

The First Nation of Nacho Nyak Dun v Yukon—Interpretation, Reconciliation and the Land Use Planning Process in Modern Treaties

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On December 2, 2014, the Yukon Supreme Court released its much anticipated decision in The First Nation of Nacho Nyak Dun v Yukon.ⁱ The decision centred on interpreting land use planning process provisions in the Umbrella Final Agreementⁱⁱ (Agreement) – the land claim agreement between the Crown and Yukon First Nations. The Court’s decision is of considerable interest in other northern territories where land claim-based land use planning processes form a key element of the resource management framework. To further the process of reconciliation between Yukon and the affected First Nations, the Court confirmed the application of the land use planning process set out in the Agreement.

The Court’s decision centered on the interpretation of provisions contained in Chapter 11 of the Agreement, which outlines a detailed process for land use planning in Yukon. The Government of Yukon (Government) argued that the correct approach to interpreting the Agreement was a plain reading of individual provisions in Chapter 11. This approach would have allowed it to substantially modify the final Recommended Plan developed by the Peel Watershed Planning Commission (Planning Commission). The final plan was the result of extensive public consultation, research and hearings over a five-year period.

The Court disagreed with Yukon’s approach. The Court held that any interpretation of the Chapter 11 process should be contextual, uphold the Honour of the Crown and promote reconciliation between the Crown and First Nations. The Court issued an order quashing the Peel Watershed Regional Land Use Plan (Land Use Plan) as modified by the Government. The Court determined that the Government had not properly followed the consultation and review process specified in Chapter 11 and remitted the matter back to an earlier stage in the process, with restrictions on the Government’s ability to propose new modifications. Specifically, the Court order preserves the Planning Commission’s Recommended Plan, which proposes that approximately 80% of the planning region be given a high degree of protection as designated Special Management Areas.

The Planning Process

The Peel Watershed is an undeveloped area in northeast Yukon. Currently, there are no mines in the Peel Watershed, although there is considerable interest in mineral exploration. The land use planning process in Yukon is guided by Chapter 11 of the Agreement, which works in concert with individual self-government treaties between First Nations in Yukon and the Crown, once negotiated. As required by Chapter 11, a Peel Watershed Planning Commission was established to draft the Land Use Plan for this area.

The Planning Commission spent five years developing a land use plan through a collaborative process that included considerable input at all stages by stakeholders and First Nations. The Court summarized the Planning Commission's activities:

The Commission met its obligation in s. 11.6.1 to forward a Recommended Plan to the affected First Nations and the Government of Yukon. That document was a substantial and comprehensive report based on extensive research and hearings over a period of approximately five years. In generating the Recommended Plan, the Commission worked within the framework of the unanimously agreed-on General Terms of Reference, utilized a consultative and consensus-driven approach, and took sustainable development as its cornerstone principle, as it was required to do by the Final Agreements themselves.ⁱⁱⁱ

The Planning Commission released a Final Recommended Land Use Plan in 2011. In 2012, the Government announced plans to modify and complete the Land Use Plan. The Government released its final version of the Land Use Plan in January 2014. This version was significantly different than the Planning Commission's Final Recommended Plan. In the Government's version, it unilaterally reduced the percentage of regional designated conservation lands from 80% to 29%.

The Judicial Review

Two First Nations, two environmental organizations, and two residents of Whitehorse, Yukon (Plaintiffs) sought judicial review of the Government's Land Use Plan. The Plaintiffs sought a declaration quashing the January 2014 Land Use Plan and to have consultation under the Planning Commission process re-conducted from the point where the Government proposed its modifications, with specific limits on the Government's powers to propose further changes going forward. The Court granted the relief sought by the Plaintiffs. The Court order essentially preserves the Commission's Recommended Plan.

The Court found that the provision upon which the Government relied for its authority to unilaterally modify the Land Use Plan needed to be read in the context of the framework of the Final Agreements as a whole. Although the Government may propose modifications within the land use planning framework, it must remain responsive to preceding consultation and provide written reasons for any proposed modifications. Proposed modifications and written reasons should be sent back to the Planning Commission for review. By not following this process, the Government effectively usurped the planning process and the role of the Planning Commission.

The Government's modifications did not flow from valid proposed modifications earlier in the process. The Court found that any interpretation of the process contained in the Final Agreements must be read in a manner that promotes reconciliation between the Crown and First Nations.

Conclusion

The Government is considering whether to appeal, and at the date of writing has not announced a decision. This decision provides valuable guidance on interpreting modern treaties. The Court confirms that the Honour of the Crown requires that treaties be interpreted within their entire framework. In this case, there was a process set out in the Final Agreements that was misinterpreted and misapplied by the Government. In doing so, the Government undercut key principles of consultation, and the objective of reconciliation. This decision confirms protection for process as well as substantive rights. It also emphasizes the Court's continuing focus on reconciliation as a key objective in guiding the actions of the Crown in future consultation and planning processes.

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ⁱ 2014 YKSC 69.

ⁱⁱ The Umbrella Final Agreement was reached in 1988 and finalized in 1990 and represents a political agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon. The agreement may be accessed through the Council of Yukon First Nations website: <http://cyfn.ca/agreements/umbrella-final-agreement/>.

ⁱⁱⁱ At paragraph 40 of the Court's decision.