

## **Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69**

### Background

In the spring of 2001, the federal government approved a winter road running through the Mikisew Cree First Nation reserve without consulting with the First Nation. The Crown had held a general open house and public consultation on the winter road in early 2000, to which the Mikisew Cree had been invited. The Mikisew Cree asserted that an open house was not a forum for adequate consultation on their rights. When the Mikisew protested the decision, the road was re-routed around the reserve, again without consultation. The Mikisew objected to the 118-km long road based on its direct impact to the 23 square kilometers it will cover, including impacts to fourteen families residing nearby, the traplines of several more families and the moose hunting grounds of nearly 100 hunters. As well, they were concerned about the proposed road's impact on the area as a whole – keeping the area in a natural state is very important to their ability to teach their traditional culture and skills to the next generation.

The Mikisew Cree are signatories to Treaty 8. Under Treaty 8, the First Nation has rights to hunt, trap and fish and pursue their traditional way of life. The Crown also has rights, under the treaty, to “take up” lands within the treaty area for various purposes.

### Legal Issue

Did the Crown fulfill its duty to consult and accommodate Aboriginal peoples under section 35 of the Canadian Constitution in publicly consulting on, and planning and approving the winter road?

### The Law

When the Crown wants to “take up” lands under Treaty 8, as for this proposed road, it must act honourably towards reconciliation. The honour of the Crown inheres in every treaty and is expected in fulfillment of treaty obligations. Treaty rights include both procedural rights (to be consulted and accommodated) and substantive rights (to hunt, fish and harvest). The Crown's actions in this case,



based on an idea that the Crown could act unilaterally as the land was 'surrendered', were the "antithesis of reconciliation and mutual respect" (at paragraph 49). Under s. 35 the Crown has a continuing duty to consult and accommodate Aboriginal peoples when it plans activities that may impact Aboriginal and treaty rights on lands covered by treaties.

In this case, because the road was proposed on treaty lands, the duty to consult is at the lower end of the spectrum. The Mikisew Cree were entitled to notice of the project and direct engagement with the Crown, including information about the project which would address Mikisew interests and which the Crown could foresee as having potential negative impacts on their rights (for example, disruption to animal migration and traplines). The Crown is required to ask for and listen carefully to Mikisew concerns about the project, and make efforts to reduce negative impacts on rights. A general call for public consultation is not sufficient to fulfill the Crown's duty to consult and accommodate Aboriginal peoples.

### Conclusion

This decision is significant because the duty to consult and accommodate was developed through the course of several cases that centred on title claims and the exercise of Aboriginal rights where there are no treaties. The decision in Mikisew Cree confirms that the Crown's duty to consult and accommodate applies to treaty rights and on treaty lands. Justice Binnie emphasized the purpose s. 35 as reconciliation and clearly described Crown conduct that was not reconciliatory.