

ABORIGINAL PEOPLES

Fisheries — Duty to consult — Appeal from Federal Court decision (2017 FC 1182) dismissing judicial review of decision of Fisheries and Oceans Canada's Regional Director General, Pacific Region (Regional Director), only partially allowing appellant's request that its allocation for Fraser sockeye (harvested for food, social and ceremonial purposes) be increased from 20,000 pieces to 70,000 pieces — Whether Federal Court erring in finding appellant's request for increase in allocation of Fraser sockeye not triggering duty to consult or, if triggered, duty at low end of spectrum — Whether Federal Court erring in finding Regional Director's decision reasonable — Appellant's request for increase in allocation triggering duty to consult — Federal Court wrong to conclude appellant failing to show issuance of communal fishing licence would adversely affect its asserted right to fish — Respondent's Aboriginal Fisheries Strategy, issuance of Aboriginal communal fishing licences were management tools to conserve fishery pending final settlement of appellant's asserted right to fish — Not basis of appellant's asserted constitutionally protected right to fish — Appellant required to demonstrate "appreciable", "apprehended, evidence-based potential or possible impact" on their right — Duty to consult designed to prevent damage, preserve Indigenous rights, claims while negotiations underway — Upon receiving appellant's request for allocation change, respondent tasked with providing fresh assessment of how licencing system, restrictions on fishing would restrict or adversely impact appellant's ability to assert its right in years to come — Consultation essential to Crown's ability to discharge that task — Duty owed not at low end of consultation spectrum — Requiring interactive process, including meaningful two-way dialogue given importance, fundamental nature of asserted right, respondent's non-contestation of asserted right, advice about impact of Fraser sockeye salmon allocation upon appellant — Duty to consult also requiring provision of written reasons — Duty to consult not reasonably, adequately discharged herein — Process followed failing to result in meaningful two-way dialogue — Respondent not providing responsive, considered, meaningful responses to appellant's concerns — Regional Director's reasons failing to demonstrate that appellant's concerns considered, taken into account — Regional Director's decision made without adequate consultation with appellant — This constituting error of law — Decision therefore unreasonable — Appeal allowed, but because Regional Director's decision increasing appellant's allocation of sockeye salmon, decision not quashed — Rather, decision declared to have been made in breach of Crown's duty to consult with appellant in respect of its asserted right to fish for food, social and ceremonial purposes — Therefore, should appellant remain of view that allocation of Fraser sockeye inadequate, parties will be required to begin fresh round of consultation concerning appellant's request for increased allocation.

Squamish First Nation v. Canada (Fisheries and Oceans) (A-39-18, 2019 FCA 216, Dawson J.A., reasons for judgment dated August 8, 2019, 34 pp.)