

AK LEGISLATURE SPECIAL COMMITTEE FILES SCOMM 155 331488

SCOMM

155:22

ALASKA STATE LEGISLATURE

Senator Charlie Huggins, Chair
Senate Special Committee on Energy
State Capitol, Room 119
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Representative John Harris, Chair
House Rules Subcommittee on AGIA
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Juneau, AK 99801
Phone: 465-4859
Fax: 465-3799

Fourth Special Session
Twenty-Fifth Legislature

Gymnasium
Terry Miller Building, Juneau Alaska

Friday July 11, 2008
9:00-5:00 p.m.

Joint Meeting AGENDA

- SB 3001/HB 3001 Approving AGIA License for Natural Gas Pipeline Project as proposed by TransCanada Alaska Company, LLC and Foothills Pipelines Ltd. (TC Alaska) to the State of Alaska.

- 9:00 – 5:00 Round Table Discussion

Shippers – Chevron – John Zager, General Manager

ConocoPhillips - Wendy King, Vice President of External Affairs

Exxon Mobil – Marty Massey, US Jt. Venture Manager

BP Exploration – Dave Van Tuyl, AK Gas Commercialization Mngr.

TransCanada – Tony Palmer, VP AK Business Development

AOGCC – Cathy Foerster, Commissioner

LB&A Consultants – Steve Porter
Dan Dickinson

Administration – Pat Galvin, Commissioner of Revenue

Scott Smith, VP Black & Veatch

Rich Ruggerio, Sr. Consultant Gaffney Cline

On deck: Deepa Poduval, Principal Consultant Black & Veatch

Mike Elenbaas, Sr. Consultant Black & Veatch

Paul Bloom, VP Goldman Sachs

Bruce Schwartz, VP Goldman Sachs

Don Shepler, Greenberg Traurig

Scott Hobbs, Principal, Energy Capital Advisors

Testimony: By Invitation

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Fourth Special Session
Twenty-Fifth Legislature

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Friday July 11, 2008

1:30-8:00 p.m.

9:00 am 5:00 pm

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Juneau, AK 99801
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Fourth Special Session
Twenty-Fifth Legislature

Gymnasium
Terry Miller Building, Juneau Alaska

Saturday July 12, 2008
9:00-5:00 p.m.

Joint Meeting AGENDA

- SB 3001/HB 3001 Approving AGIA License for Natural Gas Pipeline Project as proposed by TransCanada Alaska Company, LLC and Foothills Pipelines Ltd. (TC Alaska) to the State of Alaska.

- 9:00 – 5:00 Project Economics and Risk; Oil and Gas Offtake

Shippers – Chevron – John Zager, General Manager

ConocoPhillips - Wendy King, Vice President of External Affairs

Exxon Mobil – Marty Massey, US Jt. Venture Manager

BP Exploration – Dave Van Tuyl, AK Gas Commercialization Mngr.

TransCanada – Tony Palmer, VP AK Business Development

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Paul Bloom, VP Goldman Sachs

Bruce Schwartz, VP Goldman Sachs

Don Shepler, Greenberg Traurig

Scott Hobbs, Principal, Energy Capital Advisors

Testimony: By Invitation

*lunch
11:30-
1:15*

Scott Smith

ALASKA STATE LEGISLATURE

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Fourth Special Session
Twenty-Fifth Legislature

Gymnasium
Terry Miller Building, Juneau Alaska
Saturday July 12, 2008
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Scott Hobbs, Principal, Energy Capital Advisors

Testimony: By Invitation

Key Take-Aways

- **Successful gas pipeline project requires:**
 - 4.5 BCFD initial gas sales with low cost expansions
 - Point Thomson gas available ~~4.5 BCFD~~
 - Ownership equal to FT ~~4.5 BCFD~~
 - Fiscal and tariff predictability
 - World-class project execution
- **Agreement on the above will maximize value to State**
- **EM committed to the development of Alaska's gas resources**
- **EM ready to work with the State, TransCanada, ConocoPhillips, BP**

SCOMM

155:24

Keith B. Bergner

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Keith Bergner is a partner with Lawson Lundell LLP. He represents clients in the areas of Aboriginal law, constitutional law and regulatory/energy law. Keith has appeared before numerous regulatory tribunals and all levels of Superior, Federal and Appellate Courts in Canada, including the Supreme Court of Canada.

Keith's practice focuses on advising governments and private sector clients on regulatory and Aboriginal law matters, with a particular emphasis on the North. After beginning his legal practice in Vancouver, Keith moved north to anchor Lawson Lundell's office in Yellowknife, Northwest Territories from 1999 to 2002. He has continued to devote a significant portion of his practice to northern issues since returning to Vancouver in 2003. A recent project involves advising the NWT territorial government in relation to the Mackenzie Gas Project application currently pending before the National Energy Board.

Within the area of Aboriginal law, Keith has been involved in numerous matters regarding Aboriginal rights and title claims. Keith advises governments, Crown Corporations and private sector clients regarding the extent of the duty of consultation and compensation for infringement of Aboriginal rights or title by major industrial projects. Keith regularly advises BC Hydro in respect of Aboriginal consultation requirements for generation or transmission projects. Keith also represents project proponents and governments in appeals and judicial reviews challenging project approvals or permitting decisions. *

In the area of regulatory/energy law, Keith has been involved in a number of significant regulatory hearings and alternative dispute resolution processes for oil and gas, electricity (both generation and transmission) and mining projects. Keith appears regularly before numerous administrative tribunals including the National Energy Board, the British Columbia Utilities Commission, the Alberta Utilities Commission (formerly the Alberta Energy and Utilities Board) and the NWT Public Utilities Board. Keith also acts as counsel on appeals or applications seeking judicial review of decisions by administrative boards and tribunals.

Keith is a regular speaker at conferences on Aboriginal and regulatory/energy law, including, recently, the Rocky Mountain Mineral Law Institute, the BC Law Society's Continuing Legal Education program and Yellowknife's Geoscience Forum..

Bar Admissions

British Columbia (1997)

Northwest Territories (2000)

Nunavut (2000)

Education

McGill University (B.A. Honours, 1990)

McGill University (LL.B., 1996)

4th Spec. Session

Presented 7-13-2005 Juneau
Sunday

Keith B. Bergner
Partner, Vancouver
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VANCOUVER ▼

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(1) Consultation and Accommodation

I. Asserted Claims

II. Historical Treaty Areas

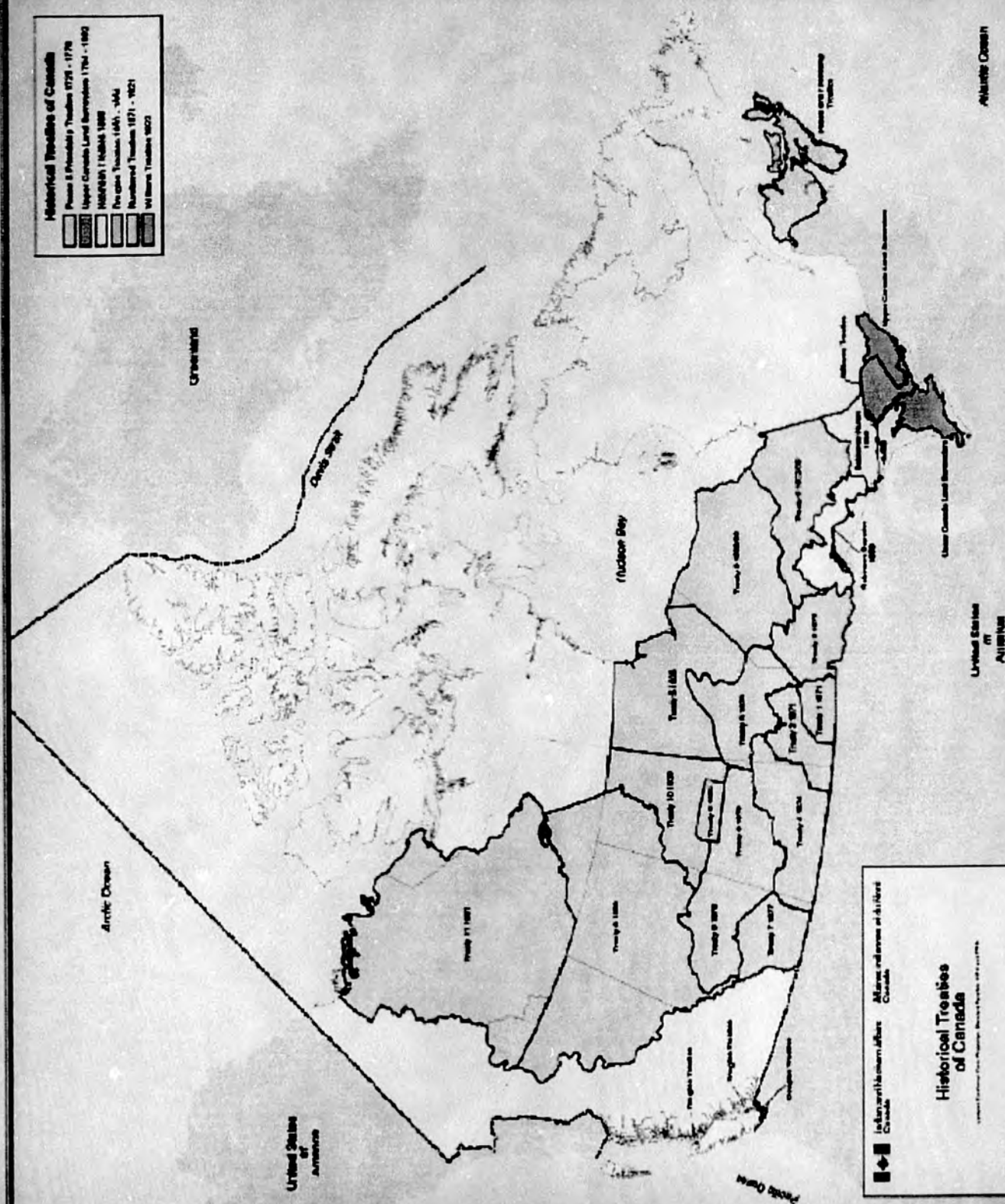
III. Modern Treaty Areas

(2) Agreements with First Nations



Historical Treaties of Canada

Peace & Friendship Treaties 1775 - 1776
 Upper Canada Land Surrenders 1784 - 1802
 Robinson's 1850
 Robinson's 1850
 Robinson's 1850
 Robinson's 1850
 Robinson's 1850



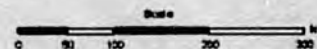
Historical Treaties of Canada

Indian and Métis land surrenders
 Main and reserve of Indian land
 Main and reserve of Indian land



Canada

Treaty Negotiations in British Columbia



STATEMENTS OF INTENT TO NEGOTIATE TREATIES ACCEPTED BY THE
BRITISH COLUMBIA TREATY COMMISSION AS OF MARCH 2007

- | | |
|--|--|
| 1 Aho Gawa Kwa First Nation | 30 McLeod Lake Indian Band |
| 2 Alsea Tribes of Los Alamos | 31 Musqueam Nation |
| 3 Carleton Place First Nation | 32 Nema's Nation |
| 4 Carleton Place Tribal Council | 33 Nkxw Nation |
| 5 Chippewas and Anishinabe First Nations | 34 Northern Shuswap Tribal Council Society |
| 6 Chisholm First Nation | 35 Nuxalk Nation Tribal Council |
| 7 Council of the Nuxalk Nation | 36 Pechewa Indian Band |
| 8 Crowsnest Indian Band | 37 Quilchewa First Nation |
| 9 Dene First Nation | 38 Peace River First Nation |
| 10 Dene Nation | 39 Sechelt Indian Band |
| 11 Gwich'in Nation | 40 Shuswap Indian Band |
| 12 Gwich'in Nation | 41 Shuswap First Nation |
| 13 Gwich'in Nation | 42 Squamish Nation |
| 14 Haida Nation | 43 St. John's Nation |
| 15 Haida Nation | 44 Taku River Tlingit First Nation |
| 16 Haida Nation | 45 Taku River Treaty Association (Haida) |
| 17 Haida Nation | 46 Taku River Treaty Association (Tlingit) |
| 18 Haida Nation | 47 Taku River Treaty Association (Nuxalk) |
| 19 Haida Nation | 48 Taku River Treaty Association (Nuxalk) |
| 20 Haida Nation | 49 Taku River Treaty Association (Nuxalk) |
| 21 Haida Nation | 50 Taku River Treaty Association (Nuxalk) |
| 22 Haida Nation | 51 Taku River Treaty Association (Nuxalk) |
| 23 Haida Nation | 52 Taku River Treaty Association (Nuxalk) |
| 24 Haida Nation | 53 Taku River Treaty Association (Nuxalk) |
| 25 Haida Nation | 54 Taku River Treaty Association (Nuxalk) |
| 26 Haida Nation | 55 Taku River Treaty Association (Nuxalk) |
| 27 Haida Nation | 56 Taku River Treaty Association (Nuxalk) |
| 28 Haida Nation | 57 Taku River Treaty Association (Nuxalk) |
| 29 Haida Nation | 58 Taku River Treaty Association (Nuxalk) |

Approximate Boundaries of
Traditional Territories

Native Lands

Non-Native Area

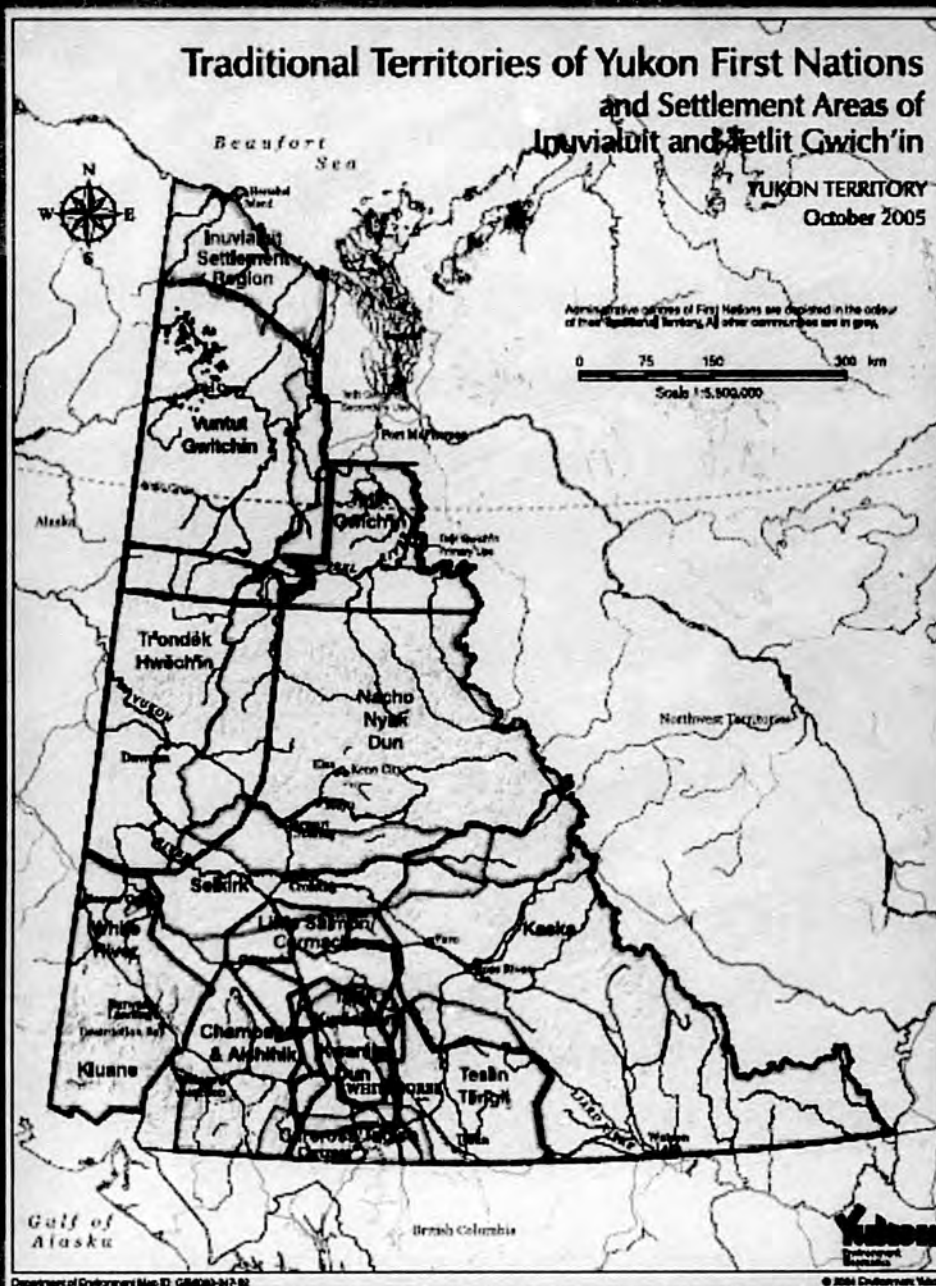
Produced by Professional & Technical Services under the Information Sharing
Protocol for the Federal Treaty Negotiation Office, Indian and Northern Affairs
Canada, and Integrated Land Management Bureau, Ministry of Agriculture and
Forestry for the Ministry of Aboriginal Relations and Reconciliation



The lines on this map represent the approximate boundaries of traditional territories identified in First Nation Statements of Intent to
negotiate treaties which have been submitted to, and accepted by the B.C. Treaty Commission. They are illustrative only and may be
updated in the future. Additional Statements of Intent may be received. Publication of this map does not imply that the First Nations,
the Province of British Columbia, or the Government of Canada have agreed to the boundaries shown.

Traditional Territories of Yukon First Nations and Settlement Areas of Inuvialuit and Kutchikan

YUKON TERRITORY
October 2005



What triggers the Duty to Consult?

- When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

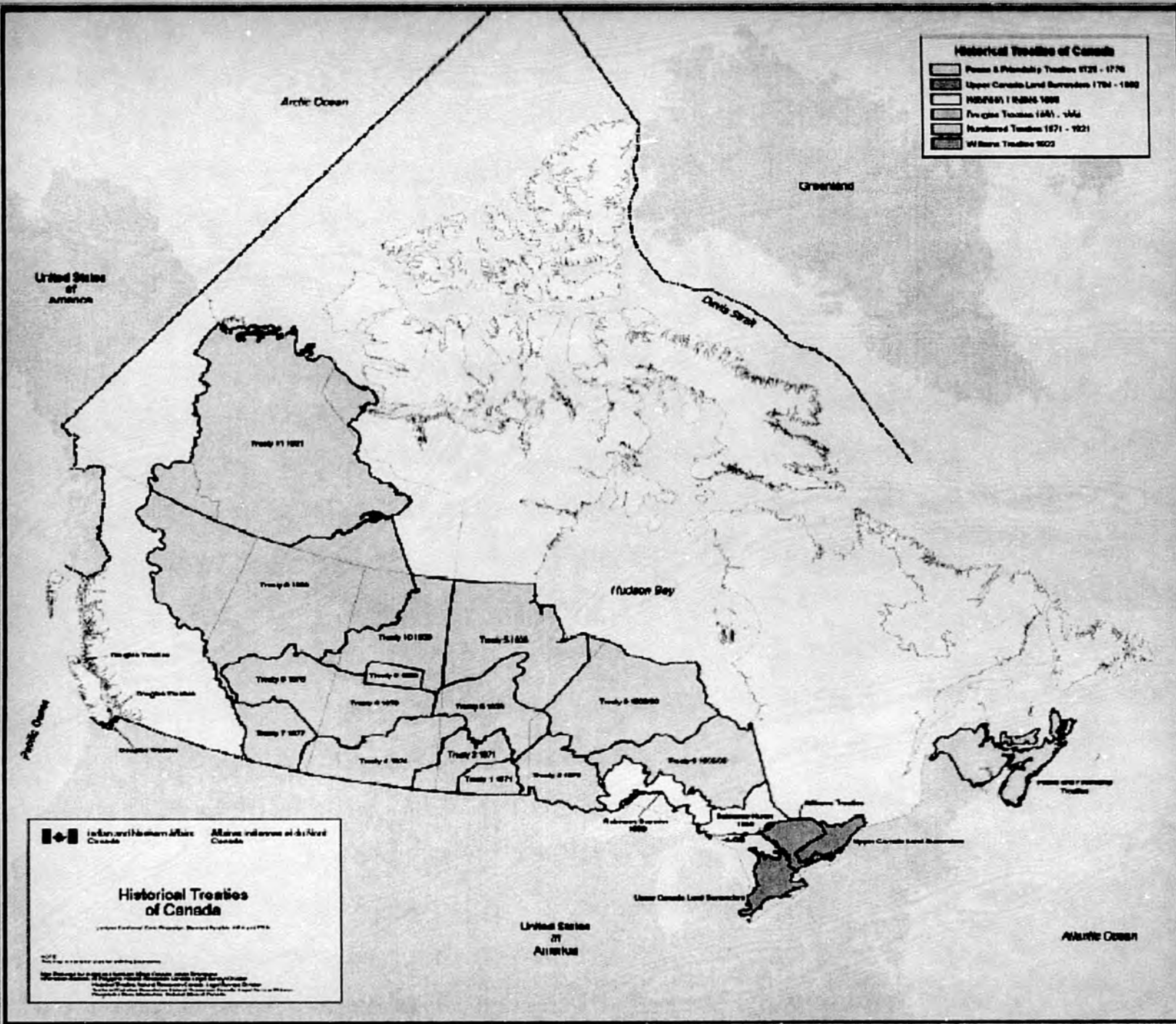
1. The Crown (both Federal and Provincial) has a legal duty to consult and, if necessary, accommodate in respect of asserted Aboriginal claims
2. The source of the duty to consult is the "Honour of the Crown"
3. Third parties do not have a duty to consult

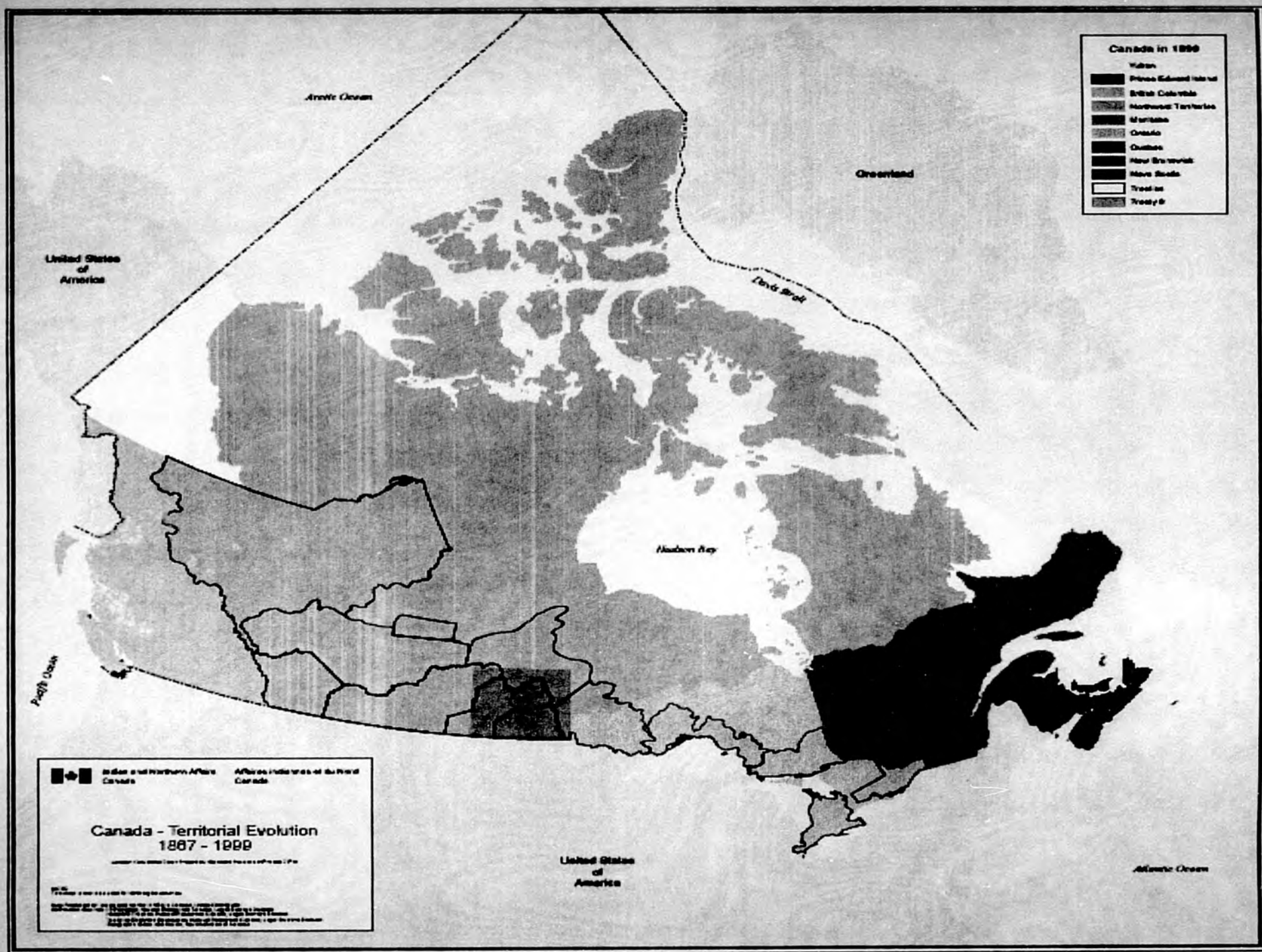
*The Crown can delegate
“procedural aspects of
consultation”*

Scope and content of duty on a “spectrum”

1. Strength of Claim
2. Seriousness of the Impact

- 1871 and 1923
- 11 numbered treaties – Ontario, Manitoba, Saskatchewan, Alberta, Northwest Territories





“And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered...saving and excepting such tracts as may be required or *taken up* from time to time for settlement, mining, lumbering, trading or other purposes.”

Background:

- winter road proposed to connect three aboriginal and one non-aboriginal communities to Alberta highway system
- did not talk to Mikisew Cree

Power to Take Up Land Confirmed

- not limited to express purposes
stated in treaty

*Requires Consultation Where Taking
Up Infringes Treaty Rights*

Spectrum

1. Specificity of the Treaty

Promise

2. Seriousness of Potential Impact

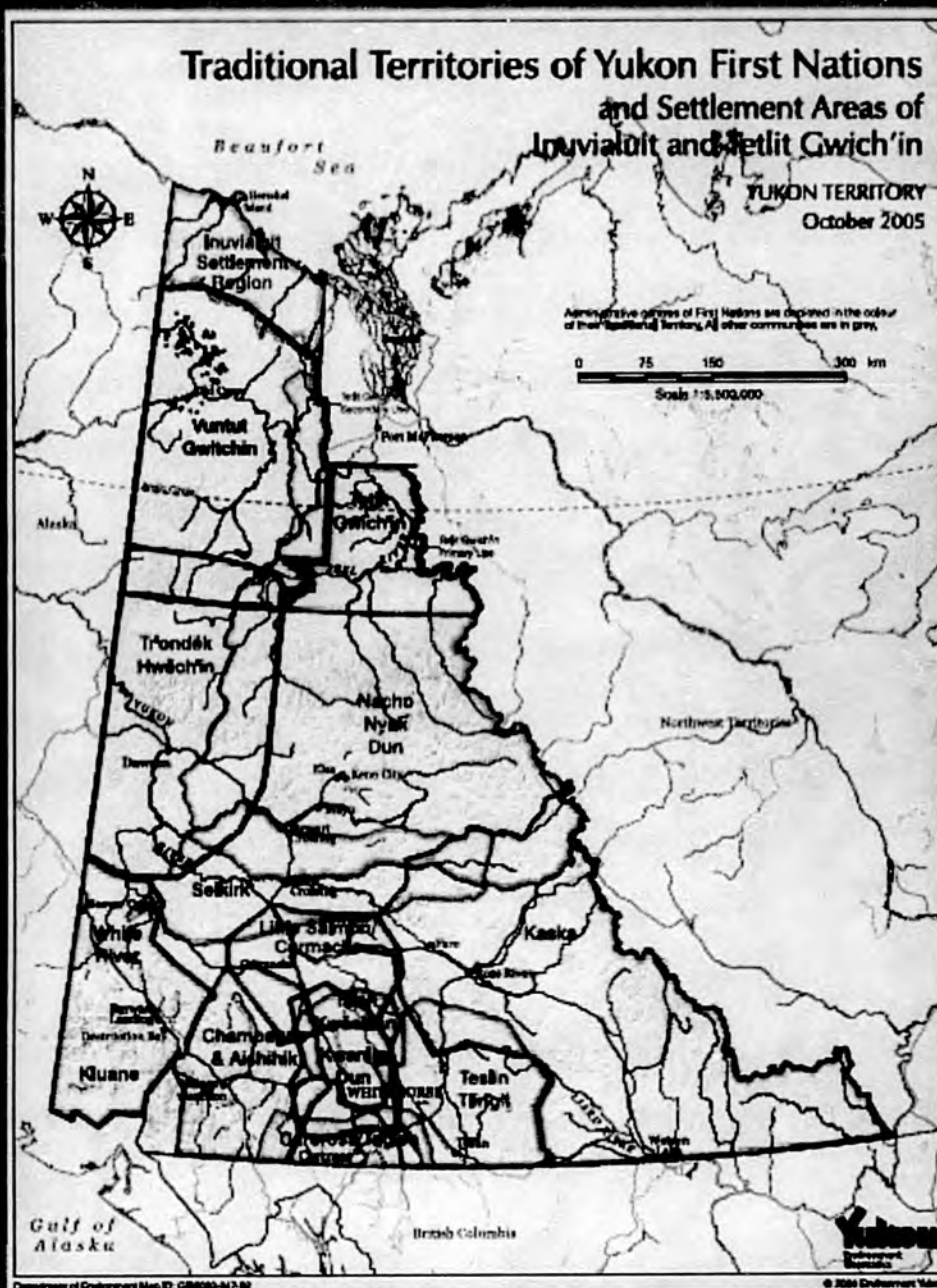
Since 1973

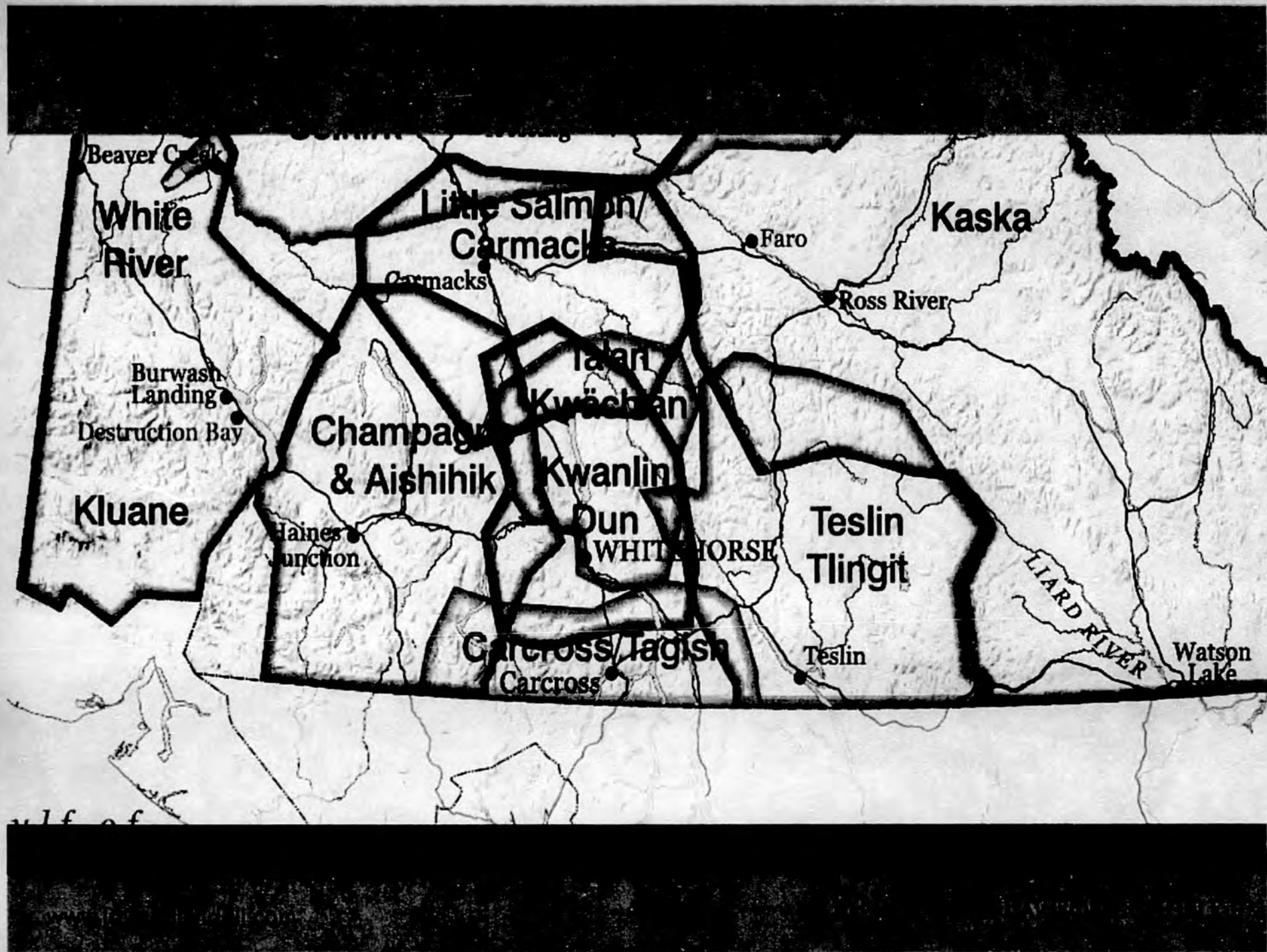
**Sixteen (16) comprehensive land
claims in Yukon, NWT and Nunavut**

**Four (4) other comprehensive land
claim in the rest of Canada**

Traditional Territories of Yukon First Nations and Settlement Areas of Inuvialuit and Kutchikan

YUKON TERRITORY
October 2005



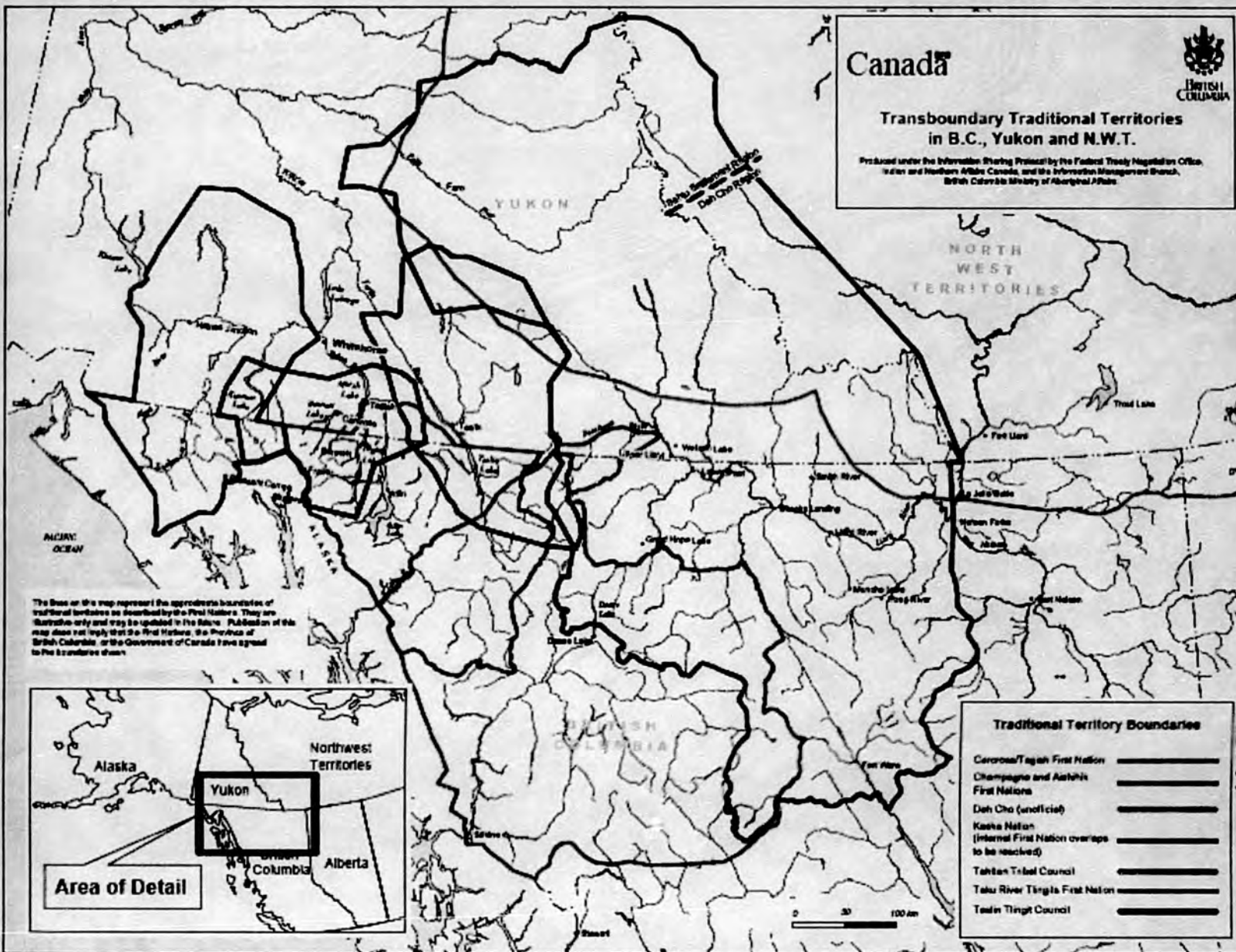


Canada



Transboundary Traditional Territories in B.C., Yukon and N.W.T.

Produced under the Information Sharing Protocol by the Federal Treaty Negotiation Office,
Indian and Northern Affairs Canada, and the Information Management Branch,
British Columbia Ministry of Aboriginal Affairs



The lines on this map represent the approximate boundaries of traditional territories as described by the First Nations. They are illustrative only and may be updated in the future. Publication of this map does not imply that the First Nations, the Province of British Columbia, or the Government of Canada have agreed to the boundaries shown.



Traditional Territory Boundaries

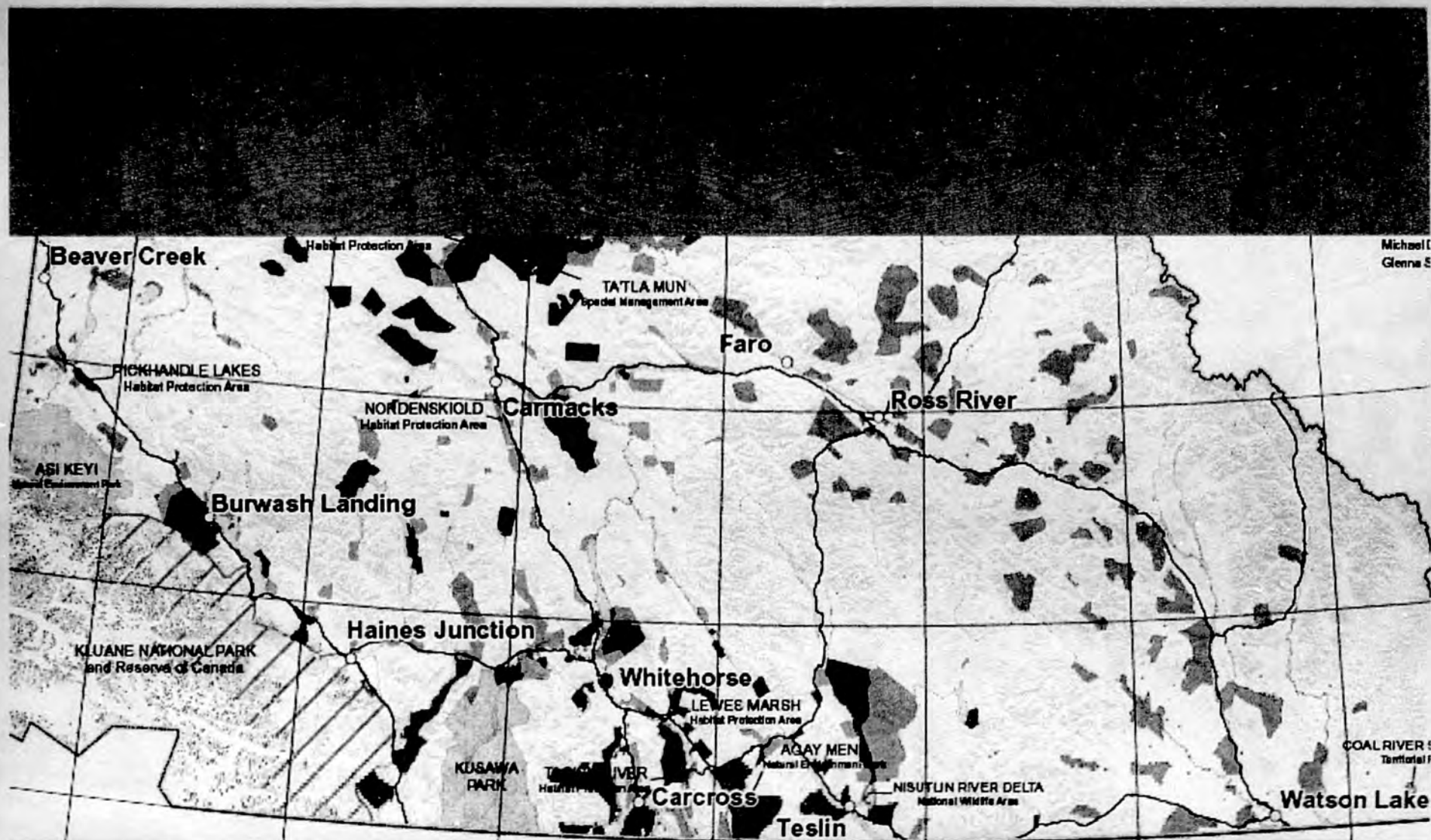
Caribou/Tagish First Nation	_____
Champagne and Aishihik First Nations	_____
Deh Cho (unofficial)	_____
Kaska Nation (Internal First Nation overlaps to be resolved)	_____
Tahltan Tribal Council	_____
Taku River Tlingit First Nation	_____
Tsimshian Tribal Council	_____

Lands in fee simple

- Management Area participate in:
- land use planning
 - land and water use

Still larger tract of land

- Hunting fishing and trapping
- May be overlapping with other groups



**Does a modern land claim agreement
displace the common law duty to
consult?**

*Little Salmon/Carmacks First Nation v. The Gov't of
Yukon (Min. of Energy, Mines and Resources),
2007 YKSC 28
(Under Appeal – heard in June 2008)*

Asserted Claims - *Haida and Taku*

Duty to consult applies to asserted (not yet proven) claims

Historic Treaties - *Mikisew Cree*

Duty to consult applies in the context of the historic numbered treaties

Modern Land Claim Agreements – *Little Salmon*

Expressly define consultation obligations

■■■ When is Accommodation Required?

“When the consultation process suggests amendment of Crown policy, we arrive at the stage of Accommodation” (*Haida*, at para 47).

■■■ Accommodation is Not Required in Every Situation

Accommodation May Include:

(1) Avoidance of Specific Areas

(2) Minimizing Impacts

(3) Compensation

Binding Agreements

- Access/Benefit Agreements
- Impact/Benefit Agreements
- Impact Management and Benefit Agreements
- Participation Agreements
- Cooperation Agreements

Who?

- Project Proponent
 - Parent company/subsidiaries
 - Contractors/subcontractors
 - Successors and assignees

Who?

- First Nation
 - Band (*Indian Act*)
 - Tribal Council
 - Nation
 - Corporations or societies
 - Land claim/self-government agreement entities (governments)
 - Metis

Who?

- Government
 - Canada
 - Provincial government
 - Territorial government

Why Not The Crown?

- Duty to consult and accommodate is a legal duty of the Crown (Haida)
- Crown can delegate “procedural aspects of consultation” to Project Proponents
- Industry seeking “sign-off” on Crown’s duty

How?

- Employment opportunities
- Contracting opportunities
- Financial consideration
- Communications Committee
- Legal certainty

Why?

- Industry: Proceed with the Project and Legal Certainty
- First Nation: Share in the benefits and provide input on the Project
- Both parties: Build relationships

The Alternatives

- Judicial review
- Appeal
- Injunction
- Litigation (nuisance, etc.)
- Delay in permit authorization
- Lack of access

■ ■ Timely

■ ■ Cost-effective

■ ■ Competitive Advantage

Past Grievances/Infringements

- *Gitxsan v. British Columbia (Minister of Forests)*
- *Gwasslam v. British Columbia (Minister of Forests)*

“If a...licence has been issued in breach of the Crown’s duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence.” (Gitxsan, p. 81)

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LAWSON LUNDELL LLP

BARRISTERS & SOLICITORS

4th Spec. Session

Presented 7-13-2008 Juneau
Sunday

LAWSON LUNDELL LLP

BARRISTERS & SOLICITORS

VANCOUVER ▼ CALGARY ▼ YELLOWKNIFE

**The Crown's Duty
to Consult and Accommodate**

By
Keith B. Bergner

*This paper was presented at The Canadian Institute's 2nd Annual Conference on
Aboriginal Consultation: Best Practices and Leading Edge Strategies
for Managing Aboriginal Consultations
June 2006
Vancouver, British Columbia*

*This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.
For specific legal advice on the information provided and related topics,
please contact the author or any member of the Aboriginal Law Group.*

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**THE CROWN'S DUTY
TO CONSULT AND ACCOMMODATE**

Keith B. Bergner
Lawson Lundell LLP

Canadian Institute's 2nd Annual Conference on
Aboriginal Consultation: Best Practices and Leading Edge Strategies
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June 2006
Vancouver, British Columbia

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On November 18, 2004, the Supreme Court of Canada released its decisions in *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 S.C.C. 73 ("Haida") and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 S.C.C. 74 ("Taku"). These landmark decisions provide a preliminary outline of the parameters of the Crown's duty to consult and, where appropriate, accommodate Aboriginal peoples in circumstances where Aboriginal interests have been asserted, but not proven. The decisions also provide a framework for Aboriginal consultation activity related to potential infringements of Aboriginal rights caused by land and resource development activities. As a result, the two decisions are perhaps the most significant Supreme Court of Canada Aboriginal law decisions since the 1997 decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

On November 24, 2005, the Supreme Court of Canada delivered its decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 S.C.C. 69 ("Mikisew") which affirmed the existence of a duty to consult in a post-treaty context. The Court ruled that whereas governments have the power to exercise their treaty rights, those rights are subject to a duty to consult in situations where the exercise of those treaty rights would have an adverse effect on Aboriginal treaty rights.

The purpose of this paper is to summarize the above cases, examine the subsequent jurisprudence that has considered the decisions, and to comment on some of their implications.

I. *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*

(a) Background and Lower Court Decisions

The *Haida* case involved a judicial review, pursuant to the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, of the Minister's decision to replace and approve the transfer of a tree farm licence. In 1961, the Province of British Columbia issued the tree farm licence to a large forestry company, MacMillan Bloedel, permitting it to harvest trees in an area of Haida Gwaii (the Queen Charlotte Islands). The Minister replaced the licence in 1981, 1995 and 2000. In 1999, the Minister also approved a transfer of the tree farm licence to Weyerhaeuser. The Haida commenced judicial review proceedings in 2000 to challenge these replacements and the transfer, which were made without their consent and, since approximately 1994, over their express objections.

The Chambers Judge, Halfyard J. of the British Columbia Supreme Court, dismissed the Haida's petition (2000 B.C.S.C. 1280). He reasoned that the law could not presume the existence of Aboriginal rights merely from proof of their assertion and proof that there had been no formal surrender or extinguishment of such rights. He found that until the nature and extent of Aboriginal title and right of the Haida had been conclusively determined by legal proceedings, questions of infringement could not be decided with certainty and questions about justification could not be accurately framed or decided in respect of speculative infringement of unproven rights. He concluded that the Crown had only a "moral duty" to consult with the Haida regarding their claims.

The Court of Appeal allowed the appeal—ultimately issuing two judgements on the matter. In the first decision, reported at 99 B.C.L.R. (3d) 209 ("*Haida #1*"), the Court of Appeal held that the Provincial Crown had fiduciary obligations of good faith to the Haida with respect to Haida claims to Aboriginal title and right. Further, it found that the Provincial Crown and Weyerhaeuser were aware of the Haida's claims to all or significant parts of the area covered by the licence and the claims were supported by a good *prima facie* case. In the result, the Court granted a declaration that the Crown and Weyerhaeuser had a legally enforceable duty to the Haida to consult in good faith and endeavour to seek workable

accommodation between Aboriginal interests of the Haida and objectives to manage the area in accordance with the public interest.

The Court of Appeal's decision in *Haida #1* raised considerable controversy whether private parties could owe a duty to consult to Aboriginal people similar to that owed by the Crown. (The issue had not been argued either at first instance or on appeal.) Counsel for the Crown and Weyerhaeuser sought clarification and the Court permitted supplementary argument on this point (reported at 2002 BC.C.A. 223). The subsequent Court of Appeal decision, reported at 5 B.C.L.R. (4th) 33, ("*Haida #2*") resulted in a 2-1 decision on August 19, 2002. The majority of the Court of Appeal confirmed that Weyerhaeuser had a legal duty to consult and seek accommodation with the Haida and seek workable accommodations between the Haida and the objectives of the Crown and Weyerhaeuser.

(b) *Haida* -- Supreme Court of Canada Decision

The Supreme Court of Canada, in a unanimous 7-0 decision, dismissed the Crown's appeal, but allowed the appeal of Weyerhaeuser.

(i) *Consultation Obligation Applies Where Rights Are Asserted*

The Court found that the source of the duty to consult and accommodate is grounded in the "honour of the Crown" (paragraph 16). In circumstances where the Aboriginal rights and title have been asserted, but not defined or proven, the Aboriginal interest is insufficiently specific to impose a fiduciary duty on the Crown (paragraph 18). The Court stated that the duty to consult and accommodate arises where the Crown has knowledge of the potential existence of an Aboriginal right or title, whether or not that right or title has been legally established, and contemplates conduct that may adversely affect it (paragraph 35).

The nature and scope of the duty to consult and accommodate will vary with the circumstances. In general terms, the scope of the duty is proportionate to a preliminary assessment of the strength of the asserted right or title, and the seriousness of the potential impact on it (paragraph 39). This produces a spectrum of consultation. In some cases, mere notice and an opportunity to discuss the proposed decision may be required. In other cases,

"deep consultation" may be required where there is a strong claim to the Aboriginal right or title, or where the risk of non-compensable damage to the right or title is high (paragraphs 43-44).

(ii) *Accommodation*

Good faith consultation efforts by the Crown and affected Aboriginal groups may, in turn, lead to an obligation to accommodate Aboriginal concerns. Where a strong *prima facie* case exists and the consequences of a proposed decision would affect it in a significant way, addressing Aboriginal concerns may require "taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim" (paragraph 47). The accommodation required is a process of "seeking compromise in an attempt to harmonize conflicting interests" (paragraph 49).

(iii) *No Obligation to Obtain Aboriginal Consent*

The Supreme Court confirmed that the final decision regarding balancing of Aboriginal and societal interests rests with the Crown. While the Crown is obligated to consult in good faith with the affected Aboriginal group, Aboriginal consent is not required. The court emphasized that Aboriginal groups do not have a veto over government decisions made pending final proof of their asserted rights or title. The Crown is not required to act in the best interests of the Aboriginal group, as a fiduciary, in exercising discretion.

The Court found that the duty to consult rested solely with the Crown and did not extend to Weyerhaeuser.

II. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*

(a) *Background and Lower Court Decisions*

The *Taku* case, like *Haida*, involved a judicial review pursuant to the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Redfern Resources applied in 1994 for approval from the British Columbia government to reopen, and to build a road to, the old Tulsequah Chief mine, which had previously been operated in the 1950's. In 1998, a project approval

certificate was granted for the road over the objections of the Taku River Tlingit, following an extensive three-and-a-half year environmental review process. Unlike the governmental decision at issue in *Haida*, the decision-making process reviewed in *Taku* followed a recommendation resulting from an established regulatory scheme. When the application was first made, the governing legislation was the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, which, in 1995, was replaced by the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. (The *Environmental Assessment Act* was subsequently amended again, S.B.C. 2002, c. 43.) One of the purposes of the *Environmental Assessment Act* (as it read at the time), set out in former section 2(e), was "to provide for participation, in an assessment under this Act, by... first nations ...". Under the Act, a "project committee" had to be established and a number of groups had to be invited to nominate members to the committee, including "any first nation whose traditional territory includes the site of the project or is in the vicinity of the project" (former section 9(2)(d)).

The Taku River Tlingit were invited and agreed to participate in the project committee, as well as sub-committees formed to deal with Aboriginal concerns and issues around transportation options. The primary concern of the Taku River Tlingit concerned the 160-kilometre access road from the mine, which traversed a portion of their traditional territory. They took the position that the road ought not to be approved in the absence of a land use planning strategy and that the matter should be dealt with at the treaty negotiation table. The Taku River Tlingit were advised that these issues were outside the scope of the environmental assessment process, but were referred to other provincial agencies and decision-makers. A consultant was engaged to undertake traditional land use studies and addressed issues raised by the First Nation. The consultant's report was included in the Project Report prepared by the proponent. The consultant was also engaged to prepare an addendum report addressing additional concerns raised by the First Nation following their review of the initial consultant's report.

The majority of the project committee members agreed to refer the application for a project approval certificate to the Ministers for decision. The committee prepared a written

recommendations report. The Taku River Tlingit disagreed with the recommendations contained in the report and prepared a minority report stating their concerns with the process and the proposal. In March 1998, the Ministers issued the Project Approval Certificate, approving the proposal, subject to detailed terms and conditions.

In February 1999, the Taku River Tlingit challenged the Minister's decision to issue the Project Approval Certificate by way of judicial review proceedings on both administrative law grounds and on grounds based on the Taku River Tlingit's Aboriginal rights and title. The issue of determining its rights and title was severed from the judicial review proceeding and referred to the trial list (1999 CanLII 5674 (B.C.S.C.)), leave to appeal denied, June 25, 1999 (1999 B.C.C.A. 442); application to review refusal of leave dismissed, September 22, 1999 (1999 B.C.C.A. 550).

In the judicial review proceedings, the Chambers Judge, Kirkpatrick J., concluded that the Ministers should have been mindful that their decision might infringe on Aboriginal rights, and they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the Taku River Tlingit's concerns. She also found for the Taku River Tlingit on administrative law grounds (2000 B.C.S.C. 1001).

The British Columbia Court of Appeal dismissed the Province's appeal in a 2-1 decision. Both the majority and the dissent appeared to conclude that the decision complied with administrative law principles (see paragraph 18 of the reasons of Madam Justice Southin, which, on the administrative law grounds, appears to be accepted by the majority (2002 B.C.C.A. 59)). The majority held that the Province had failed to meet its duty to consult and accommodate the Taku River Tlingit. The dissenting judge, Southin J.A., found that the consultation undertaken was adequate on the facts.

(b) Taku – Supreme Court of Canada Decision

The Supreme Court of Canada allowed the appeal. It found that the Province was under a duty to consult with the Taku River Tlingit in making the decision to reopen the mine. The

Province was aware of the Taku River Tlingit's claims by virtue of its involvement in the treaty negotiation process, and also knew that the decision to reopen the mine had the potential to adversely affect the substance of the Taku River Tlingit's claims, which, on the basis of the principles established in *Haida*, meant that the Province was under a duty to consult with the Taku River Tlingit (paragraphs 23-28).

In considering the scope and extent of the Province's duty to consult and accommodate (which 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 of the right or title claimed), the Court found that acceptance of the Taku River Tlingit's title claim for negotiation under the B.C. Treaty Commission Process established a *prima facie* case in support of its Aboriginal rights and title. The Court clarified that an Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. However, the Court suggested that acceptance of a title claim for negotiation establishes a *prima facie* case in support of Aboriginal rights and title (paragraph 30). Regarding the seriousness of the potential impact, the Supreme Court also found that, while the proposed road would occupy only a small portion of the territory over which the Taku River Tlingit asserts title, the potential for negative derivative impacts on the Taku River Tlingit's claims was high. The Court concluded that the Taku River Tlingit were "entitled to something significantly deeper than minimal consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation" (at paragraph 32). The Court concluded that the consultation provided by the Province was adequate (paragraph 39).

III. *Haida* and *Taku* and Administrative Law

The following section attempts to distill from the *Haida* and *Taku* decisions the essential points that would be of interest to practitioners of administrative law.

(a) Duty to Consult and the Standard of Review

The Supreme Court of Canada decision in *Haida* discussed the applicable standards of review, despite the fact that it was not reviewing the result of a process established to