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

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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.

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[1] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 [*Nacho Nyak Dun*].

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.

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[2] *Nacho Nyuk Dun*, *supra* note 1 at para 22.

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]

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[3] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*].

[4] *Nacho Nyuk Dun, supra* note 1at para 33.

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.

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5 *Ibid*.
6 *Ibid*, at para 34.
7 All modern land claims include their own "interpretation" chapters.
8 *Nacho Nyuk Dun*, *supra* note 1 at para 37; *Little Salmon*, *supra* note 3 at para 10.
9 *Nacho Nyuk Dun*, *supra* note 1 at para 37; *Little Salmon*, *supra* note 3 at para 54.
10 *Nacho Nyuk Dun*, *supra* note 1 at para 38.
11 *Ibid* at para 41.

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]

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12 *Ibid* at para 42.
13 *Ibid* at para 46.
14 *Ibid* at para 46.
15 *Tlicho Government v Canada* (Attorney General), 2015 NWTSC 9.
16 The full name of the Tlicho Agreement is *Land Claims and Self-Government Agreement Among the Tlicho and the Government of the Northwest Territories and the Government of Canada.*

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.

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[17] *Nacho Nyuk Dun*, *supra* note 1 at 61.

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