The Peel Decision and Beyond

MARCH 21, 2018

WESTMARK HOTEL > WHITEHORSE

MORNING

8-8:30AM	Breakfast: Coffee, Muffins
8:30-8:45AM	Call to Order Welcoming: Joe Copper Jack Opening Prayer: Julia Broeren, Ta'an Kwäch'an Elder Event Introduction: Michael Pealow, Blair Hogan
8:45 – 9AM	Why This Gathering Was Called: Pearl Callaghan, YLUPC Chair
9-9:15AM	Review of Peel Planning Process: Ron Cruikshank, Director, YLUPC
9:15– 11AM	**Implication of the Supreme Court of Canada's Peel Watershed Ruling: First Nation of Na-Cho Nyäk vs Yukon, 2017 SCC 58** Moderated by Gary W. Whittle, Whittle & Company, Lawyers Legal Panel: John Olynyk, Lawson Lundell, LLP, Mara Pollock, Pollock Law, Kyle Carruthers, Tucker and Carruthers Opening remarks by panel members Moderator's questions to panel members 10:15 Break 10:30 – 11:00 Audience questions to panel members
11AM-12PM	Break-out Session Topic: Supreme Court Ruling 2017 SCC 58 Peel Watershed Small group circle discussions
12-1PM	Lunch – Chicken Souvlaki, Rice, Salad, with music by Jerry Alfred Minister of Energy, Mines and Resources, Ranj Pillai lunch time address

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AFTERNOON

1-1:30PM	Chapter 11 Implementation: Progress and Challenges and Potential Solutions (Ron Cruikshank, YLUPC and Lesley Cabott, Stantec) Questions & Answers
1:30-2:30PM	A Planning Framework for the Yukon? Introduction: A Land Claim Based Planning Framework for the Yukon? Ron Cruikshank and Amy Ryder, Ryder Communications Alberta's Land Use Planning Framework: Continually Improving the System Jason Cathcart, Director of Regional Planning, Government of Alberta Progress on the Northwest Territories Planning Framework (temp title) Darha Phillpot, Manager of Land Use Planning, Department of Lands, GNWT Questions and Answers
2:30-2:45PM	Break
2:45 – 3:45PM	Break-out Groups: A Planning Framework for the Yukon: Your thoughts
3:45 – 4:15PM	Break-out Group: Report Back
4:15 – 4:30PM	Wrap-up and closing remarks

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Materials for the morning items

a.m.

Timeline for the Peel Watershed regional land use planning process

2014

In January 2014, the Yukon government concludes the consultation process with First Nation governments.

On January 21, 2014, the Yukon government adopts a land use plan which applies only to public lands in the Peel Watershed region.

The interim withdrawal from mineral staking in the Peel Watershed region expires on January 21, 2014 and is replaced with a permanent withdrawal from mineral staking in areas designated as Protected Areas within the Yukon government's land use plan for the region.

The Yukon government has put in place a renewed relief from assessment order for existing claimholders in the Protected Areas and Restricted Use Wilderness Areas in the Peel Watershed Land Use Plan. This order only affects claims that were already in place when the Plan was adopted on January 21, 2014. The relief order will be in effect for one year, from February 4, 2014, to February 4, 2015.

2013

In January 2013, the Yukon government extended the relief from assessment order affecting all claim holders in the Peel Watershed planning region to February 4, 2014.

In February 2013, the four-month public consultation ended on February 25, 2013.

In April 2013, the Yukon government released the What We Heard document, summarizing comments provided during consultation, along with all the feedback received.

In May 2013, the Yukon government extended the interim withdrawal from mineral staking in the Peel Watershed region to December 31, 2013.

In December 2013, the Yukon government extended the interim withdrawal from mineral staking in the Peel Watershed region to January 21, 2014.

2012

In February 2012, the Yukon government releases its document used to review the Peel Watershed Planning Commission's Recommended Plan.

Yukon government also extended the interim withdrawal from mineral staking in the Peel Watershed region to September 4, 2012, and implements a temporary relief from assessment order affecting all claim holders in the Peel Watershed planning region to February 4, 2013.

In August 2012, the Yukon government extends the interim withdrawal from mineral staking in the Peel Watershed region to May 4, 2013.

In October 2012, the Yukon government launched a public consultation process on the land use plan for the Peel Watershed region, inviting the public and stakeholders to provide input on the Final Recommended Plan and on the territorial government's proposed new land use designations which could be applied in the Peel Watershed Region.

2011

In January 2011, the Parties signed a joint letter of understanding (LOU) and work-plan that confirmed their commitment to the process, and clarified objectives, principles, timeframes and procedures.

In February 2011, the Yukon government submitted a response to the Peel Watershed Planning Commission on the Recommended Plan.

In July 2011, the Final Recommended Plan was submitted to the Yukon government and First Nation governments. The Parties conducted internal and intergovernmental reviews of the document.

2010

In July 2010, the Yukon government and First Nation governments conducted a public consultation process on the Recommended Plan.

In December 2010, the Yukon government initiated a mineral staking withdrawal in the Peel Watershed Region until February 4, 2012. The withdrawal is to provide certainty during the regional land use planning process. The withdrawal applies to the issuance of new sub-surface rights only. This means no staking of any new quartz or placer claims and no new rights will be issued for oil and gas or coal.

2009

In December 2009, the Recommended Plan was submitted to the Yukon government and First Nation governments. The Parties conducted internal and intergovernmental reviews of the document.

Peel land use court case timeline

2017

- December 1. Supreme Court of Canada issued a decision on the Peel land use court case.
- March 22. Supreme Court of Canada hearing in Ottawa.
- January 19. The Government of Yukon filed its factum with the Supreme Court of Canada. See the Government of Yukon factum.

2016

- June 9. The Government of Yukon issues its statement on the Supreme Court of Canada decision to hear the Peel regional land use planning court case.

2015

- December 15. Government of Yukon statement is released.
- November 4. Yukon Court of Appeal decision is delivered.
    - Yukon Court of Appeal decision
    - Government of Yukon statement
- April 16. The Government of Yukon files an amended notice of appeal with the Yukon Court of Appeal.
    - Amended notice of appeal
    - Government of Yukon statement
- March 12. The Government of Yukon retains new legal counsel.
- January 8. The Government of Yukon issues a temporary withdrawal from mineral staking in the Peel Watershed Region.

2014

- December 30. The Government of Yukon files a notice of appeal with the Yukon Court of Appeal.
    - Notice of appeal
    - Government of Yukon statement
- December 2. The decision on the Supreme Court of Yukon hearings is delivered.
    - Government of Yukon statement
- December 1. Dawson Regional Land Use Planning process is temporarily suspended.
- October. An additional one-day hearing is held.
- October 17. The Government of Yukon files an outline of further argument (remedies) in the Supreme Court of Yukon.
    - The Government of Yukon’s outline of further argument (remedies)
- July. The Peel land use case is heard in the Supreme Court of Yukon.
- July 2. The Government of Yukon files a reply to the written submission of the Gwich’in Tribal Council.
    - Government of Yukon's reply to written submission of Gwich’in Tribal Council

- June 9. The Government of Yukon files its outline of argument with the Supreme Court of Yukon
    - Government of Yukon's outline of argument
- April 24. The Government of Yukon files its amended statement of defence with the Supreme Court of Yukon.
    - Government of Yukon amended statement of defence
- February 18. The Government of Yukon files its statement of defence with the Supreme Court of Yukon.
    - Statement of defence
    - Government of Yukon statement
- January 24. The plaintiffs file a statement of claim against the Government of Yukon in the Supreme Court of Yukon.

2017 SCC 58, 2017 CSC 58
Supreme Court of Canada

First Nation of Nacho Nyak Dun v. Yukon

2017 CarswellYukon 135, 2017 CarswellYukon 136, 2017 SCC 58,
2017 CSC 58, [2017] B.C.W.L.D. 7141, 285 A.C.W.S. (3d) 228

First Nation of Nacho Nyak Dun, Tr'ondëk Hwëch'in, Yukon Chapter-Canadian Parks and Wilderness Society, Yukon Conservation Society, Gill Cracknell, Karen Baltgailis and Vuntut Gwitchin First Nation (Appellants) and Government of Yukon (Respondent) and Attorney General of Canada, Gwich'in Tribal Council and Council of Yukon First Nations (Interveners)

McLachlin C.J.C., Abella J., Moldaver J., Karakatsanis J., Wagner J., Gascon J., Côté J., Brown J., Rowe J.

Heard: March 22, 2017
Judgment: December 1, 2017
Docket: 36779

Proceedings: reversing in part *First Nation of Nacho Nyak Dun v. Yukon* (2015), 654 W.A.C. 78, 379 B.C.A.C. 78, 95 C.E.L.R. (3d) 187, [2016] 1 C.N.L.R. 73, 2015 YKCA 18, 2015 CarswellYukon 81, Bauman C.J.Y.T., Goepel J.A., Smith J.A. (Y.T. C.A.); additional reasons at *First Nation of Nacho Nyak Dun v. Yukon* (2016), 2016 CarswellYukon 65, 2016 YKCA 8, Bauman C.J.Y.T., Goepel J.A., Smith J.A. (Y.T. C.A.); reversing in part *First Nation of Nacho Nyak Dun v. Yukon* (2014), 2014 YKSC 69, 2014 CarswellYukon 102, 91 C.E.L.R. (3d) 286, [2015] 1 C.N.L.R. 81, R.S. Veale J. (Y.T. S.C.)

Counsel: Thomas R. Berger, Q.C., Margaret D. Rosling, Micah S. Clark, for Appellants
John B. Laskin, John A. Terry, Nick Kennedy, Mark Radke, for Respondent
John S. Tyhurst, for Intervener, Attorney General of Canada
Jeff Langlois, David Wright, for Intervener, Gwich'in Tribal Council
Lino Bussoli, Tammy Shoranick, for Intervener, Council of Yukon First Nations

Subject: Constitutional; Environmental; Property; Public

APPEAL from judgment reported at *First Nation of Nacho Nyak Dun v. Yukon* (2015), 2015 YKCA 18, 2015 CarswellYukon 81, 95 C.E.L.R. (3d) 187, 379 B.C.A.C. 78, 654 W.A.C. 78, [2016] 1 C.N.L.R. 73 (Y.T. C.A.), reversing in part declaration that Yukon did not act in conformity with consultative process and quashing Yukon's second consultation and its plan.

POURVOI formé à l'encontre d'un jugement publié à *First Nation of Nacho Nyak Dun v. Yukon* (2015), 2015 YKCA 18, 2015 CarswellYukon 81, 95 C.E.L.R. (3d) 187, 379 B.C.A.C. 78, 654 W.A.C. 78, [2016] 1 C.N.L.R. 73 (Y.T. C.A.), infirmant en partie un jugement déclarant que le Yukon n'avait pas agi en conformité avec les processus de consultation et annulant la deuxième consultation et son plan.

Karakatsanis J. **(McLachlin C.J.C. and Abella, Moldaver, Wagner, Gascon, Côté, Brown and Rowe JJ. concurring):**

I. Overview

As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the *Constitution Act, 1982*, they have assumed a vital place in our constitutional fabric. Negotiating

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modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.), at para. 10; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at pp. 3, 10, 40-41 and 56).

(UFA), a monumental agreement that set the stage for concluding modern treaties in the Yukon, For almost a decade, Yukon and the affected First Nations participated in the process set out in these agreements to develop a regional land use plan for the Peel Watershed. Near the end of the approval process, after the independent Commission had released a Final Recommended Peel Watershed Regional Land Use Plan, Yukon proposed and adopted a final plan that made substantial changes to increase access to and development of the region.

3 Before this Court, the parties agree with the courts below that Yukon did not respect the land use plan approval process set out in the Final Agreements. However, they do not agree on the basis for concluding that Yukon's adoption of its final plan is invalid and the appropriate remedy.

In my view, this proceeding is best characterized as a judicial review of Yukon's decision to approve its land use plan. In a judicial review concerning the implementation of modern treaties, a court should simply assess whether the challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship.

6 I conclude that Yukon did not have the authority to make the extensive changes that it made to the Final Recommended Plan, and that the trial judge therefore appropriately quashed Yukon's approval of its plan. The effect of quashing this approval was to return the parties to the stage in the land use plan approval process where Yukon could "approve, reject or modify" the Final Recommended Plan after consultation, as per s. 11.6.3.2 of the Final Agreements. The Court of Appeal erred in returning the parties to an earlier stage in the process. I would therefore allow the appeal in part. The trial judge's order quashing the approval is upheld. As no further judicial direction was required, the other parts of the trial judge's order are set aside.

A. The Final Agreements

7 The Umbrella Final Agreement and the specific Final Agreements that implement its terms are the product of decades of negotiations "between well-resourced and sophisticated parties" (*Little Salmon*, at para. 9). The modern treaties at issue in this case are the Final Agreements of the First Nation of Nacho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin First Nation. A Yukon Transboundary Agreement executed by the Gwich'in Tribal Council on behalf of the Tetlit Gwich'in is also implicated in this case.

8 Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, which include treaty rights that now exist by way of land claims agreements. Section 6(1) of the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, states that a Yukon Final Agreement or

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Transboundary Agreement is in effect a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982* (see also s. 2.2.1 of the UFA). Thus, these agreements fall within the constitutional protection of s. 35.

9 The UFA reflects a unique approach in modern treaty negotiation. It was designed to apply to all Final Agreements, but each agreement may include provisions specific to a Yukon First Nation (s. 2.1.3). While the UFA does not create or affect any legal rights (s. 2.1.2), a Yukon First Nation may exchange its Aboriginal rights for defined treaty rights under a Final Agreement (*Little Salmon*, at para. 9).

10 The UFA is a model for reconciliation. This framework establishes institutions for self-government and the management of lands and resources. The Final Agreements falling under the UFA are intended to foster a positive and mutually respectful long-term relationship between the signatories (see *Little Salmon*, at paras. 8 and 10). In this way, the Final Agreements address past grievances, and yet are oriented towards the future. [1]

11 The UFA establishes, and the Final Agreements implement, a land use planning process for the lands designated in each Final Agreement. These Final Agreements and the Transboundary Agreement recognize the traditional territories of the affected First Nations in the Yukon portion of the Peel Watershed and their right to participate in the management of public resources in that area.

B. The Peel Watershed

12 The Peel Watershed Planning Region spans almost 68,000 square kilometers and is located in northern Yukon. It is one of the largest intact wilderness watersheds in North America. Its landscape ranges from "rugged mountains to low, flat taiga forests". The ecosystem is characterized by its rich water resources and abundant and diverse fish, wildlife, and plant populations. This wilderness character is nearly untouched by contemporary development — there are no permanent residents and few roads in the watershed. As an intact ecosystem, the watershed supports the traditional activities of the First Nations.

13 Although the current level of land use activity in the watershed is relatively low, it presents further opportunities for economic development. The watershed currently carries low-level renewable resource use, including traditional land uses, wilderness tourism, recreation, big game outfitting, and trapping. There is also a growing interest in developing its non-renewable resource potential, including mineral, and oil and gas exploration. These land uses are not all necessarily compatible. In recognition of this reality, the parties have created a process for managing land use in the Peel Watershed.

C. The Peel Watershed Land Use Planning Process

14 Chapter 11 of the UFA establishes a process for developing regional land use plans that ensures the meaningful participation of First Nations in the management of public resources in settlement and non-settlement lands (*Little Salmon*, at para. 9). "Settlement Land" is land held by a Yukon First Nation. The Final Agreements each incorporate, without modification, the provisions in Chapter 11 of the UFA, including the provisions that set out the land use plan approval process (s. 11.6.0).

15 By voluntary agreement of Yukon and the affected First Nations, the Yukon Land Use Planning Council established the Peel Watershed Planning Commission in 2004 to develop a Regional Land Use Plan for the portion of the Peel Watershed within Yukon. The plan would address land use in both settlement and non-settlement areas. As required by Chapter 11 of the Final Agreements, the members of the Commission were nominated by Yukon, the First Nations, and jointly.

16 Throughout the planning process, the Commission engaged in intensive stakeholder, expert, and public consultation and published various reports which informed its development of the Recommended Plan.

17 In 2009, after more than four years of research and consultation, the Commission initiated the land use plan approval process by submitting its Recommended Peel Watershed Regional Land Use Plan to Yukon and the affected

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First Nations (s. 11.6.1). This process is found in ss. 11.6.1 to 11.6.5.2 of Chapter 11, set out in an Appendix to these reasons.

18 After consultation, Yukon was required to approve, reject, or propose modifications to the part of the plan that applied to non-settlement land (s. 11.6.2). If Yukon chose to reject it or propose modifications, it was required to provide written reasons (s. 11.6.3). The First Nations have similar rights and responsibilities with respect to the part of the Recommended Plan that applies to settlement land (ss. 11.6.4 and 11.6.5).

19 Before carrying out consultation on the Recommended Plan as required by s. 11.6.2, Yukon met with the affected First Nations and in 2010, signed a Joint Letter of Understanding (LOU). The 2010 LOU set out the parties' intention to establish a coordinated response to the Recommended Plan, to conduct joint community consultation, and to endeavour to achieve consensus on the plan. In January 2011, the parties signed a second LOU, with similar terms to the 2010 LOU, in anticipation of the second round of consultation.

20 A joint response of all the parties to the Commission's Recommended Plan, as required by the 2010 LOU, and a response of the affected First Nations were submitted to the Commission in February 2011. A few days later, Yukon submitted its own written response to the Commission.

21 Yukon's written response included three specific proposed modifications to the Recommended Plan that were similar to those set out in the joint response. In addition, Yukon made two statements expressing its interest in a plan that included increased options for access and development:

> 1. Re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan.
>
> 2. Develop options for access that reflect the varying conservation, tourism and resource values throughout the region.

(Letter from Minister of Energy, Mines and Resources, dated February 21, 2011; A.R., vol. VII, at p. 84)

22 The Commission was required to reconsider the Recommended Plan in light of Yukon's written response (s. 11.6.3.1). In the Commission's view, the development and access points were not sufficiently detailed to be considered in the development of the Final Recommended Plan; they were simply expressions of Yukon's general desires and were not "proposed modifications". The Commission reconsidered its Recommended Plan in light of the joint response, the First Nations' response, and Yukon's response, including the three specific proposed modifications, and released its Final Recommended Plan in July 2011.

23 Yukon was slow to respond, and when it did so, it did not follow the January 2011 LOU. In February 2012, the Minister of Energy, Mines and Resources issued a news release developing eight core principles to guide its "modification" of the Final Recommended Plan. Within days, the First Nations objected and stated that Yukon could only modify the Final Recommended Plan in accordance with previously proposed modifications. Yukon responded that it had carried out the process in good faith and acted within the scope of its authority. Several months later, Yukon proposed a new land use designation system. The First Nations objected to the new system, stating that it was a rejection of the land use planning process set out in the Final Agreements. In response, Yukon set out its view that Yukon and the First Nations each had the "ultimate authority" to approve, reject, or modify that part of the Final Recommended Plan that applies to the land under their authority.

24 Yukon then turned to conducting the second consultation under s. 11.6.3.2. It carried out this consultation on its own, without the coordinated involvement of the First Nations required by the 2011 LOU.

25 In October 2013, Yukon sent a letter to the affected First Nations summarizing its anticipated "modifications" to the Final Recommended Plan. The changes were intended to increase development and access. Later that month, the First

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Nations again objected to this position, stating that it was inconsistent with the process set out in the Final Agreements. In January 2014, Yukon approved its land use plan for non-settlement land in the Peel Watershed (s. 11.6.3.2).

26 These legal proceedings ensued. The appellants, First Nation of Nacho Nyak Dun, Tr'ondëk Hwëch'in, Yukon Chapter-Canadian Parks and Wilderness Society, Yukon Conservation Society, Gill Cracknell and Karen Baltgailis sought a declaration that Yukon did not properly conduct the second consultation as required by s. 11.6.3.2 and orders quashing Yukon's plan and directing Yukon to re-conduct the second consultation. The appellants also sought orders limiting Yukon's power to modify or reject the Final Recommended Plan going forward. The Vuntut Gwitchin First Nation did not originally join the court action, but was added as a respondent on the appeal to the Court of Appeal.

II. Decisions Below

27 The trial judge, Veale J., declared that Yukon did not act in conformity with the process set out in the Final Agreements and quashed Yukon's second consultation and its plan (2014 YKSC 69, [2015] 1 C.N.L.R. 81 (Y.T. S.C.)). He held that, by introducing changes that had not been presented to the Commission, Yukon did not properly conduct the second consultation and invalidly modified the Final Recommended Plan.

28 In interpreting the Chapter 11 process, the trial judge held that Yukon can only make modifications to a Final Recommended Plan (under s. 11.6.3.2) that are based on those it proposed to the Recommended Plan (under s. 11.6.2) and that Yukon cannot reject a Final Recommended Plan in its entirety if it has proposed modifications to the Recommended Plan. The trial judge therefore ordered Yukon to re-conduct its second consultation, and to then either approve the Final Recommended Plan, or modify it based on the modifications it had previously proposed.

29 Bauman C.J., writing for Smith and Goepel JJ.A. of the Yukon Court of Appeal (2015 YKCA 18, [2016] 1 C.N.L.R. 73 (Y.T. C.A.)), allowed the appeal in part and set aside the part of the trial judge's order that returned the parties to the second round of consultation. The Court of Appeal found that Yukon had failed to properly exercise its right to propose modifications to the Recommended Plan, and the court returned the parties to the stage in the process where Yukon could remedy this failure (s. 11.6.2). The court agreed with the trial judge that Yukon's authority to modify the Final Recommended Plan was limited to modifications it had previously proposed to the Recommended Plan. The Court of Appeal however, disagreed with the trial judge's interpretation of the scope of Yukon's authority to reject a Final Recommended Plan, and concluded that this authority was broad.

III. Analysis

30 The appellants submit that Yukon's authority to modify a Final Recommended Plan under s. 11.6.3.2 is restricted to modifications based on those it proposed to a Recommended Plan. The trial judge agreed. At trial and before the Court of Appeal, Yukon argued that its ability to modify the Final Recommended Plan was unconstrained. Before this Court, Yukon concedes that it breached the Final Agreements and that its approval of its final plan is invalid. However, it agrees with the Court of Appeal that the appropriate remedy was to return it to the earlier stage of the planning process, where it can propose modifications to the Recommended Plan (s. 11.6.2). In contrast, the First Nations agree with the trial judge that the matter should be returned to the s. 11.6.3.2 stage.

(b) Was Yukon's approval of its plan authorized by s. 11.6.3.2 of the Final Agreements?

(c) What is the appropriate remedy?

A. The Appropriate Role of the Court in These Proceedings

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As demonstrated by the remedies sought by the First Nations, and the powers set out in s. 8 of the *Yukon First Nations Land Claims Settlement Act*, The First Nations submitted that Yukon's approval of its land use plan did not comply with the land use plan approval provisions of the Final Agreements, and they asked the trial judge to quash the plan on that basis. This type of remedy is available on judicial review (Rule 54 of the *Rules of Court*, Y.O.I.C. 2009/65; see also trial reasons, at para. 167). An application for judicial review does not invite the court to assess the legality of every decision that preceded the challenged decision.

In any event, the appropriate judicial role is informed by the fact that this dispute arises in the context of the implementation of modern treaties. Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership (see *Report of the Royal Commission on Aboriginal Peoples*, at pp. 3, 10 and 40-41; see also *Little Salmon*, at para. 10). In resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance (see *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (S.C.C.), at para. 313, per McLachlin J., dissenting, but not on this point; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186, per Lamer C.J.; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (S.C.C.), at para. 24). This approach recognizes the *sui generis* nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship.

That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

B. Yukon's Approval of Its Plan Was Not Authorized by Section 11.6.3.2 of the Final Agreements

35 I agree with the parties and both courts below that Yukon's changes to the Final Recommended Plan did not respect the land use planning process in the Final Agreements. However, the reasoning and the focus of the parties and courts below lead to different conclusions and different remedies. In my view, Yukon's approval of the plan was not valid as Yukon's changes to this plan were not authorized. To explain why, I must interpret s. 11.6.3.2 of the Final Agreements, which sets out Yukon's right to modify a Final Recommended Plan.

Because modern treaties are "meticulously negotiated by well-resourced parties," courts must "pay close attention to [their] terms" (*Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557 (S.C.C.), at para. 7). "[M]odern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability" (*Little Salmon*, at para. 12). Compared to their historic counterparts, modern treaties are detailed documents and deference to their text is warranted (*Little Salmon*, at para. 12; see also Julie Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2010), 26 *N.J.C.L.* 25, at p. 41).

(*Little Salmon*, at para. 10; *Moses*, at para. 7; ss. 2.6.1, 2.6.6 and 2.6.7 of the Final Agreements; see also the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12). Indeed, a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted "in an ungenerous manner or as if it were an everyday commercial contract" (*Little Salmon*, at para. 10; see also D. Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011), 54 *S.C.L.R.* (2d)

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475). Furthermore, while courts must "strive to respect [the] handiwork" of the parties to a modern treaty, this is always "subject to such constitutional limitations as the honour of the Crown" (*Little Salmon*, at para. 54).

38 By applying these interpretive principles, courts can help ensure that modern treaties will advance reconciliation. Modern treaties do so by addressing land claims disputes and "by creating the legal basis to foster a positive long-term relationship" (*Little Salmon*, at para. 10). Although not exhaustively so, reconciliation is found in the respectful fulfillment of a modern treaty's terms.

I turn first to the language of s. 11.6.3.2 in the UFA and Final Agreements:

> Government shall ... approve, reject or modify that part of the plan recommended under 11.6.3.1 applying on Non-Settlement Land, after Consultation with any affected Yukon First Nation and any affected Yukon community.

While the word "modify" is unqualified in this provision, its juxtaposition to "reject" shows that Yukon cannot modify a Final Recommended Plan so significantly as to effectively reject it. The limited nature of "modify" is also supported by

Similarly, "*modifier*" [modify] which appears in the French version of the UFA is defined in the *Grand Robert de la langue française* (2nd ed. 2001) as [TRANSLATION] "to change (a thing) without altering its nature, its essence". The meaning of the term conveys that a modification is a limited exercise, which involves changing something without altering its fundamental nature.

41 "Consultation" is a defined term in the UFA and Final Agreements and requires Yukon to provide

> (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
>
> (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
>
> (c) full and fair consideration by the party obliged to consult of any views presented.

Yukon must therefore provide notice in "sufficient form and detail" to allow affected parties to respond to its contemplated modifications to a Final Recommended Plan, then give "full and fair consideration" to the views presented during consultations before it decides how to respond to the Final Recommended Plan in order to comply with the robust definition of "consultation". Thus, all parties and courts below agree that if Yukon decides to modify a Final Recommended Plan, it must comply with these procedural requirements in exercising its authority under s. 11.6.3.2.

42 As well, the language of s. 11.6.3.2 must be read in the broader context of the scheme and objectives of Chapter 11 of the Final Agreements, which establishes a comprehensive process for how the territorial and First Nations governments will collectively govern settlement and non-settlement lands, both of which include traditional territories.

43 The land use plan approval process is initiated when the Regional Land Use Planning Commission forwards a Recommended Plan to Yukon and affected First Nations (s. 11.6.1). Yukon then has the obligation, after consultation with the affected First Nations and communities, to approve, reject, or propose modifications to the plan as it applies to non-settlement land (s. 11.6.2). Written reasons are required if Yukon rejects the plan or proposes modifications (s. 11.6.3). If Yukon does not approve the plan, the Commission reconsiders it and then proposes a Final Recommended Plan (s. 11.6.3.1). After consultation, Yukon then approves, rejects, or modifies this Final Recommended Plan as it applies to non-settlement land (s. 11.6.3.2). Once a plan is approved, it must be periodically reviewed and can be amended

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(ss. 11.2.1.4 and 11.2.1.5). Each step of the process builds on decisions made at an earlier stage. This process may span many years and government cycles.

44 Chapter 11 gives a politically neutral Commission a central role in the land use planning process. The expert Commission's responsibilities overlap significantly with the objectives of Chapter 11, and include ensuring adequate opportunity for public participation, minimizing actual or potential land use conflicts, utilizing the knowledge and traditional experiences of Yukon Indian People and the knowledge of other residents in the region, promoting the well-being of Yukon residents, and promoting sustainable development (ss. 11.1.0 and 11.4.5). As well, the Commission must reconsider a Recommended Plan, in light of any proposed modifications and the written reasons, and propose a Final Recommended Plan (s. 11.6.3.1).

[2] In the Final Agreements, most traditional territory was designated as non-settlement land. In exchange for comparatively smaller settlement areas, the First Nations acquired important rights in both settlement and non-settlement lands, particularly in their traditional territories (see Chapters 7, 10, 13, 14, 16, 17 and 18; see also *Little Salmon*, at para. 9). Section 9.3.1 recognizes that "[t]he amount of Settlement Land to be allocated ... has been determined in the context of the overall package of benefits in the Umbrella Final Agreement." Barry Stuart, the Chief Land Claims Negotiator for the Yukon Territorial Government, explains that it was more important to First Nations that they be able to meaningfully participate in land use management in all of their traditional territory than to acquire vast tracts of their traditional territory as settlement lands:

> ... it became abundantly clear that [the First Nations'] interests in resources were best served by creatively exploring opinions for shared responsibility in the management of water, wildlife, forestry, land, and culture. Effective and constitutionally protected First Nation management rights advanced their interests in resource use more effectively than simply acquiring vast tracts of land [as settlement lands]. ...
>
> . . . . .
>
> The Yukon government's desire to decentralize decision making and create meaningful opportunities for public participation in managing resources complemented First Nation interests in resource management, and served their interests more effectively than increasing settlement land holdings. [3]

47 In short, it is a clear objective of Chapter 11 to ensure First Nations meaningfully participate in land use management in their traditional territories. As well, the Chapter 11 process is designed to foster a positive, mutually respectful, and long-term relationship between the parties to the Final Agreements.

Thus, I agree with the lower courts that and an unconstrained authority to modify the Final Recommended Plan would render this process meaningless, as Yukon would have free rein to rewrite the plan at the end. Interpreting s. 11.6.3.2 in the context of Chapter 11 shows that Yukon cannot exercise its modification power to effectively create a new plan that is untethered from the one developed by the Commission, on which affected parties had been consulted.

49 I agree with both courts below that Yukon can make modifications to a Final Recommended Plan (s. 11.6.3.2) that are based on those it has proposed to the Recommended Plan (s. 11.6.2), as the Commission has had the chance to consider these modifications. However, I disagree that these are the only modifications Yukon can make. Interpreting

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"modify" that narrowly would mean Yukon could only respond to changing circumstances that may arise in the land use planning process by rejecting the Final Recommended Plan. A rejection triggers different consequences than a modification — it brings the land use plan approval process to an end. The parties are left with no land use plan for the region, unless they initiate the process again. Yukon's power to modify in s. 11.6.3.2 was intended to give it some flexibility to respond to changing circumstances.

50 For example, in responding to Yukon's proposed modifications to a Recommended Plan, the Commission may make changes that impact the overall plan. A land use plan is not made of self-contained autonomous components. A change to one aspect of the plan may impact other aspects. Yukon must be able to respond to those changes.

51 Furthermore, views expressed during the second consultation, views to which Yukon must give "full and fair consideration", may indicate that modifications to the Final Recommended Plan are needed (Chapter 1 — Definitions, "Consultation"). Given the importance of the robustly defined "consultation" to the land use planning process, Yukon must be entitled to respond to these views.

52 Yukon may therefore make modifications that respond to changing circumstances, such as those that may arise from the second consultation and changes made by the Commission in its reconsideration of the plan. Given that modifications are, by definition, minor or partial changes, Yukon cannot "modify" a Final Recommended Plan so significantly as to effectively reject it. In all cases, Yukon can only depart from positions it has taken in the past in good faith and in accordance with the honour of the Crown (*Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 (S.C.C.), at para. 73; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), at para. 51; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at paras. 19 and 42). When exercising rights and fulfilling obligations under a modern treaty, the Crown must always conduct itself in accordance with s. 35 of the *Constitution Act, 1982*.

53 Turning to the circumstances of this case, I agree with the courts below and the parties that Yukon did not have the authority under s. 11.6.3.2 to make the changes that it made to the Final Recommended Plan, and that Yukon's approval of its plan must therefore be quashed. Yukon's changes to the Final Recommended Plan were neither partial nor minor. As the trial judge found:

> The Government approved plan is significantly different than the Final Recommended Plan created by the Commission, in that it both changed the land designation system and shifted the balance of protection dramatically. Under the Government approved plan, 71% of the Peel Watershed is open for mineral exploration with 29% protected compared to 80% protected and 20% open for mineral exploration under the Final Recommended Plan. [para. 111]

54 Yukon concedes that these significant changes were not based on modifications it had proposed earlier in the process. While it expressed a general desire for more development and access in the Peel Watershed after reviewing the Recommended Plan, it did not properly propose modifications on this matter. Rather, it sent the Commission "bald expressions of preference" related to access and development which were "not sufficiently detailed to permit the Commission to respond in a meaningful way" (trial reasons, at para. 196). Further, Yukon does not argue that its changes to the Final Recommended Plan were made in response to changing circumstances.

55 Imagined as a conversation, Yukon chose not to propose a point for discussion, but then proceeded to advance its point in the most general terms and only after the discussion had substantially progressed. Had Yukon proposed these specific modifications for increased access and development after it received the Recommended Plan, the communities would have had an opportunity to provide their views in the first round of consultation and the Commission would have had the opportunity to provide its expert response. By ultimately making these changes to the Final Recommended Plan after failing to present them to the Commission in sufficient detail, Yukon thwarted the land use plan approval process.

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56 Furthermore, Yukon's plan was based upon a second round of consultation that ignored the framework that it had agreed to in the 2011 LOU. This LOU required Yukon and the affected First Nations to conduct the consultations together and to prepare a joint response to the Final Recommended Plan.

57 By proceeding in this manner, Yukon "usurped the planning process and the role of the Commission" (trial reasons, at para. 198). Its changes did not respect the Chapter 11 process. Respect for this process is especially important where, as here, the planning area includes First Nations' traditional territories within non-settlement areas. As both the trial judge and Court of Appeal noted, Yukon's conduct was not becoming of the honour of the Crown. I therefore agree with the courts below that Yukon's approval of its plan must be quashed.

C. The Appropriate Remedy

58 Where a government decision is quashed, the process prescribed by the treaty simply continues as though the government decision "had never been made" (G. Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 557). The effect of quashing Yukon's approval of the plan is to return the parties to "the position that they were in prior to the making of the invalid decision", that is, to the s. 11.6.3.2 stage of the land use plan approval process (D.J.M. Brown and J.M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 12-105; *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.), at p. 862). At this stage, Yukon must "approve, reject or modify that part of the plan ... applying on Non-Settlement Land, after Consultation". As a result, it was unnecessary for the trial judge to quash the second consultation.

59 The Court of Appeal would have returned the parties to an earlier stage in the process. Although it agreed with the trial judge that Yukon's changes to the Final Recommended Plan were an invalid exercise of Yukon's power under s. 11.6.3.2, it went on to consider whether Yukon's conduct earlier in the land use plan approval process, specifically its "failure to properly exercise its right to provide modifications" to the Recommended Plan, respected the land use plan approval process (paras. 113-14). The Court of Appeal concluded that Yukon "fail[ed] to honour the letter and spirit of its treaty obligations" by proposing modifications to the Recommended Plan that were not sufficiently detailed (para. 177). Accordingly, the Court of Appeal returned the parties to the s. 11.6.2 stage of the land use plan approval process, where Yukon would have the opportunity to remedy this failure and to once again respond to the Recommended Plan.

In my view, the Court of Appeal's approach is inconsistent with the appropriate role of courts in a judicial review involving a modern treaty dispute.

Close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and long-term relationship that these treaties are designed to foster. Judicial restraint leaves space for the parties to work out their understanding of a process — quite literally, to reconcile — without the court's management of that process beyond what is necessary to resolve the specific dispute. By assessing the adequacy of Yukon's conduct at the s. 11.6.2 stage of the land use plan approval process, even though the First Nations did not seek to have the approval quashed on that basis, the Court of Appeal improperly inserted itself into the heart of the ongoing treaty relationship between Yukon and the First Nations.

Moreover, This failure therefore had no bearing on the validity of Yukon's approval of its final plan (*Chandler*, at p. 863; see also *Little Narrows Gypsum Co. v. Nova Scotia (Labour Relations Board)* (1977), 24 N.S.R. (2d) 406 (N.S. C.A.)), at para. 19). As Binnie J. explained in *Little Salmon*, "[i]t is up to the parties, when treaty issues arise, to act diligently to advance their respective interests" (para. 12). Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time. Accordingly, I agree with the trial judge that "it would be inappropriate to give the Government the chance to now put its January 2014 plan to the Commission" (para. 219).

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The appropriate remedy was to quash Yukon's approval of its plan, thereby returning the parties to the s. 11.6.3.2 stage of the land use plan approval process. It was not open to the Court of Appeal to return the parties to an earlier stage.

62 In addition to quashing Yukon's approval of its plan, which returned the parties to the s. 11.6.3.2 stage, the trial judge ordered Yukon, after it conducts the consultation, to either approve the Final Recommended Plan, or modify it based on the modifications it had proposed to the Recommended Plan.

63 As I have explained, the effect of quashing Yukon's decision to approve its plan was to return the parties to the s. 11.6.3.2 stage of the process. It was unnecessary to quash the second consultation. As well, it is premature to interpret the scope of Yukon's authority to reject the Final Recommended Plan after it consults with the affected First Nations, and it is unnecessary to do so in order to resolve this appeal. I would therefore set aside the trial judge's orders quashing the second consultation and relating to Yukon's conduct going forward.

IV. Conclusion

64 The appeal is allowed in part with costs to the appellants. The trial judge's order quashing Yukon's approval of its plan is upheld. As a result, the parties are returned to the s. 11.6.3.2 stage of the land use plan approval process, where Yukon can approve, reject, or modify the Final Recommended Plan as it applies to non-settlement land after consultation with the specified parties. The other parts of the trial judge's order are set aside.

Appeal allowed in part.

Pourvoi accueilli en partie.

Appendix

Final Agreements, Chapter 11, ss. 11.6.1 to 11.6.5.2

> 11.6.1 A Regional Land Use Planning Commission shall forward its recommended regional land use plan to Government and each affected Yukon First Nation.
>
> 11.6.2 Government, after Consultation with any affected Yukon First Nation and any affected Yukon community, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying on Non-Settlement Land.
>
> 11.6.3 If Government rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons, or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon:
>
> > 11.6.3.1 the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to Government, with written reasons; and
> >
> > 11.6.3.2 Government shall then approve, reject or modify that part of the plan recommended under 11.6.3.1 applying on Non-Settlement Land, after Consultation with any affected Yukon First Nation and any affected Yukon community.
>
> 11.6.4 Each affected Yukon First Nation, after Consultation with Government, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying to the Settlement Land of that Yukon First Nation.
>
> 11.6.5 If an affected Yukon First Nation rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon:

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11.6.5.1 the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to that affected Yukon First Nation, with written reasons; and

11.6.5.2 the affected Yukon First Nation shall then approve, reject or modify the plan recommended under 11.6.5.1, after Consultation with Government.

Footnotes

1 Indeed, in 1973, Chief Elijah Smith presented Prime Minister Pierre Trudeau a document entitled "Together Today for Our Children Tomorrow" (published in 1977), which outlined the Council for Yukon Indians' vision for negotiating a land claim with the Government of Canada.

2 The lower courts and the parties treated ss. 11.6.2 to 11.6.3.2 and ss. 11.6.4 to 11.6.5.2 as mirroring provisions. However, whereas s. 11.6.3.2 authorizes Yukon to "approve, reject or modify that part of the [Final Recommended Plan] applying on Non-Settlement land", s. 11.6.5.2 appears to authorize the Yukon First Nations to approve, reject, or modify the Final Recommended Plan, without limitation to the part that applies to settlement land. It is unnecessary to determine the exact nature of the Yukon First Nations' role in the approval process, as this issue does not arise in this case.

3 B. Stuart, "The Potential of Land Claims Negotiations for Resolving Resource-use Conflicts", in M. Ross and J. O. Saunders, eds., *Growing Demands on a Shrinking Heritage* (1992), 129, at p. 136.

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Canada: Yukon Must Follow Land Use Planning Process From Umbrella Final Agreement, SCC Rules

Last Updated: December 5 2017
Article by **Roy Millen** and **Paul Rand**
Blake, Cassels & Graydon LLP

On December 1, 2017, in *First Nations of Nacho Nyak Dun v. Yukon (Nacho Nyak Dun)*, the Supreme Court of Canada (SCC) overturned a Yukon government decision to open the Peel watershed for development and significantly modify the Peel Watershed Planning Commission's (Commission) final recommended plan (Plan). The SCC ruled that the final agreements with a number of First Nations, which enabled the Commission and provided for the land use planning process, did not permit Yukon to make such dramatic modifications to the Commission's Plan.

BACKGROUND

In 1993, Canada, Yukon and the Council for Yukon Indians entered into an Umbrella Final Agreement, which served as the blueprint for individualized final agreements, which were later negotiated with Yukon First Nations. The final agreements recognize the traditional territories of the First Nation signatories and their right to participate in the management of public resources in that area. Each final agreement adopted the consultative and collaborative process for the development of regional land use plans in Yukon, which had been negotiated in the Umbrella Final Agreement.

The Peel watershed, rich in non-renewable natural resources, forms part of the traditional territory of a number of Yukon First Nations. The Commission is a politically neutral body formed in 2004 with appointments from both Yukon and First Nations. Its mandate is to generate a land use plan for the region in accordance with the final agreements reached with First Nations in the area. The Commission was responsible for producing a draft and final recommended plan, with a prescribed process for consultation with First Nations. Yukon has the authority to approve, reject or modify the Commission's recommendations.

In 2009, after more than four years of research and extensive consultation, the Commission released its draft land use plan. Following further consultation, Yukon submitted its proposed modifications to the draft plan¬. The Commission accepted three of Yukon's proposals but rejected the other two, and released its Plan in 2011.

In 2014, Yukon unilaterally adopted a dramatically different land use plan for the Peel watershed. Whereas the Commission had recommended protection of 80 per cent of the region and development in the remaining 20 per cent, the plan adopted by Yukon permitted development in 71 per cent of the region and protection of the remaining 29 per cent. The affected First Nations sought judicial review of Yukon's plan.

The Yukon Supreme Court quashed the government approval, holding that Yukon was only entitled to propose modifications to the Commission's Plan, which were consistent with Yukon's prior proposals. The Yukon Court of Appeal found that because Yukon had

failed to properly exercise its right to propose modifications to the Commission's draft plan, the process ought to restart back at that point, before the Commission's Plan.

DECISION

Modern Treaty Interpretation

Modern treaty interpretation has undergone development since the SCC's 2010 decisions in *Quebec (Attorney General) v. Moses* (*Moses*) and *Beckman v. Little Salmon/Carmacks First Nation (Beckman)*. In the *Moses*decision, the SCC (by a 5:4 majority) strictly enforced the terms of the 1975 James Bay and Northern Quebec Agreement. The SCC emphasized the nature of modern treaties as detailed and meticulously negotiated documents that ought to be regarded with deference. For further information on Moses, please see our May 2010 *Blakes Bulletin: Quebec v. Moses: Canadian Environmental Assessment Act Applies on James Bay Treaty Land*.
In *Beckman*, the SCC acknowledged that strict adherence to the treaty text may undermine its underlying reconciliatory objectives, and held that a modern treaty must not be confused with a commercial contract. The SCC thus applied the "honour of the Crown" principle, which has become central to the interpretation of historical treaties and aboriginal rights.

In *Nacho Nyak Dun,* the SCC emphasized that deference to the treaty text must not take precedence over its underlying objectives and the constitutional limitations imposed by section 35 of the *Constitution Act, 1982*. The SCC stated that "[m]odern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership", and found that where a treaty such as the final agreements sets out in precise terms a cooperative governance relationship, those terms should be enforced. In this way, "reconciliation is found in the respectful fulfillment of a modern treaty's terms."

Peel Watershed Plan

Applying these principles to the case, the SCC concluded that the Yukon government could not unilaterally modify the Plan; it could only make minor or partial changes, based on those it proposed earlier or in response to changing circumstances. By circumventing the regional land use process, Yukon's decision had the effect of preventing the First Nations from exercising their rights as per the final agreements. The SCC found that Yukon's conduct did not uphold the honour of the Crown.

The SCC agreed with the trial judge that the appropriate remedy was to overturn the government's decision and return the parties to the position in the process prior to the government's decision to unilaterally adopt its own plan. The SCC rejected the Court of Appeal's decision to return the parties to an earlier stage in the process, as it would have allowed the government a new opportunity to make more substantial modifications than it had originally proposed. Yukon would have to bear the consequences of its lack of diligence in the early part of the Commission's planning process.

IMPLICATIONS

This decision emphasizes the SCC's respect for the terms of modern treaties and its role in preserving First Nations' rights to meaningful participation in land use planning processes prescribed under those treaties. While governments will generally have final decision-making authority, that authority cannot be used to thwart the agreed-upon process leading up to that decision. Both parties, First Nations and governments alike, are expected to advance their treaty rights diligently and in good faith. These behavioural expectations accord with the positive and mutually respectful long-term relationship that modern treaties are intended to foster. In this sense, the SCC has once again demonstrated its commitment to enforcing processes as a means to reconciliation between the Crown and Aboriginal Peoples in Canada.

Supreme Court's Peel decision is straight to the point

Ruling is an important, precedent-setting decision that defines the scope of land use planning

Dec. 12, 2017

Kyle Carruthers | Pointed Views

The Supreme Court of Canada's decision on land use planning in the Peel region was short in comparison to some of the lengthy tracts we were forced to digest in law school. But what it lacked in length — weighing in at just 39 pages in PDF format — it made up for in density of legal substance. Written by Justice Andromache Karakatsanis for a unanimous court, I was impressed by its pith and clarity.

I support the protection of the Peel, so I am pleased by the outcome.

But I must confess I'm surprised by the result. Given the relative newness of the final agreements, the lack of clarity about the government's role in the land use planning process, and the ostensibly broad authority of Yukon to "accept, reject or modify" a proposed land use plan I expected that the government would get another kick at the can like it did at the Court of Appeal.

I was caught off guard by how far our country's highest court went in its decision. It was as if the court wanted to put to bed some issues surrounding the interpretation of the final agreements which, while not directly at issue in the lower court rulings, would inevitably arise in the future. In particular, I was struck by the constraints the court put on the ability of the government to modify a land use planning decision.

As those who have followed the case know, the meaning of the word "modify" has important implications for the land use planning process. If its scope is broad, Yukon is very much in the driver's seat and — provided it follows the process properly — can create whatever plan it desires. If the meaning of modify is narrow, the commission has much more clout and the government's only option is to reject the proposal in its entirety.

The judges and justices of the Yukon Supreme Court and the Court of Appeal had all declined to limit the term's scope — focusing instead on the government's failure to show its cards at the earlier stage of the process as the basis for rejecting its imposed plan.

All levels of court had found that the government breached the process. The more important question all along was what the repercussions of that breach would be. The Supreme Court of Canada's decision is more in line with that of the Yukon Supreme Court than the Court of Appeal but it went significantly further in terms of protecting the authority of land use planning commissions and limiting that of the government.

Justice Karakatsanis wrote of how the co-management of traditional territory was a compromise the First Nations received when they signed final agreements in exchange for scaled-back land claims. She borrowed from the Oxford English Dictionary which defines the term "modify" as "to make partial or minor changes to … to vary without radical transformation" and a French dictionary which defines the word as "to change (a thing) without altering its nature, its essence."

These conclusions put to rest the oft-stated position of the former Pasloski government that land use planning was the prerogative of "public government" in the territory and its implied position that the land use planning commission effectively played an advisory role. If modifications are to be partial and minor, and they cannot not alter the essence of a proposed plan, the role of the commission is very much enhanced.

Now that the Supreme Court has had the final word on the subject it appears that the only recourse available to a government displeased with a proposed plan will be to reject it in its entirety. Choosing to appeal the original Yukon Supreme Court decision will go down as a very poor decision.

I wrote previously that I did not expect the Peel decision to become a significant precedent because no future government would make the same error as the previous Yukon Party government by proposing vague, general changes and waiting in the weeds with a substantially different plan at the last moment. Those are words I think I must now take back. *First Nation of Nacho Nyak Dun v. Yukon* is an important, precedent-setting decision that defines the scope of land use planning for the future.

Part of me wonders if the top court felt an urge to rehabilitate its reputation as an important institutional safeguard for Indigenous rights after a recent decision permitting the development of a large ski resort in an area regarded as sacred by the local Ktunaxa Nation over their objections. It was a decision generally seen as a blow to First Nations lands rights and by some as an insult to Indigenous spiritual beliefs and the imposition of westernized standards of religious freedoms.

But whatever the court's reasons for writing such a far-reaching judgment, we have unexpected guidance about the land use planning process.

Kyle Carruthers is a born-and-raised Yukoner who lives and practises law in Whitehorse.

Commentary: SCC decision on Peel watershed in Yukon another win for First Nations

The Peel watershed in northern Yukon Territory. Credit: Protectpeel.ca

BY: BILL GALLAGHER, SPECIAL TO THE NORTHERN MINER DECEMBER 6, 2017 **VOLUME 103 NUMBER 26 DECEMBER 25, 2017 – JANUARY 7, 2018**

First Nations have just won an important lawsuit at the Supreme Court of Canada on account that the Yukon government had tried to do an end-run on their land claim settlements.

Bill Gallagher

Readers who have followed my tracking of the native legal winning streak in Canada will be familiar with my preferred wording of "Land Rights" as the catch-all phrase whereby natives typically win in the resources sector since they have constitutionally-protected land rights that the rest of us don't.

My message to government and industry is always the same: realize that natives are resource gatekeepers in Canada and work them into the project as the key local players that they are.

In this instance, the Yukon Party under Premier Darrell Pasloski — in office from 2011 to 2016 — proposed in November 2012 to reverse environmental protection

measures suggested for the Peel watershed by an independent land use commission established pursuant to modern land claims agreements between the Yukon and Canadian governments and representatives of the territory's First Nations.

The commission had recommended that 80% of the watershed be kept pristine with the rest opened for resource development. The Pasloski government wanted to reverse that equation in order to get the territory's resource sector rolling.

Regional map showing Peel watershed boundaries in northern Yukon. Credit: Yukon government.

But planning for the Peel watershed had been ongoing for a decade, with the process governed by settled native land claim procedures.

The native side held fast to its belief that the Peel watershed was special: "It's our university, our hospital, indeed there's lots of activity going on there already. Our traplines, our ancestors, our thousand years of history; that's where we go to bond and to gain back our spiritual and cultural strength." (Chief Roberta Joseph speaking on Dec. 1, 2017, on *CBC News*)

There was a merging of agendas as eco-activists climbed aboard, and a **sophisticated public relations machine** rolled out to stop the reversal process during the litigation lead-up to the final court ruling.

The problem for the Yukon Party is that by then it had lost a number of other resource sector rulings to the native side — meaning the law respecting the on-going application of modern day land claim settlements was already well-defined.

The risk the Yukon Party ran by litigating the Peel Watershed Land Use Plan was that it might well be directed to follow its own defined process.

Perhaps that was why it turned to Bay Street lawyers to argue the case for the subsequent appeals. In court, they freely admitted in argument that the Yukon government had "erred", "didn't follow the process", "accepted there was a breach of the agreement", "stepped off the judicial path", "failed to express sufficient detail" and "misread the agreement."

That in turn, invited the Supreme Court to weigh-in with a series of reprimands in the **final decision**:

By proceeding in this manner, Yukon "usurped the planning process and the role of the Commission" (trial reasons, at para. 198). Its changes did not respect the Chapter 11 process. Respect for this process is especially important where, as here, the planning area includes First Nations' traditional territories within non-settlement areas. As both the trial judge and Court of Appeal noted, Yukon's conduct was not becoming of the honour of the Crown. I therefore agree with the courts below that Yukon's approval of its plan must be quashed. (First Nation of Nacho Nyak Dun v. Yukon, 2017 SCC 58) (author's underlining)

The underlined portion is why this ruling is important for miners, strategically-speaking, since one could be forgiven in thinking that these lands were Crown lands over which the Yukon territorial government had complete jurisdiction.

That would be mistaken, because the modern-day land claim settlements imbue the native-side with land rights to Crown lands (being their traditional lands).

Here's the court in the same decision on how those Crown lands are to be managed:

As well, the language … must be read in the broader context of the scheme and objectives of Chapter 11 of the Final Agreements, which establishes a comprehensive process for how the territorial and First Nations governments will collectively govern settlement and non-settlement lands, both of which include traditional territories. (author's underlining)

That "collectively govern" requirement is what the Yukon government lost on.

Today, the state of affairs can perhaps be best summed up as: Crown land isn't what we all formerly thought it was.

A drilling company's CEO used that line to his executive team after one of my presentations on the topic.

It's really all you need to know in planning your access to traditional lands as part of your overall exploration strategy in Canada.

Thus, when the final appeal decision was issued on Dec. 1, the Supreme Court didn't mince words:

Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time.

This means that in all likelihood a very large percentage of the Peel watershed will remain off-limits to miners.

As Chief Joseph told the CBC: "This is the outcome we were hoping for. We wanted a collaborative planning process. It was not our choice, we never wanted to go to court. But we're prepared to work to protect the Peel watershed."

As a strategist, I wonder how this case ever got so far?

For miners the message is clear: these natives have land rights even on Crown land, and if you want access to this land, it's best to have them on your radar screen from the beginning.

A win like this greatly advances the land rights legitimacy of the rise of native empowerment and the overall heft of their legal winning streak. At 250 legal wins, it's the biggest win cycle in Canadian legal history. The map of Canada is being redrawn one land rights ruling at a time!

— Based in London, Ont., Bill Gallagher is a lawyer, author and strategist specializing in the relations between First Nations, governments and resource companies.

December 14, 2017

Court Confirms that Good Faith Fulfilment of Modern Treaties is Essential to the Project of Reconciliation

By: Nigel Bankes

Case Commented On: *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (CanLII)

In this unanimous decision authored by Justice Karakatsanis, the Supreme Court of Canada confirmed what seems like an obvious proposition, namely that good faith fulfilment of modern treaties is a necessary condition for the project of reconciliation. The Court concluded that the land use planning process established by the Yukon Final Agreements permitted Yukon to modify a Recommended Final Plan (in this case the Peel Watershed Regional Land Use Plan), but that the power to modify did not include the power to change a Plan "so significantly as to effectively reject it" (at para 39). More specifically, Yukon's power to modify was confined by the scope of the issues that it had raised during the planning process; it could not raise significant new issues although it could respond to changing circumstances. As a result, Yukon's purported approval of the Plan was invalid (at para 35).

The appropriate remedy in these circumstances was to turn back the clock to the stage in the decision-making process where Yukon was to "approve, respect or modify" the Plan in accordance with the above directions as to the scope of the power to modify (at para 58). The Court expressly rejected the remedy directed by the Yukon Court of Appeal which would have taken the process back further – thereby allowing Yukon the opportunity to introduce new issues into the planning process and thereby also enhancing the scope of its modification power. According to the Court (at para 61), "Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time."

All of this seems entirely appropriate.

In reaching her conclusion Justice Karakatsanis emphasises (at para 4) that "this proceeding is best characterized as a judicial review of Yukon's decision to approve its land use plan" (and see also para 32). That was perhaps not controversial in this particular case. Indeed, Justice Karakatsanis seems to use that frame of reference both to justify rejecting the Court of Appeal's analysis but also to suggest that the Court should play a restrained role in the implementation of modern treaties or land claim agreements. She puts it this way (at para 60):

> In my view, the Court of Appeal's approach is inconsistent with the appropriate role of courts in a judicial review involving a modern treaty dispute. The court's role is not to assess the adequacy of each party's compliance at each stage of a modern treaty process. Rather, it is to determine whether the challenged decision was legal, and to quash it if it is

> not. Close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and long-term relationship that these treaties are designed to foster. Judicial restraint leaves space for the parties to work out their understanding of a process — quite literally, to reconcile — without the court's management of that process beyond what is necessary to resolve the specific dispute. By assessing the adequacy of Yukon's conduct at the s. 11.6.2 stage of the land use plan approval process, even though the First Nations did not seek to have the approval quashed on that basis, the Court of Appeal improperly inserted itself into the heart of the ongoing treaty relationship between Yukon and the First Nations.

But while this approach and framing seems to have favoured the First Nations in this particular case, I am not sure that a judicial review approach is consistent with the idea of building a consent-based relationship between Indigenous communities and the state. The purpose of judicial review is to ensure the proper exercise of statutory power rather than the good faith fulfilment of consent-based relationships. It is judicial supervision within the framework of the legal system of the settler state rather than judicial supervision of an inter-societal normative order that requires that treaties be performed by both parties in good faith (Vienna Convention on the Law of Treaties, Article 26). Justice Karakatsanis seems to recognize this alternative framing in the opening words of her judgment (at para 1) when she states that: "As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation" but then quickly moves to the judicial review framing. But how are these two framings connected? Or are they fundamentally disconnected?

I think that some of the (disconnecting) consequences of an over emphasis on a judicial review framing include the following:

- It downplays the significance of land claim agreements as contracts, treaties and constitutional accords.
- It invites the framing of judicial intervention in terms of standard of review and deference (to statutory decision-makers) rather than in terms of ensuring good faith implementation.
- It emphasises the statutory rules (including the Rules of Court) of the settler state rather the development of inter-societal norms to foster reconciliation.
- It invites parties to frame remedies in terms of quashing rather than in terms of (state) responsibility, or restitution, or fulfilling the terms of the bargain.

In this particular case a judicial review framing seems not to have made much difference and indeed seems to have allowed the Supreme Court to settle upon a remedy that perhaps best fulfilled the terms of the land claim agreement; but the Court could have used other language to achieve that result. For example, it might simply have said that the remedy sought by Yukon and endorsed by the Court of Appeal was inconsistent with the fundamental norm of good faith implementation of consent-based obligations (*pacta sunt servanda*); or it could have said that the remedy granted by the Court of Appeal was *ultra petita* (i.e. a remedy beyond that sought by the applicant) – a familiar concept in consent-based inter-state arbitration.

My point is not that judicial review is never an appropriate approach in the context of land claim agreement implementation: see for example: *Nunavut Tunngavik Inc. v Canada (Minister of*

Fisheries and Oceans), [1998] 4 FCR 405, 1998 CanLII 9080 (FCA). Rather my point is that land claim agreements are normatively complex instruments, part contract, part treaty, part statute, part constitutional instrument and that thus we should be open to considering a range of remedies that best fulfil the overall objective of the agreements – remedies that judicial review cannot always provide. An example of this broader approach is *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 (CanLII) (on the remedy of disgorgement; for ABlawg post see here). In that case the parties ultimately reached a $255 settlement agreement.

Thanks to my colleague Martin Olszynski for stimulating a discussion of the judicial review framing in the case.

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THE NEED FOR FORTHRIGHT CONSULTATION:

FIRST NATION OF NACHO NYAK DUN

Published: 12/04/2017
By Thomas Isaac, Arend J.A. Hoekstra

On December 1, 2017, the Supreme Court of Canada released its decision in *Nacho Nyak Dun*, addressing the Yukon Government's decision to disregard the process set out in modern land settlement agreements and instead approve its own land use plan for non-settlement lands in the Peel Watershed. While the decision addresses specific elements of the Yukon Umbrella Final Agreement, the Court also highlights the importance of clear and forthright communication of the Crown's interests and intentions during consultation.

Facts

In 1993, the Yukon Umbrella Final Agreement (the Agreement) was entered into between Canada, the Yukon Government, and Yukon First Nations, and established a collaborative regional land use planning process for Yukon Territory. The Agreement was the product of decades of negotiations between well-resourced and sophisticated parties and was incorporated into modern Yukon treaties.

Process for Developing Land Use Plans

The Agreement includes a process for developing land use plans. The Court noted that in signing onto the Agreement and accompanying treaties, First Nations accepted comparatively smaller settlement areas in exchange for important rights in both settlement and non-settlement lands, and particularly in their traditional territories.

Under the Agreement, land use plans are developed by an independent Commission, with members nominated by the Yukon Government and the affected Yukon First Nations. Land use plans are intended to apply to settlement and non-settlement lands and to encourage a consistent approach to resource development. The development of a land use plan under the Agreement includes a four-part process that applies to the Yukon Government:

1. The independent Commission prepares and provides a recommended regional land use plan to the Yukon Government and the affected First Nations.
2. **After consultation with First Nations**, the Yukon Government considers the recommended regional plan. If the Yukon Government rejects or proposes to amend the recommendations, the Yukon Government must send written reasons, and proposed modifications if applicable, to the Commission.
3. The Commission considers the written reasons and proposed modifications, if any, and makes a final recommendation for the regional land use plan.
4. **After consultation with First Nations**, the Yukon Government may approve, reject, or modify the proposed land use plan for non-settlement lands.

Under the Agreement, the affected First Nations must follow a similar process before rejecting, modifying, or adopting a land use plan for settlement lands.

Agreed Approach

In 2004, by voluntary agreement, the Yukon Government and the affected First Nations agreed to establish a regional Commission to develop a regional land use plan for the Peel Watershed. In 2009, the Commission released its recommended plan, and in 2010 and again in 2011, the Yukon Government and the affected First Nations entered into joint letters of understanding to establish a coordinated approach to consultation and to seek to achieve consensus on the plan.

Divergence of Yukon Government

Following the initial consultation effort, the Yukon Government provided the Commission with two vague statements expressing its goal of increasing options for resource access and development, including a request that the Commission "re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan." In July 2011, after determining that the Yukon Government's comments were simply expressions of general desires, and did not qualify as "proposed modifications," the Commission released its Final Recommended Plan,[10] which protected 80% of the region while opening 20% for mineral exploration.

Following the release of the Final Recommended Plan, and despite the protests of affected First Nations, the Yukon Government proposed to substantially modify the land use plan, and engaged in an independent consultation initiative rather than follow the previously agreed upon collaborative approach.

In 2014, the Yukon Government approved its land use plan for non-settlement land in the Peel Watershed. The plan opened up 71% of the Peel Watershed to mineral exploration.

Issues

The primary issue in *Nacho Nyak Dun* is whether the Yukon Government acted lawfully, and in accordance with the Agreement. More relevant for those outside of Yukon Territory however, is the Court's focus on the importance of forthright communication during consultation efforts between the Crown and Indigenous peoples.

Issue 1: Interpreting Modern Treaties

Consistent with the Court's previous review of the Yukon Territory's modern treaties in *Beckman v. Little Salmon/Carmacks First Nation*, the Court emphasizes that modern treaties have been meticulously negotiated by well-resourced parties, and that in reviewing actions under modern treaties, the reviewing court must pay close attention to their terms. The Court notes that the power to modify or reject a land use plan recommendation under the Agreement is subject to prior consultation, and requires the earlier provision of written reasons to the Commission in order to enable them to review and potentially amend their recommendations. The process must also meet the clear objective of ensuring that First Nations can meaningfully participate in land use management in their traditional territories.[19] The Yukon Government's actions were inconsistent with the Agreement. First, the Yukon Government did not provide meaningful feedback to the Commission for their review and instead provided "bald expressions of preference" which were not sufficiently detailed to permit the Commission to respond in a meaningful way. Not only did this breach the requirements of

the Agreement, it removed the opportunity for the Commission to provide its expert response. Second, by not clearly proposing specific modifications after the initial report of the Commission, affected First Nations missed an opportunity to provide meaningful feedback, early on, to the proposed modifications. Third, while the Yukon Government was able to make modifications pursuant to the Agreement, those modifications could not be so significant as to effectively reject the recommendations, as was seen in this case. Finally, when seeking to depart from positions it has taken in the past, the Crown must act in good faith and in accordance with the honour of the Crown. By failing to comply with the processes of the Agreement, failing to provide the Commission and First Nations with sufficient opportunity to provide feedback, and abandoning the approach to joint review and consultation that was previously agreed upon, the Court concluded that the conduct of the Yukon Government was not becoming of the honour of the Crown.

Issue 2: The Importance of Forthright Communication

In conducting consultation, governments must be flexible **and** forthright in their approach. In *Mikisew Cree* the Court noted that real consultation requires more than just an opportunity for Indigenous communities to "blow off steam before the Minister proceeds to do what she intended to do all along." For some governments, this has led to overly general consultation efforts where everything is left 'on the table.' While the approach appears, at least superficially, to promote reconciliation, it can also undermine real consultation and constrain the Crown's later use of discretionary powers.

Nacho Nyak Dun highlights the risks and deficiencies of this approach. By not engaging in a forthright manner and fully expressing its preferences early on, while (it appears) hoping the process would resolve itself favourably without the Crown needing to display its bias towards a particular outcome, Yukon Government undermined the effectiveness of its consultation effort. The importance of clearly communicating the Crown's goals was highlighted by the Court when it concluded that "Yukon must bear the consequences of its **failure to diligently advance its interests and exercise its right** [Emphasis added]."

Yukon Government's breach of the Agreement was not necessary. Had it clearly stated its objections following receipt of the draft recommendations of the Commission, Yukon could have engaged in meaningful consultation, and could have exercised its discretionary authority under the Agreement in good faith while upholding the honour of the Crown. Instead, by vaguely suggesting its objectives, possibly with the hope of appearing open and flexible to the process and interests of the affected First Nations, the Yukon Government undermined effective consultation and forfeited a substantial portion of the discretionary authority provided under the Agreement.

Implications

Consultation does not require governments to start from a blank sheet. It does not require all options to be on the table, and it does not require governments to act as independent arbitrators, disassociated from any particular public interest. What consultation, particularly at the deepest levels, **does** require is an avenue for Indigenous groups to make submissions, be able to formally participate in the decision-making process, and for their

concerns to be considered and addressed. Without clearly stating **the goals and interests of the Crown**, Indigenous peoples are unable to fully and meaningfully understand the potential impact to their interests and effectively disclose their interests to the Crown.

Much effort has been made recently to encourage cooperation between Crown governments and Indigenous communities. The 10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, in particular, highlights the importance of including Indigenous self-governments in a system of cooperative federalism. While encouraging an effective, respectful approach to Indigenous/Crown relationships is a worthwhile goal, the processes used to achieve the objective should be examined critically.

Whether in collaborative processes or in consultation generally, the Crown and Indigenous peoples do not come to the table as equals. While holding substantial resources and legislative powers, the Crown is materially constrained by the honour of the Crown. The honour of the Crown reflects the constrained powers of the Crown when dealing with Indigenous interests, while also reflecting the Crown's larger responsibility of balancing competing societal interests with Aboriginal and treaty rights. In contrast, effective consultation **requires** Indigenous groups to set out and advance **their** interests. There is no obligation for Indigenous groups to consider other parties or restrain the assertion or exercise of their rights.

For cooperative federalism to be effective, Crown governments **must diligently** communicate and advance the interests of those parties not represented at the table. Such interests include economic interest, fiscal interests, community interests, and the interests of non-participating Indigenous peoples. Pretending to come to the table unencumbered by interests and preferences undermines effective consultation, disadvantages the process, and undermines the honour of the Crown.

The honour of the Crown does not require self censorship. In processes set out in modern treaties, it requires the Crown to "diligently advance its interests." In consultation efforts, it requires the Crown to listen to and consider the concerns of Indigenous peoples and, where warranted, to provide the form of accommodation which **it** deems appropriate, having consideration to the competing interests. To be effective, cooperative federalism and reconciliation generally does not require parties to blindly agree or pay lip service. Rather, it requires all parties to diligently advance their interests within the context of Section 35 of the *Constitution Act, 1982*.

Canada: Supreme Court Of Canada Underlines The Need For Diligence In The Negotiation And Implementation Of Modern Treaties

Last Updated: February 2 2018
Article by **Khurrum Awan** and **Katlyn Cooper**
Miller Thomson LLP

The Supreme Court of Canada's recent judgment in *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (*Nach Nyak Dun*), has outlined the appropriate role of the Court in resolving modern treaty disputes. The judgment indicates that the Courts will pay close attention to and largely defer to the treaty terms stipulated by governments and First Nations, but will remain vigilant to ensure that governmental conduct is consistent with its constitutional obligations and the honour of the Crown.

The judgment provides key guidance to First Nations as well as federal and provincial governments in regards to the treaty negotiation process and the standard of conduct expected during the implementation of modern treaties.

Factual Background

At issue in *Nacho Nyak Dun* was Yukon's compliance with a framework agreement (the "Framework") for negotiating treaties with First Nations, and a number of treaties which had been negotiated under the Framework. The Framework had established a collaborative regional land use planning process for negotiating land claims agreements, and had been used to negotiate related treaties or agreements (the "Agreements") between Yukon and several First Nations.

The Agreements established the planning process for land use in the Peel Watershed Region of Yukon (the "Region"). The Region comprised one of the largest intact wilderness watersheds in North America, and was nearly untouched by contemporary development. The Region included the traditional territories of several First Nations.

The Framework and Agreements had established a commission to develop a land use plan for the Region (the "Commission"). After several years of research and consultation, the Commission issued an initial recommended plan to Yukon and affected First Nations, thus triggering the plan approval process under the Agreements. The approval process required Yukon to approve, reject or propose modifications to the initial recommended plan. The parties initially filed a joint response to the recommended plan. Further responses were subsequently filed by affected First Nations and Yukon. Yukon's response included two statements expressing its interest in a revised plan with increased options for access to and resource development in the Region.

As required by the Agreements, the Commission reconsidered the initial recommended plan in light of the parties' joint response and subsequent submissions. However, the Commission did not consider Yukon's statements of interest in a revised plan on the basis that the statements lacked sufficient detail. Several months later, Yukon proposed extensive changes to the Commission's final recommended plan, even though the changes had not been proposed earlier in the process. Yukon proceeded with

consultations on its proposed changes without the coordinated involvement of First Nations, and then approved a land use plan for non-settlement lands in the Region – lands which were not held by First Nations pursuant to the Agreements. Yukon took the position that Yukon and First Nations each had ultimate authority to approve, reject or modify the part of the final recommended plan which applied to lands under their authority.

The affected First Nations commenced legal proceedings, seeking declarations and orders that Yukon had failed to properly consult with First Nations, requiring Yukon to reinstitute consultations on the final recommended plan, and limiting Yukon's powers to modify or reject any further recommended plan from the Commission.

Rulings of the Yukon Supreme Court and the Yukon Court of Appeal

The Yukon Supreme Court declared that Yukon had failed to comply with the planning process set out in the Agreements and quashed the land use plan approved by Yukon for non-settlement lands. The Court further ordered Yukon to reinstitute the second consultation and then either approve the final recommended plan or modify it based on modifications it had proposed earlier in the planning process.

The Yukon Court of Appeal set aside the part of the trial judge's order which returned the parties to the second round of consultation. The Court of Appeal found that Yukon had failed to properly exercise its right to propose modifications to the initial recommended plan and returned the parties to an earlier stage in the process, where Yukon could remedy this failure. It also overturned the limits imposed by the trial judge on the scope of Yukon's ability to reject the Commission's final recommended plan and concluded that the scope of the authority was broad.

Judicial Treatment of Modern Treaties

The Supreme Court of Canada outlined the principles which govern the judicial treatment of modern treaties. Modern treaties were intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership.[1] As a result, the Courts are generally to leave space for the parties to govern together and work out their differences. It was not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship.[2]

Furthermore, compared to their historical counterparts, modern treaties are detailed documents that warrant deference to their text. Modern treaties are "meticulously negotiated by well-resourced parties" and are "designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability".[3] Paying close attention to the terms of a treaty requires interpreting the provision at issue in light of the treaty's text as a whole and its objectives.[4]

On the other hand, the Supreme Court noted that modern treaties are constitutional documents, and Courts play a critical role in safeguarding the rights they enshrine.[5] Modern treaties are not to be interpreted "in an ungenerous matter or as if [they] were ... everyday commercial contract[s]". While the Courts must "strive to respect the handiwork" of modern treaties, that was always subject to "such constitutional limitations as the honour of the crown".[6]

These interpretive principles ensure that modern treaties advance reconciliation, which was founded partly "in the respectful fulfillment of a modern treaty's terms".[7]

Yukon's Violation of Treaties with First Nations

Applying these interpretive principles, the Supreme Court found that the Agreements did not authorize Yukon to make extensive changes to the final recommended plan. The language of the Agreements indicated that the power to modify a final recommended plan was a limited exercise which did not extend to an alteration of the fundamental nature of the plan. The power to modify was also limited by the requirement of prior consultation. Under the Agreements, prior consultation required Yukon to provide sufficient notice to affected parties of contemplated modifications, and to then accord "full and fair consideration" to the views which were presented.

The context of the relevant provisions indicated that the Agreements had established a comprehensive process for how Yukon and First Nations would collectively govern settlement and non-settlement lands. That process included consultation and meaningful participation for Yukon First Nations in the land use planning process for their traditional territories, which were situated in both settlement and non-settlement areas. Background evidence on the negotiations which led to the Agreements indicated that First Nations had agreed to receive relatively smaller settlements areas in exchange for meaningful participation in land use management for all of their traditional territories.

The Court thus concluded that Yukon's authority to modify a final recommended plan was limited to two circumstances. Firstly, Yukon could proposed modifications it had proposed earlier in the process. Secondly, Yukon could modify a final recommended plan in response to changing conditions, which could arise, for instance, from consultations on the final recommended plan or changes proposed by the Commission. However, Yukon could not modify a final recommended plan so significantly as to effectively reject it.

In this instance, Yukon had not proposed modifications to the initial recommended plan in sufficient detail to allow the Commission to respond in a meaningful way. The significant changes Yukon made to the final recommended plan had not been advanced earlier in the process. Furthermore, Yukon had failed to properly consult First Nations on these changes as required by the Agreements. This conduct was unbecoming of the honour of the Crown and Yukon's approval of its plan was thus quashed.

In granting a remedy, the Supreme Court directed the parties to return to the stage in the process where Yukon could approve, modify or reject the final recommended plan following consultations. The Court of Appeal had erred in returning the parties to an earlier stage of the process on the basis that Yukon had failed to exercise its right to modify the initial recommended plan. That remedial approach was inconsistent with the appropriate judicial role in resolving modern treaty disputes. When the initial recommended plan was issued, Yukon had chosen not to exercise its right to advance the significant changes it eventually proposed. By permitting Yukon to return to a stage in the process where it could then advance those significant changes, in the form of modifications to the initial recommended plan, the Court of Appeal had improperly inserted itself into the treaty relationship between Yukon and the First Nations.

Key Takeaways

The judgment in *Nacho Nyak Dun* highlights the importance of a detailed and well-drafted modern treaty and the need for the parties to act diligently in the implementation of their agreements. There is a presumption that modern treaties are detailed documents negotiated by well-resourced parties, thus warranting a deferential approach from the

Courts. This presumption could be rebuttable in appropriate circumstances. However, it highlights the need for proper and competent legal advice over the course of the treaty negotiation process.

In regards to the implementation of modern treaties, the Supreme Court noted that "[i]t is up to the parties, when treaty issues arise, to act diligently to advance their respective interests".[8] It was on that basis that the Supreme Court declined to return Yukon to an earlier stage in the planning process. Yukon had to "bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the [initial recommended plan]".[9] This reasoning again highlights the need for diligence and the engagement of legal counsel where appropriate during the implementation of modern treaties.

First Nations can also take some comfort from the judgment in *Nacho Nyak Dun.* It indicates that the Courts are prepared to intervene where the Crown had acted dishonourably and contrary to its constitutional obligations to First Nations. However, in the absence of such conduct, the parties to modern treaties cannot rely on the Courts to rescue them from a lack of diligence during the treaty negotiation and implementation process.

First Nation of Nacho Nyak Dun v. Yukon: SCC addresses the role of courts in resolving modern treaty disputes

By Stephanie Axmann and Connor Bildfell on January 10, 2018Posted in Aboriginal

On December 1, 2017, the Supreme Court of Canada (**SCC**) issued its decision in *First Nation of Nacho Nyak Dun v. Yukon*,[i] concerning a contested land use planning decision of the Yukon Government under the Yukon Umbrella Final Agreement. The case is one of only a few by the SCC to substantively address modern treaties,[ii] and thus provides helpful commentary with respect to the principles governing the interpretation of modern treaties, the role of the courts in resolving modern treaty disputes, and the scope of the appropriate remedy where government has breached its treaty obligations.

Background

Following decades of negotiation, in 1990 the Yukon and federal governments and 14 Yukon First Nations finalized the Umbrella Final Agreement, which set the groundwork for concluding modern treaties in the Yukon and established a collaborative land use planning process. This led to several modern land claims agreements, including Final Agreements with the First Nation of Nacho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin First Nation (as well as a Yukon Transboundary Agreement executed by the Gwich'in Tribal Council on behalf of the Tetlit Gwich'in) (the **Final Agreements**). These agreements recognized the traditional territories of the affected First Nations and their right to participate in the management of public resources in the Peel Watershed in northern Yukon. The Peel Watershed is one of the largest intact wilderness watersheds in North America.

Yukon and the affected First Nations commenced the process set out in the Final Agreements to develop a regional land use plan for the Peel Watershed. In 2004, the parties agreed to the establishment of an independent Peel Watershed Planning Commission (**Commission**) to develop the land use plan. Following intensive consultation, the Commission submitted a Recommended Plan to Yukon and the First Nations in 2009.

After completing a first round of consultation with the affected First Nations, Yukon was required under the Final Agreements to approve, reject, or propose modifications to the Recommended Plan. Yukon's written response to the Commission included certain statements expressing interest in increasing options for access and development. The Commission determined that those comments were not sufficiently detailed to constituted "proposed modifications", but were merely expressions of general desires. Accordingly, these points were not considered in the development of the Commission's Final Recommendation Plan, released in 2011.

In 2012, Yukon announced it would "modify" the Final Recommended Plan. Following a second round of consultation (which, contrary to a letter of understanding signed by Yukon, was carried out without the coordinated involvement of the First Nations), Yukon approved its own revised land use plan. The plan made substantial changes to the Commission's Final Recommended Plan, allowing for increased development and access to the region. The First Nations objected to Yukon's approval of its plan, considering it inconsistent with the process set out in the Final Agreements.

Decisions Below

The trial judge held that Yukon did not act in conformity with the process set out in the Final Agreements, and with inadequate consultation, had invalidly modified the Final Recommended Plan. The judge ordered Yukon to re-conduct its second consultation and to then either approve or modify the Final Recommended Plan based on the modifications it had previously proposed.

The Court of Appeal allowed Yukon's appeal in part. It set aside the trial judge's order returning the parties to the second round of consultation, instead directing the parties to return to the earlier first stage of consultation after finding that Yukon had failed to properly exercise its right to propose modifications to the Commission's Recommended Plan at that earlier stage.

SCC Decision

On appeal, the First Nations submitted that Yukon's authority to "modify" the Final Recommended Plan under the Final Agreement was restricted to modifications that it had previously proposed to the Recommended Plan. Accordingly, the First Nations argued that the matter should be returned to the second stage of consultation, as the trial judge had ordered.

Yukon conceded that it had breached the Final Agreements, but agreed with the Court of Appeal that the appropriate remedy was to return the parties to the first stage of consultation. This approach would (conveniently) allow Yukon to propose additional modifications to the Recommended Plan that it had not previously raised.

The SCC held that Yukon's extensive changes to the Final Recommended Plan did not respect the process set out in the Final Agreements and quashed Yukon's approval of the plan. Overturning the Court of Appeal's decision, the SCC sent the parties back to the second round of consultation. The SCC found it would be inappropriate to afford Yukon a second chance at earlier consultation, noting that it had failed to diligently advance its interests and exercise its rights in the initial round of consultation and must bear the consequences of that failure.

The appropriate role of the courts in resolving modern treaty disputes includes exercising judicial restraint

Emphasizing that modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership, the SCC stated that in the context of resolving modern treaty disputes, courts should generally "leave space for the

parties to govern together and work out their differences", and that "reconciliation often demands judicial forbearance".[iii]

However, the SCC acknowledged that modern treaties enshrine constitutional rights that courts must safeguard, and that such judicial restraint "should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance."[iv]

Yukon's changes to the plan were not authorized by the Final Agreements

The SCC agreed with the courts below that Yukon's changes to the Final Recommended Plan did not respect the process set out in the Final Agreements, and that Yukon's adoption of its plan was therefore invalid. The SCC interpreted the word "modify" as permitting Yukon to make changes to the Final Recommended Plan without altering its fundamental nature; it did not grant Yukon a right to modify the plan so significantly as to effectively reject it. The right to modify was also subject to the obligation to conduct prior consultation as described in the Final Agreements. Consultation was a key component of the approval process. In addition, the objectives of the land use plan approval process — including ensuring meaningful participation on the part of First Nations in land use management in their traditional territories, and fostering a "positive, mutually respectful, and long-term relationship between the parties to the Final Agreements"[v]— further limited the scope of permitted modifications. The SCC held that Yukon did not enjoy an unconstrained right to make "modifications" that effectively rewrote the plan at the end of the process, as such a right would render the process meaningless. Any modifications had to be "minor or partial changes" made in good faith that were consistent with constitutional principles such as the honour of the Crown.[vi]

In discussing the principles governing the interpretation of modern treaties, the SCC noted that because modern treaties are "meticulously negotiated by well-resourced parties", courts must pay close attention to their terms.[vii] Further, specific terms must be read "in light of the treaty text *as a whole* and the treaty's objectives".[viii] The SCC stated that reconciliation is found in, among other things, "the respectful fulfillment of a modern treaty's terms",[ix] and that the honour of the Crown continues to be a central doctrine in this context.

The appropriate remedy was to return the parties to the second round of consultation, where the breach at issue occurred

The SCC quashed Yukon's approval of its plan. The remaining question was whether the parties should be returned to the first round of consultation, as the Court of Appeal had ordered, or instead to the second round of consultation, as the trial judge had ordered.

The SCC found that the Court of Appeal had improperly inserted itself into the treaty relationship "by assessing the adequacy of Yukon's conduct at the [earlier] stage of the land use plan approval process, even though the First Nations did not seek to have the approval quashed on that basis".[x] The SCC commented:

In my view, the Court of Appeal's approach is inconsistent with the appropriate role of courts in a judicial review involving a modern treaty dispute. The court's role is not to assess the adequacy of each party's compliance at each stage of a modern treaty process. Rather, it is to determine whether the challenged decision was legal, and to quash it if it is not. Close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and long-term relationship that these treaties are designed to foster. Judicial restraint leaves space for the parties to work out their

*understanding of a process — quite literally, to reconcile — without the court's management of that process beyond what is necessary to resolve the specific dispute.**[xi]***
The SCC also observed that the effect of the Court of Appeal's decision was to give Yukon another opportunity to propose access and development modifications to the Recommended Plan. The SCC found it would be inappropriate to afford Yukon this second chance, noting that it had failed to diligently advance its interests and exercise its rights in the first round of consultation, and that it must bear the consequences of that failure.

The SCC concluded that the appropriate remedy was to quash Yukon's approval of its plan and return the parties to the second round of consultation, meaning that Yukon would not have a second opportunity to propose access and development modifications to the Recommended Plan.

The Takeaways

First Nation of Nacho Nyak Dun confirms that while "judicial restraint" are the buzzwords when it comes to the appropriate approach of the courts in resolving modern treaty disputes, the courts continue to play an important role in safeguarding the constitutional rights enshrined in modern treaties.

The decision provides a reminder to federal, provincial, and territorial governments that treaties are constitutionally protected documents to which the standards of the honour of the Crown apply, and of the importance of respecting the processes set out in modern treaties with First Nations – should government fail to do so, it must bear the consequences.

In Dispute

BC SUPREME COURT UPHOLDS DECISION QUASHING PEEL WATERSHED LAND-USE PLAN

January 22, 2018 | by Lisa C. Fong

The Supreme Court of Canada unanimously quashed the Yukon Government's land use plan for the Peel Watershed, as Yukon did not respect the collaborative land use process set out in their agreements, and went on to determine its role in these types of proceedings, and the appropriate remedy in such circumstances, in *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58.

In 1990, fourteen First Nations from the Yukon concluded an Umbrella Final Agreement (UFA), which set out a framework for regional land use planning between the First Nations of the Yukon, and the government of Yukon and Canada. In 2004, a commission was established in order to generate a regional land use plan for the Peel Watershed. Near the end of the plan, Yukon made substantial changes that sought to increase access and development of the region.

While both parties agree that the Yukon did not respect the collaborative process set out in the UFA, they did not agree on what basis, and the remedy for this breach.

The Supreme Court found that the clear objective of the agreement was to allow the First Nations to engage in meaningful participation in regards to their traditional territories. Modern treaties were best seen as "constitutional documents," whose rights were subject to the honour of the Crown.

The court defined it's role as being one of judicial review, thus being able to decide "whether the challenged decision was legal, and to quash it or not (par 60)." The Court held that modifications under the UFA must be "minor or partial changes" and were always subject to prior consultation. The Court therefore upheld the trial judge's order to quash the decision, and to return it back to the stage where the Yukon could approve, reject, or modify the plan after consultation. The Court found that it was not open to them to return it to an earlier stage.

This case demonstrates the importance of including provisions in modern day legal instrucments with First Nations to address government powers exercised contrary to the spririt of agreement. The Court affirmed in this case that deference to the text of modern treaties is warranted. Therefore, given that the Court's role is simply to ensure whether a decision is legal or not, it is important to make sure that the text of an arrangement accounts for the Province acting in opposition to the treaty's objectives. Since modern treaties are also interpreted in light of their scheme and objectives, the inclusion of these are also important in creating an agreement.

First Nation of Nacho Nyak Dun v. Yukon, 2017 SCC 58

Lisa C. Fong and Kimberly Webber

Canada: Reconciliation Includes Respecting Land Claims Agreements And Co-Management Processes – Supreme Court Of Canada Quashes Yukon's Peel Watershed Land Use Plan

Last Updated: December 12 2017

Article by **Charles Birchall**, **John J.P. Donihee** and **Serin Remedios**
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On December 1, 2017 the Supreme Court of Canada released its long-awaited decision on the future of Yukon's Peel watershed.[1] In its unanimous decision, the Court quashed the Government of Yukon's (Yukon) land use plan and returned the parties to the stage in the land use plan approval process where Yukon can approve, reject, or modify the land use plan put forward by the Peel Watershed Planning Commission (the Commission).

This case centred on the interpretation of the Umbrella Final Agreement (UFA) and the roles of government and others in the implementation of a modern Treaty protected under section 35 of the *Constitution Act 1982*. More specifically, the Court's decision focuses on the implementation of the co-management processes set out in the UFA and other land claim agreements and clearly underscores the importance of reconciliation with Indigenous peoples in the context of abiding by those processes.

This decision will primarily affect governments, First Nations, Aboriginal organizations, industry and others living and operating in areas of Canada where modern comprehensive land claim agreements have been settled or are being negotiated. While the majority of the Canadians do not reside in these areas, this decision is geographically important as modern treaties cover more than 50% of the Canadian landscape and lands abundant in natural resources.

Background

The UFA and the First Nations Final Agreements that implement the UFA's terms were completed and ratified after decades of negotiation between Yukon First Nations and Yukon. The Final Agreements are modern treaties with individual First Nations including the First Nation of Nacho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin First Nation. The UFA applies to all Final Agreements but Final Agreements can be tailored to include provisions specific to each First Nation.

Chapter 11 of the UFA establishes a process for developing regional land use plans. The process is designed to ensure meaningful participation of First Nations in the co-management of public resources in settlement land (owned by a Yukon First Nation) and non-settlement lands. Each Final Agreement incorporates Chapter 11 of the UFA without modification.

The Yukon Land Use Planning Council established the Commission in 2004 to develop a Regional Land Use Plan for the Yukon portion of the Peel Watershed. As required by Chapter 11, the Yukon and First Nations individually and jointly nominated members of the Commission.

After more than four years of research and consultation, the Commission submitted its Recommended Peel Watershed Regional Land Use Plan (Recommended Plan) to Yukon and the affected First Nations. After consultation, Yukon was required to approve, reject, or propose modifications to the Recommended Plan. If Yukon proposed modifications, Chapter 11 required Yukon to provide written reasons supporting such modifications.

Prior to carrying out consultation on the Recommended Plan (as required by Chapter 11), Yukon and the affected First Nations met and signed a Letter of Understanding (LOU) in 2010, which set out plans to conduct joint community consultation and to work towards achieving consensus on the land use plan. Yukon and the affected First Nations signed a similar second LOU in January 2011 in anticipation of a second round of consultation.

In February 2011, parties, including affected First Nations, submitted responses to the Recommended Plan as required by the LOU. A few days later, Yukon submitted its written response. Yukon's written response included two statements expressing interest in increased options for access and development in the Peel Watershed area.

The Commission was required to reconsider the Recommended Plan in view of Yukon's written response and responses received from other parties. The Commission concluded that Yukon's statements on increasing access and development were merely expressions of general inclination and not "proposed modifications".[2]

In July 2011, the Commission released its Final Recommended Plan. The Final Recommended Plan incorporated specific modifications proposed by the parties, but did not incorporate any part of Yukon's statements on increasing access and development.

Following the release of the Final Recommended Plan, Yukon did not follow the second LOU agreed to by Yukon and affected First Nations. Instead, Yukon released principles to guide or explain its "modification" of the Final Recommended Plan, as well as a new land use designation system. First Nations objected to both the principles and the proposed land use designation system. Yukon then conducted a second round of consultation without coordination with affected First Nations as required by the LOU.

In October 2013, Yukon sent letters to affected First Nations summarizing its anticipated "modifications" to the Final Recommended Plan. Despite objections from the First Nations, in January 2014, Yukon approved its land use plan for non-settlement land in the Peel Watershed. Legal challenges followed.

Both the trial judge and the Court of Appeal agreed with the appellants that Yukon did not act in conformity with the process set out in the Final Agreements. Additionally, both courts agreed that Yukon's authority to modify the Final Recommended Agreement was limited to modifications it had previously proposed to the Recommended Plan.

However, the courts differed on the scope of Yukon's authority to reject a Final Recommended Plan. While the trial judge held that Yukon could not reject a Final Recommended Plan in its entirety if it had already proposed modifications to the Recommended Plan, the Court of Appeal concluded that the Yukon's authority was broad and could include rejection of a Final Recommended Plan.

The courts also disagreed on the appropriate remedy. The trial judge ordered Yukon to re-conduct its second consultation, then either approve the Final Recommended Plan or modify it based on Yukon's previously proposed modifications. The Court of Appeal returned the parties to an earlier stage in the planning process where Yukon could propose new or further modifications to the Recommended Plan.

The Supreme Court Decision

The basic question to be resolved by the Court was whether Yukon had the authority to make the significant changes that it did to the Final Recommended Plan. If not, the Court had to determine at what stage in the land-use planning process should the parties return to under the UFA for any renewed efforts to complete the Peel watershed planning process.

As explained above, the UFA gives Yukon the authority to approve, reject or modify a Final Recommended Plan proposed by the Commission. On the question of how extensive a modification could be, the Court held that the term did not include an unconstrained power to make changes to the Final Recommended Plan as argued by Yukon. The Court held that the term "modify" is limited by its context and by a reading of the whole UFA. The Court found that such a modification exercise could only involve minor or partial changes that would not alter the fundamental nature of the Final Recommended Plan.

The interpretation of the word "modify" in this context is important because it has implications beyond just the UFA. Arrangements whereby the Crown may "accept, modify or reject" a decision of a co-management tribunal are commonly found in other land claims decision-making processes for matters ranging from wildlife management to environmental impact assessment.

The Court, consistent with its decision in the *Little Salmon*,[3] spoke to the role of the courts when a dispute arises in the implementation of a modern treaty:

In resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance.[4]

The Court further held that:

It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship. This approach recognizes... modern treaties... as in this case, may set out in precise terms a cooperative governance relationship.[5]

However, the Court did not back away entirely: "[J]udicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance".[6]

The Court applied its framework of modern treaty interpretation principles consistent with its earlier jurisprudence and the interpretation principles set out in the UFA itself.[7] The Court emphasized the importance of deference to the text of modern treaties and that such treaties will not accomplish the purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if they are interpreted "in an ungenerous manner or as if it were an everyday commercial contract".[8]

Most importantly, the Court held that courts must "strive to respect the handiwork of the parties to a modern treaty, subject to such constitutional limitations as the honour of the Crown".[9] The Court was clear that the purpose of these interpretive principles is to advance reconciliation:

Although not exhaustively so, reconciliation is found in the respectful fulfillment of a modern treaty's terms.[10]

Speaking to the details in the UFA, the Court noted that the power to approve, reject or modify a land-use plan is subject to prior "consultation". The term "consultation" is defined in the treaty to require notice in "sufficient form and detail" to allow affected parties to respond to the Crown's contemplated modifications to the Final Recommended Plan and then give "full and fair consideration" to the views presented during the consultations before deciding how to respond to the Final Recommended Plan. The Court characterized the consultation process required by the Agreement as "robust".[11] Other comprehensive land claim agreements include definitions of "consult" or "consultation" which are similar to those in the UFA.

The Court went further in its discussion of the context within which relevant provisions of Chapter 11 of the UFA should be interpreted, recognizing the fundamental trade-off made by First Nations in the negotiation of the UFA. The Court underlined the importance of the UFA as a "comprehensive process for how the territorial and First Nations governments will collectively govern settlement and non-settlement lands, both of which include traditional territories".[12] The Court acknowledged that "[t]he Chapter 11 process ensures that Yukon First Nations can meaningfully participate in land-use planning for both settlement and non-settlement lands. ... [In] exchange for comparatively smaller settlement areas, the First Nations acquired important rights in both settlement and non-settlement lands, particularly in their traditional territories."[13]

The Court makes clear the application of the *Nacho Nyuk Dun* decision to the overall resource management framework established in Yukon by the UFA. The Court quotes with approval from the Chief Land Claims Negotiator for the Yukon government at the time the UFA was settled:

... It became abundantly clear that [the First Nations'] interests in resources were best served by creatively exploring options for shared responsibility in the management of water, wildlife, forestry, land and culture. Effective and constitutionally protected First Nation management rights advanced their interests and resource use more effectively than simply acquiring vast tracts of land [as settlement lands]...[14]

Through this decision, the Court has identified and emphasized the fundamental importance of the co-management regimes which characterize comprehensive land claim agreements across northern Canada. The *Nacho Nyuk Dun* decision underscores the constitutional underpinning of these arrangements and their importance in the quest for reconciliation in northern landscapes.

The Court has signalled that governments are required to consult First Nations with land claim agreements and may only make changes under these co-management regimes in a manner consistent with the land claims and with the honour of the Crown. Recent experience in the Northwest Territories devolution process with legislation purporting to consolidate land and water co-management boards in the Mackenzie Valley indicates that such changes must be approached carefully and, we suggest, where possible, collaboratively between government and the First Nations. For instance, in 2015 the Tlicho government successfully brought an application for an injunction preventing the elimination of various Land and Water Boards resulting from the *Northwest Territories Devolution Act*, SC 2014, c. 2.[15] The Court found that the elimination of the Boards could violate the Tlicho government's right to effective and guaranteed participation under the Tlicho Agreement and granted the injunction.[16]

In *Nacho Nyuk Dun,* the Court also strongly emphasized the importance of good faith participation in the co-management process set out in the UFA for land-use planning. Respecting the options available to Yukon once the Final Recommended Plan had been presented, the Court concluded:

Yukon must bear the consequences of its failure to diligently advance its interests and exercise its rights to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time. Accordingly, I agree with the trial judge that "it would be inappropriate to give the Government the chance to now put its January 2014 plan to the Commission". The appropriate remedy was to quash Yukon's approval of its plan..."[17]

Conclusion

While this decision speaks to the importance of consultation, its overarching effect is to show the importance of land claims based co-management processes in the context of broader government decision-making about land and resource management in areas covered by comprehensive land claim agreements. These processes are a fundamental part of the bargain negotiated and accepted by First Nations and Inuit in exchange for the relinquishment of their claims over parts of their traditional areas of land use and occupancy. The constitutional protections afforded to these processes through land claim agreements establish a new framework for governance which must be respected by governments. While changes to such arrangements are possible, they can only be achieved collaboratively.

Government participation in decision-making in relation to such processes must be undertaken in good faith and in a manner which upholds the honour of the Crown. This framework of rights, obligations and processes is fundamental to the ongoing accommodation of Aboriginal interests which is essential to the Crown's long-term goal of reconciliation with Indigenous peoples.

Canada: Implementation Of Modern Treaties: First Nation Of Nacho Nyak Dun v. Yukon

Last Updated: January 11 2018
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On Friday, December 1, the Supreme Court of Canada released its decision in the Peel River case that we first reported on here and here. The decision deals with the obligations of the Yukon Government to follow the land use planning process set out in modern land claim agreements with First Nations in Yukon, more specifically the development of a land use plan for the Peel River watershed. However, while the decision arises from a land use planning regime unique to Yukon, the decision will have implications for how governments and courts approach interpretation and application of obligations under modern treaties across Canada. By extension, the decision will have implications for resource developers in parts of Canada that are covered by modern treaties.

Background

As set out in more detail in our previous posts, this case involved the interpretation of provisions in modern treaties (called final agreements) between three Yukon First Nations, Canada and the Yukon Government. Those final agreements contain provisions setting out a process for collaborative development of land use plans within the First Nations' traditional territories. The process allows the parties to create an independent land use planning commission to develop an initial recommended plan for approval by the Yukon government (for territorial lands) and by the First Nations (for their settlement lands). The process requires the Yukon government to consult on that plan before approving, rejecting, or proposing modifications to it (section 11.6.2 of the Final Agreement). In response to Yukon's decision at that stage, the Commission was then required to reconsider as necessary and propose a Final Recommended Plan, followed by another obligation on Yukon to consult on that plan before final approval, rejection or modification by Yukon (section 11.6.3.2 of the Final Agreement).

In this case, Yukon provided very general requested changes to the initial recommended plan developed by the Commission. When the Final Recommended Plan was submitted by the Commission, the Yukon government then proposed substantial modifications. The trial judge found that to be "an ungenerous interpretation not consistent with the honour and integrity of the Crown", and not only remitted the process back to the 11.6.3.2 stage, but ordered Yukon, after it conducted the ordered consultation, to either approve the Final Recommended Plan, or modify it based on the modifications it had proposed to the initial recommended plan. In other words, in the trial judge's view it was not open to the Yukon government to reject the Final Recommended Plan.

The Court of Appeal agreed with the trial judge that Yukon had run afoul of its obligations under the treaties, but imposed a significantly different remedy. The Court of Appeal ordered that the parties return to the 11.6.2 stage, which would effectively have given Yukon an opportunity to propose more extensive changes to the recommended plan, as opposed to limited modifications to the Final Recommended Plan. In many ways, for the Yukon First Nations this was "winning the battle but losing the war", and they appealed to the Supreme Court of Canada.

Before the Supreme Court, the Yukon government did not contest that it had not complied with the process set out in the final agreements. However, at issue was whether the land use planning process should be sent back to an earlier stage in the process, or to the final stage where the Yukon government's options were limited to approving, modifying or rejecting the Final Recommended Plan.

This was more than an academic dispute about processes. The Final Recommended Plan had proposed significant limits to resource development activities in the Peel River region, focussing instead on conservation priorities. The Yukon government wished to override those recommended limits through the extensive changes it proposed to the Final Recommended Plan. If the planning process was only sent back to the final stage, the Yukon government's ability to make those changes would be more limited.

Decision

The Supreme Court overturned the Court of Appeal's decision and reinstated part of the trial judge's ruling, which was to return the parties to the point in the process where Yukon was only able to either approve, reject or modify the Final Recommended Plan. Unlike the Court of Appeal, the Supreme Court did not send the parties back to an earlier stage in the process, which would have effectively allowed Yukon an opportunity to "backfill" and introduce modifications that it previously failed to make. Rather, the Court returned the parties to the position they were in after the Commission issued the Final Recommended Plan, significantly narrowing the range of modifications Yukon would be allowed to make to the plan. The Court stated:

> [61] ... Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time.

In making its decision, the Court underscored that courts should not go further than they need to in resolving a dispute regarding an alleged breach of a modern land claims agreement. The Court was clearly concerned that the Court of Appeal had inserted itself into the ongoing treaty relationship by returning the parties to an earlier stage of the land use planning process. In a similar vein, the Court was concerned that the trial judge had also gone further than needed by ordering that Yukon must either accept or modify the Final Recommended Plan *based on recommendations it had previously proposed*. Rather, the Court simply returned the parties to the stage they were at, without constraining the Yukon government's decision beyond what was required by the treaty. In doing so, the Court clarified that the Yukon government was not necessarily limited to recommendations it had previously proposed and that it could make minor amendments based on changing circumstances, but it could not do as it had done earlier and effectively propose a brand new plan at this stage of the process.

Implications

As with the lower court decisions, the Supreme Court of Canada's decision confirms that the Yukon government has the ultimate power to make decisions regarding the management and use of its territorial lands. However, that power is not unfettered. The decision also reminds governments — and by extension resource developers relying on authorizations given by governments — that treaty rights contained in modern land claim agreements are to be given a large and liberal interpretation

consistent with the objectives of the treaty and in a manner that upholds the honour of the Crown. This includes commitments governments have made about processes for consideration of Indigenous interests in making decisions about Crown lands. In particular, the decision sends a message to governments that where a land use planning process is set out by a treaty, governments must follow that process in good faith from the outset – they will not be allowed to backfill where they fail to raise issues at the outset.

Because this case deals with the unique wording of the land use planning provisions of the Yukon treaties, its direct impact outside the Yukon may be limited. Nevertheless, there are broader implications.

First, the decision emphasizes the Court's view that reconciliation is achieved not only by negotiating modern treaties, but in how they are implemented. At one time the conclusion of modern treaties alone was seen as a way for governments to achieve finality and certainty as to the extent of Indigenous rights and the scope of government responsibilities to Indigenous groups. Now conclusion of treaties is only one step in the process of reconciliation, which continues into the treaty implementation phase.

Second, while the Court states that "reconciliation often demands judicial forbearance" and that "[i]n resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and to work out their differences", at the same time "courts play a critical role in safeguarding the rights" that modern treaties, as constitutional documents, provide. Courts will still supervise Crown conduct in the implementation of modern treaties, and can strike down government decisions not consistent with the honour of the Crown. It remains to be seen whether this approach will result in the meaningful dialogue and reconciliation that the Court no doubt wishes to encourage, or whether this approach will result in parties landing back in Court every time a further snag in the treaty implementation process is encountered.

Third, for resource developers — particularly in the North where many modern treaties have been entered into — the message remains as before that modern treaties define and constrain the processes that governments must follow in making decisions about Crown lands and resources. Resource developers must therefore pay close attention to obligations arising under modern treaties that apply in areas where a project is proposed and should independently consider whether government regulatory decisions are being made in a manner that respects the terms of the treaties and the honour of the Crown. If proper processes are not being observed, then it is possible, as in this case, that the resulting decision may be quashed.

SCC: Judicial Intervention in Modern Treaty Processes Should Promote Negotiation and Reconciliation

December 08, 2017

John A. Terry | Michael J. Fortier | Nick Kennedy

In *First Nation of Nacho Nyak Dun et al. v. Government of Yukon*,[1] the Supreme Court of Canada (SCC) emphasized that "[r]econciliation often demands judicial forbearance," and in that respect, "[c]ourts should generally leave space for the parties to govern together and work out their differences." In this case, the SCC considered Yukon's decision to approve its land use plan for the Peel Watershed (a largely undeveloped wilderness area in Northern Yukon), which was developed through a modern treaty process, as well as the role of courts in resolving disputes that arise in the context of modern treaty implementation.

What You Need To Know

- The SCC noted that "modern treaties are constitutional documents and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance."
- In this context, the SCC emphasized that "[j]udicial restraint leaves space for the parties to work out their understanding of a process – quite literally, to reconcile – without the court's management of that process beyond what is necessary to resolve the specific dispute." The role of courts is to "assess whether a challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship."
- Since the SCC found that Yukon breached the process agreed to by the parties, the appropriate remedy was to return the parties to that stage of the process where the breach occurred so that Yukon could "approve, reject or modify" the plan following consultations with affected First Nations and any affected Yukon community.
- The SCC indicated that the parties must act diligently to advance their respective interests when treaty issues arise; parties cannot use court proceedings to obtain another opportunity to exercise a right the party chose not to exercise at the appropriate time.

Background

In 1993, the Council of Yukon Indians, the Government of Canada and Government of Yukon entered into the Umbrella Final Agreement (UFA). The UFA provides a framework for concluding

final agreements between First Nations, Yukon and Canada. The First Nations of Nacho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin have all entered into Final Agreements.

The Final Agreements incorporate Chapter 11 of the UFA dealing with the development of land use plans. This multi-step land use planning process facilitates the parties jointly appointing a land use planning commission. After the commission is appointed, the process generally unfolds as follows for non-settlement lands:

- First, the planning commission prepares and submits a recommended plan to Yukon and each affected First Nation. Yukon must, after consultation with any affected Yukon community and each affected First Nation, "approve, reject or propose modifications to" the parts of the land use plan applicable to non-settlement lands.
- Second, the commission reconsiders the plan and, with written reasons, issues a final recommended plan. Following further consultation with any affected Yukon community and any affected First Nation on the final recommended plan, Yukon must "approve, reject or modify" that part of the final recommended plan applicable to non-settlement land.[2]

Process Implementation

The parties established the Planning Commission for the Peel Watershed Region (Commission) in 2004. After extensive background work, the Commission forwarded its Recommended Plan to Yukon, the First Nations of Nacho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin, and the Gwich'in Tribal Council, in December 2009.

Yukon and the First Nations proposed modifications to the Recommended Plan, and the Commission reconsidered the Recommended Plan in light of the parties' submissions. The Commission rejected two of the changes proposed by Yukon because, in the Commission's view, they were not sufficiently particularized. The Commission forwarded its Final Recommended Plan in July 2011. In general, the Final Recommended Plan did not significantly alter the general management direction of the Recommended Plan.

In February 2012, Yukon announced that it was developing principles to guide its modifications to the Final Recommended Plan, and following a series of correspondence with the First Nations, Yukon sent a letter to the First Nations in October 2013 summarizing its anticipated modifications to the Final Recommended Plan. Following further correspondence, Yukon announced in January 2014 that it had approved its land use plan for non-settlement land in the Peel Watershed.

Prior Decisions

The appellants subsequently commenced legal proceedings in Yukon's Supreme Court (YSC) seeking, among other things, a declaration that Yukon did not properly consult on the Final Recommended Plan, and an order quashing Yukon's proposed land use plan and remitting the process for consultations on the Final Recommended Plan. YSC accepted the First Nations' position, and remitted the matter for consultation on the Final Recommended Plan. The Court of Appeal reversed YSC's decision in part, since the Court of Appeal found that the failure occurred at the Recommended Plan stage, and accordingly the Court of Appeal remitted the matter for consultation on the Recommended Plan.

SCC Decision

The First Nations appealed to the SCC, which granted the appeal in part. Specifically, the SCC found that Yukon's breach of the process occurred at the Final Recommended Plan stage and remitted the process to that stage for consultation on the Final Recommended Plan accordingly. In so finding, the SCC explained that "the appropriate judicial role [in this context] is informed by the fact that this dispute arises in the context of the implementation of modern treaties." These treaties, the SCC explained, "are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership." Therefore, "[i]n resolving disputes that arise under modern treaties, courts should generally leave space for the parties to govern together and work out their differences. Indeed, reconciliation often demands judicial forbearance."

With these principles in mind, the SCC provided a roadmap for the parties going forward. At the Final Recommended Plan stage, and following consultation with affected First Nations, Yukon can "approve, reject or modify" the Final Recommended Plan. The SCC explained that in making modifications, Yukon may "make modifications that respond to changing circumstances, such as those that may arise from the second consultation and changes made by the Commission in its reconsideration of the plan." Further, the SCC indicated that, "[i]n all cases, Yukon can only depart from the positions it has taken earlier in the process in good faith and in accordance with the honour of the Crown."

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[1] Torys acted as counsel for Government of Yukon in this appeal.

[2] Each affected First Nation must follow a similar process in respect of parts of the plan applicable to the settlement land of that First Nation.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

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Supreme Court affirms that modern Treaties must be honoured

by Benjamin Brookwell

Despite co-management provisions in modern treaties, the Yukon Government acted unilaterally to try to impose what it wanted in the Peel Watershed. Today's Supreme Court decision confirmed a lower court's finding that the Yukon Government can't do that. It has to work with the final recommended plan proposed by an independent commission, and has only a narrow leeway to modify that plan, acting according to the treaty-based co-management process.

- This blog provides a summary of the Supreme Court of Canada ("Supreme Court")'s decision in *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, released this morning, and some related commentary. This case dealt with a dispute that arose in the context of modern treaty implementation, and also touched on the role of the courts in resolving such disputes generally.

OVERVIEW OF THE CASE

For thousands of years prior to the arrival of Europeans, the Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin have lived in what is now known as the Yukon. In this blog, I'll refer to them as the "First Nations". The traditional territory of these First Nations includes the Peel Watershed, which spans almost 68,000 square kilometers of northern Yukon and is one the largest undeveloped natural areas in North America.

Around 1990, these First Nations, Yukon and Canada, along with other Yukon First Nations, concluded an Umbrella Final Agreement. This agreement set out a framework for reaching land claim and self-government agreements, known as Final Agreements: binding modern treaties. The 3 First Nations who led the court case released today all reached Final Agreements in the 1990s. Their Final Agreements (modern treaties) are based on the Umbrella Final Agreement.

These Final Agreements are "land claims agreements" within the meaning of section 35(3) of the *Constitution Act, 1982*, and accordingly the rights held by the First Nations under these agreements are modern treaty rights with constitutional protection.

For almost a decade, the First Nations and Yukon worked to develop a regional land use plan for the Peel Watershed using the co-management process set out in their treaties.

In 2004, they established the Peel Watershed Planning Commission with representatives appointed by the First Nations, by Yukon, and jointly. The Commission then undertook a broad process to develop a recommended Regional

Land Use Plan for the portion of the Peel Watershed within Yukon. The plan addresses land use in both lands held by the First Nations ("settlement land") and lands held by the Yukon Government or others ("non-settlement land").
In 2009, the Commission reached a Recommended Plan. It forwarded that Recommended Plan to Yukon and the affected First Nations. This started the approval process.

At that stage, Yukon had the obligation to consult with the affected First Nations and communities, and then approve, reject, or propose modifications to the plan as it applies to non-settlement land. First Nations had the same obligation for settlement land.

At first, the Yukon Government and the First Nations developed an agreed back-and-forth process based on their treaty obligations in which their consultations would be coordinated. As per the treaties, their written responses would be considered by the Commission in a Final Recommended Plan for approval.

But near the end of the approval process in 2012-2013, after the Commission had released a Final Recommended Peel Watershed Regional Land Use Plan, Yukon proposed and adopted a ***different*** final plan that made substantial new changes to increase access to and development of the region. These changes did not reflect its earlier submissions, or the results of earlier steps in the process.

The new Yukon plan substantially changed the percentage of land in the Peel Watershed that would be given protection from development from 80% to only 29%. Yukon argued that it could do this because it had the "ultimate authority" to approve, reject, or modify any part of the Final Recommended Plan that applied to non-settlement land (para. 23).

LOWER COURT DECISIONS

At trial, the court held that Yukon had no authority to present new modifications to the Final Recommended Plan, and further, had no authority to approve its own Plan. The trial judge ordered Yukon to re-conduct its consultation, and to then either approve the Final Recommended Plan, or modify it based on the modifications it had previously proposed.

Yukon appealed the trial decision. The Yukon Court of Appeal found that Yukon had failed to properly exercise its right to propose modifications to the Recommended Plan. But Yukon's appeal succeeded in part, as the Court of Appeal put no limitations on the modifications that Yukon could propose after it re-conducted consultation. Effectively, it told Yukon to follow the procedural steps but allowed it to disregard the substance of the remainder of the process.

TODAY'S SUPREME COURT DECISION

The Supreme Court found that the clear objective of the Umbrella Final Agreement and the modern treaties made under it was to ensure First Nations meaningfully

participate in land use management in their traditional territories. An unconstrained authority for Yukon to modify the Final Recommended Plan at the very last stages would render the rest of this process meaningless, as Yukon would have free rein to rewrite the plan at the end (para. 48).

The Supreme Court agreed with the courts below that the Yukon did not have the authority to make the extensive changes that it made to the Final Recommended Plan. It confirmed that Yukon's plan was invalid, and ordered Yukon to re-conduct its consultation, and to then either approve, modify, or reject the Final Recommended Plan – but within a narrower scope.

Overturning the Court of Appeal, the Supreme Court ordered that Yukon's modifications had to be "minor or partial" (para. 5), and must be limited to those that:

(1) are based on those it proposed earlier in the process; or
(2) respond to changing circumstances.

Yukon cannot "change the Final Recommended Plan so significantly as to effectively reject it" (para. 5).

The Supreme Court held that Yukon can only depart from positions it has taken earlier in the process in good faith and in accordance with the Honour of the Crown (para. 5). The court said that Yukon had to bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications at an earlier stage (para. 61).

GENERAL LEGAL PRINCIPLES

In making this decision, the Supreme Court decision also set out some guiding principles on the court's role in similar cases:

- It said: "The court's role is not to assess the adequacy of each party's compliance at each stage of a modern treaty process. Rather, it is to determine whether a challenged decision was legal, and to quash it if it is not." (para. 60) However, in our view at OKT, we would have concerns if this ends up becoming a signal for "non-interference" by the courts in when modern treaties are breached in their implementation. Honouring treaties is important at every stage, not just in the final result. Breaches at earlier stages will also have important implications for decisions at the end. As this bulk of this decision recognizes, a path-dependency takes hold and cannot necessarily be changed later on.
- The Court also said that modern treaties are "meticulously negotiated by well-resourced parties," and courts must pay close attention to their terms. Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text *as a whole*and the treaty's objectives. (paras. 36-37) Clearly, paying close attention to what the parties negotiated, as a whole and in context, is essential.

- Finally, it said, reiterating earlier cases, that while courts must "strive to respect [the] handiwork" of the parties to a modern treaty, this is always subject to the constitutional limitations of the honour of the Crown (para. 37). The Crown has an overriding obligation to act honourably, and this remains true in implementing modern treaties.

Pacific Business & Law Institute:

Peel Watershed: SCC affirms the Honour of the Crown in Modern Treaty Implementation

On Friday December 1, 2017, in First Nation of Nacho Nyak Dun, et al. v. Government of Yukon, the Supreme Court of Canada rendered a **unanimous** decision on the Peel Watershed land use planning process that is an integral part of the Umbrella Final Agreement. The Court allowed the appeal on key parts of Yukon First Nations and several other Yukon parties' five-year struggle over the application of this planning process. The Court found the Yukon government failed to fully respect the terms constitutionally entrenched in the planning process.

The *Peel Watershed* decision makes a vital contribution to what the Court's role will be in resolving disputes arising from modern treaties. This decision sets important guidelines governing how courts can safeguard rights of all parties enshrined in treaties. The Court recognized the important contribution treaties make to reconciliation between First Nation and all other Canadian governments.
This decision begins to address many important questions:

1. What diligent efforts to resolve disputes will be expected of all parties before turning to courts?
2. Will the honour of the crown extend the duty to negotiate in good faith to a duty to implement a treaty in good faith?
3. What remedies will the court engage to ensure rights enshrined in treaties are safeguarded?
4. What influence will explicit and implicit treaty objectives have in interpreting modern treaties?

This decision affirms that courts will play an important role in maintaining the collaborative partnerships necessary to make the social contract, inherent in all treaties, to successfully advance reconciliation.

Newly elected Yukon Premier Sandy Silver has said he will accept the final recommended plan from the Peel Planning Commission in accordance with the Supreme Court of Canada decision.

Former Chief Yukon Negotiator Barry Stuart said:

"*A good day for all Yukon parties as the Court recognized that modern treaties are intended to foster reconciliation at all levels. Diligent, collaborative efforts to implement treaties are expected from all parties. It is particularly important for Courts in interpreting modern treaties to consider the intent and purpose of the treaties.*"

PBLI will include this decision in our upcoming programs, to advance a shared understanding of the contribution this SCC decision provides to making treaties a viable part of the Canadian governing process.

By Pauline Cusack and Amelia Boultbee

Materials for the afternoon items

p.m.

A Yukon Regional Land Use Strategy

A Jurisdictional Analysis and Proposed Framework for Planning

Produced for the Yukon Land Use Planning Council

December 2017

by

Ryder Communications Management

Whitehorse, Yukon

Executive Summary

The Common Land Use Planning Process (CLUPP) recommends a regional planning process for planning commissions to produce a recommended plan. Recently, the Yukon Land Use Planning Council has identified a number of topics regarding the CLUPP that are in need of additional research. Specifically, there is a desire to complete a comparative analysis across jurisdictions regarding regional land use planning frameworks and hierarchies to determine if such a system could work in Yukon. This document endeavours to compare the land use planning frameworks adopted by other jurisdictions, and propose a suggested template for a Yukon land use planning framework. Approaches in 13 jurisdictions were compared and assessed. After cross-referencing with Yukon's mandated requirements in Chapter 11 of the Umbrella Final Agreement (UFA), this report proposes a framework of strategic and operational documents. The goal of this suggested approach is to remain consistent with the UFA, reduce redundancy, provide more clarity and certainty to those directly involved in the planning process, and increase the ability for commissions to stay on track with respect to timelines and budgets.

Part II: Proposed Contents of a Yukon Regional Land Use Strategy

At the highest level of the land use planning framework, The Yukon Regional Land Use Strategy is intended to describe land use planning in the territory. It ties in with requirements under the Umbrella Final Agreement, provides planning details that are meant to be consistent across all planning regions, describes the general land use planning process, and gives an overview of planning interest statements. It is designed to be high-level yet thorough. It provides the starting point for regional processes to create the unique level of detail appropriate for that region, while remaining consistent across regions.

1. INTRODUCTION

   Overview and contextual information regarding land use planning in Yukon.

   1.1. HISTORY AND CURRENT STATUS

      Describes how we got to where we are.

   1.2. THE LAND, THE PEOPLE, THE RESOURCES

      Includes high-level descriptions of Yukon's land, people, and economics.

2. PURPOSE OF STRATEGY

   Purpose of Strategy and how it fits within the context of regional land use planning in Yukon and the Umbrella Final Agreement. Why is land use planning important for Yukon?

3. LEGAL AUTHORITY

   Description of the Umbrella Final Agreement as the legal authority to regional land use planning. It shall always prevail in the case of a conflict.

4. VISION AND OBJECTIVES

   4.1. VISION STATEMENT

      What is the vision for land use planning in Yukon?

   4.2. PLANNING OBJECTIVES

      These are copied from the Umbrella Final Agreement (11.1.1.1 to 11.1.1.6)

   4.3. PLANNING REQUIREMENTS

      These are copied from the Umbrella Final Agreement (11.2.1.2 to 11.2.1.12). These replace the need for planning principles.

5. GOVERNANCE

   Describe the high-level relationship between Government of Yukon and the affected First Nations. Also discuss the joint preparation of a Regional Strategy and a General Terms of

Reference which will be given to the commission at start-up. Appendices for the templates of these documents will be referenced and included.

6. DECISION MAKING

   General terms that indicate Government and the affected parties will be the approval bodies. And a general provision that all plans will be developed using consensus based decision making.

7. PLANNING REGIONS

   Map of planning regions in Yukon and description of how they were developed. Some detail regarding overlap and transboundary processes.

8. THE PLANNING PROCESS

   8.1. START-UP

   Describe the process for starting up the commission including the parties preparing a regional strategy and the council providing a general terms of reference. Reference these templates in the appendices.

   8.2.INTERESTS AND ISSUES

   A list of Statements of Interest that will be broad enough and consistent for all of Yukon (e.g. Economic Diversity and Prosperity; Healthy and Vibrant Traditional Cultures; Thriving Natural Systems and Biodiversity) It could be as simple as these three statements or more detailed as in the model of Saskatchewan, where a statement is given as well as provisions on how planning regions will address them in the plan. To the extent possible, these statements should build on the objectives in 11.1.1. Commissions will be able to identify new issues and interests as they come up.

   8.3.INFORMATION GATHERING AND MANAGEMENT

   General provisions that the Parties will provide all resource information necessary for planning to the commission at start-up. This section will also include details on how information and data will be managed, especially in the case when new information is provided to the commissions from outside sources.

   8.4.OPTIONS AND SCENARIOS

   General provisions that the commission will develop options to support the statements of interest using the available information provided to them, as well as any additional information provided by stakeholders.

   8.5. DRAFT PLAN

   Will describe the process for producing a draft plan, including details on content.

8.6. PLAN APPROVAL

Approval process as per Umbrella Final Agreement and legal precedents described here. Includes a description of the recommended plan, final recommended plan (if needed), and the approved land use plan.

8.7. IMPLEMENTATION AND REVIEW

Describe the roles and responsibilities for plan implementation and review. Also include provisions that require commissions to develop implementation plans if necessary.

9. LAND DESIGNATION SYSTEM

General over-arching land designation definitions to be provided here (i.e. protection and conservation zones; resource development; community boundaries; mixed-use; etc). Provisions that, at the discretion of the commissions, zones may be further sub-divided or refined in ways that make sense for the region. At a high level, all of Yukon will use the same categories.

10. PUBLIC PARTICIPATION

Describe how planning commissions will provide for participation and engagement with the public and other stakeholders.

11. LINKAGES TO OTHER RESOURCE MANAGEMENT EFFORTS

General provisions that indicate planning hierarchy and that the commission must consider other planning efforts or strategies in the region. Include information on sub-regional plans from the Umbrella Final Agreement.

12. LEGACY PLANS

Describe considerations for bringing Legacy Plans like the North Yukon, or plans underway under the CLUPP into alignment (or not) with this framework.

13. REVIEW AND AMENDMENT OF STRATEGY

Describe considerations for reviewing and updating the strategy.

14. APPENDICIES

Template for Regional Strategy

Template for General Terms of Reference

NORTHERN LANDS
NORTHERN LEADERSHIP

The GNWT Land Use and Sustainability Framework

Northwest Territories

Our **Lands**, Our **Interests**,
Our **Future**

MESSAGE FROM THE PREMIER

Land is life. It is the link to our past. Many people draw their spiritual and cultural identity from the land. It has provided food and materials to sustain the people of the Northwest Territories (NWT) for hundreds of years, and it is the key to the future. The abundance of natural features and resources offers the potential for economic development and revenues to support investments in our people, our environment and our economy.

We have long held that decisions that influence our territory's economy and environment are better guided and managed by the people who live here. The devolution of authorities over public lands, water and resources gives the people of our territory that decision-making power.

It is important that NWT land owners and other partners know how the Government of the Northwest Territories (GNWT) will be managing land, water and resources in the public interest. The *Land Use and Sustainability Framework* lays out the GNWT's vision. It will guide our land use decision-making and describes how we will carry out our new roles and responsibilities after devolution.

The North has always been about partnerships. Everyone in the NWT has a stake in making this a healthy, strong and prosperous territory. The framework sets out the principles and interests the GNWT will bring to the table when working with our partners to unlock our natural resources' vast potential and achieve environmental sustainability to create prosperity for our people.

The framework links past policy and incorporates changing realities and new responsibilities. It sets out how the GNWT will deal with the broad issue of land use and the sustainability principles that have always been the cornerstone of this government's approach to resource development and our relationship to the land, the water and resources. We hope that the framework will bring clarity and transparency and make it easier to work with other partners for the benefit of the people of the NWT.

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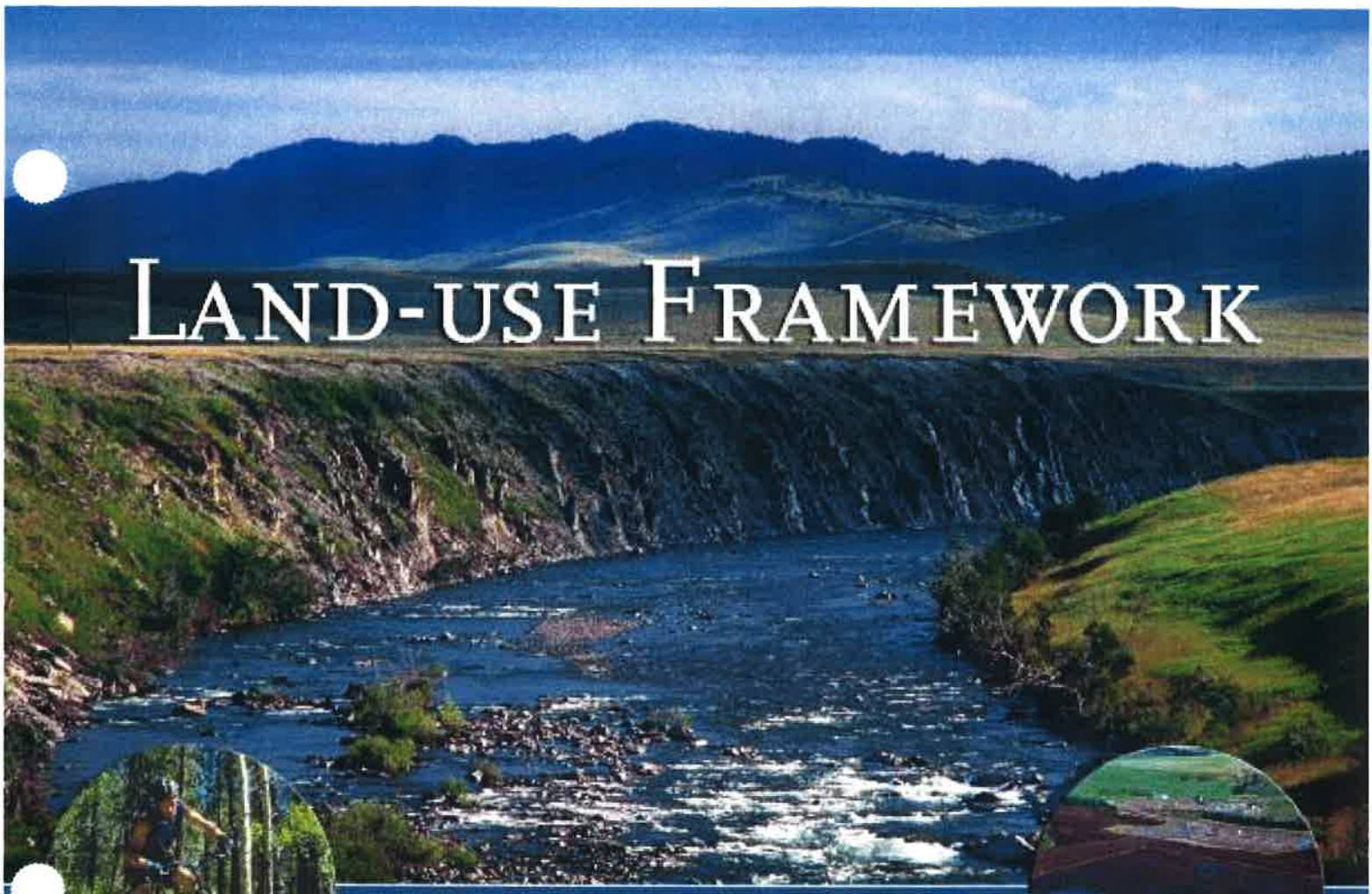

Alberta

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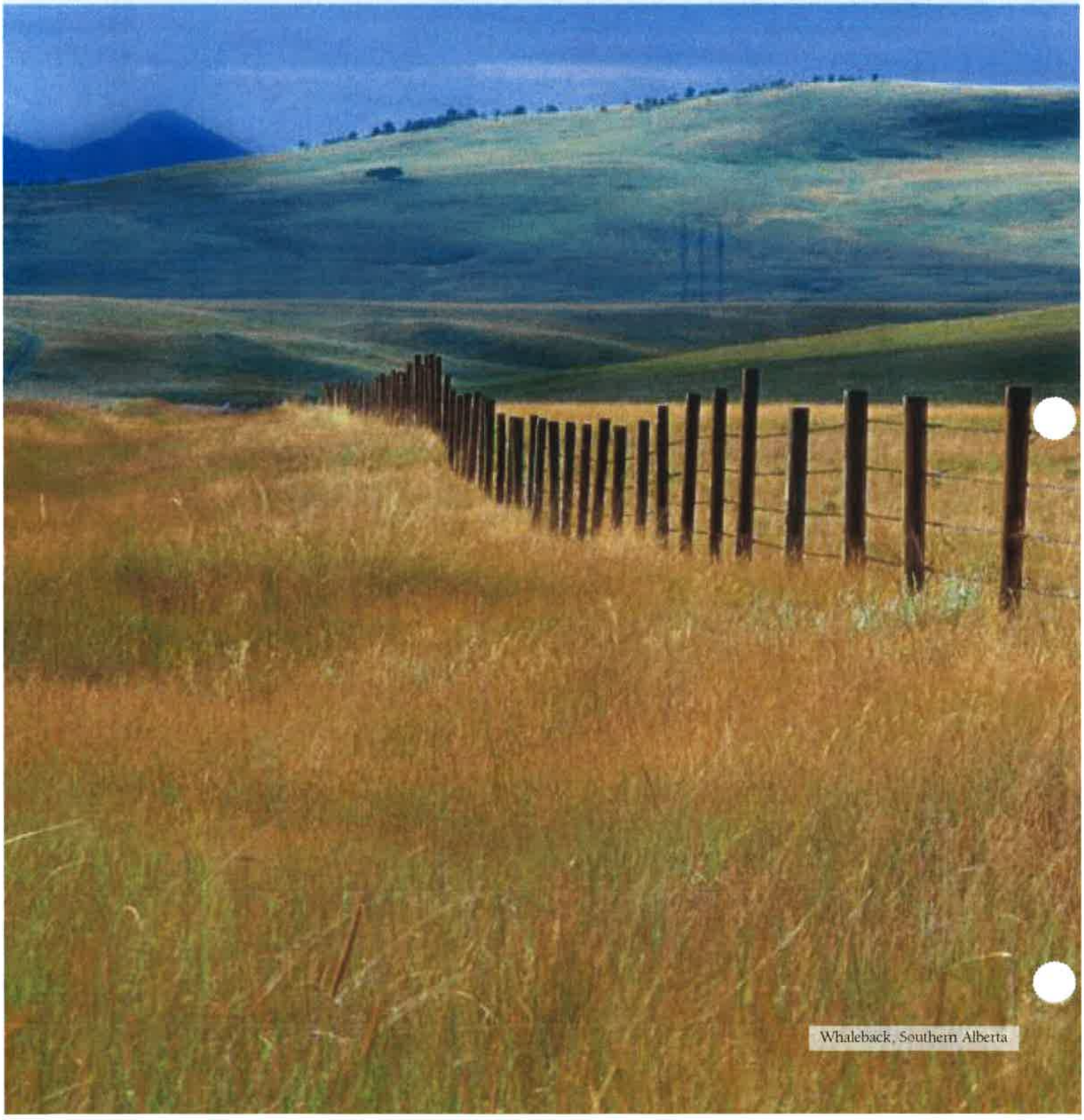
Executive Summary



Whaleback, Southern Alberta

Alberta's prosperity has created opportunities for our economy and people, but it also has created challenges for Alberta's landscapes. Industrial activity, municipal development, infrastructure, recreation and conservation interests often are competing to use the same piece of land. There are more and more people doing more and more activities on the same piece of land. The competition between user groups creates conflict, and often puts stress on the finite capacity of our land, air, water and habitat.

What worked for us when our population was only one or two million will not get the job done with four, and soon five million. We have reached a tipping point, where sticking with the old rules will not produce the quality of life we have come to expect. If we want our children to enjoy the same quality of life that current generations have, we need a new land-use system.

The purpose of the Land-use Framework is to manage growth, not stop it, and to sustain our growing economy, but balance this with Albertans' social and environmental goals. This is what the Land-use Framework is about—smart growth.

Our consultations with Albertans indicate widespread support for greater provincial leadership on land-use issues. This does not mean creating a heavy-handed, centralized bureaucracy in Edmonton. It does mean that the Alberta government must provide the kind of policy direction and guidelines, and opportunities that the local levels of government cannot. The Land-use Framework will leave local decision-making authority with the same officials who currently exercise it. However, in the future, these decisions will have to be consistent with regional plans. Accordingly, the Land-use Framework consists of seven basic strategies to improve land-use decision-making in Alberta.

Strategy 1

Develop seven regional land-use plans based on seven new land-use regions.

Alberta does not currently have formalized regional-level planning. Nor is there any formalized co-ordination between Government of Alberta land-use decisions on Crown lands and municipal land-use decisions. To remedy this, the government will create seven new land-use regions and develop a regional plan for each. The regional plans will integrate provincial policies at the regional level; set out regional land-use objectives and provide the context for land-use decision-making within the region; and reflect the uniqueness and priorities of each region. Municipalities, other local authorities and provincial government departments will be required to comply with each regional plan.

Strategy 2

Create a Land-use Secretariat and establish a Regional Advisory Council for each region.

Strong provincial leadership will be critical to the success of land-use planning and resource management. Establishing a formal governance structure for implementing the Land-use Framework will be necessary. To meet this need, the Land-use Framework creates a Land-use Secretariat to support implementation of the framework. The Secretariat will develop regional plans in conjunction with government departments and Regional Advisory Councils. Final decision on regional plans rests with Cabinet.

Strategy 3

Cumulative effects management will be used at the regional level to manage the impacts of development on land, water and air.

Our watersheds, airsheds and landscapes have a finite carrying capacity. Alberta's system for assessing the environmental impacts of new developments has usually been done on a project-by-project basis. This approach worked at lower levels of development activity. However, it did not address the combined or cumulative effects of multiple developments taking place over time.

A cumulative effects management approach will be used in regional plans to manage the combined impacts of existing and new activities within the region.

Strategy 4

Develop a strategy for conservation and stewardship on private and public lands.

Clean water and air, healthy habitat and riparian areas, abundant wild species and fisheries are all "public goods" that Albertans enjoy and value. The costs of supplying these goods on private lands are left largely on the shoulders—and pocketbooks—of our ranchers and farmers. Public lands that are managed for a variety of purposes also supply these goods. If Albertans value these landscapes and the benefits they provide to all of us, we have to find new ways to share the costs of conserving them. To do this, the Government of Alberta will develop new policy instruments to encourage stewardship and conservation on private and public lands.

Strategy 5

Promote efficient use of land to reduce the footprint of human activities on Alberta's landscape.

Land is a limited, non-renewable resource and so should not be wasted. Land-use decisions should strive to reduce the human footprint on Alberta's landscape. When it comes to land use, other things being equal, less is more—more choices for future generations. This principle should guide all areas of land-use decision-making: urban and rural residential development, transportation and utility corridors, new areas zoned for industrial development, and agriculture.

Strategy 6

Establish an information, monitoring and knowledge system to contribute to continuous improvement of land-use planning and decision-making.

Good land-use decisions require accurate, timely and accessible information. A sound monitoring, evaluation and reporting system is needed to ensure the outcomes of the Land-use Framework are achieved. The Government of Alberta will collect the required information to support land-use planning and decision-making, and create an integrated information system to ensure decision-makers have access to relevant information. The system will include regular monitoring, evaluation and reporting on the overall state of the land, and progress toward achieving provincial and regional land-use outcomes. A key component of this system will be the province's Biodiversity Monitoring Program.

Strategy 7

Inclusion of aboriginal peoples in land-use planning.

The provincial government will strive for a meaningful balance that respects the constitutionally protected rights of aboriginal communities and the interests of all Albertans. The Government of Alberta will continue to meet Alberta's legal duty to consult aboriginal communities whose constitutionally protected rights, under section 35 of the *Constitution Act, 1982 (Canada)*, are potentially adversely impacted by development. Aboriginal peoples will be encouraged to participate in the development of land-use plans.

Priority actions for the Land-use Framework.

There are five immediate priorities that the provincial government will support and implement on a priority basis. These are: legislation to support the framework, metropolitan plans for the Capital and Calgary regions, the Lower Athabasca Regional Plan, and the South Saskatchewan Regional Plan. In addition, a number of policy gaps and areas of provincial interest will be addressed by the provincial government in the short-term.