



Questions and Answers

Yukon Supreme Court Decision – KDC v. Yukon and Liard First Nation

Q: What were the key findings that influenced the ruling in this case?

A: Before turning to his analysis, Justice Veale made several critical findings of fact at paragraph 91 of the decision. These findings include:

- KDC is a treaty society which negotiates land claims on behalf of Kaska citizens in northern BC.
- Kaska members of Lower Post are a part of Liard First Nation.
- Daylu Dena Council is a sub-council of LFN.
- The Kaska Nation is made up of four rights-bearing groups: Ross River Dena Council, Liard First Nation, Dease River First Nation and Kwadacha First Nation.
- There is no transfer of aboriginal rights, title or interests to the KDC.
- KDC was not authorized to bring this action.⁶

Q: What was the summary result of the ruling?

A: Justice Veale determined there were six issues critical to be decided in the trial. On each of these issues, he ruled against KDC. The following questions and responses outline the court's findings in relation to the six critical issues that were identified by the court.

Q: Is KDC authorized to legally represent the Kaska of northern BC?

A: Justice Veale concludes that there has been no transfer of aboriginal title by the members of the Kaska Nation in northern British Columbia to KDC. Nor was KDC authorised by the rights-bearing First Nations and therefore is not authorized to bring the court action.⁶

In reaching this conclusion, Justice Veale reviewed the caselaw of consultation in particular *Haida* and *Tsilhqot'in* and confirmed that “[w]here there are competing Aboriginal groups



claiming a duty to consult, the question may be determined by identifying the rights-bearing group”.⁷ Justice Veale found that there was no suggestion or evidence that KDC has been authorized by “the individual Kaska members who are members of the KDC nor the constituent First Nations to bring this court action and establish that the duty to consult is owed to KDC”.⁸

KDC relied heavily on the Northwest Territories Metis case *Enge v. Canada (Minister of Indian Affairs and Northern Development)*, 2017 FC 932 for the proposition that they could represent a self-selecting subset of the Kaska Nation. At paragraph 112 of the judgment, Justice Veale outlined a number of reasons why this case was different than *Enge*. These differences include:

- KDC is not a rights-bearing group;
- KDC membership forms do not state that those who enrol are choosing KDC to represent their aboriginal rights (over the First Nations to which they continue to belong);
- Some members of KDC come from communities not a part of the Kaska Dena land claim;
- KDC membership does not purport to include all members of the Kaska Nation in BC;
- There was no resolution authorizing the court action.

For the reasons outlined as distinguishing *Enge* Justice Veale concluded KDC was not a rights-holding group and had not been authorized so therefore could not properly claim to legally represent the Kaska of northern BC in the manner they did in this case.

Q: Could KDC bring a representative action on behalf of its membership?

A: A representative action allows for a claim to be brought on behalf of a number of claimants by a single, authorized representative. Rule 5(11) of the *Rules of Court* outline how a representative action can be commenced. Justice Veale reviewed whether KDC could have brought this claim as a representative action on behalf of their members and concluded that they could not. He concluded based on recent caselaw that “the application of Rule 5(11) would only be appropriate in the exceptional case where there is no collective aboriginal rights holder”.⁹ The logical conclusion from this paragraph that – because there are collective aboriginal rights holders for the Kaska Nation (LFN, Ross River, Dease River First Nation and Kwadacha First Nation) another non-



rights- holding group could not commence a representative proceeding. This is a collateral victory in this judgment which will be discussed further below.

Q: Did past agreements between KDC and Yukon prevent Yukon from arguing KDC was not allowed to bring this claim?

A: KDC argued that Yukon was prohibited from opposing its case on the basis that the Yukon had previously agreed through various agreements that KDC had the authority to bring the court action. This is referred to throughout the judgment as “estoppel”. The agreements that KDC pointed to include the Umbrella Final Agreement, the Devolution Transfer Agreement and various other memoranda of understanding or agreements between Yukon Government and the Kaska. Justice Veale ruled that the various agreements between KDC and Yukon did not “confer KDC with the rights-bearing aboriginal authority to bring this action”.¹⁰ For that reason Yukon was not estopped from opposing KDC’s claim of a duty to be consulted on wildlife tags.

Q: Did past agreements between KDC and LFN prevent LFN from arguing KDC was not allowed to bring this claim?

Justice Veale similarly dismissed arguments by KDC that the 1997 KDC-LFN Memorandum of Agreement and the 2011 British Columbia Treaty and Transboundary Representation Protocol (which is appended to the Kaska Collaboration Accord) prevented LFN from arguing KDC had no authority to bring the duty to consult action.¹¹

Q: Did the Consent Order in KDC’s 2015 case on mineral staking prevent Yukon from arguing KDC was not allowed to bring this claim?

A: In 2014, KDC initiated a lawsuit against Yukon claiming that it was owed a duty to be consulted prior to mineral concession being granted in the southeastern Yukon. It is an important aside that prior to launching the 2014 mineral claim case, KDC sought and was granted authorization from the Kaska First Nations.



The 2014 mineral case was never heard but in August 2015, KDC and Yukon signed a Consent Order which recognized, among other things, that KDC was owed a duty to be consulted.

KDC argued that because a duty to consult KDC had been acknowledged in the 2015 Consent Order, no party could argue they were not entitled to the same remedy in this case. Justice Veale disagreed holding that, although there were similarities between the 2015 mineral rights case and this case, there were different legislative regimes and underlying issues at play.¹² Additionally, Justice Veale ruled that by virtue of LFN's involvement, the parties were different between the 2015 and current action.¹³ For these two reasons, KDC's argument was dismissed. Notably, Justice Veale also stated that even if these two reasons were not present, it would be an injustice to LFN to allow the 2015 Consent Order to have the prohibitive effect suggested by KDC.

Q: Is there a duty to consult and accommodate KDC prior to issuing sport hunting licenses and tags?

A: Justice Veale begins this section of the judgment reiterating his conclusion that "KDC is not an aboriginal rights-bearing group and that it is not authorized to act on behalf of its individual Kaska members of the Kaska First Nations who do hold the collective aboriginal rights of the Kaska Nation".

He then goes on to consider the specific form of relief sought by KDC in the context of the ongoing disagreement between the Kaska First Nations and the Yukon over the sovereignty, jurisdiction, title and ownership of the Kaska traditional territory in the southern Yukon. He concludes that the relief sought in the court action – a declaration and a court order that a duty to consult and accommodate KDC – would not bring "any resolution to the fundamentally differing views [between Yukon and Kaska First Nations] about sovereignty, jurisdiction, title and ownership".

Essentially, Justice Veale concludes that – even if KDC were somehow permitted to bring this court action – the relief sought would not serve to resolve the real and ongoing issues surrounding ownership of Kaska traditional territory.



Q: What are the practical implications of this judgment?

1. KDC is not a rights-holding group of the Kaska Nation.

The judgment holds that the rights-holding communities of the Kaska Nation are LFN, the Ross River Dena Council, Dease River First Nation and Kwadacha First Nation. KDC is not a rights-holding group and must be expressly authorized to act by one or more of the Kaska First Nations. This should prevent KDC from future claims to Kaska rights on behalf of themselves and their members.

2. KDC is not the appropriate body to bring a representative proceeding.

The judgment suggests that KDC cannot bring further court cases which could otherwise be brought by one of the Kaska First Nations. Representative actions, which might allow KDC to bring an action on behalf of its members, should only be brought in “the exceptional case where there is no collective aboriginal rights holder”. This is a powerful statement which will require KDC to come to Kaska First Nations, including LFN, prior to commencing further litigation.

3. Daylu Dena Council is confirmed to be a sub-council of LFN.

Justice Veale’s affirmation that Daylu Dena Council is a part of LFN, as opposed to an independent Kaska community capable of asserting and exercising Kaska rights and title, is a collateral victory for LFN in this case. While Justice Veale did not explain what exact powers a sub-council had, in omitting Daylu Dena Council as one of the current Kaska Nation rights-holding communities, it can be presumed that Daylu Dena Council exercise their Kaska rights through LFN.

4. Treaty negotiations.

The impact that this judgment will have on ongoing treaty negotiations by KDC in both BC and the Yukon is not immediately clear. However, it should result in more engagement of LFN in any future ratification process. The court held that KDC is acting within their jurisdiction to negotiate



a treaty on behalf of their membership. But by clarifying that the rights-holding communities are the four Kaska First Nations and also that LFN interests transcend the Yukon/BC border, any negotiated deal should be coming back to LFN as a part of the ratification process (if not well before).

Kaska Dena Council v. Yukon (Government of Yukon), 2019 YKSC 13

⁶ Para 114

⁷ Para. 99

⁸ Para 111

⁹ Para 12.

¹⁰ Para 134

¹¹ Para 138

¹² Para 142

¹³ Para 143