. During negotiations the statements and positions of all parties are to be on a "without prejudice" basis relating to any present or future legal proceedings. Furthermore, the acceptance of your claim ought not to be regarded as an official recognition of the boundaries on the map you submitted as being the extent of the land traditionally used and occupied by the Tlingit people represented by the Atlin Indian Band.
>
> At the same time, the government recognizes your continuing interest in the border area Yukon Territory and anticipates that you will be reaching an agreement with the Council for Yukon Indians on this overlapping question. In this regard, I note that you have received a contribution of

> $125,000 this year to pursue discussions on this matter with the CYI. (my emphasis)

[13] The First Nation received the $125,000 contribution to reach agreement with the Council for Yukon Indians (now Council for Yukon First Nations) on the overlapping claims in Yukon. Ultimately, the Taku River Tlingit received almost $1.7 million to research their transboundary claim and negotiate overlaps with other First Nations.

[14] On October 21, 1985, the Taku River Tlingit made a submission to the Task Force on Comprehensive Claims which raised the issue of traditional boundaries of First Nations not being respected. In explaining that the Taku River Tlingit have claims in British Columbia, Yukon and Alaska, the submission stated:

> This situation creates a problem for [everyone] involved, the Tlingit boundaries established since time immemorial do not match non-Indian governments' lines drawn through our territories. The Indian First Nations are then forced to try and accommodate to the non-Indian governments' boundary lines. Present government policy is designed to solve government' [as written] perceived problems by respecting only non-Indian boundaries and ignoring First Nations boundaries. In our view this has to stop.

[15] As an example, the First Nation submitted that;

> ... in the government's recent negotiations with the Council for Yukon Indians interim Agreements In Principle (which were never ratified) were made concerning our aboriginal title without our knowledge and without our consent.

[16] In 1986, Canada, Yukon and the Taku River Tlingit met along with other First Nations to discuss how their claims would proceed. In the same year, Canada published a revised policy entitled *The Comprehensive Land Claims Policy* (the "1986 Claims Policy").

[17] The 1986 Claims Policy set out the following procedure to be followed:

1. Statement of Claim;
2. Acceptance of Claims;
3. Preliminary Negotiations;
4. Framework Agreements;
5. Agreements in Principle;
6. Final Agreements;
7. Implementation.

[18] It also made the following statements:

> ... The fair and equitable resolution of such claims is also a major priority of the Government of Canada.
>
> ...
>
> The last review of the comprehensive land claims policy
> en growing
> y. Serious
> ress in
> between
> deral olic
> initiatives. ... (my emphasis)
>
> ...

[19] With respect to Lands, the 1986 Claims Policy stated:

> Where more than one claimant group utilizes common areas of land and resources, and the claimants cannot agree on boundaries, resource access or land-sharing arrangements, no lands will be granted to any group in the contested area until the dispute is resolved.
>
> In cases where a claimant group currently utilizes resources in a province or territory other than that in which its communities are located, the range of benefits available to the group outside the province or territory of residence will be determined by negotiation with the province or territory

> involved and with any other aboriginal groups which can establish competing claims to the land. The content of such negotiations will be identified in framework agreements. (my emphasis)

[20] The first paragraph regarding overlapping claims, although reworded, is identical in substance to the one quoted above from the 1981 Claims Policy.

[21] Regarding the involvement of Territorial Governments, the 1986 Claims Policy stated:

> In the territories, lands and resources fall under federal jurisdiction. Negotiations in these areas will be bilateral in nature leading to federally-legislated settlements complemented by territorial legislation as required. Territorial governments will participate fully in the application of land claims policy and in negotiations, under the leadership of the federal government. (my emphasis)

[22] Under the heading Aboriginal Rights, the 1986 Claims Policy stated:

> Appropriate interim measures may be established to protect aboriginal interests while the claim is being negotiated. These measures will be identified in initial negotiating mandates in specific cases.

[23] The above quotations are all subject to various qualifications but they do set out principles upon which the 1986 Claims Policy was to be implemented.

[24] In January 22, 1987, Ms. Jennie Jack, the Taku River Tlingit Chief Negotiator advised the Standing Committee on Aboriginal Affairs and Northern Development:

> We are one of three Tlingit bands in Canada. The other two are known as the Carcross-Tagish Band, from the Yukon Territory, and the Teslin Band, also from within the Yukon boundaries. Together with those two bands, we function as the Tlingit Nation.
>
> ...
>
> This Tlingit Nation takes its direction from elders from each of the three communities. The Carcross-Tagish and the

Teslin Indian Bands are represented by the Council for Yukon Indians within the Yukon, and have been active in claims negotiations for about 14 years. We have focused our attention on ensuring the protection of Tlingit interests in British Columbia, just as has the Tlingit people on the Yukon side of the border are guarding our interests within the Yukon jurisdiction. We work very closely with all organizations in the province to ensure and respect the protection of aboriginal rights in British Columbia for all First Nations.

Our comprehensive claim was accepted for negotiation by the Government of Canada in April 1983. Since that time we have done a lot of work, primarily concerned with what is known as the "overlap issue", and we have been able to accomplish a great deal of research concerning our practice of aboriginal rights in our territory.

We Taku River Tlingits in British Columbia find ourselves in a very unusual and awkward position. The Government of Canada has been negotiating with the members of our Tlingit Nation in the Yukon for the past 14 years, negotiations we participate in and heartily endorse. The Tlingits in Alaska have entered into a land claim treaty with the United States government on at least two separate occasions. Therefore the only Tlingits who have never had an opportunity to enter into negotiations, or even to achieve a land claim settlement, are the Tlingits whom we represent, and who reside primarily in British Columbia. This anomaly is not created by the Tlingit people themselves, but is a result of non-Indian divisions within our own territory, which we have had nothing to do with.

...

First, I would like to say that we have been doing a lot of research for the last three years. We are very close to being able to sit down and negotiate a full land claims settlement.

The fact that we are 13th on the list [of First Nations to negotiate with across the country] may make us wait a little longer, but we have been receiving research dollars to negotiate our overlap, our joint jurisdiction within the Yukon, so that has enabled us to get a lot of our research done. So it may be put on our shoulders to let the Province of British Columbia realize that yes, we may be 13th on the list, but we

> are prepared to negotiate and ready to go to the tables very soon, whereas other groups who will receive research dollars will have to take years to research and then negotiate. So it would be in our interest to convince the government that we are ready to go now and let us do it and get it over with. (my emphasis)

[25] I add here that the reference by Ms. Jack to the Taku River Tlinglit's participation in Yukon negotiations is in the context of the Tlingit Nation and not Taku River Tlingit directly. It is my understanding that the Taku River Tlingit were not involved in negotiation of Final Agreements for Carcross/Tagish First Nation or Teslin Tlingit Council.

[26] In response to the 1986 Claims Policy, the Land Claims Director of the Taku River Tlingit wrote on June 9, 1987:

> From a reading of the press in recent weeks, we are now aware that the Federal Cabinet has developed a "Yukon Mandate" which as a [as written] understand it is a set of instructions to the Federal negotiators to get on with the negotiations in the Yukon. In a recent personal contact with Mr. Peter Fisher, Negotiator for the Federal Government, he indicated that the Mandate includes the Federal Government dealing with those of us who have claims in the Yukon, but are ordinarily non-resident.
>
> ... Now that claims in the Yukon will move into a more intense period we are required to put ourselves into a more advanced state of preparation so that we can be a part of the negotiations which affect our people's interests. ... (my emphasis)

[27] On June 11, 1990, the Minister of Indian and Northern Affairs replied to a letter from Chief Sylvester Jack of the Taku River Tlingit which referred to "transactions that have been taking place on all unsurrendered Indian lands", i.e. "Traditional Territory".

He stated:

> ... In Yukon, this process recently resulted in the initialling of an Umbrella Final Agreement by negotiators of the Council for Yukon Indians, Canada and the Yukon Territorial Government. This important milestone has paved the way for negotiation of the Yukon First Nation Final Agreements, and a schedule for these negotiations is being developed. I understand that the transboundary claim of the Taku River Tlingits will be dealt with in the context of negotiation of the Yukon First Nation final agreements of the Carcross-Tagish First Nation and the Teslin Tlingit Council. I hope that these negotiations result in a resolution of your claims in Yukon that is satisfactory to all parties. (my emphasis)

[28] On September 25, 1991, the Taku River Tlingit wrote to the Chief Federal Negotiator:

> Please be advised that the Taku River Tlingit First Nation (TRTFN) is ready to negotiate a final transboundary agreement within the context of the Tlingit Nation and the Yukon Umbrella Framework Agreement.
>
> Given that the Teslin Tlingit First Nation is soon expected to ratify their final agreements, we expect to engage in the transboundary process prior to the end of this calendar year. The problem, however, as indicated in our previous letter dated July 16, 1991, is a lack of funds. (my emphasis)

[29] By letter dated October 3, 1991, the Chief Federal Negotiator responded that he was very pleased to begin negotiation of a transboundary agreement in Yukon with the Taku River Tlingit First Nation.

[30] The Taku River Tlingit did not complete a tranboundary agreement with Yukon before entering the B.C. treaty process in December 1993. Although communication continued between the Taku River Tlingit and Canada's Chief Negotiator for the Yukon, it is fair to say that the transboundary negotiations took a back seat to the Tlingit's negotiations with British Columbia.

Other Transboundary Agreements

[31] Canada, while negotiating treaties in the territories, did finalize a number of transboundary agreements. The Inuvialuit of the western Arctic whose traditional territory included the communities of Aklavik, Holman, Inuvik, Paulatuk, Sachs Harbour and Tuktoyaktuk in the Northwest Territories and the North Slope of Yukon and offshore areas, settled their claim on June 5, 1984, as amended on January 15, 1987. The Inuvialuit claim includes a special conservation area on the Yukon North Slope, described as "north of the height of land dividing the watersheds of the Porcupine River and the Beaufort Sea" between the boundaries of Yukon and Alaska.

[32] Further south of the Inuvialuit Settlement Region in the Northwest Territories, the Tetlit Gwich'in signed a Comprehensive Land Claim Agreement in 1992, which also contains a transboundary agreement providing the Tetlit Gwich'in 600 square miles of fee simple settlement land in Yukon along with a role in the management of land and resources in Yukon to be exercised within the applicable First Nation and Yukon management systems.

[33] Counsel for Canada points out that Tetlit Gwich'in settlement reached an Agreement in Principle on the Northwest Territories portion first before their transboundary claim was considered. The Inuvialuit settlement is similar in that respect.

[34] Significantly though, land claims processes in the territories did not involve a provincial Crown, and the vast majority, if not all, of the land was under the jurisdiction of Canada. Yukon, which began the negotiations as part of Canada's team, became full participants in the 1986 Claims Policy, although "under the leadership of the federal government."

Tlingit Claims in Yukon

[35] On May 29, 1993, Canada, Yukon and Yukon First Nations, as represented by the Council for Yukon Indians signed the Umbrella Final Agreement, (the "UFA"). The UFA provided the framework for the settlement of individual Yukon First Nation land claims and for self-government agreements.

[36] Whenever a Yukon First Nation signs a Final Agreement, the provisions of the UFA are incorporated into that Final Agreement. Additional provisions specific to that First Nation are added.

[37] The Teslin Tlingit Council signed its Final Agreement with Canada and Yukon on May 29, 1993.

[38] The Carcross/Tagish First Nation signed its Final Agreement with Canada and Yukon on October 22, 2005.

[39] Both of these Tlingit First Nations have reached Stage 4 of negotiating their transboundary claims in British Columbia.

[40] Chapter 10 of the Carcross/Tagish First Nation Final Agreement contains four specifically designated Special Management Areas, one of which is Agay Mene Natural Environment Park described in Schedule D. The Park covers an area of 752 km^2 to the east of Atlin Lake and Little Atlin Lake running from the British Columbia border north to the Alaska Highway, an area wholly within the area claimed by the Taku River Tlingit. A Steering Committee to prepare and recommend a management plan for the Park consists of two members for Yukon and one member each for Carcross/Tagish First Nation and the Teslin Tlingit Council.

[41] The Final Agreement does not refer to the Taku River Tlingit but Yukon invited the Taku River Tlingit by letter dated June 10, 2013, to participate in the Agay Mene Territorial Park Steering Committee.

[42] During the negotiations involving lands in Yukon, Canada discussed the formal devolution of administration and control of lands and natural resources (mines and minerals, forestry, inland water) to Yukon.

[43] Various Yukon First Nations and later the Tetlit Gwich'in were consulted on the issue of devolution to Yukon but not the Taku River Tlingit. Yukon invited Yukon First Nations to the negotiating table to discuss devolution. Canada also responded to the representations of the Tetlit Gwich'in. On September 3, 1998, Canada, Yukon and Yukon First Nations signed the Yukon Devolution Protocol Accord setting out the framework to negotiate a Transfer Agreement to Yukon, to include the following sub-paragraphs:

> ...
>
> 1. d) provisions to safeguard interests respecting lands and resources for those Yukon First Nations and Transboundary claimant groups having unsettled land claims in the Yukon as at the date of transfer of NAP [referring to the Northern Affairs Program control of lands and resources]; and
>
>   e) provisions to be outlined in a YTG/ First Nations bilateral schedule to safeguard, after the date of transfer, interests respecting lands and resources for those Yukon First Nations and Transboundary claimant groups having unsettled land claims in the Yukon as at the date of transfer of NAP
>
> ...

[44] On October 29, 2001, the Devolution Transfer Agreement between Canada and Yukon, without First Nation signatories, agreed to transfer administration and control of

lands and resources in Yukon from Canada to Yukon. In paragraph 1.3 of the Agreement, Canada and Yukon agreed to conclude "as a matter of the highest priority in the Yukon, the negotiation of any outstanding Settlement Agreement, including the negotiation of the Taku River Tlingit Transboundary Agreement within the policies and mandates given to their respective officials to negotiate such agreements from time to time. ..." (my emphasis)

[45] The *Yukon Act*, S.C. 2002, c. 7, contains ss. 49 and 50. Section 49 provides a procedure whereby Canada may "take-back" the administration and control of lands from Yukon "if the Governor in Council consider it necessary to do so for:

> ... (d) the settlement of an aboriginal land claim or the implementation of an aboriginal land claim agreement.

[46] Section 50 enables Canada to prohibit the issuance of interests or the conduct of activities while a decision to "take-back" is considered.

The Taku River Tlingit Negotiations with British Columbia

[47] While the UFA, transboundary agreements and devolution were being negotiated in the Yukon, British Columbia was participating in the British Columbia Claims Task Force with Canada and representatives of British Columbia First Nations. The Task Force first met on January 16, 1991, to discuss how to proceed with land claim negotiations in British Columbia.

[48] The British Columbia Claims Task Force released its report on the negotiation of First Nation Claims on June 28, 1991. Canada responded and accepted all 18 recommendations put forward. In 1992, a tripartite agreement between Canada, British Columbia and British Columbia First Nations formally declared the intention to begin comprehensive claims negotiations.

[49] On December 16, 1993, the British Columbia Treaty Commission ("BCTC") commenced work.

[50] The Taku River Tlingit First Nation had passed its Statement of Intent to begin negotiations with Canada and British Columbia on December 15, 1993, and the BCTC accepted the Statement of Intent on December 16, 1993, its first day of operation. The Taku River Tlingit First Nation Statement of Intent included the fact that they had been working on their transboundary claim in Yukon.

[51] On April 8, 1994, the Minister of Indian Affairs, by letter to Taku River Tlingit First Nation, confirmed its commitment to make substantive progress in the settlement of land claims and the establishment of Aboriginal Self-government.

[52] In April 1995, Canada's Chief Negotiator in B.C. had been appointed and negotiation dates agreed upon.

[53] Canada also had a Chief Federal Negotiator for the Yukon claims and by letter dated April 12, 1995, encouraged the Taku River Tlingit to contact him directly about the First Nation's transboundary claim:

> Regarding your transboundary claim, Mr. Tim Koepke, Chief Federal Negotiator for the Yukon claims, is responsible for these negotiations ... I encourage you to contact him directly. Our federal negotiation teams in the Yukon and British Columbia are in close contact on matters affecting transboundary claims.

[54] Although the Taku River Tlingit were in contact with Yukon's Chief Federal Negotiator, as discussed above, the record does not indicate that there were any substantive transboundary negotiations at this time.

[55] By August 26, 1996, Canada, British Columbia and Taku River Tlingit First Nation entered into a Framework Agreement, which concluded Stage 3 of the British

Columbia Treaty process. Stage 1 was the acceptance of Taku River Tlingit First Nation's claim for negotiation which was accomplished in 1993 – 94. Stage 2 was demonstrating the readiness to negotiate, which required a qualified negotiator with a mandate. The next stage, Stage 4, is the negotiation of an Agreement in Principle ("AIP"), i.e. the substantive treaty negotiation stage. Stage 5 formalizes the treaty and Stage 6 is implementation.

[56] It is at Stage 4, the negotiation of an AIP, that land selection and tenure are negotiated. Specifically, the Framework Agreement provides a list of subjects which the Parties wish to address in the negotiations which includes:

> 5.1.2 Lands
>
> Land Selection and Tenure
> Access
> Parks and Protected Areas
> Surface and Sub-surface Rights
> Environmental Management
> Heritage Resources

[57] The Framework Agreement also provided for Suspension of Negotiations as follows:

> 13.1 The Parties are committed to interest based negotiations within the BCTC Process. Each Party reserves the right to suspend its participation in these negotiations, and any Party may object to such a suspension, but such objection does not affect the right of any Party to suspend participation in these negotiations. Where there is a dispute, the Parties may work together to resolve the dispute prior to, or after, suspending these negotiations.
>
> 13.2 If a Party decides to exercise its right of suspension, that Party shall provide written confirmation to the other Parties and to the BCTC, setting out the reasons for the suspension and the date of commencement.

[58] In September and October 1996, the Taku River Tlingit wrote letters to Canada and British Columbia expressing outrage and frustration at the British Columbia government's refusal to commit to schedules beyond February 1997 and Main Table Negotiations every three months.

[59] Meetings continued through 1996 – 1998 with Canada, Taku River Tlingit and British Columbia.

[60] Changes to the Taku River Tlingit negotiating team took place in 1998. By letter dated April 9, 1998, the Daak Ka Nation representing the Teslin Tlingit Council, Carcross/Tagish First Nation and Taku River Tlingit advised the Minister of Indian Affairs and Northern Development that:

> ... Although the First Nations are committed to negotiating treaties in good faith, the Daak Ka Nation has concerns in relation to the continued alienation of the lands and resources within our combination traditional territories. If these infringements to our aboriginal title and rights continue without our consent, the Daak Ka Nation will be forced to initiate court action to defend our lands and resources.

[61] The Daak Ka Nation, or Daak Ka Tribal Council, as it is also referred to, was a forum used by the Tlingit Nation in the 1990s but has not been active since.

[62] At a meeting on September 8, 1998, the Taku River Tlingit team decided to join the Transboundary Regional Negotiation Table, which was established in July 1997 to focus on the three Yukon First Nations' (Champagne and Aishihik, Carcross/Tagish and Teslin Tlingit Council) transboundary claims in British Columbia.

[63] By letter dated September 18, 1998, Tim Koepke, the Chief Federal Negotiator for Yukon, advised the BCTC that the Transboundary Regional Negotiation table, having been joined by the Taku River Tlingit, would become a new Northern Regional

Negotiation table to reflect the intention to also negotiate the Taku River Tlingit main treaty with B.C. in the same forum. On September 29, 1998, the province of British Columbia advised the BCTC that it welcomed the creation of the Northern Regional Negotiation table and the addition of the Taku River Tlingit.

[64] The AIP negotiations progressed at the Northern Regional Table from 1996 through 1999 during which time the Taku River Tlingit First Nation raised issues about the alienation of land in British Columbia. There were no complaints about land alienation in their Yukon Claims.

[65] The Taku River Tlingit commenced a court action in February 1999 to quash a decision to permit Redfern Resources Ltd. to build a road through the Taku River Tlingit traditional territory to re-open an old mine. The case was finally resolved at the Supreme Court of Canada under *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74, which established a duty to consult that had been met.

[66] Despite the correspondence between Canada and the Taku River Tlingit to negotiate their transboundary claim, no substantive negotiations about lands in Yukon took place.

[67] In a letter dated July 28, 1999, entitled "Negotiation of the Taku River Tlingit First Nation's Transboundary Land Claim in Yukon" and directed to the Executive Director and Land Claims Coordinator of the Taku River Tlingit, the Chief Federal Negotiator and the Chief Negotiator, Yukon, set out their joint views as follows:

> Further to our several brief conversations on the above-noted topic over the last year, and more specifically to follow up on the telephone conversation between Tim Koepke, Chief Federal Negotiator and Susan Carlick on June 15,

1999, Canada and Yukon are hereby responding to your inquiry into how negotiation of this claim might proceed.

In reviewing Canada's files for the Taku River Tlingit (TRTFN) claim, this department, on behalf of Canada, received a Band Council Resolution dated February 10, 1983 containing the TRTFN "... declaration of claims to the land outlined on attached maps ...". The department's Treaties and Historical Research Division of the day undertook an initial analysis of the claim, which was supported by anthropological and historical evidence, and accepted the claim for negotiation on November 5, 1984. This acceptance was not geographically specific, but as the map of the claimed territory encompassed British Columbia and a small portion of southern Yukon, it was anticipated that an agreement would (someday) be concluded involving Canada and the Province of British Columbia for the BC portion, and following that a transboundary agreement would be concluded with Canada and Yukon.

As you are well aware, the British Columbia treaty making process was slow in coming, during which time an Agreement in Principle and an Umbrella Final Agreement were concluded with the Council for Yukon Indians on behalf of the Yukon First Nations it represented. Following these events, land claim final agreements and self-government agreements were reached with various Yukon First Nations, including the Teslin Tlingit Council, with which TRTFN is closely affiliated.

Once the British Columbia Treaty Commission was established and operational, Champagne and Aishihik First Nation (CAFN) and Teslin Tlingit Council (TTC) both filed Statements of Intent with BCTC in accordance with its six stage process. These claims were accepted for negotiation which commenced first with CAFN and later with TTC. By the time Stage 3 – Framework Agreement negotiations commenced, but CAFN's and TTC's final and self-government agreements in Yukon had come into effect. Carcross/Tagish First Nation (CTFN) soon after inquired into how to initiate its transboundary claim in BC and was advised by Canada to file a Statement of Intent. Once substantial progress was made on the elements of its Yukon claim, CTFN quickly adopted a slightly modified version of the TTC BC Framework Agreement which was subsequently agreed to and signed. These three transboundary groups

know the extent of their respective Yukon claim provisions which serves to inform their BC transboundary AIP discussions.

The same reasoning would apply to the transboundary claim in Yukon of the Taku River Tlingit First Nation, having the similarities with the Yukon transboundary groups in not having a population base in the transboundary area.

Canada and BC negotiated provisions of the UFA and final agreements in Yukon knowing that there was a potential for three BC-based First Nations to request negotiation of transboundary arrangements in Yukon. It is fair to say that public governments and First Nation governments want to achieve workable arrangements which satisfy the respective needs of the parties and which are not set up to create either jurisdictional or administrative confusion. To that end, Canada and Yukon, and presumably the TTC and CTFN, will want to have Yukon transboundary provisions for the TRTFN which are consistent with the UFA. I mentioned in my conversation on June 15 that Appendix C of the Gwich'in Comprehensive Land Claim Agreement sets out the rights of the Tetlit Gwich'in in Yukon and in fact incorporates directly the relevant provisions of the UFA. We would anticipate that the same approach would be taken for the TRTFN transboundary claim.

Ms. Carlick expressed concern in our June 15 conversation that while the above approach might sound logical, it is dependent on progress with the TRTFN treaty in BC. As you know, Canada and BC are working bilaterally at the present time to develop outlines of offers for agreements in principle for each of the four First Nation parties at the Northern Regional Negotiations table. We expect to convene a scoping session to discuss these outlines once BC has confirmed its Cabinet mandates, expected now about the end of September, and would expect a fairly short turnaround time for responses from the First Nations. After receiving the responses we will all know whether we have the makings of an agreement with the TRTFN. If the decision is to proceed forward to a TRTFN AIP, then we will have a better idea of timing for that AIP and also a better estimate of the time necessary to complete the negotiation of a final treaty document. All of this information will give us a better sense of the appropriate time to commence Yukon transboundary negotiations with TRTFN.

> Regardless of the AIP outline response from TRTFN, it would be useful to convene a meeting between Canada, Yukon and the TRTFN to discuss the next steps. If for some reason an AIP and final treaty with TRTFN are not indicated by the response, there should be at least a discussion of the options available to address the parties' interests. Canada would be pleased to accept the role of organizing such a meeting.
>
> We trust that we have outlined our views in sufficient detail for now and look forward to a date when we can commence the negotiation of the Taku River Tlingit transboundary interests in Yukon. (my emphasis)

[68] I have included the complete letter as it is the first time that, on the record before me, that Canada stated that Yukon transboundary negotiations were contingent upon an AIP and final treaty agreement with British Columbia.

[69] In an email dated November 15, 2003, the Chief Federal Negotiator confirmed the frustration of the Taku River Tlingit with British Columbia's lack of interest in negotiating Yukon First Nation transboundary interests. He said that "we continue to work on British Columbia and BCTC at the senior officials and ministers levels to get the necessary work done so that the transboundary tables can proceed."

[70] In December 2005, British Columbia advised that it had no mandate to negotiate with First Nations outside of British Columbia. This effectively terminated the Northern Regional Negotiation table.

[71] The 2007 BCTC Annual Report described the Northern Regional Negotiations as follows:

> **NORTHERN REGIONAL NEGOTIATIONS**
>
> There has been no activity at the Northern Regional Negotiations table. Following an exercise in 1999 in which Canada and British Columbia outlined their preliminary

> positions with respect to land, cash and other provisions that would be included in a comprehensive treaty, negotiations stalled. Over the following few years meetings were infrequent and the First Nations focused on land use planning and protection.
>
> The table has effectively been shut down since spring of 2003 when the BC government announced it would not return to tripartite negotiations until it has reassessed its mandate for transboundary negotiations. To date this task has not been completed.
>
> Champagne and Aishihik First Nations, Carcross/Tagish First Nation, Taku River Tlingit First Nation and Teslin Tlingit First Nation represent approximately 2,200 members who traditionally used and occupied the lands in southwest Yukon and northwest British Columbia. With the exception of Taku River Tlingit, whose traditional territory lies predominantly in British Columbia, these First Nations have negotiated land claims agreements with the Government of Yukon. All of the members of the Northern Regional Negotiation table have transboundary claims, that is, claims to land and resources that span the British Columbia and Yukon border. (my emphasis)

[72] I add that Susan Carlick, the present Chief Negotiator for the Taku River Tlingit, stated in an affidavit that the Northern Regional Negotiation table dissolved shortly after a "scoping offer" made by Canada and British Columbia was rejected.

[73] On December 19, 2008, Taku River Tlingit advised that they wished to re-enter the British Columbia Treaty Negotiations process. By 2009, an agreement to negotiate was reached and the British Columbia treaty negotiations with the Taku River Tlingit recommenced. Negotiations continued to 2015 resulting in all chapters of the Agreement in Principle drafted and now actively under review and discussion. The Taku River Tlingit continued to make verbal requests to start the Yukon transboundary negotiations on several occasions during the negotiations between 2008 and December 2013.

[74] The request for transboundary negotiations became more urgent when Yukon announced on March 15, 2013, that it was building a campground on Atlin Lake within the Taku River Tlingit transboundary claim in Yukon. Historically, the Taku River Tlingit had a village site at the north end of Atlin Lake before moving to their present site at Atlin.

[75] The Taku River Tlingit say Yukon did not consult in any manner before the announcement of the campground.

[76] The Taku River Tlingit met with Yukon on September 13, 2013, to discuss the proposed campground for Atlin Lake. Yukon proposed "as a first step" to enter into discussions about developing a consultation protocol. The Yukon letter continued:

> Turning to the proposed campground, we will take into consideration the matter you raised with us during the meeting of September 13th, in the correspondence you have sent to us over the course of the past few months and in your submissions to the Teslin Designated Office. Our officials remain interested in continued dialogue with TRTFN as part of our consultation effort and to further assess mitigation measures with respect to its identified concerns with the proposed campground. We would like to continue our consultation with TRTFN and look forward to its participation.

[77] The letter did not contain an offer to negotiate the Taku River Tlingit transboundary claim in Yukon.

[78] Yukon proceeded through Yukon Environmental and Social Economic Assessment Board ("YESAB") and obtained approval for the campground on November 26, 2013. By an urgent letter dated December 9, 2013, the Taku River Tlingit wrote the Minister of Aboriginal Affairs and Northern Development requesting a meeting with the Minister and his Yukon staff to discuss how they can best achieve:

1. Protection of their asserted rights and title in Yukon;
2. Interim protection of their land selection within the transboundary claim; and
3. The engagement of the Taku River Tlingit in the negotiation and consultation of their Yukon transboundary claim.

[79] Canada says that it was first made aware of the urgency in the fall of 2013, when the Taku River Tlingit advised Canada at the negotiating table about the campground proposed by Yukon to be built on Atlin Lake. A copy of the December 9, 2013 letter to the Minister was provided to Dionne Savill, Regional Director General, Yukon Region, on December 10, 2013. Ms. Savill met with Taku River Tlingit Spokesperson Ward to discuss his letter and request. Spokesperson Ward wrote another letter dated December 19, 2013, to Dionne Savill confirming that Yukon was "moving forward" with the Atlin Lake campground project within their comprehensive claim. Spokesperson Ward again requested immediate intervention by Canada.

[80] On December 31, 2013, Ms. Savill confirmed that the issues raised by the Taku River Tlingit were important and she brought them to the attention of Canada's Treaties and Aboriginal Government Negotiations West branch ("TAGNW"). She recommended a meeting between the Taku River Tlingit, TAGNW and Yukon to discuss the transboundary claim and the campground. On January 28, 2014, the Minister advised he was unable to meet because of a heavy schedule.

[81] A meeting took place on February 6, 2014. Canada was represented by the Senior Director of Negotiations North. Apparently, Yukon was ready to participate in the negotiation of a transboundary agreement if Canada confirmed a full mandate to

engage the Taku River Tlingit. By letter dated February 19, 2014, Taku River Tlingit confirmed that Canada would not negotiate the Taku River Tlingit transboundary agreement until the Taku River Tlingit claim was signed and ratified in the BCTC claim process.

[82] Spokesperson Ward stated:

> The cumulative adverse effect of Canada's failure to protect TRTFN's asserted rights and title to land in the Yukon is devastating to TRTFN culture, detrimental to our long-term economic interests and prejudicial to our future transboundary agreement. The proposed YG Atlin Lake campground is located at a site of particular cultural significance. The loss of this particular site from our future transboundary agreement is immitigable.
> The TRTFN prefers negotiation over confrontation. Accordingly, the TRTFN has asked Canada to engage in the negotiation of a transboundary agreement, provide interim protection for TRTFN land settlement selections, and protect our asserted Aboriginal rights and title lodged in the Yukon portion of our comprehensive claim.

[83] Canada was not prepared to provide funding for "federal consultation activities". Yukon again proposed a Consultation Protocol with Taku River Tlingit prior to the commencement of this court action on February 24, 2014.

[84] At present, Yukon is not developing the proposed campground on Atlin Lake.

[85] In September 2014, Canada published a document entitled "Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights." Its purpose is to develop a "new framework" for addressing Section 35 Aboriginal Rights and, as a first step, Canada appointed Douglas Eyford as the Ministerial Special Representative to lead engagement with aboriginal groups "to further renew and reform the 1986 Claims policy."

[86] The September 2014 document also set out an "interim policy" with included:

> **f) Shared Territories and Overlapping Claims**
>
> Shared territory and overlap issues are situations in which more than one Aboriginal group has potential or established Aboriginal or treaty rights in the same geographical area.
>
> If left unresolved, shared territory and overlap issues can harm both the process of reconciliation between Canada and Aboriginal groups and the relationships among Aboriginal groups. The resolution of these overlaps is a key interest for all parties.
>
> Aboriginal groups are best placed to resolve shared territory and overlap disputes between themselves. Where there are competing claims to the same geographical area, Canada may consider options in advance of final treaty which support the reconciliation of section 25 rights and encourage Aboriginal groups to resolve the dispute. Canada continues to support Aboriginal groups' efforts to resolve shared territory disputes. Throughout the treaty negotiation process, Canada will consult with Aboriginal groups where there may be potential adverse impacts on asserted or established section 35 rights by a treaty. (my emphasis)
>
> **g) Trans-Boundary Claims**
>
> Where an Aboriginal group currently utilizes resources, in a province or territory, other than that in which its communities are located, the range of benefits available to the group outside its province or territory of residence will be determined by negotiation with the province or territory involved and consultation with any other Aboriginal groups with shared territory or overlapping claims. (my emphasis)

[87] On February 20, 2015, Douglas Eyford issued his report entitled "A New Direction – Advancing Aboriginal and Treaty Rights" (the "Eyford Report"). While the Eyford Report is comprehensive and each party can point to statements supporting their respective position, some of the following has relevance as it considers institutional barriers to resolving land claims:

> It is discouraging, however, that only 26 agreements have been finalized in 42 years given the expenditure of time and resources on negotiations. From the outset, the comprehensive land claims process has been undermined by institutional barriers and process inefficiencies. Today, 75 claims are at various stages of negotiation. More than 80 per cent of those tables have been in the treaty process for longer than ten years, some for more than two decades. (p. 4)
>
> ...
>
> Furthermore, Canada's claims procedures are cumbersome, requiring Cabinet approval at several stages in negotiations. It is not unusual for each approval to take two years or longer. Today, six treaty tables are waiting for Canada to either initial or sign their respective agreements-in-principle. Three of the agreements-in-principle have been in the queue for more than two years. (p. 49)
>
> ...
> Canada is not the only party responsible for delay. Many Aboriginal groups are hesitant to close negotiations because they are apprehensive about the permanence and finality of modern treaties. Understandably, Aboriginal groups are reluctant to lock-in treaty rights when there is a prospect that other rights not contemplated during negotiations may subsequently be defined by the courts. The fact the treaty process provides a constant source of funding and employment in Aboriginal communities can also serve as a disincentive to conclude negotiations. Finally, many Aboriginal groups are simply not ready to take on the responsibilities of a treaty despite spending a decade or longer in negotiations. (p. 50)
>
> ...

[88] With respect to the British Columbia Treaty Commission, Mr. Eyford reports:

> Modern treaty negotiations in British Columbia began in 1993. At the time, it was anticipated that treaty-making would be completed by 2000.
>
> After more than 20 years of negotiations, it is clear those expectations were overly ambitious if not unrealistic. Still, important lessons have been learned. Only four treaties

> have been concluded under the BC treaty process. Today, 53 tables representing approximately half of the *Indian Act* bands in the province are engaged in the process. Only four tables are at the stage of negotiating a final agreement. While predicting outcomes in treaty negotiations is challenging, it is improbable that each of the 53 tables will complete a final agreement. It is more likely that no more than ten tables are likely to conclude a treaty in the foreseeable future. (p. 58)

[89] In the section of the Eyford Report entitled "D. Shared Territories and Overlapping Claims", Mr. Eyford states:

> Since 1973, Canada has consistently encouraged Aboriginal groups to resolve overlapping claims between themselves. The 1981 and 1986 Policies established that no land in areas of shared territory would be granted as part of a comprehensive land claim unless boundary disputes had been resolved. The Coolican Report supported this approach, recommending that rights in an overlap area not be recognized until after the overlap had been resolved. The BC task force was more nuanced, indicating that overlap issues did not have to be resolved prior to the commencement of negotiations. Recommendations 8 from the BC Task Force Report called on First Nations to resolve issues relating to overlapping traditional territories among themselves. Aboriginal organizations agree and regularly issue declarations and pass resolutions to that effect. Nevertheless, Canada has completed treaties in areas where overlap disputes have not been resolved. (p. 66) (my emphasis)

[90] It is noteworthy that the Taku River Tlingit are not included in the 8 Transboundary Tables listed in Appendix B of the Eyford Report, although it includes the "Northern Region Negotiations (Carcross/Tagish First Nation, Champagne and Aishihik First Nations, Teslin Tlingit Council).

[91] The Taku River Tlingit First Nation is included as one of the 27 First Nations negotiating tables under "AIP Negotiations".

FINDINGS OF FACT

[92] I find the following facts:

1. Canada declared publicly in August 1973 its recognition of Indian title and its willingness to negotiate with First Nations across the country to settle land claims. In the 1973 Claims Policy, Canada assumed responsibility for negotiating land claims in the territories, including Yukon, and indicated that it would push the process forward in British Columbia.
2. Canada accepted the Taku River Tlingit's land claim for negotiation in 1984, although the acceptance with respect to lands in British Columbia was contingent on British Columbia's participation in a tripartite process.
3. Canada's acceptance of the Taku River Tlingit claim anticipated that the First Nation would be resolving its land interests in the Yukon through an agreement with the Council for Yukon Indians in the context of the Yukon land claims negotiations.
4. Canada's 1981 and 1986 Claims Policies both stated that, where there was more than one claimant for land, no lands in the contested area would be granted until the dispute is resolved. Despite this, in 1987 Canada entered interim Agreements in Principle with Yukon First Nations that had overlapping claims to the Taku River Tlingit's transboundary area, without advising the Taku River Tlingit, who had indicated their interest in joining the Yukon claims process.
5. The 1986 Claims Policy also indicated that "appropriate interim measures may be established to protect aboriginal interests while the claim is being

negotiated". There have never been any interim measures in place to protect Taku River Tlingit land interests in Yukon.

6. In October 1991, the Taku River Tlingit and Canada acknowledged their readiness to negotiate a final transboundary agreement within the context of the Yukon Umbrella Final Agreement. This was not done before May 29, 1993, when Canada, Yukon and Yukon First Nations represented by the Council for Yukon Indians signed the Umbrella Final Agreement;

7. Also on May 29, the Teslin Tlingit Council signed its Final Agreement with Canada and Yukon on May 29, 1993. Canada did not include the Taku River Tlingit in discussions about overlapping land use or otherwise negotiate the Yukon transboundary claim in this context;

8. British Columbia agreed to enter into a treaty process with the Taku River Tlingit in December 1993, and by August 1996, Canada, British Columbia and the Taku River Tlingit had entered into a Framework Agreement, completing Stage 3 of the six-step B.C. treaty process. The Taku River Tlingit's Yukon transboundary claims were not discussed or negotiated in this context; rather the Taku River Tlingit were encouraged to contact Canada's Chief Negotiator in Yukon directly.

9. By 1998, the Taku River Tlingit were growing frustrated with the slow pace of the British Columbia treaty process. The British Columbia and Transboundary negotiating tables were joined to form the Northern Regional Negotiation Table, which included representation from Canada, British Columbia and Yukon.

10. On September 3, 1998, Canada, Yukon and Yukon First Nations signed a Devolution Protocol Accord to negotiate an agreement to transfer Canada's administration and control of lands and resources to Yukon. The Transfer Agreement was to include provisions to safeguard the interests of transboundary claimant groups. The Taku River Tlingit were neither a party to or consulted about the Yukon Devolution Protocol Accord;

11. By letter dated July 28, 1999, the Chief Federal Negotiator and the Chief Negotiator, Yukon, indicated that the Taku River Tlingit transboundary claim in Yukon would not be concluded until after a final agreement between Canada and British Columbia for the British Columbia claim. This was the first time there was any indication that the settling the Yukon claim of the Taku River Tlingit was dependent on negotiations in British Columbia.

12. Despite the Devolution Transfer Agreement between Canada and Yukon considering it "a matter of the highest priority" to conclude the Taku River Transboundary Agreement there have been no negotiations of the Taku River Tlingit Yukon Transboundary Claim since 1999.

13. Canada and British Columbia made a "scoping offer" on December 1, 1999, which was rejected by the four First Nations at the Northern Regional Negotiations table, including by the Taku River Tlingit.

14. The Carcross/Tagish First Nation signed its Final Agreement with Canada and Yukon on October 22, 2005. The Taku River Tlingit were not involved in any transboundary negotiations at this time, even though Chapter 10 of

that Agreement established the Agay Mene Natural Environment Park as a Special Management Area of 752 km^2 that is wholly within the Taku River Tlingit claim.

15. In 2003, British Columbia announced it would not return to negotiations at the Northern Regional Table until it had reassessed its mandate for transboundary negotiations with Yukon First Nations. This effectively ended all land claims negotiations for the Taku River Tlingit until late 2008, when the First Nation re-entered the B.C. treaty process,

16. Since re-entering the B.C. treaty process, the Taku River Tlingit have made verbal requests to Canada at the British Columbia table to resolve the Yukon transboundary claim. These requests became urgent when Yukon announced on March 15, 2013, that it was building a campground on Atlin Lake in a sensitive area of the Taku River Tlingit transboundary claim in Yukon.

17. Despite the willingness of Yukon to negotiate a transboundary agreement, Canada maintains its position that it will not negotiate a transboundary agreement until a Taku River Tlingit treaty is signed and ratified in British Columbia, or at least until "substantial progress" is made towards this goal.

THE DUTY TO NEGOTIATE IN GOOD FAITH

[93] Counsel for Canada and the Taku River Tlingit agree that there is a constitutional duty on Canada to negotiate land claims agreements, honourably and in good faith. However, Canada denies the existence of a duty to commence or continue negotiations,

and says that the duty only extends to how negotiations should be conducted when they are taking place. Canada submits that it is negotiating the Taku River Tlingit comprehensive land claim honourably and in good faith by negotiating the British Columbia claim first and deferring the Yukon claim until after an Agreement in Principle is reached. Taku River Tlingit claims that the failure or refusal to negotiate their Yukon claim while land alienations and settlements proceeded in the Yukon does not meet the required standard of honourable conduct.

[94] The Supreme Court of Canada stated in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73:

> 19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall, supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship ...".
>
> 20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.
>
> ...

> 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests. (my emphasis)

[95] In the companion case with Haida Nation, the Court said in *Taku River Tlingit,* cited above:

> 24 The Province's submissions present an impoverished vision of the honour of the Crown and all [page564] that it implies. As discussed in the companion case of Haida, supra, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1). (my emphasis)

[96] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, The court restated its previous decisions as follows:

> 32 The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While 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: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 25:
>
> > Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[97] More recently in *Manitoba Métis Federations Inc. v. Canada (Attorney General)*, 2013 SCC 14, the Supreme Court of Canada stated:

> 73 The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": Haida Nation, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:
>
> > (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (Wewaykum, at paras. 79 and 81; Haida Nation, at para. 18);
> >
> > (2) The honour of the Crown informs the purposive interpretation of s. 35 of the Constitution Act, 1982, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest: Haida Nation, at para. 25;
> >
> > (3) The honour of the Crown governs treaty-making and implementation: Province of Ontario v. Dominion of Canada, (1895), 25 S.C.R. 434, at p. 512, per Gwynne

> J., dissenting; Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (Badger, at para. 41); and
>
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples: R. v. Marshall, [1999] 3 S.C.R. 456, at para. 43, referring to The Case of The Churchwardens of St. Saviour in Southwark (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and Roger Earl of Rutland's Case (1608), 8 Co. Rep. 55a, 77 E.R. 555; Mikisew Cree First Nation, at para. 51; Badger, at para. 47.
>
> 74 Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.
>
> 75 By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it. (my emphasis)

[98] Most recently, the Supreme Court of Canada wrote in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44:

> 17 In Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511, the Court applied the Delgamuukw idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown's duty to consult and accommodate the asserted Aboriginal interest "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" (para. 24). Thus, the idea of proportionate balancing implicit in Delgamuukw reappears in

> Haida. The Court in Haida stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.
>
> 18 The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:
>
> * Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
>
> * Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
>
> * Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
>
> * Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
>
> * Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.(my emphasis)

[99] On November 12, 2010, Canada endorsed the "United Nations Declaration on the Rights of Indigenous Peoples" (UNDRIP).

[100] Although not enforceable against Canada, the Supreme Court has confirmed UNDRIP's usefulness in interpreting Canada's Constitution in *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981,

> 103 I agree with the NCC's general premise that UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux Dubé stated in Baker, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In Simon, Justice Scott, then of this Court, similarly concluded that

> while the Court will favour interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada's international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.

[101] Although the case law intermingles the duty to negotiate honourably with the duty to consult, the case at bar is about the Crown's duty to negotiate honourably. The duty to consult with Yukon is the subject of a separate court action to be heard later. The duty to consult does not apply to the case at bar to the extent that it is not Canada that has a proposed campground development on Atlin Lake. As the Chief Justice has stated in para. 4 of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* cited above, treaty negotiation is distinct from environmental assessment. In my view, treaty negotiation involves land selection and its protection rather than the duty to consult and accommodate. In land claims negotiations, the First Nation is putting forward its plans for its traditional territory. The duty to consult arises when government or private parties propose developments and the First Nation is consulted and perhaps accommodated.

1. Has Canada negotiated the Taku River Tlingit Yukon Transboundary Claim honourably?

[102] Canada submits that the honour of the Crown does not create a legal duty to negotiate but rather speaks to how an obligation must be fulfilled. See *Manitoba Métis Federation*, at para. 73.

[103] Canada submits, and I agree, that the duty to negotiate in good faith arises from the honour of the Crown. Also noted in the *Manitoba Métis Federation* case is the Crown's duty to fulfill a constitutional promise in a diligent way.

[104] Canada states that it is negotiating the Taku River Tlingit comprehensive claim in British Columbia and that it is not refusing to negotiate the Yukon portion of the claim. Rather, Canada is saying "not now" but later, when "substantial progress" is achieved in British Columbia. I point out that Canada's position on negotiating the Taku River Tlingit transboundary claim has evolved considerably over the years, including:

1. An express 1981 and 1986 Claims policy not to conclude comprehensive claim agreements unless boundary disputes had been resolved;
2. An express commitment to negotiate with the Taku River Tlingit in the context of Final Agreements with Carcross/Tagish First Nation and Teslin Tlingit Council;
3. A specific agreement of the Chief Federal Negotiator on October 3, 1991, to begin Yukon transboundary negotiations;
4. A commitment to negotiate (someday) after the Taku River Tlingit reached a final agreement with Canada and British Columbia (1999);
5. Negotiation in consultation with other overlapping claims (Interim Policy 2014).

[105] There are two distinct yet interrelated principles at issue in this case. The first is whether there is a duty to negotiate and the second is the duty to negotiate honourably.

[106] In my view, this is not a case about whether this Court can order that Canada has a duty to negotiate but rather whether having committed to negotiate, Canada must

do so honourably. On November 5, 1984, Canada officially "accepted for negotiation" the comprehensive claim submitted by the Taku River Tlingit in February 1983. I conclude from this that Canada has made the political decision to commence negotiations, so the case is not about ordering Canada to negotiate. That decision has been made and Canada has not resiled from it except to the extent that "someday" and "not now" may be inconsistent with the commitment to negotiate.

[107] The November 5, 1984 letter agreeing to commence negotiations treated the Yukon negotiations separately from negotiations in British Columbia. In addition, Canada officially agreed to begin negotiation of a transboundary agreement in Yukon in letter dated October 3, 1991 from the Chief Federal Negotiator in Yukon. This makes it clear that Canada did not consider the Taku River Tlingit claim to be one all-encompassing claim but treated it as a comprehensive claim that involved British Columbia primarily and a smaller portion in Yukon. It was never the position of Canada in November 1984 that the Yukon claim was contingent on British Columbia agreeing to participate in tripartite negotiations. In my view, this was confirmed in the October 3, 1991 letter.

[108] Even if British Columbia's participation in a treaty process was a condition, that contingency was met when the BCTC commenced in December 1993.

[109] It is also significant that the 1991 agreement to negotiate the Taku River Tlingit transboundary claim followed the commitment of the Taku River Tlingit on September 25, 1991, to negotiate a final transboundary agreement "within the context of the Tlingit Nation and the Yukon Umbrella Framework Agreement". This agreement to adopt the framework of the UFA by the Taku River Tlingit is significant as Canada had a policy

clearly stated in the 1981 and 1986 Claims Policy that no lands would be granted to any group in a contested area until the dispute was resolved. Canada has clearly breached that 1981 and 1986 Policy. At the same time, the Taku River Tlingit has never, on the evidence before me, taken issue with the lands or special management areas granted to the Yukon Tlingit First Nations in its Yukon Transboundary claim.

[110] In the 30 years since Canada accepted the Taku River Tlingit British Columbia and Yukon claims for negotiation, Canada has concluded agreements with the Teslin Tlingit First Nation (1993) and the Carcross/Tagish First Nation (2005), both of which granted special rights to those First Nations with shared land interests in the Taku River Tlingit transboundary claims. Then, in the face of Yukon planning to develop a territorial park in the remaining portion of the Taku River Tlingit claim, Canada refused to negotiate the claim. While not an absolute outright refusal to negotiate, it is "not now" in the face of the pending development of a culturally significant portion of the Taku River Tlingit claim that has not been granted to a Yukon First Nation. Whether it is "not now" or "not until a final agreement is negotiated with British Columbia", it fundamentally ignores the earlier promises of Canada to negotiate without any reservation.

[111] Canada's position to not negotiate the Yukon transboundary claim of the Taku River Tlingit by making its negotiation contingent on an agreement in the British Columbia claim negotiations was not formally expressed in writing until the joint letter of the Chief Federal Negotiator and the Chief Negotiator, Yukon, dated July 28, 1999. I repeat the specific wording:

> This acceptance was not geographically specific, but as the map of the claimed territory encompassed British Columbia and a small portion of southern Yukon, it was anticipated that an agreement would (someday) be concluded involving

> Canada and the Province of British Columbia for the BC portion, and following that a transboundary agreement would be concluded with Canada and Yukon. (my emphasis)

[112] I do not find any support for Canada's "anticipation" of a reaching a British Columbia agreement first. To the contrary, Canada, at a Cabinet meeting on July 19, 1973, was prepared to assist First Nations in court if British Columbia would not enter land claims negotiations. The 1981 and 1986 claims policy both required boundary disputes to be resolved before comprehensive claims. Again in June 1990, Canada explicitly stated it would negotiate the Taku River Tlingit transboundary claim in Yukon in the context of negotiating the Final Agreements of the Yukon Tlingit First Nations in the framework of the UFA. The Taku River Tlingit explicitly agreed.

[113] Canada now raises a plethora of specific and general reasons not to negotiate the Yukon claim which I will set out and comment on:

a) The need to negotiate in multiple jurisdictions with multiple provincial and/or territorial partners; and the consequential need to determine the range of benefits available for the First Nation at more than one negotiation table. This concern has been met by the Taku River Tlingit and Canada agreeing to the framework of the UFA of the transboundary claim;

b) The determination of scope and extent of rights in transboundary jurisdictions where the majority of members of the First Nation are not resident, and may not be a provincial/territorial priority. Again, this concern has been addressed by the Taku River Tlingit and Canada agreeing to the framework of the UFA for the transboundary claim (As well, Yukon, which

has statutory control of the land in question, is prepared to negotiate the Tlingit claim);

c) In the case of claims in British Columbia, utilization of two different treaty negotiation processes – the BCTC Process for the British Columbia portion of the claim and the comprehensive claims process applicable to the rest of Canada. This is a very weak justification for not negotiating the Taku River Tlingit Yukon Transboundary Claim, which has the UFA and a precedent in which the UFA was applied to the Tetlit Gwich'in Agreement in its Yukon transboundary claims.

d) The main part of the claim is larger than the transboundary part of the claim and therefore more of a priority for all parties to negotiate. This is a clear shift in priorities, as Canada considered in the Devolution Transfer Agreement that the Taku River Tlingit transboundary claim should be concluded "as a matter of the highest priority in the Yukon". The fact that Canada now submits the British Columbia claim is a higher priority should not prevent the negotiation of a transboundary claim in Yukon particularly when what remains of the Taku River Tlingit Transboundary claim is faced with a campground development;

e) Negotiating the main part of the claim is more practical because it establishes the negotiating relationship between Canada and the First Nation. In fact, this relationship is more apparent in the Yukon than British Columbia as the Yukon has a framework concluded and a small area to negotiate where the Yukon overlaps have been granted to Yukon First

Nations. In other words, there is no impediment to negotiating the Yukon Transboundary claims;

f) The main part of the claim is negotiated in the jurisdiction where the First Nation communities are located and the majority of the First Nation members reside and as a result will benefit them more directly; and it contains all of the core elements for a comprehensive treaty, including: a land management framework, a governance structure for the First Nation that will replace that in the *Indian Act*, financial components, implementation authorities and related funding. This is a general aspirational objective but the British Columbia claim has not been completed despite over 30 years elapsing since Canada accepted it for negotiation. The Yukon Transboundary claim on the other hand has been ready for negotiation for 20 years;

g) The provisions negotiated in the main part of the claim inform the transboundary part of the claim negotiations and ultimate agreements about, for example, land quantum. However, the Taku River Tlingit and Canada have agreed to negotiate the Yukon Transboundary claim within the UFA framework;

h) The content of the transboundary portion of the claim is narrower in scope than the main portion of the claim. And therefore, I would add, easier to negotiate and reach agreement on.

[114] The fundamental objection I have to Canada's submissions is that Canada created the boundary line that it now says is an impediment to negotiation despite the

fact that there are no real impediments to negotiating the Taku River Tlingit Yukon Transboundary Claim.

[115] In my view, none of the submissions expressed in a) to g) above may be considered government policy as they are not in the 1973 Claims Policy, the 1986 Claims Policy or even the 2014 "interim policy", which is not implemented.

[116] Counsel for Canada buttresses these reasons by referring to the trial court in *Hupacasath First Nation v. British Columbia*, 2002 BCSC 802, at paras. 25 and 31:

> 25 The questions in Schedule 2 to the Regulation relate to political issues. They relate to political aspects of treaty settlements. The negotiation of treaty settlements involves political judgments and evaluations, matters over which the court has no supervisory role.
>
> ...
>
> 31 In my opinion, the plaintiffs are seeking to have the courts assume a supervisory role in a matter of politics. It is for the political actors to settle on what questions should be included in the referendum, and for the political actors to settle the content and process of the treaty negotiations.

[117] That statement was made in the context of a political referendum in British Columbia on the general issue of treaty negotiations. It was made well before *Haida Nation, Manitoba Métis Federation* and *Tsilhqot'in* which clearly require an interpretation that is far more robust in terms of the Crown's constitutional obligation to negotiate honourably and the courts' role in determining what is honourable.

[118] The duty to negotiate in good faith must also be considered from the perspective of Canada's continuing negotiations with Yukon to transfer administration and control of lands and resources to Yukon. On September 3, 1998, more than 10 months before the July 28, 1999 letter delaying the Taku River Tlingit transboundary negotiation until the

conclusion of an agreement with British Columbia, Canada signed a Yukon Devolution Protocol Accord in which Canada, Yukon and Yukon First Nations agreed that the Transfer Agreement would contain provisions to safeguard the interests of transboundary claimants with unsettled claims. The Devolution Transfer Agreement dated October 29, 2001, stated that the negotiation of the Taku River Transboundary Agreement remained "the highest priority" but "within the policies and mandates" given to the respective officials to negotiate. I conclude that it is not honourable for Canada to agree to make negotiations "the highest priority" in the face of a mandate that resulted in the transboundary negotiations being contingent on British Columbia reaching agreement. In my view, Canada is not negotiating honourably when it creates a mandate that completely negates its policies and express commitments.

[119] In my view, given the acceptance of the claim for negotiation and the policy commitments that Canada has made regarding urgency and protective measures, it is not honourable to refuse to negotiate an outstanding transboundary claim, particularly when Canada has transferred the control of that land to Yukon with the commitment that negotiation is "the highest priority". I do not say that Canada is in any way forever obligated to negotiate this transboundary claim, but in the light of clear policy commitments and express agreement to negotiate, it is not honourable to stall negotiations in the face of imminent development by Yukon. It is particularly dishonourable to say "not now" when both Yukon and Taku River Tlingit are prepared to proceed to negotiation.

[120] Put another way, when Canada is faced with competing policy objectives (assuming that a condition of achieving success in a main claim first is a policy), the

honourable choice is not the one that permits the continued erosion of a First Nation transboundary claim that it expressly accepted for negotiation 30 years ago.

[121] Counsel for Canada also submits that the practice, as opposed to a policy, has been to negotiate the main claim where the First Nation resides and then negotiate the transboundary claims. The examples of this practice all involve the Yukon and the Northwest Territories, where Canada was the party that controlled all the land. Those negotiations did not involve the province of British Columbia which, to put it objectively, has not had much success in concluding negotiations; there are four completed in British Columbia compared to thirteen concluded by Canada in Yukon and the Northwest Territories. When Canada agreed to transfer administration and control of lands and resources to Yukon, Canada always retained the obligation to settle transboundary claims and the express statutory authority to "take back" lands and resources if necessary.

[122] Canada has taken the position that its policies and mandate trump the duty to negotiate honourably. I will address the Crown prerogative aspect below. However, in the context of the duty to negotiate honourably, in my view, Canada cannot change its express commitments by a simple change of mandate letter from its negotiators without reference to the principle of honourable negotiations. There are no doubt many circumstances where the Crown will have the authority to stop negotiations where they are futile or a First Nation prefers to take its case to court. But in the context of this case, that is not the honourable way. In the face of Canada's refusal to negotiate now, after committing to do so over 30 years ago, a resort to a court declaration is not unreasonable.

[123] However, in this case, Canada has moved from an original position taken in Cabinet on July 19, 1973, that it would "if necessary" assist First Nations in the courts in asserting their title against British Columbia to a position of waiting for British Columbia to conclude an agreement in negotiations proceeding at a frustratingly slow pace. Given British Columbia's lamentable track record in concluding Final Agreements as confirmed in the Eyford Report, it is not honourable to subject a Yukon transboundary claim to such a condition in the face of Canada and the Taku River Tlingit having agreed to negotiate as well as agreeing on the UFA framework for the Yukon transboundary negotiations.

[124] In my view, the "not now" position of Canada is not honourable in light of its express recognition of the urgency and "highest priority" of the Taku River Tlingit Transboundary claim in its correspondence with the Taku River Tlingit. This is especially so given that the Yukon UFA provides a framework for transboundary claims that has successfully been used in existing transboundary agreements.

2. The Crown prerogative to decide when and how to negotiate supports the non-intervention of the Court.

[125] Canada asserts that the Crown prerogative applies in this case and grants the Crown the exclusive power and authority to enter into negotiations for the purpose of concluding treaties with First Nations. As indicated above, it is not necessary to consider the Crown prerogative in the context of deciding whether to commence negotiations as that decision has been taken. Nevertheless, Canada submits that negotiating treaties with First Nations is the Crown's prerogative in fulfilling its constitutional duties to Aboriginal peoples pursuant to s. 35 of the *Constitution Act*,

1982. Canada submits the process of treaty negotiation is political in nature and a discretion exercised in the context of a host of historical, social, political and economic factors. It is exercised through Cabinet decision, policy created by Cabinet and mandates throughout the negotiation process.

[126] The Crown's prerogative was applied in *Ross River Dena Council Band v. Canada*, 2002 SCC 54, at para. 54. In that case, the First Nation was seeking the declaration that a reserve had been created under the *Indian Act*. It is distinguished from the case at bar because Canada never intended to establish a reserve for the Ross River Dena Council within the meaning of the *Indian Act*. In this case, Canada has accepted the claim of the Taku River Tlingit for negotiation and the line of cases from *Haida Nation* to *Manitoba Metis* to *Tsilhqot'in* require honourable negotiation of treaty making and negotiation. It would be a different case if Canada had not accepted the Taku River Tlingit claim for negotiation.

[127] In *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, the Supreme Court of Canada stated, at para. 37:

> The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are

> empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283. (my emphasis)

[128] In my view, this case supports the Court's review of the Crown's decision pursuant to s. 35(1) of the *Constitution Act*, 1982, which has as one of its purposes the negotiation of just settlement of Aboriginal claims. The negotiation of land claims is certainly one of the powers and privileges accorded by the common law to the Crown but the duty to negotiate in good faith and honourably places constitutional limitations on how that discretion is exercised.

[129] There is no need to review the discretion of the Crown to commence negotiations or its discretion to conclude the negotiations by entering into a treaty. Those issues are not at play in this case. Canada has clearly intended to exercise the Crown prerogative to negotiate the Taku River Tlingit Yukon Transboundary Claim. The issue to be determined is whether the Crown has met its constitutional obligation under s. 35 of the *Constitution Act* to negotiate honourably and in good faith and, in my view, it has not.

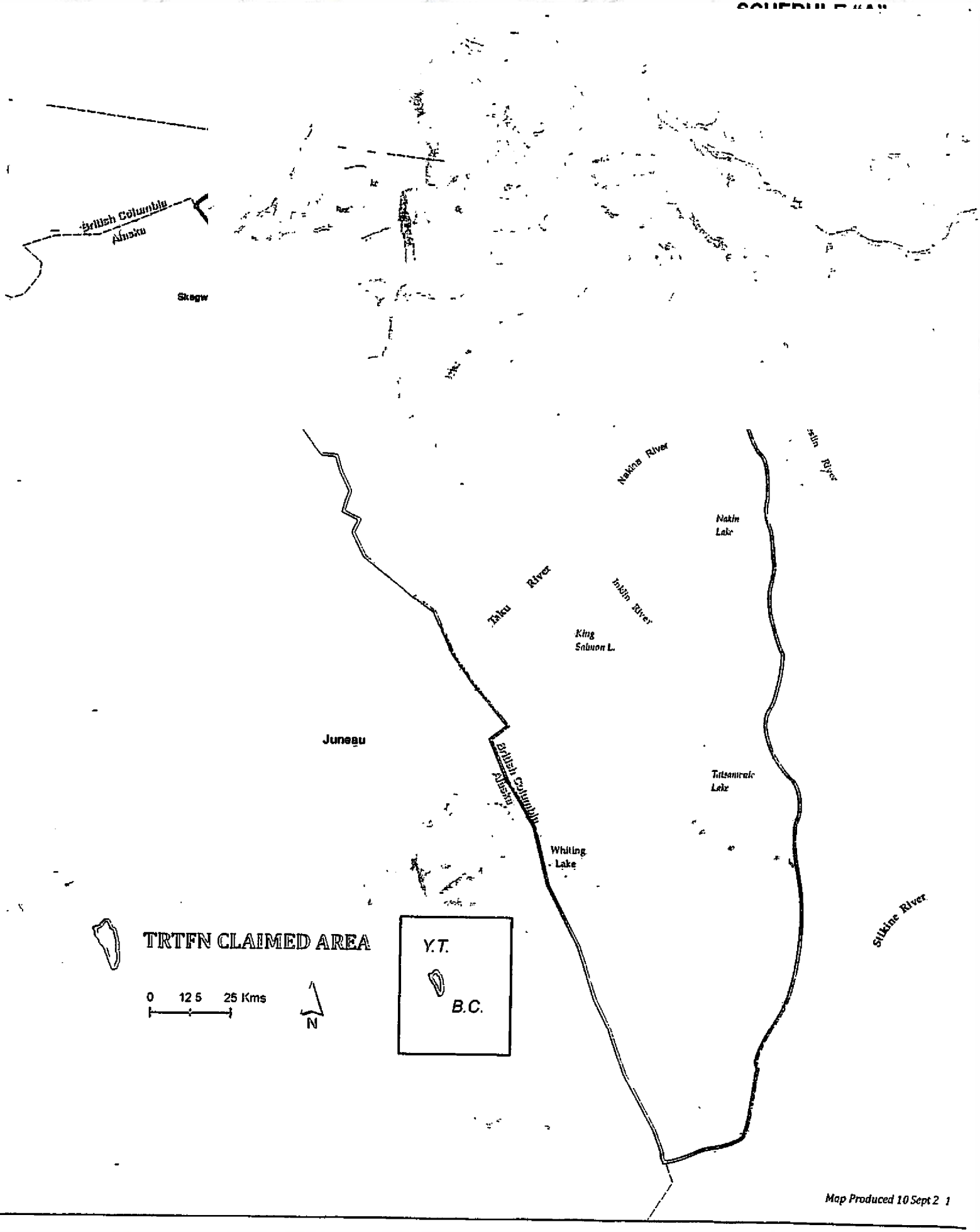
3. Does the Honour of the Crown require Canada to take steps within its power to preserve and protect Taku River Tlingit rights and interests in its Yukon transboundary claim?

[130] This issue will no doubt be an urgent matter to be considered in the context of negotiations but calls for details and considerations that are neither before this court nor appropriate for the court's supervision. Canada, Yukon, and the Taku River Tlingit can address those in negotiations.

SUMMARY AND DISPOSITION

[131] For the reasons set out above, I have concluded that Canada has not negotiated the Taku River Tlingit Yukon Transboundary Claim honourably. I therefore declare that Canada, having officially accepted the Taku River Tlingit Yukon Transboundary Claim for negotiation, must participate and proceed to negotiate honourably. I decline to declare the specific terms of Canada's duty to negotiate honourably.

VEALE J.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