

Media Summary

The First Nation of Nacho Nyak Dun v. Yukon (Government of), 2014 YKSC 69

This media summary does not form part of the Reasons for Judgment. It is prepared for the assistance of members of the media. The judgment of the Court is the sole authoritative description of the decision of the Court and the reasons for that decision.

The Peel Watershed is a vast and virtually undeveloped piece of land in Northern Yukon. In 2004, a Land Use Planning Process was entered into pursuant to Chapter 11 of the Final Agreements of the First Nation of Na-Cho Nyak Dun and the Tr'ondëk Hwëchin, both of which have Traditional Territory within the Watershed.

Following approximately five years of background work and information-gathering, the Peel Watershed Regional Planning Commission released a Recommended Land Use Plan for the Peel Watershed in December 2009. After receiving proposed modifications from both the Government of Yukon and the affected First Nations in February 2011, the Planning Commission released its Final Recommended Land Use Plan for the Watershed on July 22, 2011. In February 2012, the Government of Yukon announced eight core principles to guide the modification and completion of the Peel Watershed Regional Land Use Plan, and in September 2012, it revealed new land use designations and four maps reflecting proposed new concepts for the land use plan. After consultation, the Government ultimately approved a Peel Watershed Regional Land Use Plan in January 2014. Relying on its s. 11.6.3.2 authority to “modify” the Planning Commission’s Final Recommended Plan as it applies to Non-Settlement Land, the approved Plan shifted the balance of protected land in the area from 80% to 29%.

The plaintiff First Nations partnered with two environmental organizations to bring this law suit alleging that the Government of Yukon had not acted in accordance with s. 11.6.3.2 of the Final Agreements. The Plaintiffs sought an order that the Government approved Peel Watershed

Regional Land Use Plan, dated January 2014, be quashed, as well as an order requiring the Government of Yukon to re-conduct the s. 11.6.3.2 Consultation with constraints on its ability to modify the Final Recommended Plan.

In its decision indexed as *The First Nation of Nyak Dun v. Yukon (Government of)*, 2014 YKSC 69, the Court grants the remedies sought by the Plaintiffs.

The land use planning process set out in Chapter 11 of the Final Agreements has a constitutional dimension by virtue of s. 35 of the *Constitution Act, 1982*. As treaties, the Final 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. The Final Agreements must be interpreted in a manner that furthers the objective of reconciliation between Aboriginal and non-Aboriginal societies.

The Final Agreements give Yukon First Nations certain rights in their Traditional Territories in exchange for the release of their claims to it. This includes a right to participate in the management of public resources. Chapter 11 encourages the development of a common land use planning process that applies to both Settlement and Non-Settlement Land in the Traditional Territories of the First Nations.

The approach to land use planning in Chapter 11 is consultative and collaborative and relies on an independent and objective Commission. The Government of Yukon is required to Consult, as that term is defined by the Final Agreements, with affected First Nations and affected Yukon communities in each of the Recommended and Final Recommended Plan reviews. In accepting, rejecting or proposing modifications in response to the Recommended Plan, the Government of Yukon must be responsive to the preceding Consultation. If the Government proposes modifications, it must provide written reasons. These reasons must be drafted with

some precision so that the Commission can reconsider the Recommended Plan and make a final recommendation addressing the proposed modifications. Once the Final Recommended Plan is released, the Government of Yukon must again Consult, following which it may accept, reject or modify the Final Recommended Plan. If the Government proceeds to modify the Final Recommended Plan, those modifications must be based on the proposed modifications with written reasons earlier put forward to the Planning Commission. Without this constraint, the Government could thwart the land use planning entirely by imposing new modifications that the Commission was not able to address.

In this case, the process adopted by the Government of Yukon in approving the Peel Watershed Regional Land Use Plan was not based upon a contextual interpretation of s. 11.6.0 of the Final Agreements. The plain reading interpretation endorsed by the Government does not enhance the goal of reconciliation and is inconsistent with the honour and integrity of the Crown.

The Government chose to propose modifications to the Recommended Plan in February 2011. Of the five modifications proposed, two simply stated a preference for more balance and increased options for access. This level of detail was insufficient for Consultation and lacked any tangible or practical guidance for the Planning Commission. To comply with the Final Agreements and respect the planning process, it was incumbent on the Government of Yukon at this stage to set out details about which Land Management Units it wanted zoned for increased access along with rationales and suggestions about mechanisms to accomplish this. These details should have been provided to the First Nations and the affected communities at the Consultation stage and their responses considered before the proposed modifications were submitted to the Planning Commission.

The modifications the Government made to the Final Recommended Plan at the final stage of the process in s. 11.6.3.2 did not flow from the valid proposed modifications communicated

earlier and did not respect the land use planning process set out in Chapter 11 of the Final Agreements.

The appropriate remedy is to return the matter to the point in the process where the error occurred. This was at the stage of Consultation with respect to the Final Recommended Plan. In the result, the January 2014 Government approved Peel Watershed Regional Land Use Plan is quashed. The Government of Yukon is required to hold final Consultations with the affected First Nations and affected communities under s. 11.6.3.2 of the Final Agreements, based on the modifications it proposed in sufficient detail at the earlier stage in the process. Any modifications to the Final Recommended Plan shall be limited to these proposed modifications, including the Government's 16-page detailed response attached to the modifications, but not the stated preference for more balance and increased options for access.

For questions about this document, please contact Andrea Bailey, Legal Officer, at 667-8637.