



SUPREME COURT OF CANADA

CITATION: Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69

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BETWEEN:

Mikisew Cree First Nation

Appellant

and

Sheila Copps, Minister of Canadian Heritage,

and Thebacha Road Society

Respondents

- and -

Attorney General for Saskatchewan, Attorney General

of Alberta, Big Island Lake Cree Nation, Lesser Slave

Lake Indian Regional Council, Treaty 8 First Nations

of Alberta, Treaty 8 Tribal Association, Blueberry

River First Nations and Assembly of First Nations

Interveners

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 70)

Binnie J. (McLachlin C.J. and Major, Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R.
388, 2005 SCC 69

Mikisew Cree First Nation

Appellant

v.

**Sheila Copps, Minister of Canadian Heritage,
and Thebacha Road Society**

Respondents

and

**Attorney General for Saskatchewan, Attorney General
of Alberta, Big Island Lake Cree Nation, Lesser Slave
Lake Indian Regional Council, Treaty 8 First Nations
of Alberta, Treaty 8 Tribal Association, Blueberry
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**Indexed as: Mikisew Cree First Nation v. Canada (Minister of Canadian
Heritage)**

Neutral citation: 2005 SCC 69.

File No.: 30246.

2005: March 14; 2005: November 24.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish,
Abella and Charron JJ.

on appeal from the federal court of appeal

Indians — Treaty rights — Crown's duty to consult — Crown exercising its treaty right and "taking up" surrendered lands to build winter road to meet regional transportation needs — Proposed road reducing territory over which Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish and trap — Whether Crown had duty to consult Mikisew — If so, whether Crown discharged its duty — Treaty No. 8.

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples

Appeal — Role of intervener — New argument.

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories, an area whose size dwarfs France, exceeds Manitoba, Saskatchewan and Alberta and approaches the size of British Columbia. In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap and fish throughout the land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around

the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injunction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is

not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [33-34] [59]

The Crown, while it has a treaty right to “take up” surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown’s duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown’s right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown’s argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the “taking up” limitation, the content of the Crown’s duty of consultation in this case lies

at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550,

2004 SCC 74; **distinguished:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Natural Resources Transfer Agreement, 1930 (Alberta) (Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), para. 10.

Wood Buffalo National Park Game Regulations, SOR/78-830, s. 36(5).

Treaties and Proclamations

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Treaty No. 8 (1899).

Authors Cited

Mair, Charles. *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto: William Briggs, 1908.

Report of Commissioners for Treaty No. 8, in Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc., reprinted from 1899 edition. Ottawa: Queen's Printer, 1966.

APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Sexton and Sharlow JJ.A.), [2004] 3 F.C.R. 436, (2004), 236 D.L.R. (4th) 648, 317 N.R. 258, [2004] 2 C.N.L.R. 74, [2004] F.C.J. No. 277 (QL), 2004 FCA 66, reversing a judgment of Hansen J. (2001), 214 F.T.R. 48, [2002] 1 C.N.L.R. 169, [2001] F.C.J. No. 1877 (QL), 2001 FCT 1426. Appeal allowed.

Jeffrey R. W. Rath and Allisun Taylor Rana, for the appellant.

Cheryl J. Tobias and Mark R. Kindrachuk, Q.C., for the respondent Sheila Copps, Minister of Canadian Heritage.

No one appeared for the respondent the Thebacha Road Society.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey and Angela J. Brown, for the intervener the Attorney General of Alberta.

James D. Jodouin and Gary L. Bainbridge, for the intervener the Big Island Lake Cree Nation.

C. Allan Donovan and Bram Rogachevsky, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and Dominique Nouvet, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and Jay Nelson, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, Q.C., and *Gary A. Nelson*, for the intervener the Blueberry River First Nations.

Jack R. London, Q.C., and *Bryan P. Schwartz*, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

1 BINNIE J. — The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

- 2 Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres), exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

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 as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]

(Report of Commissioners for Treaty No. 8 (1899), at p. 12)

- 3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the "Mikisew") until the 1986 Treaty Land Entitlement Agreement, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track

the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

- 4 In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*), was breached. The Mikisew appeal should be allowed, the Minister's approval quashed, and the matter returned to the Minister for further consultation and consideration.

I. Facts

5 About 5 percent of the territory surrendered under Treaty 8 was set aside in 1922 as Wood Buffalo National Park. The Park was created principally to protect the last remaining herds of wood bison (or buffalo) in northern Canada and covers 44,807 square kilometres of land straddling the boundary between northern Alberta and southerly parts of the Northwest Territories. It is designated a UNESCO World Heritage Site. The Park itself is larger than Switzerland.

6 At present, it contains the largest free-roaming, self-regulating bison herd in the world, the last remaining natural nesting area for the endangered whooping crane, and vast undisturbed natural boreal forests. More to the point, it has been inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living by hunting, fishing and commercial trapping within the Park boundaries. The Park includes the traditional lands of the Mikisew. As a result of the Treaty Land Entitlement Agreement, the Peace Point Reserve was formally excluded from the Park in 1988 but of course is surrounded by it.

7 The members of the Mikisew Cree First Nation are descendants of the Crees of Fort Chipewyan who signed Treaty 8 on June 21, 1899. It is common ground that its members are entitled to the benefits of Treaty 8.

A. The Winter Road Project

8 The proponent of the winter road is the respondent Thebacha Road Society, whose members include the Town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park, where the Park headquarters is located), the Fort Smith Métis Council, the Salt River First Nation, and

Little Red River Cree First Nation. The advantage of the winter road for these people is that it would provide direct winter access among a number of isolated northern communities and to the Alberta highway system to the south. The trial judge accepted that the government's objective was to meet "regional transportation needs": (2001), 214 F.T.R. 48, 2001 FCT 1426, at para. 115.

B. The Consultation Process

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because "... an open house is not a forum for us to be consulted adequately".

10 Apparently, Parks Canada left the proponent Thebacha Road Society out of the information loop as well. At the end of January 2001, it advised Chief Poitras that it had just been informed that the Mikisew did not support the road. Up to that point, Thebacha had been led to believe that the Mikisew had no objection to the road's going through the reserve. Chief Poitras wrote a further letter to the Minister

on January 29, 2001 and received a standard-form response letter from the Minister's office stating that the correspondence "will be given every consideration".

11 Eventually, after several more miscommunications, Parks Canada wrote Chief Poitras on April 30, 2001, stating in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the [Mikisew Cree First Nation]". At that point, in fact, the decision to approve the road with a modified alignment had already been taken.

12 On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorized to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". No reference was made to any obligations to the Mikisew.

13 The Minister now says the Mikisew ought not to be heard to complain about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.

14 The proposed winter road is wide enough to allow two vehicles to pass. Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, creation of the road would trigger a 200-metre wide corridor within which the use

of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

15 The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills on to the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

16 The Mikisew applied to the Federal Court to set aside the Minister's approval based on their view of the Crown's fiduciary duty, claiming that the Minister owes "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" (trial judge, at para. 26).

17 An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

18 *Constitution Act, 1982*

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

III. Judicial History

A. *Federal Court, Trial Division* ((2001), 214 F.T.R. 48, 2001 FCT 1426)

19 Hansen J. held that the lands included in Wood Buffalo National Park were not “taken up” by the Crown within the meaning of Treaty 8 because the use of the lands as a national park did not constitute a “visible use” incompatible with the existing rights to hunt and trap (*R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sioui*, [1990] 1 S.C.R. 1025). The proposed winter road and its 200-metre “[no] firearm” corridor would adversely impact the Mikisew’s treaty rights. These rights received constitutional protection in 1982, and any infringements must be justified in accordance with the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In Hansen J.’s view, the Minister’s decision to approve the road infringed the Mikisew’s Treaty 8 rights and could not be justified under the *Sparrow* test.

20 In particular, the trial judge held that the standard public notices and open houses which were given were not sufficient. The Mikisew were entitled to a distinct consultation process. She stated at paras. 170-71:

The applicant complains that the mitigation measures attached to the Minister’s decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew’s rights. I agree. Even the realignment, apparently adopted in response to Mikisew’s objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew’s treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew’s concerns.

Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights.

21 Accordingly, the trial judge allowed the application for judicial review and quashed the Minister's approval.

B. *Federal Court of Appeal* ([2004] 3 F.C.R. 436, 2004 FCA 66)

22 Rothstein J.A., with whom Sexton J.A. agreed, allowed the appeal and restored the Minister's approval. He did so on the basis of an argument brought forward by the Attorney General of Alberta as an intervener on the appeal. The argument was that Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads. The winter road was more properly seen as a "taking up" pursuant to the Treaty rather than an infringement of it. As Rothstein J.A. held:

Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible. [para. 21]

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74.)

23 Sharlow J.A., in dissenting reasons, agreed with the trial judge that the winter road approval was itself a *prima facie* infringement of the Treaty 8 rights and that the infringement had not been justified under the *Sparrow* test. The Crown's obligation as a fiduciary must be considered. The failure of the Minister's staff at Parks Canada to engage in meaningful consultation was fatal to the Crown's attempt at justification. She wrote:

In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights. [para. 152]

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from

time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".

- 25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:

The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.

(C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)

As Cory J. explained in *Badger*, at para. 57, "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings".

- 26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would

continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]

- 27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to “explain the relations” that would govern future interaction “and thus prevent any trouble” (Mair, at p. 61).

A. *Interpretation of the Treaty*

- 28 The interpretation of the treaty “must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation]” (*Sioui*, at p. 1069). As a majority of the Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14:

The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown’s approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty . . . the completeness of any written record . . . and the interpretation of treaty terms once found to exist. The bottom line is the Court’s obligation is to “choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles” the [First Nation] interests and those of the Crown. [Emphasis in original; citations omitted.]

See also *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, *per* McLachlin C.J. at paras. 22-24, and *per* LeBel J. at para. 115.

- 29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must

be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [para. 52]

30 In the case of Treaty 8, it was contemplated by all parties that “from time to time” portions of the surrendered land would be “taken up” and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, “the same means of earning a livelihood would continue after the treaty as existed before it” (p. 5).

31 I agree with Rothstein J.A. that not every subsequent “taking up” by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government’s fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.

B. *The Process of Treaty Implementation*

33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:

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”.

...

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises 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.

34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger (“might adversely affect it”) but in the variable content of the duty once triggered. At the low end, “the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice” (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

C. The Mikisew Legal Submission

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in

Haida Nation and *Taku River*, then, *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a “good practice” (para. 24).

D. *The Minister’s Response*

36 The respondent Minister seeks to distinguish *Haida Nation* and *Taku River*. Her counsel advances three broad propositions in support of the Minister’s approval of the proposed winter road.

1. In “taking up” the 23 square kilometres for the winter road, the Crown was doing no more than Treaty 8 entitled it to do. The Crown as well as First Nations have rights under Treaty 8. The exercise by the Crown of *its* Treaty right to “take up” land is not an infringement of the Treaty but the performance of it.
2. The Crown went through extensive consultations with First Nations in 1899 at the time Treaty 8 was negotiated. Whatever duty of accommodation was owed to First Nations was discharged at that time. The terms of the Treaty do not contemplate further consultations whenever a “taking up” occurs.
3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

37 For the reasons that follow, I believe that each of these propositions must be rejected.

(1) In “taking up” Land for the Winter Road the Crown Was Doing No More Than It Was Entitled To Do Under the Treaty

38 The majority judgment in the Federal Court of Appeal held that “[w]ith the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt” (para. 19).

39 The “Crown rights” argument was initially put forward in the Federal Court of Appeal by the Attorney General of Alberta as an intervener. The respondent Minister advised the Federal Court of Appeal that, while she did not dispute the argument, “[she] was simply not relying on it” (para. 3). As a preliminary objection, the Mikisew say that an intervener is not permitted “to widen or add to the points in issue”: *R. v. Morgentaler*, [1993] 1 S.C.R. 462, at p. 463. Therefore it was not open to the Federal Court of Appeal (or this Court) to decide the case on this basis.

(a) *Preliminary Objection: Did the Attorney General of Alberta Overstep the Proper Role of an Intervener?*

40 This branch of the Mikisew argument is, with respect, misconceived. In their application for judicial review, the Mikisew argued that the Minister’s approval of the winter road infringed Treaty 8. The infringement issue has been central to the proceedings. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before

the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, where Duff J. stated, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 51-52.

41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could “further light” have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, that “[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice” (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta’s legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal

analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to “risk an injustice”.

(b) *The Content of Treaty 8*

42 The “hunting, trapping and fishing clause” of Treaty 8 was extensively reviewed by this Court in *Badger*. In that case Cory J. pointed out that “even by the terms of Treaty No. 8, the Indians’ right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation” (para. 37). The members of the First Nations, he continued, “would have understood that land had been ‘required or taken up’ when it was being put to a [visible] use which was incompatible with the exercise of the right to hunt” (para. 53).

[T]he oral promises made by the Crown’s representatives and the Indians’ own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis. [para. 58]

43 While *Badger* noted the “geographic limitation” to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which “from time to time” land would be “taken up” and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to “regulations as may from time to time be made by the government”. The Alberta licensing scheme denied to “holders of treaty rights as modified by the [*Natural*

Resources Transfer Agreement, 1930] the very means of exercising those rights” (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note parenthetically that the *Natural Resources Transfer Agreement* is not at issue in this case as the Mikisew reserve is vested in Her Majesty in Right of Canada. Paragraph 10 of the Agreement provides that after-created reserves “shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof”.)

44

The Federal Court of Appeal purported to follow *Badger* in holding that the hunting, fishing and trapping rights would be infringed only “where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains” (para. 18). With respect, I cannot agree with this implied rejection of the Mikisew procedural rights. At this stage the winter road is no more than a contemplated change of use. The proposed use would, if carried into execution, reduce the territory over which the Mikisew would be entitled to exercise their Treaty 8 rights. Apart from everything else, there would be no hunting at all within the 200-metre road corridor. More broadly, as found by the trial judge, the road would injuriously affect the exercise of these rights in the surrounding bush. As the Parks Canada witness, Josie Weninger, acknowledged in cross-examination:

Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that’s been what Parks Canada observed in the past with regards to other roads, correct?

A: It is documented that roads do impact. I would be foolish if I said they didn’t.

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the “trigger” to the duty to consult identified in *Haida Nation* is satisfied.

45 The Minister seeks to extend the *dictum* of Rothstein J.A. by asserting, at para. 96 of her factum, that the test ought to be “whether, after the taking up, it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so” (emphasis added). This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.

46 The Attorney General of Alberta tries a slightly different argument, at para. 49 of his factum, adding a *de minimus* element to the treaty-wide approach:

In this case the amount of land to be taken up to construct the winter road is 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National Park and out of 840,000 square kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

47 The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):

The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

48

What Rothstein J.A. actually said at para. 18 is as follows:

With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

(c) *Unilateral Crown Action*

49 There is in the Minister's argument a strong advocacy of unilateral Crown action (a sort of "this is surrendered land and we can do with it what we like" approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister's acknowledgment at para. 41 of her factum that "[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians' exercise of hunting, fishing and trapping rights without consultation".

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

Given that a consultation obligation would mean that the Crown would be required to engage in meaningful consultations with any and all affected Indians, being nomadic individuals scattered across a vast expanse of land, every time it wished to utilize an individual plot of land or change the use of the plot, such a requirement would not be within the range of possibilities of the common intention of the parties.

The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible, and any administrative inconvenience incidental to managing the process was rejected as a defence in *Haida Nation* and *Taku River*. There is no need to repeat here what was said in those cases about the overarching objective of reconciliation rather than confrontation.

(d) *Honour of the Crown*

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court as a *treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations with First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown's Duty of Consultation and Accommodation?

53 The Crown's second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

55 The Crown has a treaty right to “take up” surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew “in good faith, and with the intention of substantially addressing” Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown’s duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

56 In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify *Badger*'s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in *Badger*) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

58 *Sparrow* holds not only that rights protected by s. 35 of the *Constitution Act, 1982* are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in *Sparrow*-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the

Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

(3) Was the Process Followed by the Minister Through Parks Canada in this Case Sufficient?

59 Where, as here, the Court is dealing with a *proposed* “taking up” it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the “taking up” is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister’s order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for “taking up” lands under Treaty 8. It is obvious that the listed purposes of “settlement, mining, lumbering” and “trading” all require suitable transportation. The treaty does not spell out permissible “other purposes” but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433, (Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to “travel”.

61 The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown’s duty to consult. The answer turns on the particulars of that duty shaped by the circumstances

here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [Emphasis added.]

62 In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. . . .

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. . . .

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. . . . [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the

Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections.

We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge's findings of fact make it clear that the Crown failed to demonstrate an "intention of substantially addressing [Aboriginal] concerns' . . . through a meaningful process of consultation" (*Haida Nation*, at para. 42). On the contrary, the trial judge held that

[i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

. . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

68 I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was "fundamentally flawed" (para. 153).

69 In the result I would allow the appeal, quash the Minister's approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

V. Conclusion

70 Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Appeal allowed with costs.

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Solicitors for the respondent the Thebacha Road Society: Ackroyd Piasta Roth & Day, Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Big Island Lake Cree Nation: Woloshyn & Co., Saskatoon.

Solicitors for the intervener the Lesser Slave Lake Indian Regional Council: Donovan & Co., Vancouver.

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