

## Ross River Dena Council v. Yukon: The Duty to Consult and Wildlife Management

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*On November 26, 2015, the Supreme Court of Yukon (the “Court”) released its decision in Ross River Dena Council v. Yukon.<sup>1</sup> This is not the Ross River Dena Council’s (“RRDC”) first challenge to Government of Yukon (“Yukon”) consultation practices.<sup>2</sup> The issues in this case were whether Yukon has a duty to consult and accommodate the RRDC when issuing wildlife hunting licences, permits, and seals and at what point the duty arises.*

The RRDC applied for a declaration that Yukon has a duty to consult and accommodate the RRDC prior to the annual issuance of hunting licences, permits and seals. The Court found that Yukon does in fact owe the RRDC a duty to consult and accommodate in managing wildlife and issuing hunting licences that affect part of the RRDC traditional area. The Court found, however, that Yukon provided evidence showing that it satisfied its duty to consult and accommodate in this matter. Although on the facts in this case the Court rejected the RRDC’s application for a declaration that this duty must be satisfied each year prior to issuing hunting licences and seals, the Court did find that regular consultation on the effects of hunting on first nation harvesting were advisable.

The RRDC is a Yukon First Nation whose members are part of the Kaska Nation. The Ross River Area is an area of the RRDC’s traditional territory that is of particular importance to the RRDC for harvesting.<sup>3</sup> The RRDC has asserted claims to Aboriginal title and rights in the Ross River Area. Yukon has knowledge of the RRDC’s asserted claims in the area and regularly consults with the RRDC on hunting, trapping and related matters within the RRDC’s traditional territory.<sup>4</sup> The RRDC’s land claims are not settled and no Final Agreement has been signed with the Crown. The Court’s duty to consult analysis was based on asserted Aboriginal title and rights rather than the law related to settled land claims agreements or modern land treaties, as we have seen in recent consultation cases from Yukon. The Court thus determined Yukon’s duty to consult by applying the test found in *Haida Nation v. British Columbia (Minister of Forests)* (“*Haida*”)<sup>5</sup> and the reasoning in *Tsilhqot’in Nation v. British Columbia* (“*Tsilhqot’in*”).<sup>6</sup>

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<sup>1</sup> 2015 YKSC 45 [RRDC #2].

<sup>2</sup> *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14.

<sup>3</sup> *Ibid* at para 2.

<sup>4</sup> *Ibid* at paras 64-65.

<sup>5</sup> 2004 SCC 73.

<sup>6</sup> 2014 SCC 44.

The Court also relied heavily on a 2012 Yukon Court of Appeal (the “Court of Appeal”) decision, *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 (“RRDC #1”), in which it was held that Yukon owes a duty to consult the RRDC in exercising its authority relating to the mineral rights system in the Yukon.<sup>7</sup> In *RRDC #1*, the Court of Appeal granted the declaration sought by the RRDC that a duty to consult arises at the point that Yukon determined whether mineral rights on Crown lands within the Ross River Area were to be made available to third parties under the *Quartz Mining Act*.<sup>8</sup> We wrote about *RRDC #1* [here](#) (see page 5).

### **Yukon’s Wildlife Management Regime**

The Yukon *Wildlife Act* and *Regulations* set out the licensing and permitting scheme and the game management “sub-zones” for the territory that apply to Yukon residents.<sup>9</sup> A Yukon resident must obtain a hunting licence and a seal, or seals, to hunt big game in any area of the Yukon.<sup>10</sup> A hunter may also be required to obtain a permit to hunt a particular species in a specific game management “sub-zone.”<sup>11</sup> All licenced big game hunters are required to report their hunting activities including kill dates and the “sub-zone” where the hunting took place.<sup>12</sup> Yukon’s wildlife management regime does not apply in the same way to non-aboriginal Yukon residents and RRDC members. RRDC members do not need to obtain a licence, permit, or seal to hunt for subsistence purposes in the Ross River Area or anywhere in the territory.<sup>13</sup>

The Yukon Fish and Wildlife Management Board (“YFWMB”) was established pursuant to Chapter 16 of the *Umbrella Final Agreement* between Yukon and First Nations, to address fish and wildlife management in the territory. The RRDC has not yet signed a Final Agreement and is not represented on the YFWMB.<sup>14</sup> Yukon’s Department of the Environment (“Environment Yukon”) is the primary organization responsible for addressing concerns and issues raised by the RRDC about hunting in the Ross River Area. Environment Yukon issues licences and seals, and collects data from licenced hunters.

The Ross River Area is a popular area for hunting by licenced hunters. This area is easily accessible by major roads and 83 of the 443 game management “sub-zones”, in which hunting is permitted, are located in the Ross River Area. The Ross River Area is home to a variety of large game and wildlife including caribou, moose, tinnhorn sheep, mountain goats, grizzly bears, black bears and wolves. Seven mountain caribou herds are found within the Ross River Area.

The Finlayson caribou herd remains entirely within the Ross River Area and is an important resource for members of the RRDC.<sup>15</sup> Environment Yukon has consulted with the RRDC about the management of the Finlayson herd several times. Environment Yukon and the RRDC have collaborated to monitor the Finlayson herd and to establish permit hunts between 1995 and 2007. Environment Yukon has consulted with the RRDC about another caribou herd, as well as mountain goat, moose, and wolf populations.<sup>16</sup>

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<sup>7</sup> Leave to appeal to SCC refused.

<sup>8</sup> *RRDC #2 supra* note 1 at para 8.

<sup>9</sup> RSY 2002, c.229.

<sup>10</sup> *RRDC #2 supra* note 1 at para 11.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* at para 18.

<sup>13</sup> *Ibid* at para 12.

<sup>14</sup> *Ibid* at para 14.

<sup>15</sup> *Ibid* at para 22.

<sup>16</sup> *Ibid* at para 33

### **Yukon owes the RRDC a Duty to Consult**

Since the RRDC has not signed a Final Agreement, the Court applied the test in *Haida* to determine whether Yukon owes the RRDC a duty to consult. The Court found that Yukon owes the RRDC a duty to consult about the issuance of hunting licences.

The Court found that Yukon had knowledge of RRDC's asserted Aboriginal title and rights in the Ross River Area. This was sufficient to meet the first part of *Haida* test. The Court followed its decision in *RRDC #1* and found that Yukon had admitted knowledge of the RRDC claim for Aboriginal title, rights and interest in the Ross River Area.<sup>17</sup>

The Court also found that Yukon's issuance of hunting permits was sufficient conduct to satisfy the second part of the *Haida* test. Yukon had argued that the duty to consult would be triggered at the earlier stage of the process which Yukon called the "higher wildlife management level"<sup>18</sup> which includes permit hunts, threshold hunts and closure of licenced hunting or early hunting season closures. The Court was not so specific and stated only that in determining whether Crown conduct triggers the duty to consult the issue is "really whether there is Crown conduct or decision and whether the duty to consult should occur before that conduct."<sup>19</sup> Of particular note, the Court disagreed with Yukon's argument that the annual issuance of licences and seals is simply an administrative task that could not trigger the duty to consult. The Court followed its reasoning affirmed by the Court of Appeal *RRDC #1* and rejected the argument that an absence of statutory discretion absolves the Crown of its duty to consult.<sup>20</sup>

The Court also found that there was sufficient evidence to meet the third element of the *Haida* test. The Court reasoned that Yukon's annual issuance of hunting licences, insofar as it allows licenced hunters to harvest wildlife in the Ross River Area, has the potential to adversely affect the RRDC's Aboriginal title and right to hunt in the Ross River Area.<sup>21</sup> The Court found that hunting has a direct impact on wildlife resources. The Court went on to cite *Tsilhqot'in* and say that the issuance of licences and seals that allow hunting in the Ross River Area affect the RRDC's claim to title as hunting, to some extent, infringes on the RRDC's asserted claim to Aboriginal title and the right to use and control the land and to reap the benefits flowing from it.<sup>22</sup>

As stated in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, "Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it." To some extent, Yukon's issuance of hunting licences and seals can be said to permit conduct inconsistent with claimed Aboriginal title."<sup>23</sup>

The Court also clarified that the *Haida* test requires only that the RRDC prove there is a potential for adverse effects on its asserted rights and not the "material evidence" of an actual impact to asserted rights argued by Yukon.<sup>24</sup>

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<sup>17</sup> *Ibid* at para 46.

<sup>18</sup> *Ibid* at para 50.

<sup>19</sup> *Ibid* at para 51.

<sup>20</sup> *Ibid* at para 49.

<sup>21</sup> *Ibid* at para 58.

<sup>22</sup> *Ibid* at para 56.

<sup>23</sup> *Ibid* at para 56.

<sup>24</sup> *Ibid* at para 57.

## **Yukon Satisfied the Duty to Consult**

The Court found that Yukon satisfied its duty to consult and accommodate the RRDC. The Court stated that declarations are discretionary remedies that should be used sparingly and that because consultation had already taken place between Yukon and the RRDC, a declaration would serve no real purpose to the parties in this case.<sup>25</sup>

The Court heard evidence that Yukon had a well-developed wildlife management system which included a co-management framework. The RRDC did not participate directly in this co-management because it had not settled its land claims but the RRDC was regularly invited to participate in such decisions. The Court found that the RRDC provided no evidence to show that Yukon breached its duty to consult and that Yukon provided evidence of extensive consultations with the RRDC about wildlife management. The Court found that when it came to the Finlayson Caribou herd permits and other populations within the Ross River Area, Yukon consulted with the RRDC before the annual issuance of hunting licences and seals.<sup>26</sup>

The Court did not make a declaration that the duty to consult in the Ross River Area arises before the issuance of Yukon-wide licences and seals because it found that Yukon satisfied its duty to consult and accommodate the RRDC. The Court further found that the sought after declaration was not appropriate because it contemplated consultation for the issuance of licences and seals for the whole of the Yukon, not just the Ross River Area. However, Justice Veale shared his view that Yukon may benefit from consulting on a more regular and predictable basis when dealing with hunting regulations, as an effective way of ensuring that RRDC's claims to title and hunting rights within the Ross River Area are recognized.<sup>27</sup>

## **Implications**

This decision has important implications in the areas of wildlife law and consultation. This is especially so for wildlife management regimes where non-Aboriginal hunting could adversely affect subsistence harvesting by native people whose rights have priority. This ruling should be considered by governments making wildlife allocation decisions in areas without the co-management regimes established by comprehensive land claim agreements.

Broadly based wildlife allocation decisions may now require consultation with Aboriginal rights and title claimants and treaty rights holders whose opportunities to hunt are adversely affected by government allocation and licensing decisions.

Consultation is grounded in reconciliation and the honour of the Crown. These are the fundamental guiding principles in land use planning, wildlife and resource management that must be adhered to by federal and provincial government decision-makers.

For more on reconciliation, consultation and the honour of the Crown, see our article about the Yukon Court of Appeal's decision in *First Nation of Nacho Nyak Dun v. Yukon* [here](#).

*The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.*

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<sup>25</sup> *Ibid* at paras 99 .

<sup>26</sup> *Ibid* at para 80.

<sup>27</sup> *Ibid* at para 99.

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