

Canadian Institute of Resources Law  
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**The Peel Watershed Case:  
Implications for Aboriginal Consultation  
and Land Use Planning in Alberta**

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## **The Peel Watershed Case: Implications for Aboriginal Consultation and Land Use Planning in Alberta**

“I am the land that listens, I am the land that broods;  
Steeped in eternal beauty, crystalline waters and woods. [...]  
Wild and wide are my borders, stern as death is my sway,  
From my ruthless throne I have ruled alone for a million years and a day; [...]  
Wild and wide are my borders, stern as death is my sway,  
And I wait for the men who will win me – and I will not be won in a day; [...]  
Lofty I stand from each sister land, patient and wearily wise,  
With the weight of a world of sadness in my quiet, passionless eyes;  
Dreaming alone of a people, dreaming alone of a day,  
When men shall not [plunder] my riches, and curse me and go away; [...]  
Dreaming of men who will bless me, of women esteeming me good,  
Of children born in my borders of radiant mother hood,  
Of cities leaping to stature, of fame like a flag unfurled,  
As I pour the tide of my riches in the eager lap of the world.”

- Robert William Service (1874-1958), *The Law of the Yukon*

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act; 1982. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

- Justice Binnie, *Beckman v Little Salmon/Carmacks First Nation*, 2010  
SCC 53 at para 10

## 1.0 Introduction

The Peel case (*Nacho Nyak Dun et al v Yukon*)<sup>1</sup> arises from a breakdown in the land use planning process for the Peel Watershed Region in the Yukon. The matter has been heard by the Yukon Supreme Court [YKSC] and Yukon Court of Appeal [YKCA], and was heard at the Supreme Court of Canada [SCC] on March 22, 2017. The Peel litigation is significant with respect to land use planning and consultation with First Nations, and more broadly in terms of procedural and substantial duties of First Nations consultation and the judicial remedy for breaches.

The SCC rendered a judgment on December 1, 2017, allowing the appeal in part, with costs awarded to the appellants. Characterizing the matter as judicial review of implementation of a modern treaty, the Court quashed the Yukon government's Final Plan, and returned consultation to s. 11.6.3.2 on the basis of a contextual reading of the Umbrella Final Agreement UFA].<sup>2</sup> An addendum to the SCC judgment is at the end of this paper.

Development of the Peel Watershed Regional Land Use Plan [PWRLUP] was underway from 2005 to 2014, to direct land use in a large, unpopulated and largely undeveloped area of the Yukon with potential for oil and gas and hard rock mineral development. The land use planning process is governed by a modern treaty: the respective Final Agreements [FAs] formed from the UFA, which govern a consultative and collaborative process to be followed in negotiating land use plans.<sup>3</sup> Under the FAs, an independent planning commission is appointed to create a recommended plan and a final recommended plan that the Yukon Government [Yukon] can approve, reject, or modify following consultation with First Nations in both steps. Yukon had provided general suggestions to the Commission regarding the first recommended plan, which differed from the first recommended plan beyond Yukon's earlier general comments. Notably, it included significantly reduced environmental protection.<sup>4</sup>

The YKCA released its judgment in November 2015,<sup>5</sup> and held that Yukon failed to uphold the terms of the prevailing treaties. It held that Yukon "failed to honour the letter and spirit of its treaty obligations"<sup>6</sup> contained in the Final Agreements in three ways: by failing to reveal their extensive plan modifications, by providing overly general comments, and in proposing a new plan at the final stage, thereby usurping the role of the independent Commission.<sup>7</sup> The court noted that while Yukon retains final authority over its land use plan, meaningful consultation with the First Nations is required.

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<sup>1</sup> *Nacho Nyak Dun YKSC*, *Nacho Nyak Dun CA*, *Nacho Nyak Dun SCC*, or collectively "Peel litigation" or "Peel case"

<sup>2</sup> *Umbrella Final Agreement between The Government of Canada, The Council for Yukon Indians, and The Government of Yukon* (29 May 1993), online: < [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al\\_ldc\\_ccl\\_fagr\\_ykn\\_umb\\_1318604279080\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf) > [UFA]

<sup>3</sup> In particular, duties of consultation described in the UFA sections 11.6.2 and 11.6.3.2

<sup>4</sup> Where the Final Recommended Plan included 80% Special Management Areas and 20% Integrated Management Areas (*Nacho Nyak Dun YKCA* at para 45-7), Yukon's new plan included 71% open for development and 29% protected areas (*Nacho Nyak Dun YKSC* at para 111 point 11)

<sup>5</sup> *The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18 (CanLII) [*Nacho Nyak Dun CA*]

<sup>6</sup> *Ibid* at 1, Summary and para 177

<sup>7</sup> *Ibid* para 177

The YKSC<sup>8</sup> and YKCA both found that Yukon breached its duty to consult in a meaningful process with the First Nations. The YKSC had ordered the matter be returned to the planning process, although at a more advanced stage in the process, thereby restricting Yukon's changes to those described in its earlier comments. The YKCA ordered the matter be returned to the planning process at the point in which the government's obligations were breached, that is, at the point of the comments on the first recommended plan. As a result, much of the multi-year planning process must now be redone. The Supreme Court of Canada heard the matter in March 2017.

Notably, the Peel case is not about environmental protection: conservation is a stakeholder motivation and matter of practical implication but is not the subject of litigation. The case is about treaty interpretation. Practical implications on conservation are in fact much reduced because Yukon's new governing party elected in late 2016 supports the principles of the plan endorsed by the applicant First Nation and conservation groups.

The issues in this litigation remain publicly important despite the change in Yukon's governing party, and are:

- 1) Whether Yukon breached treaty (this point is conceded before the SCC);
- 2) If Yukon breached treaty, what was the point of the breach;
- 3) If Yukon breached treaty, to what proper point in the consultation process should that process be returned; and
- 4) Treaty interpretation: whether Yukon has the ability to reject a final plan, and within that, what is demanded by the honour of the Crown in the context of prescribed consultation in a land use process within a modern treaty.

The Peel case has significant implications for Alberta, which has likewise been developing comprehensive land-use planning in recent years, under Alberta's *Land Use Framework* [LUF]<sup>9</sup> and *Alberta Land Stewardship Act* [ALSA]<sup>10</sup>. The case has implication for the way in which the Alberta Government [Alberta] should address the unresolved issue of cumulative effects management and provide direction for decision-making regarding multiple demands on a limited land base. Alberta is not governed by modern land claim agreements, but rather subject to numbered Treaties, nor are First Nations consultation processes so clearly described under Alberta's land use planning framework or implementation documents. However, the province is subject to constitutional requirements and common law, and has articulated its aboriginal consultation policy outside of the specific context of land use planning in the *First Nation Consultation Policy (2013)*<sup>11</sup> and related directions. Alberta is also continuing to develop land use plans of which First Nations consultation is a required but practically vague component.<sup>12</sup>

<sup>8</sup> *The First Nation of Nach Nyak Dun v. Yukon*, 2014 YKSC 69 [*Nacho Nyak Dun YKSC*]

<sup>9</sup> Government of Alberta, *Land-use Framework* (December 2008), online: <<https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20-%202008-12.pdf>> [LUF]

<sup>10</sup> Under the *Land Use Framework* (December 2008), *Alberta Land Stewardship Act*, SA2009, cA-26, and regional plans completed to date, being the *Lower Athabasca Regional Plan* and the *South Saskatchewan Regional Plan 2014-2024: an Alberta Land-use Framework Integrated Plan* (Alberta: 2014)

<sup>11</sup> *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resources Management, 2013*. See David Laidlaw and Monique Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook* (2014), CIRL Occasional Paper #44 for discussion [Laidlaw OP#44]

<sup>12</sup> See ALSA, s.52(2)(a) as well as terms within the LUF and SSRP, for example, which describe in general terms inclusion of aboriginal peoples in land-use planning, see also discussion *infra* at section 4.2

The adequacy of consultation with First Nations has arisen in the Alberta land use planning process, particularly surrounding the *Review Panel Report 2015: Lower Athabasca Regional Plan* [Review Panel Report 2015]<sup>13</sup> in response to six First Nations filing Requests for Review of the Lower Athabasca Regional Plan, in which they claimed the Plan fails to protect their Treaty and Aboriginal Rights.

This paper will review the Peel Watershed Region land use planning case, its significance, its court judgments, and its resulting implications for land use planning and Aboriginal consultation in the Yukon. It will then review the land use planning and Aboriginal consultation processes in Alberta, and explore the implications of the Peel case for Alberta in terms of Aboriginal consultation and land use planning. This paper will address issues including the status of land use planning consultation as a treaty right, procedural vs. substantive breaches of the duty to consult, and the potential for unilateral Crown decision-making in both contexts. The broader “spirit” of government obligation, the “honour of the Crown,” will also be considered in light of the Peel case.

## 2.0 Yukon Territory and Peel Region

### 2.1 Constitutional Context

The Yukon is one of three Territories in Canada. It borders Alaska, British Columbia, and Northwest Territories. The Yukon has a population of approximately 37,642 people and a size of 482,443 km<sup>2</sup>.<sup>14</sup>

As a territory, the Yukon lacks the powers constitutionally delegated to provinces under s.92 of the *Constitution Act*, but has its own legislature and courts system. The Yukon is considered a “devolved” territory as a result of changes to the *Yukon Act* in 2003 based on the *Yukon Northern Affairs Program Devolution Transfer Agreement* between Canada, Yukon, and First Nation groups, which granted Yukon responsibility for land and resource management.<sup>15</sup>

Much of the Yukon is governed by treaty. Yukon has negotiated many modern treaties with its First Nations. The 1993 UFA<sup>16</sup> between Canada, Yukon and the Council of Yukon First Nations, created a framework for negotiating Final Agreements with different First Nations.<sup>17</sup> 11 of 14 First Nations in Yukon have Final Agreements.<sup>18</sup> The UFA is non-binding but each Final Agreement [FA] in which the terms of the UFA are incorporated is a modern treaty, protected under s.35 of the *Constitution Act, 1982*. As Chief Justice Bauman noted:

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<sup>13</sup> Alberta, *Review Panel Report 2015: Lower Athabasca Regional Plan* (22 June 2015), online at: <[https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations\\_2016-06-22.pdf](https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations_2016-06-22.pdf)>

<sup>14</sup> Yukon Executive Council Office, *General Facts*, online: <<http://www.eco.gov.yk.ca/stats/1467.html>>

<sup>15</sup> Indigenous and Northern Affairs Canada, *Yukon Devolution*, online: <<https://www.aadnc-aandc.gc.ca/eng/1352470994098/1352471080537>>

<sup>16</sup> UFA, *supra* note 2

<sup>17</sup> See *Nacho Nyak Dun YKCA*, *supra* note 1 at para 7-13

<sup>18</sup> Yukon Aboriginal Relations, *Agreements with First Nations*, online: <<http://www.eco.gov.yk.ca/aboriginalrelations/agreements.html>>

Each of these Final Agreements is a “land claims agreement” within the meaning of s. 35(3) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11. As such, all rights held by these First Nations under the Final Agreements are treaty rights with constitutional protection (s. 35(1); *Little Salmon v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 2). In the Yukon, any law that is inconsistent with a Final Agreement is void to the extent of the inconsistency (*Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, s. 13(2)).<sup>19</sup>

Essential terms of these Final Agreements were described in *Little Salmon*<sup>20</sup> as:

Under the Yukon treaties, the Yukon First Nations surrendered their [undefined] Aboriginal rights in almost 484,000 square kilometres, roughly the size of Spain, in exchange for defined treaty rights in respect of land tenure and a quantum of settlement land (41,595 square kilometres), access to Crown lands, fish and wildlife harvesting, heritage resources, financial compensation, and participation in the management of public resources.<sup>21</sup>

Key concepts in the FAs with respect to the Peel litigation include Traditional Territory, subcategorized into “Settlement Land” and “Non-Settlement Land”.<sup>22</sup> Chief Justice Bauman noted, “At a very high level of generality, it can be said that First Nations have primary authority over Settlement Land while Yukon has primary authority over Non-Settlement Land. The [Peel litigation] involves Non-Settlement Land.”<sup>23</sup> Additionally, the UFA defines “Special Management Areas”, created “to maintain important features of the Yukon’s natural or cultural environment for the benefit of Yukon residents and all Canadians while respecting the rights of Yukon Indian People and Yukon First Nations.”<sup>24</sup> Chapter 11 of the UFA directs Land Use Planning, and its terms were incorporated into each relevant FA.

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<sup>19</sup> *Nacho Nyak Dun YKCA*, *supra* note 1 at para 8

<sup>20</sup> *Little Salmon*, *infra* note 111

<sup>21</sup> *Nacho Nyak Dun YKCA*, *supra* note 5 at para 9, citing *Little Salmon* at para 9

<sup>22</sup> *Ibid* at para 11ff

<sup>23</sup> *Ibid* at para 12

<sup>24</sup> *Ibid* at para 13, citing UFA s.10.1.1.

## 2.2 Peel Region



The Peel Watershed region [PWR] is a vast and largely uninhabited and pristine portion of northeastern Yukon. Of this region, Yukon controls 97.3% (Non-Settlement Land) and First Nations control 2.7% (Settlement Land), subject to Land Use Planning provisions of the FAs.<sup>26</sup>

The First Nations of Nacho Nyak Dun, Tr’ondëk Hwëch’in, Vuntut Gwitchin and Tetlit Gwich’in have Traditional Territory in the PWR.<sup>27</sup> The NWT Gwichin communities also hold traditional land in the region. Surrounding settlements include Keno, Mayo, Dawson City, and Fort McPherson.<sup>28</sup>

The PWR is “unusual in the Yukon, Canada and the world, as it is remote and relatively undeveloped in that it is largely devoid of roads and infrastructure.”<sup>29</sup> The region is 68,000km<sup>2</sup> in area and contains six major river systems: the Ogilvie, Blackstone, Hart, Wind, Bonnet plume, and Snake, all of which run into the Peel River which drains into the MacKenzie River into the Beaufort Sea.<sup>30</sup>

<sup>25</sup> Credit to Mining.com

<sup>26</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 10

<sup>27</sup> *Ibid* at para 6

<sup>28</sup> *Ibid* at para 6

<sup>29</sup> *Ibid* at para 9

<sup>30</sup> *Ibid* at para 5

Describing the PWR, CPAWS-Yukon describes “dramatic peaks and high plateaus, [...] sprawling river valleys and wetlands, [...] vast wilderness burst[ing] with animal and plant life [including] bears, wolves, lynx and caribou, [...] millions of boreal and migratory birds, [and] endemic plant species found nowhere else.”<sup>31</sup> The Guardian describes caribou populations, including the “barren-ground porcupine caribou herd, which makes the largest land mammal migration on Earth along routes that are 27,000 years old.”<sup>32</sup> The PWR contains renewable resources including “subsistence harvesting, trapping, big game outfitting, and recreational tourism.”<sup>33</sup>

### 2.3 Development Potential

Along with abundant wildlife and wilderness and renewable resources, the PWR contains undetermined wealth. Justice Veale noted “considerable interest in mineral development [and] two mineral deposits of significant economic size: the Crest iron deposit and the Bonnet Plume coal deposit. To a large extent the area is unexplored, but it is considered to have a large portion of the Yukon’s oil and gas potential.”<sup>34</sup> CPAWS-Yukon lists “mineral wealth [...] iron, ore, lead-zinc, copper, nickel, and uranium – as well as coal, oil and gas.”<sup>35</sup>

The history of the Peel Watershed Regional Land Use Plan [PWRLUP] coincided with federal developments with respect to Canada’s north as well as developments in devolution.<sup>36</sup>

Canada’s 2009 “Canada’s Northern Strategy: Our North, Our Heritage, Our Future”<sup>37</sup> set out Canada’s northern policy, with four priority areas, being:

- Exercising our Arctic sovereignty
- Protecting our environmental heritage
- Promoting social and economic development
- Improving and devolving Northern governance

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<sup>31</sup>CPAWS-Yukon, Peel Watershed, online: <<http://cpawsyukon.org/campaigns/peel-watershed> >

<sup>32</sup> Jason LaChappelle and Julia Duchesne, photographs by Peter Mather and Tyler Kuhn, “Protect the Peel: one of North America’s last wildernesses under threat – in pictures” (30 September 2016), online: The Guardian <<https://www.theguardian.com/global-development-professionals-network/gallery/2016/sep/30/protect-the-peel-one-of-americas-last-wildernesses-under-threat-in-pictures> >

<sup>33</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 7

<sup>34</sup> *Ibid* at para 8

<sup>35</sup> CPAWS-Yukon, Peel Watershed, online: <<http://cpawsyukon.org/campaigns/peel-watershed> >

<sup>36</sup> A detailed look at the federal and territorial context of Canada’s Northern Strategy, devolution and the Yukon land use planning is outside the scope of this paper, and I expressly do not draw conclusions in this regard, however, the timing is notable due to the relationship between Yukon and Canada. It is also worthy of note that federally, the Conservative party governing (the Harper Government) from 2006-2015 was replaced in 2015 by the Liberals, and current political priorities may have shifted. As discussed later in this paper, the Territorial government and policy has shifted during this time.

<sup>37</sup> Canada, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, *Canada’s Northern Strategy: Our North, Our Heritage, Our Future* (Ottawa: Minister of Public Works and Government Services Canada, 2009), online: Government of Canada <<http://www.northernstrategy.gc.ca/cns/cns-eng.asp>>1 [Canada’s Northern Strategy]

Components of the Northern Strategy included an increase in geographical oil and gas resource potential,<sup>38</sup> as well as promotion of sustainable development. The Strategy notes,

The Arctic on the cusp of change [...] Aboriginal people throughout the North have negotiated land claim and self-government agreements that give them the institutions and resources to achieve greater self-sufficiency. The increasing political maturity and certainty in the North are helping to encourage private sector companies to explore and develop the region's vast natural resources and to diversify the region's economies. [...] the enormous economic potential of the North is being unlocked. [...] International interest in the North has intensified because of the potential for resource development, the opening of new transportation routes, and the growing impacts of climate change [citing for example increased navigability of the Northwest Passage].<sup>39</sup>

In August 2012, changes to terms of devolution increased potential resource development revenue to Yukon from Canada, through amendments to the *Yukon Northern Affairs Program Devolution Transfer Agreement* and the 1993 *Canada-Yukon Oil and Gas Accord*.<sup>40</sup> Similar arrangements were made contemporaneously during devolution of the Northwest Territories.

### 3.0 The Peel Case

#### 3.1 Public Attention

The Peel case has been notable for the volume and intensity of public and activist interest it has generated and received. The PWRLUP history has involved often-dramatic issues regarding environmental protection, Aboriginal rights and law, treaty interpretation, political strategy, and to an extent, litigation strategy. These issues have affected each other, but are in fact separate. Public interest has largely surrounded environmental protection and Aboriginal rights, whereas the Peel litigation is about treaty interpretation, and specifically, judicial remedy for procedural breach of treaty. While the activist interest is distinct from the legal case discussed in this paper, it is worthy of mention as both a subject of land use planning, which has inherent political dimensions, and with respect to conservation of extant wilderness, which is inescapably a related subject. In addition to local and First Nation interest, the "Protect the Peel" campaign led apparently by CPAWS-Yukon and the Yukon Conservation Society<sup>41</sup> has included protests, marches, and petitions, as well as fundraising for litigation.

Protests had started by 2012, when a group from the Peel Youth Alliance protesting the government's approach in PWR planning held banners in the legislature that read "Our land. Our plan. Our government?" and refused to leave, forcing the Speaker to clear the room of MLAs, and another day when a gallery filled with protesters, many wearing T-shirts that said "Protect democracy, the plan, the Peel."<sup>42</sup> Then-Minister of Energy, Mines and Resources Brad

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<sup>38</sup> *Ibid*

<sup>39</sup> Canada's Northern Strategy, *supra* note 37 at 1

<sup>40</sup> Indigenous and Northern Affairs Canada, *Yukon Devolution*, online: < <https://www.aadnc-aandc.gc.ca/eng/1352470994098/1352471080537> >

<sup>41</sup> The fundraising to Protect the Peel goes to YCS – see [www.protectpeel.ca](http://www.protectpeel.ca)

<sup>42</sup> Roxanne Stasyszyn, "Peel protesters shut down legislature" (11 May 2012) Yukon News, online: < <http://www.yukon-news.com/news/peel-protesters-shut-down-legislature> >

Cathers “pointed out the polarization of the issue by noting that Tuesday saw the gallery filled with people who supported the government’s dismissal of the proposed land-use plan.”<sup>43</sup>

The Yukon Supreme Court decision refers to a consultant report dated around 2013 which noted in its conclusions,

There can be little doubt that Yukoners, Canadians and people from across the world are passionate about the future of the Peel Watershed. Overall 10,175 submissions were received over the course of public consultations and of those 2,781 originated in Yukon. And respondents were not limited to Canada or the United States, but represented virtually every corner of the globe, with submissions from individuals and organizations from North America, Europe, Asia and Australia.<sup>44</sup>

Following the release of Yukon’s Final Plan in January 2014, a demonstration was held in Whitehorse as well as several Yukon and NWT communities in opposition to the Final Plan and in support of litigation. The Yukon News noted, “at least 300 people came out to the Whitehorse rally Wednesday afternoon [January 29, 2014]. O Canada played over the speakers as a Protect the Peel flag was raised over the legislative building, between the Canadian and Yukon flags.”<sup>45</sup> That article noted that mining groups were also dissatisfied with overly restrictive conditions on development, but noted that then-Premier Pasloski was confident the Final Plan had found a “balance” and cited examples of other partnerships with First Nations.<sup>46</sup>

At the same time, there were protests across the Yukon, as well as the Northwest Territories. Protests were noted in the Northern Journal:

From Aklavik to Dawson City, protesters hit the frozen streets across the NWT and Yukon last week in protest of the Yukon Government’s new land use plan for the Peel watershed that opens the majority of the pristine area to industry for the first time.

Under the banner of “Protect the Peel,” hundreds marched in Inuvik, Aklavik and Fort McPherson last week, with sister demonstrations taking place across the border in Whitehorse and Dawson.

In Fort McPherson, over 200 elders, leaders, residents and children took part in a march on Thursday that ended with a traditional feast and sharing circle at the community lodge. [...]

All four impacted Aboriginal governments, including the Gwich’in Tribal Council, Na-cho Nyak Dun, Tr’ondëk Hwëch’in and Vuntut Gwitchin oppose the Yukon’s current plan.<sup>47</sup>

Writing about the Yukon Supreme Court hearing held in July 2014, Eva Holland wrote for Up Here magazine:

THE PEEL TRIAL was simultaneously an esoteric legal argument and a dramatic public spectacle. It drew elders and chiefs, activists and government bureaucrats, and a squadron of local media. It was the culmination of months of rallies and fundraisers—Climb-a-Thon for the Peel; Zipline for the Peel; Yoga for the Peel—

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<sup>43</sup> *Ibid*

<sup>44</sup> *Nacho Nyak Dun YKSC, supra* note 7 at para 99-100, citing a 27-page report entitled “Peel Watershed Regional Land Use Plan Public Consultation 2012-2013 What We Heard Report” (the “What We Heard Report”), prepared by J.P. Flament Consulting Services (undated)

<sup>45</sup> Jacqueline Ronson, “Pasloski responds to Peel protests” (31 January 2014) Yukon News, online: < <http://www.yukon-news.com/news/pasloski-responds-to-peel-protests/> >

<sup>46</sup> *Ibid*

<sup>47</sup> Meagan Wohlberg, “Gwich’in demand Peel River protection with protests across the North” (3 February 2014) Northern Journal, online: < <https://norj.ca/2014/02/gwichin-demand-peel-river-protection-with-protests-across-the-north/> >

and had already spawned a series of rival bumper stickers: the dominant “Protect the Peel,” the cheeky “Protect the Peelers,” and the ambivalent “Protect the Peel? Let’s Vote On It.”<sup>48</sup>

A special report in the Guardian described and explained the uniqueness of the Peel watershed and the passions around it:

The fate of the Peel watershed in northern Yukon is at the centre of an extended legal battle between the territorial government and First Nations. The case is one of many conflicts over natural resource development to test Canada’s commitment to reconciliation and indigenous rights.

With only a single road traversing the western edge of the watershed, the Peel is one of the most remote places in the world. Its rugged beauty attracts intrepid paddlers and other outdoor enthusiasts from across the world. The unspoiled wilderness of the Peel is an important source of tourism for the Yukon and could bring economic benefits to First Nations communities.

A recent study revealed that humans have destroyed a tenth of the Earth’s remaining wilderness in the last 25 years. As unspoiled places are disappearing before our eyes, northern Canada is one of the few remaining strongholds of vast, intact wilderness. ‘The environment is not for sale. Industry and the corporate world have got to realise that First Nations are adamant about land protection,’ says Simon Mervyn, chief of the First Nation of Na-Cho Nyak Dun.

‘Protect the Peel’ stickers can be seen everywhere in the Yukon, from the bumpers of cars and trucks to bicycle baskets, signposts, and, of course, canoes. The rivers and wildlife of the Peel have run wild and free since time immemorial. First Nations people, other Yukoners and visitors from around Canada and the world continue to rely on these wild lands for sustenance and solace in a changing world.<sup>49</sup>

### 3.2 Peel Watershed Regional Plan History

The PRWLUP planning process is prescribed under pertinent FAs. These FAs are based on the 1993 UFA signed between the Yukon First Nations, the Government of Canada, and the Government of the Yukon,<sup>50</sup> and, as modern treaties, are embedded in the Canadian Constitution and Yukon law. Chapter 11 directs land use planning and is appended hereto. Duration of the resultant Plan is somewhat indeterminate: the Final Recommended Plan suggests review within every 10 years, subject to agreement at the implementation stage,<sup>51</sup> and the Yukon Final Plan was to be reviewed when warranted, and assessment of whether review is warranted is to take place within 10 years.<sup>52</sup>

The approval process for land use planning under Chapter 11 involves the following steps:

#### 11.6.0 Approval Process for Land Use Plans

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<sup>48</sup> Eva Holland, “The Battle for the Peel”, Up Here, August 5, 2015: <http://uphere.ca/articles/battle-peel>

<sup>49</sup> Jason LaChappelle and Julia Duchesne, photographs by Peter Mather and Tyler Kuhn, “Protect the Peel: one of North America’s last wildernesses under threat – in pictures” (30 September 2016), online: The Guardian < <https://www.theguardian.com/global-development-professionals-network/gallery/2016/sep/30/protect-the-peel-one-of-americas-last-wildernesses-under-threat-in-pictures> >

<sup>50</sup> UFA, *supra* note 2

<sup>51</sup> Peel Watershed Planning Commission, *Final Recommended Peel Watershed Regional Land Use Plan* (Peel Watershed Planning Commission: 22 July 2011) [Final Recommended Plan]

<sup>52</sup> Yukon Final Plan, *infra* note 70 at 6-1

- 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:
  - 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.

The following table summarizes the relevant steps required under Chapter 11 and the events that unfolded in the PWRLUP history.<sup>53</sup>

Relevant Step under Chapter 11		Events	
11.4.1	Govt/FN agrees to establish a Regional Land Use Planning Commission [RLUPC] to develop a regional land use plan	2004	Land use planning in the Peel begins with the formation of the PWPC
11.4.4 & 11.6.1	RLUPC prepares and recommends to government and affected FN a regional land use plan within established timeframe	2008	PWPC releases Draft Recommended Plan, followed by further consultations and revisions
		2009	PWPC releases a revised Recommended Plan for the Peel Watershed, followed by further review
11.6.2	Government, after affected FN/community consultation, shall approve/reject/propose modifications to LUP applying on Non-Settlement Land	Feb 2011	Yukon and FNs propose modifications to Recommended Plan
11.6.3	If Government rejects/modifies recommended plan, it shall forward proposed modifications with written reasons to PWPC	Feb 2011	Yukon proposed 5 modifications: #1 & 2 were vague Access & Development modifications
11.6.3.1	RLUPC reconsiders plan and makes final recommendation for LUP to Government	July 22, 2011	PWPC releases Final Recommended Plan in July; accepted by the four First Nations involved
11.6.3.2	Government approves/rejects/modifies LUP applying on Non-Settlement Land, after Consultation with affected FN/communities	Feb 2012	Yukon announces intentions to modify the Final Recommended Plan and soon after presents eight core principles to guide decisions on how to regulate land use in the Peel
		Sept 2012	Yukon reveals new land use designations for PWR and four maps reflecting proposed new concepts for LUP
		2013	Yukon-led consultation with communities and general public on the Final Recommended Plan and proposed land designations ends on February 25, consultation specifically with First Nations continues after this
		January 20, 2014	Yukon announces Yukon Final Plan

<sup>53</sup> The Events portion of this table is built on and modified from Staples, *infra* note 131 at 147

In 2004, the Yukon government initiated the Peel River Watershed land use planning by establishing the Peel Watershed Planning Commission [PWPC]. The PWPC was made up of six people: two nominated by the affected First nations, two nominated by Yukon, and two agreed upon by both parties.<sup>54</sup> The relevant First Nations were the Nacho Nyak Dun and the Tr'ondëk Hwëch'in, both of which have traditional territory within the Watershed.<sup>55</sup>

From 2005 to 2009, the PWPC operated, public consultations continued and reports were prepared.

A Draft Plan was prepared which attempted to compromise and balance development and conservation, but “no one wanted this”, so the PWPC shifted focus to an “ecosystem-based and compatible land use” approach.<sup>56</sup>

On December 2, 2009, the PWPC released the initial Recommended Plan.

On January 25, 2010, the parties signed a “Joint Letter of Understanding on Peel Watershed Regional Land Use Planning Process”<sup>57</sup>

On January 20, 2011, the parties entered into a second Joint Letter of Understanding regarding consultation on the Final Recommended Plan<sup>58</sup>

On February 18, 2011, all parties provided a joint response to the Chair of the Senior Liaison Committee (ie to the PRPC). A joint First Nations response was also dated February 18, 2011.

On February 21, 2011, Yukon proposed modifications to the Recommended Plan. Here, “Yukon opted to provide only brief, non-specific comments requesting more ‘balance’ between conservation and development and greater access to existing mineral claims.”<sup>59</sup> These modifications were summarized as below and termed at Court “Yukon proposed modifications 1 through 5” with the first two the “Access and Development modifications”. The letter attached a 16-page “Detailed Yukon Government Response to the Recommended Peel Watershed Plan”.

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.
3. Simplify the proposed land management regime by re-evaluating the number of zones, consolidating some of the land management units and removing the need for future additional sub-regional planning exercises.
4. Revise the plan to reflect that the Parties are responsible for implementing the plan on their land and will determine the need for plan review and amendment.

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<sup>54</sup> Pursuant UFA s.11.4.0

<sup>55</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 39

<sup>56</sup> *Ibid* at para 53-4

<sup>57</sup> *Ibid* at para 64

<sup>58</sup> *Ibid* at para 81

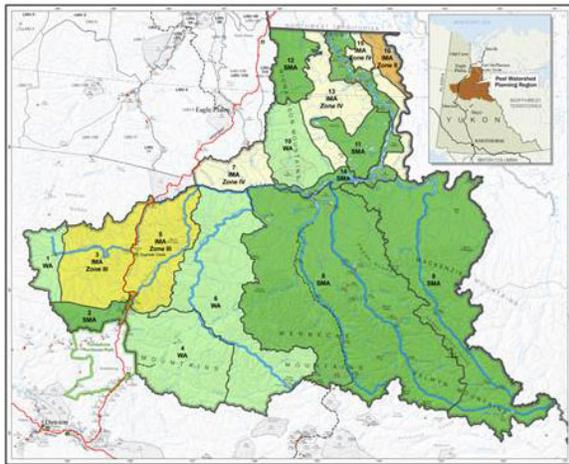
<sup>59</sup> Jeff Langlois & Claire Truesdale, “Yukon Court of Appeal kills Yukon’s Peel Watershed plan, but parties sent back to the drawing board” (4 November 2015), online: JFK Law <<http://www.jfklaw.ca/yukon-court-of-appeal-kills-yukons-peel-watershed-plan-but-parties-sent-back-to-the-drawing-board/>>

5. Generally, develop a clear, high level and streamlined document that focuses on providing long term guidance for land and resource management.

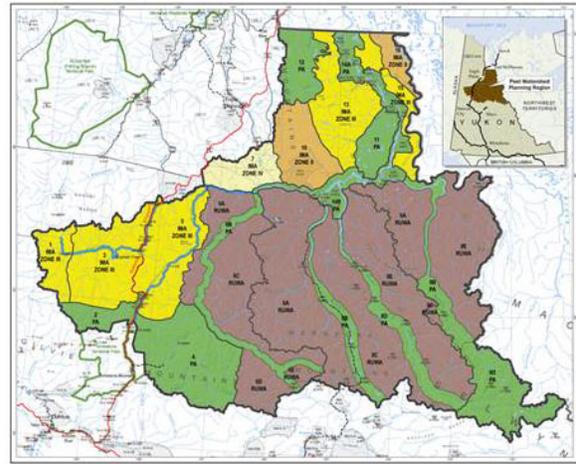
We understand that the Parties' responses to the plan will require significant deliberation by the Commission in considering its work ahead. Modifying the plan will take time and resources, and we look forward to working with the Commission in developing a reasonable work plan, timeline, and associated budget for completion of a Final Plan. Our Technical Working Group (TWG) member should be contacted if the Commission wishes further elaboration on any part of the response or technical references therein<sup>60</sup>

On July 22, 2011, the PWPC issued their Final Recommended Plan, which recommended 80% of the PWR be protected and 20% open for development. They incorporated some of Yukon's comments, but noted that

[Yukon's response] stated in general terms what it wanted, but it did not discuss why it wanted these changes and where it felt they might be appropriate. [...] The Commission noted these general desires and interpreted the thrust of the Yukon Government response to be the amount of land protected. For the Commission to adequately address this general critique, it would have to go 'back to the drawing board' and return to a much earlier stage in the planning process, a step for which there was no provision.<sup>61</sup>



**Final Recommended Plan**



**Yukon Government Plan**

(maps appended to *Nacho Nyak Dun YKSC* judgment)

On February 14, 2012, Yukon announced eight core principles to guide the PRWLUP, which were to "guide strategic modifications to the draft Peel Plan."<sup>62</sup> The principles were:

1. Special Protection for Key Areas
2. Manage Intensity of Use
3. Respect the First Nation Final Agreements
4. Respect the Importance of all Sectors of the Economy
5. Respect Private Interests
6. Active Management
7. Future Looking
8. Practical and Affordable<sup>63</sup>

<sup>60</sup> As quoted in *Nacho Nyak Dun YKSC*, *supra* note 8 at para 73

<sup>61</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 79, quoting the Commission response to Yukon proposed modifications

<sup>62</sup> *Ibid* at para 86

<sup>63</sup> *Ibid* at para 86

Correspondence between the parties followed, in which the First Nations indicated their objection to Yukon's response to the Final Recommended Plan, and Yukon indicated their belief in their appropriate conduct.<sup>64</sup>

On September 14, 2012, Yukon provided the PWRLUP "update" to the Senior Liaison Committee (PWPC), including new land use designations and maps "reflecting proposed new concepts for the land use plan."<sup>65</sup> It changed the planning tool of Landscape Management Units, Special Management Areas, and Integrated Management Areas, to a new land use designation system – replacing Conservation Area designation with Protected Area designation, adding new designation entitled Restricted Use Wilderness Areas (RUWA).<sup>66</sup>

On October 23, 2012, Yukon issued a News Release regarding public consultation up to February 25, 2013, and provided Notice of Consultation to First Nations groups.<sup>67</sup>

On January 20, 2014, following consultation, the Yukon government approved the *Peel Watershed Regional Land Use Plan* [Yukon Final Plan],<sup>68</sup> "relying on its s.11.6.3.2 authority to 'modify' the Final Recommended Plan as it applies to Non-Settlement Land [thereby] shift[ing] the balance of protected land in the area from 80% to 29%."<sup>69</sup>

On January 21, 2014, a Yukon News Release stated:

This land use plan creates vast new Protected Areas that total 19,800 square kilometres," Minister of Environment Currie Dixon said. "This will increase the amount of land protected in Yukon to almost 17 per cent of its land base, greater than any other province or territory in Canada.

By creating protected areas along the corridors of the Peel, Hart, Wind, Bonnet Plume and Snake Rivers, this land use plan responds to the wilderness tourism values in the region," Minister of Tourism and Culture Mike Nixon said. "The creation of new Wild River Parks means the stunning views and wilderness experience of the rivers will be protected for Yukoners and visitors alike.

Protected Areas make up 29 per cent of the region, while the remaining public land in the region is divided between 44 per cent of the Restricted Use Wilderness Areas, which allow for low levels of carefully managed land use activity, and 27 per cent of Integrated Management Areas, where most land use activities may occur. In the latter two types of areas, mineral staking and proposed commercial activities will be subject to enhanced regulatory and permit processes.

As of tomorrow, the Yukon government has replaced the temporary mineral claim staking withdrawal with a permanent staking withdrawal in the Protected Areas, as outlined in the land use plan. Staking is now permitted in 71 per cent of the Peel Watershed region.<sup>70</sup>

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<sup>64</sup> *Ibid*

<sup>65</sup> YKSC media summary, *infra* note 70 and *Nacho Nyak Dun YKSC*, *supra* note 8 at para 89

<sup>66</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 86

<sup>67</sup> *Ibid* at para 86

<sup>68</sup> Yukon, *Peel Watershed Regional Land Use Plan* (Yukon Government: January 2014)

<sup>69</sup> Supreme Court of Yukon, *Media Summary: The First nation of Nacho Nyak Dun v Yukon (Government of)*, 2014 YKSC 69, online: <

[http://www.yukoncourts.ca/judgements/supreme/2007/2014\\_yksc\\_69\\_the\\_first\\_nation\\_of\\_nacho\\_nyak\\_dun\\_v\\_government\\_of\\_yukon\\_media\\_summary.pdf](http://www.yukoncourts.ca/judgements/supreme/2007/2014_yksc_69_the_first_nation_of_nacho_nyak_dun_v_government_of_yukon_media_summary.pdf) > [YKSC media summary]

<sup>70</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 110

On January 27, 2014, litigation commenced.

### 3.3 Litigation

The Yukon government proposed its Yukon Final Plan on January 20, 2014. On January 27, 2014, the First Nation of Nacho Nyak Dun, the Tr'ondëk Hwëch'in, Yukon Chapter-Canadian Parks and Wilderness Society, Yukon Conservation Society, Gill Cracknell (Executive Director of CPAWS), and Karen Batigilis (Executive Director of YCS) together commenced an action against the Government of Yukon. Gwich'in Tribal Council (NWT) intervened in support of the plaintiffs, as they have traditional territory in Yukon. The case was heard before the Yukon Supreme Court July 7-10, 2014. A decision was released December 2, 2014 by Justice Ron Veale, in favour of the Plaintiffs.<sup>71</sup> Yukon appealed, and the matter was heard by the Yukon Court of Appeal August 20-21, 2015. The Vuntut Gwitchin First Nation was added as a Respondent to the appeal. Judgment was made by the Yukon Court of Appeal on November 4, 2015, with reasons by Chief Justice Bauman, largely in favour of Yukon.<sup>72</sup> The First Nations and conservation groups sought leave to appeal to the Supreme Court of Canada. Leave was granted. The Attorney General of Canada and the Council of Yukon First Nations have been added as Interveners at the Supreme Court of Canada. Despite a major shift in substantive political position in the Yukon government due to a 2016 territorial election, the matter is proceeding and factums have been filed. The matter was heard by the Supreme Court of Canada March 22, 2017.<sup>73</sup>

The Yukon Supreme Court held that the Yukon government had breached its treaty obligations, quashed the Yukon Final Plan, and directed the parties to return to the s.11.6.3.2 stage in the planning process. The Yukon Court of Appeal held that Yukon had breached its treaty obligations, quashed the Yukon plan, and directed the parties to return to the s.11.6.2 stage in the planning process. At issue before the Supreme Court of Canada is at what point did the Yukon government breach its procedural obligations, at what point the matter should be returned, and whether Yukon has the ability to reject a final recommended plan.

The subject of this litigation is not and has not been the substantive contents of the LUP, including its proportions of conservation and development. The subject of litigation is procedural compliance with the terms of the modern treaties in place during the land use planning process, with determination of obligations arising in treaty interpretation. There are implications with respect to final decision making powers on the part of Yukon and First Nation parties to the process. As the YKSC noted, “[t]o be clear, the role of the Court in this proceeding is not to determine whether more or less protection for the [PWR] is appropriate. Rather, the Court’s job is to interpret whether the planning process envisioned in the [FAs] has been followed and to determine the appropriate remedy if it has not.”<sup>74</sup>

#### 3.3.1 Yukon Supreme Court: *The First Nation of Nacho Nyak Dun v. Yukon*, 2014 YKSC 69

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<sup>71</sup> *Nacho Nyak Dun YKSC*, *supra* note 8

<sup>72</sup> *Nacho Nyak Dun YKCA*, *supra* note 5

<sup>73</sup> *The First Nation of Nacho Nyak Dun v. Yukon*, SCC File No. 36779 [*Nacho Nyak Dun SCC*]

<sup>74</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 11

At the Yukon Supreme Court, the affected First Nations and two conservation societies along with their executive directors, namely The First Nation Nacho Nyak Dun, the Tr'ondëk Hwëch'in, Yukon Chapter-Canadian Parks and Wilderness Society, Yukon Conservation Society, Gill Cracknell (Executive Director of Yukon CPAWS), and Karen Baitgalis (Executive Director of YCS), together the Plaintiffs, with the Gwich'in Tribal Council (NWT) intervening, filed a claim against the Defendant Government of Yukon.

The Plaintiffs alleged that the Yukon government breached s.11.6.3.2 of the Final Agreements. They sought an order that the Yukon Final Plan be quashed, and that the process be remitted for consultation at the s.11.6.3.2 stage with Yukon being restricted in its ability to modify the Final Recommended Plan.<sup>75</sup>

The Plaintiffs argued that by a purposive interpretation required by contextual interpretation,<sup>76</sup> s.11.6.3.2 permits the Yukon government only to address the modifications proposed under s.11.6.2. Further, they argued the Yukon's proposed Access & Development modifications were invalid due to vagueness.<sup>77</sup> The court summarizes, "the plaintiffs submit that the Government of Yukon has gone off on a 'frolic of its own' and essentially replaced the Final Recommended Plan with a new plan, through a process that is not contemplated in s.11.6.0."<sup>78</sup>

The Yukon government argued that it had not breached the process outlined in Chapter 11. They argued they retain the right to approve, reject, or modify the Final Recommended Plan "without any restriction imposed by the process",<sup>79</sup> and that a plain reading of s.11.6.3.2 allowed them to retain decision-making power over Non-Settlement Land (likewise for First Nations with respect to Settlement Land).<sup>80</sup> Under the FAs, the Final Recommended Plan requires Yukon's approval.<sup>81</sup> The court describes Yukon's position as follows:

The complexity with which the Plaintiffs have attempted to clothe these straightforward provisions masks a simple reality – on Non-Settlement Land the Government has the final word. The fact that on a plain reading of Article 11.6.3.2 the Government can modify the Final Recommended Plan, irrespective of what position the Government took on the Recommended Plan, demonstrates the simplicity of this case.<sup>82</sup>

In the alternative, the Yukon government argued that its modifications at s.11.3.2 were consistent with its proposed modifications at s.11.6.3.2.

The Court reviewed the law around modern land claims agreements and the honour of the Crown. Modern treaties exist as constitutional documents under section 35 of the *Constitution Act, 1982*.

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<sup>75</sup> YKSC Media Summary, *supra* note 70

<sup>76</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 113, citing *Reference re Senate Reform*, 2014 SCC 32 at para 26

<sup>77</sup> *Ibid* at para 113

<sup>78</sup> *Ibid* at para 114

<sup>79</sup> *Ibid* at para 117

<sup>80</sup> Citing the *Interpretation Act*, RSY 2002 c125, which requires a fair, large and liberal interpretation to attain the object of s.11.6.0.

<sup>81</sup> Citing UFA, *supra* note 2 at s.11.7.1 "Implementation": S.11.7.1 Subject to 12.17.0 [refers to Yukon Development Assessment Board], Government shall exercise any discretion it has in granting an interest in, or authorizing the use of, land, water or other resources in conformity with the part of a regional land use plan approved by Government under 11.6.2 or 11.6.3.

<sup>82</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 116

They reviewed the principles listed in *Little Salmon*. The standard of review was correctness for a question of breach of the honour of the Crown as a constitutional obligation of government.<sup>83</sup>

The Yukon Supreme Court found for the Plaintiffs. The treaties must 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.”<sup>84</sup> The “process adopted by Yukon in approving the PWRLUP 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.”<sup>85</sup> The proper remedy is to return the matter to the point at which the breach occurred. This point was s.11.6.3.2. As a result, the Yukon Final Plan is quashed, and their future final plan will be restricted in content. “Any modifications to the Final Recommended Plan shall be limited to these proposed modifications (3,4,5), 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.”<sup>86</sup>

### **3.3.2 Yukon Court of Appeal: *The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18**

Yukon appealed the Supreme Court’s declaration that it breached its treaty obligations under the Peel Watershed regional land use planning process, and related orders.

The Yukon government submitted that the YKSC erred in finding it had breached the FAs. Alternatively, if it did breach FAs, the YKSC erred in returning the process to s.11.6.3.2 rather than s.11.6.2. Yukon argued that its power under s.11.6.3.2 to modify the Final Recommended Plan was unconstrained: it is not expressly limited by language, and this interpretation fosters reconciliation because it keeps issues open for consultation – the alternative could create problems for example if the planning commission created a dramatically different Final Recommended Plan, or if there was a change in government between the stages.<sup>87</sup> In the alternative, Yukon did not breach its treaty obligations because its Final Plan was consistent with its proposed modifications (the valid Development & Access Modifications) brought forward under s.11.6.2. In the alternative, Yukon argued that if it breached the FAs and those modifications proposed at s.11.6.2 were invalid, the YKSC erred in returning the matter to s.11.6.3.2 rather than s.11.6.2.

The Respondent First Nations and conservationists (Plaintiffs at the YKSC) argued the Yukon’s interpretation rendered the process of dialogue and consultation leading to s.11.6.3.2 meaningless.<sup>88</sup> They took the position that “Yukon has authority to shape the plan for Non-Settlement Land, but this authority must be exercised through the treaty process.[...] The exchange at s.11.6.2 of proposed modifications and accompanying reasons is the heart of the process, it is not simply an opportunity to ‘blow off steam’. [...] Yukon

<sup>83</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 136

<sup>84</sup> Peel YKSC Media Summary, *supra* note 70

<sup>85</sup> Peel YKSC Media Summary, *supra* note 70 and *Nacho Nyak Dun YKSC*, *supra* note 8 at para 182-3

<sup>86</sup> Peel YKSC Media Summary, *supra* note 70

<sup>87</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 106

<sup>88</sup> *Ibid* at para 107

disregarded the process, and, in imposing its Final plan, left unfulfilled the broader purpose of the Final Agreements: long-term reconciliation.”<sup>89</sup> The Respondents maintained that the Development and Access modifications proposed at s.11.6.2 were invalid. They argued that Yukon had unconstrained power to propose modifications at s.11.6.2, but proposals at s.11.6.3.2 were limited to finalizing those proposed at s.11.6.2 as they had been considered by the PWPC.<sup>90</sup>

The Court of Appeal differed from the Supreme Court in their finding of the point of breach by Yukon. Where the Supreme Court found that the breach was at point 11.6.3.2, the Court of Appeal found that the breach took place at s.11.6.2, when Yukon proposed the vague Development and Access modifications. These proposed modifications were not a valid exercise under s.11.6.2.<sup>91</sup>

The Court of Appeal allowed Yukon’s appeal in part, finding that Yukon had breached the FA and the process should be returned to the point of breach, being the stage at s.11.6.2. “Yukon failed to honour the letter and spirit of its treaty obligations, [...] effectively [denying] the Commission performance of its treaty role to develop a land use plan.”<sup>92</sup> It failed in three ways: at s.11.6.2, by failure to reveal extensive plan modifications; when Development and Access modifications were not accompanied by requisite reasons or details; and at s.11.6.3.2 when the proposed plan disconnected from earlier s.11.6.2 proposals.<sup>93</sup>

However, the Yukon Court of Appeal qualified the “actual bargain struck,” in treaty, namely “that qualification flows from s.11.4.0 which contemplates the creation of Regional Land Use Planning Commissions [at the initiation of Yukon].”<sup>94</sup> “It was Yukon’s failure to properly exercise its right to provide modifications that derailed the dialogue essential to reconciliation as envisioned in the Final Agreements. This derailment of the dialogue is where Yukon’s failure began, and marks the point to which the process must be returned. That point is s.11.6.2.”<sup>95</sup> The YKCA disagreed with the YKSC that remitting process to the s.11.6.2 stage would allow Yukon to benefit from its breach.

The Court of Appeal added that Yukon did have the final say: with respect to the breach at s.11.6.2, Yukon’s actions at the s.11.6.2 stage did not preclude a potential rejection at the s.11.6.3.2 stage. Chief Justice Bauman wrote: “I do not accept the judge’s view that the proposal of modifications under s.11.6.2 implicitly means that Yukon has approved the other parts of the recommended plan such that it has in effect lost its right to “reject” the Final Recommended Plan under s.11.6.3.2.”<sup>96</sup>

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<sup>89</sup> *Ibid* at para 107

<sup>90</sup> *Ibid* at para 105

<sup>91</sup> *Ibid* at para 177

<sup>92</sup> *Nacho Nyak Dun YKCA*, *supra* note 5 at headnote summary

<sup>93</sup> *Ibid*

<sup>94</sup> *Ibid* at para 129

<sup>95</sup> *Ibid* at para 114

<sup>96</sup> *Ibid* at para 113

### 3.3.3 Yukon Government Change

It is particularly notable in this matter that the Yukon Territorial Government has changed during the course of this litigation. An election in November 2016 replaced the Yukon Party,<sup>97</sup> which had been in power since 2002, with the Yukon Liberal Party. The Liberals took a campaign position of accepting the Final Recommended Plan. This position was listed three times in their 2016 Platform Booklet, with respect to sustainable development, environment, and collaboration with First Nations.<sup>98</sup> It was reiterated in Premier Silver's January 2017 mandate letters to the Ministers of Energy, Mines, and Resources, and Environment, to work with each other and "collaborat[e] with First Nations on steps towards accepting the final report of the original Peel Watershed Planning Commission pending the outcome of the Supreme Court of Canada decision."<sup>99</sup>

The change in government is expected to dramatically change substantive land use planning efforts in the region, particularly with respect to conservation ratios and areas. However, the Peel litigation is ongoing. The appellant First Nations and conservation groups have not withdrawn the appeal, and Yukon has committed to defending it.

CPAWS-Yukon announced after the election that they would be continuing the suit, because of its importance in setting precedent. They wrote, "the ruling will provide certainty for all land use planning processes in the territory moving forward and set a precedent for the entire country."<sup>100</sup>

A Yukon announcement on the filing of their Factum January 19, 2017 indicated

The Supreme Court decision will provide all parties with clarity on land use planning and will enable us to continue the land use planning process in Yukon and finalize a Peel land use plan. The Yukon government continues to support the principles of the final recommended plan developed by the original Peel Watershed Planning Commission.<sup>101</sup>

Justice Minister Tracy-Anne McPhee, Premier Sandy Silver and Yukon government lawyer Mark Radke clarified in a media briefing that they could not at this point accept the Final Recommended Plan: rather, the parties will have to return to the point to which the SCC directs it, that is, to complete the consultative process as provided for by treaty and democratic process.<sup>102</sup> They noted

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<sup>97</sup> The Yukon Party was known as the Yukon Progressive Conservative Party prior to 1992

<sup>98</sup> Yukon Liberals Platform Booklet October 25, 2016, online: < [https://d3n8a8pro7vhmx.cloudfront.net/ylp/pages/630/attachments/original/1477425081/Yukon\\_Liberals\\_Platform\\_Booklet\\_Oct\\_25\\_2016.pdf?1477425081](https://d3n8a8pro7vhmx.cloudfront.net/ylp/pages/630/attachments/original/1477425081/Yukon_Liberals_Platform_Booklet_Oct_25_2016.pdf?1477425081) >

<sup>99</sup> Letter from Premier Sandy Silver to The Honourable Ranj Pillai (6 January 2017), online: <[http://www.yukonpremier.ca/pdf/The\\_Honourable\\_Ranj\\_Pillai.pdf](http://www.yukonpremier.ca/pdf/The_Honourable_Ranj_Pillai.pdf)> and Letter from Premier Sandy Silver to The Honourable Pauline Frost (6 January 2017), online: < [http://www.yukonpremier.ca/pdf/The\\_Honourable\\_Pauline\\_Frost.pdf](http://www.yukonpremier.ca/pdf/The_Honourable_Pauline_Frost.pdf) >

<sup>100</sup> CPAWS Yukon, "CPAWS Yukon congratulates Yukon Liberals; looks forward to Peel protection" (10 November 2016), online: CPAWS Yukon < <http://cpawsyukon.org/news/cpaws-yukon-congratulates-yukon-liberals-looks-forward-to-peel-protection> >

<sup>101</sup> Government of Yukon, News Release #17-007, "A statement from the Government of Yukon regarding the Peel regional land use planning case" (19 January 2017), online: < <http://www.gov.yk.ca/news/17-007.html#.EWIQnhsrLIU> >

<sup>102</sup> Government of Yukon, Media Briefing, "A statement from the Government of Yukon regarding the Peel regional land use planning case" (19 January 2017), posted on *Government of Yukon*, online: Facebook < <https://www.facebook.com/yukongov/videos/1149379158509869> >

that the matter was now before the Supreme Court of Canada as it includes matters of national importance, and also that the litigation strategy may have been different if Yukon had been appellant rather than respondent at the SCC.

For clarity, the continuing litigation surrounds matters of treaty interpretation with respect to the land use planning process, and does not commit the parties to substantive outcomes. This is particularly notable in light of the public interest in the matter, as discussed above. Yukon News noted, “While much of the public face of the case has been about protecting the wilderness, from a legal perspective the Peel case is actually about the interpretation of agreements between the Yukon government and First Nations.”<sup>103</sup> The Yukon Conservation Society expects the Liberal government to satisfy its promises of protection of the Peel watershed.<sup>104</sup> While Yukon Party critics described Yukon’s position as a flip-flop, the current Executive Director of CPAWS-Yukon explained in an interview that the continuation in litigation is expected and separate from issues of conservation, saying:

I don't think it necessarily contradicts the position that they've had, leading up to now, [...] The reality is, in a case like this they had to produce an argument that was essentially robust and supportive of the Yukon Court of Appeal, so the arguments that they've produced don't surprise us. [...] Once we are through the Supreme Court of Canada process, there's nothing stopping them from going through and protecting 80 per cent of the Peel watershed as they have promised and made some very strong commitments to do.<sup>105</sup>

### 3.3.4 Supreme Court of Canada: *The First Nation of Nacho Nyak Dun v. Yukon*, SCC File No. 36779

At the time of writing this paper, this matter was heard March 22, 2017. Appellant and Respondent facta have been filed, as have Intervener facta. A decision is expected approximately six months after the hearing.<sup>106</sup>

The First Nations and conservation groups appealed the YKCA decision. Yukon is respondent. The Attorney General of Canada and the Council of Yukon First Nations have been added as Intervenors.

There are three issues before the Supreme Court of Canada. The lower courts agreed that the Yukon government breached provisions of Chapter 11, and the Yukon Final Plan should be quashed, and agreed that the matter should be remitted to the stage in the process in which the breach took place. Yukon is no longer arguing that it did not breach its obligations under the FAs.

<sup>103</sup> Ashley Joannou, “Yukon government files its Peel arguments with the Supreme Court of Canada” (20 January 2017) Yukon News, online: < <http://yukon-news.com/news/yukon-government-files-its-peel-arguments-with-the-supreme-court-of-canada/> >

<sup>104</sup> Chuck Tobin, “YCS has faith in Grits’ pledge on Peel” (20 January 2017) Whitehorse Star, online: < <http://www.whitehorsestar.com/News/ycs-has-faith-in-grits-pledge-on-peel> >

<sup>105</sup> Cheryl Kawaja & Paul Tukker, “Yukon gov’t: accepting Peel plan not an option at this time” (19 January 2017) CBC News, online: < <http://www.cbc.ca/news/canada/north/peel-watershed-scoc-appeal-yukon-liberal-government-1.3943091> >

<sup>106</sup> Yukon, *Peel land use plan court case*, online: Executive Council Office < [http://www.eco.gov.yk.ca/peel\\_watershed\\_court\\_challenge.html](http://www.eco.gov.yk.ca/peel_watershed_court_challenge.html) >

The appellants seek to restore the YKSC ruling, and the respondent Yukon seeks to dismiss the appeal, restoring the YKCA ruling. The three issues before the SCC are:

- 1) When did Yukon's breach occur?
  - a. The Appellants take the position that the YKCA erred in determining the breach began at the s.11.6.2 stage.
  - b. Yukon takes the position that the breach occurred at the s.11.6.2 stage.
- 2) What remedy is appropriate for this breach?
  - a. The Appellants take the position that the YKCA erred in remitting the matter to the s.11.6.2 stage.
  - b. Yukon takes the position that the YKCA was correct in remitting the matter to the s.11.6.2 stage.
- 3) What rights do the parties have under the Final Agreement at the final stage of the land use planning approval process?<sup>107</sup>
  - a. The Appellants take the position that Yukon's decision to propose modifications at s.11.6.2 stage deprived it of the ability to reject the Final Recommended Plan. Justice Veale had determined that Yukon was limited to approve or modify only after s.11.6.2, but Chief Justice Bauman had expressly disagreed, finding that Yukon retained a right to reject the Final Recommended Plan notwithstanding an earlier proposal of modifications.
  - b. Yukon takes the position that it retains the ability at the end of the process to approve, modify, or reject the final recommended plan as it applies to Non-Settlement Land (and likewise for First Nations on Settlement Land).

The question of whether the third issue was properly before the Court of Appeal is a relatively technical point, but determines whether the SCC can make a ruling on it – it may decline. The Appellants say it was, as the YKCA formal order expressly allowed the appeal on that portion of the trial judge's order.<sup>108</sup> The Respondent Yukon says it was not directly before the Court, as it arises from the YKCA reasons only, not in the YKCA or YKSC findings, and may have no practical bearing on the case at hand.<sup>109</sup>

The Interveners Council of Yukon First Nations and Gwich'in Tribal Council largely supported the appellants. The Council of Yukon First Nations took the position that wherever the breach occurred, the matter would be better returned to the s.11.6.3.2 stage, as that would further reconciliation.<sup>110</sup> The Intervener Gwich'in Tribal Council took the position preferring the YKSC remedy, considering the remedy in terms of advancing reconciliation, and expressing concerns

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<sup>107</sup> As articulated by the *Nacho Nyak Dun SCC Respondent Factum*, *infra* note 110

<sup>108</sup> *First Nation of Nacho Nyak Dun, et al v Government of Yukon*, SCC File No. 36779, Factum of the Appellants, Government of Yukon (19 October 2016) [*Nacho Nyak Dun SCC Appellant Factum*] at para 54

<sup>109</sup> *First Nation of Nacho Nyak Dun, et al v Government of Yukon*, SCC File No. 36779, Factum of the Respondent, Government of Yukon (19 January 2017), online: < <http://www.eco.gov.yk.ca/pdf/Peel-YG-Factum-Jan19-2017.pdf> > [*Nacho Nyak Dun SCC Yukon Factum*] at para 8-9

<sup>110</sup> *First Nation of Nacho Nyak Dun, et al v Government of Yukon*, SCC File No. 36779, Factum of the Intervener, Council of Yukon First Nations (23 February 2017) [*Nacho Nyak Dun SCC Intervenor YCFN Factum*]

about allowing Yukon to “re-do” steps already done.<sup>111</sup> The Intervener Attorney General of Canada, however, declined to take a position on the questions on appeal as articulated, rather setting out principles for the SCC to follow: treaty interpretation to be broad, purposive, and contextual, and remedies to further reconciliation, writing:

This Court should give the treaty land use planning provisions at issue a generous, purposive and contextual interpretation that advances the process of reconciliation. Such an interpretation will give full effect to the discrete steps in such provisions that require meaningful consultation and a fully informed dialogue with relevant stakeholders on modifications proposed by the Yukon government to a recommended plan. All such requirements should be carried out and re-engaged (if necessary to ensure their fulfillment) before the government makes any decision on whether to approve, modify or reject a land use plan.<sup>112</sup>

The Attorney General of Canada took the position that the Court should decline to address the scope of Yukon’s authority to reject a final plan, as

[the] Court [...] lacks a live factual foundation for assessing this issue [...] Particularly given that the issue raises constitutionally guaranteed treaty rights or duties, this Court should await a case raising a live factual record before addressing the scope of the power to reject a plan. [...] If the Court finds it appropriate to address this issue, given the principles addressed above, requiring a contextual and purposive interpretation consistent with the objective of reconciliation, rejection should only be available after fulfillment of all the steps required in Chapter 11.<sup>113</sup> [footnotes omitted]

With respect to remedy, the Attorney General of Canada wrote:

[t]he remedy chosen by the Court should return the parties to the position they were in before the breach. The Court should avoid any remedy which would skip over or curtail any unfulfilled step in this process. While repetition of previous steps may add delay and cost, that may be the unavoidable price to be paid in order to ensure a full and meaningful exchange among the Yukon government, First Nations, the Commission and other interested parties prior to any final decision on the approval, rejection or modification of the plan.<sup>114</sup>

### 3.3.5 Issue: Treaty Interpretation

The determinations at the YKSC and YKCA around the LUP process under the FAs, in particular ss.11.6.2 and 11.6.3.2, invoked discussion of principles of modern treaty interpretation, and to what extent the Court should impose the honour of the Crown on top of treaty provisions on consultation.

The passage quoted repeatedly in this litigation in reference to the “grand purpose” of section 35 has been the following words of Justice Binnie in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC [*Little Salmon*] at paragraph 10:

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and

<sup>111</sup> *First Nation of Nacho Nyak Dun, et al v Government of Yukon*, SCC File No. 36779, Factum of the Intervener, Gwich’in Tribal Council (24 February 2017) [*Nacho Nyak Dun* SCC Intervenor Gwich’in Factum]

<sup>112</sup> *First Nation of Nacho Nyak Dun, et al v Government of Yukon*, SCC File No. 36779, Factum of the Intervener, The Attorney General of Canada (24 February 2017) [*Nacho Nyak Dun* SCC Intervenor AGC Factum] at para 2

<sup>113</sup> *Ibid* at para 30-1

<sup>114</sup> *Ibid* at para 28

non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.<sup>115</sup>

*Little Salmon* set out interpretive principles for modern treaties, “which result from lengthy negotiations between well-resourced and sophisticated parties.”<sup>116</sup> The analytical framework for interpretation of modern treaties has three steps: 1) review of general framework and key concepts; 2) identifying substantive rights in issue; and 3) discussing the formal rights and duties resulting from the prescribed consultation process.<sup>117</sup> *Little Salmon* also noted that Traditional Territory “transcends the distinction between settlement land and non-settlement land.”<sup>118</sup>

The honour of the Crown clearly applies in the implementation of modern treaties after *Little Salmon*. The honour of the Crown with respect to treaties in general was described in *Haida Nation v British Columbia (Minister of Forests)*:

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”: *Delgamuukw*, supra, at para. 186, quoting *Van der Peet*, supra, at para. 31.

[...]

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing” (*Badger*, at para. 41)<sup>119</sup>

The honour of the Crown was elaborated in *Manitoba Metis Confederation v Canada (Attorney General)*, “which also confirmed the statement in *Little Salmon/Carmacks* that the honour of the Crown has the status of a constitutional principle.”<sup>120</sup>

74 Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.

75 By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.<sup>121</sup>

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<sup>115</sup> *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*]

<sup>116</sup> *Ibid* at para 12

<sup>117</sup> *Nacho Nyak Dun YKSC*, supra note 8 at para 124, citing *Little Salmon* at para 127

<sup>118</sup> *Little Salmon*, supra note 111 at para 132

<sup>119</sup> *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 at paras 17 & 19, cited in *Peel YKSC*

<sup>120</sup> *Manitoba Metis Confederation v Canada (Attorney General)*, 2013 SCC 14 at paras 74 & 75

<sup>121</sup> As cited in *Nacho Nyak Dun YKSC*, supra note 8 at para 135

The YKCA noted the importance of looking to the text of the modern treaty itself, also with reference to *Little Salmon*.

I highlight the notions of “thoughtful administration of the treaty”, not to be interpreted “in an ungenerous manner or as if it were an everyday commercial contract”, “interpreted and applied in a manner that upholds the honour of the Crown” but at the same time “intended to create some precision around property and governance rights and obligations.”<sup>122</sup>

The YKCA found Yukon’s position of a plain reading went too far, was contrary to its context and need for a generous interpretation of the treaty, and accorded power inconsistent with the honour of the Crown.<sup>123</sup>

The YKCA referred to comments on the honour of the Crown found in *Haida Nation* and *Manitoba Metis*. In *Manitoba Metis*, that court wrote “[t]he ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. [...] (citing *Taku River Tlingit First Nation v BC*, 2004 SCC 74) In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.”<sup>124</sup>

In considering the land use planning process under Chapter 11 of the UFA, the YKCA considered the honour of the Crown to be a general context, where there was a specific context, “namely the exchange of large tracts of land for defined treaty rights, including access, harvesting rights, financial compensation, and participation in the management of public resources. [...] What is to be stressed in the context of the issue at bar, is that the UFA and the Final Agreements include as part of the bargain between the parties’ participation by the affected First Nations “in the management of public resources”. That participation occurs, in part, through the dialogue envisioned in s.11.6.0.”<sup>125</sup> Justice Bauman referred the objectives outlined in Chapter 11. The Court of Appeal affirmed the trial judge’s finding that Yukon did not honour the letter or spirit of chapter 11 in the planning process, but qualifies “to a small extent the actual bargain struck in Chapter 11 [...] That qualification flows from s.11.4.0 which contemplates the creation of Regional Land Use Planning Commissions.”<sup>126</sup> The initiation of PRPC was discretionary under Yukon’s agreement to set it in motion – in absence of a regional plan, Yukon has full responsibility for Non-Settlement Lands, although such an absence is not in the best interest of any parties.<sup>127</sup>

At the SCC, the Appellants refer to *Little Salmon* and *Haida Nation* as authority for the interpretation of land claims in a manner to further the objectives of reconciliation.<sup>128</sup> They argue that in a large and liberal interpretation, s11.6.3.2 cannot be divorced from its purpose and context, and as a result, Yukon should not be able to reject the Final Recommended Plan. The Appellants discuss a “third choice”, being proposing modifications, in addition to accepting and rejecting the

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<sup>122</sup> *Nacho Nyak Dun YKCA*, *supra* note 5 at para 118

<sup>123</sup> *Ibid*

<sup>124</sup> *Manitoba Metis*, *supra* note 116 at para 22

<sup>125</sup> *Nacho Nyak Dun YKCA*, *supra* note 5 at para 125

<sup>126</sup> *Ibid* at para 128-9

<sup>127</sup> *Ibid* at para 130

<sup>128</sup> *Nacho Nyak Dun SCC Appellant Factum*, *supra* note 109 at para 112

plan, and how this reflects an overall scheme of collaboration and consultation, as well as public interest.

The Respondent Yukon's position results in a more textual interpretation of chapter 11, preferring the approach taken at the YKCA. It too refers to *Little Salmon* and section 35 of the *Constitution Act, 1982*, but like the YKCA, they emphasize attention to the terms of the agreements. Yukon argues, modern treaties advance reconciliation, and must be implemented honourably by the Crown, and interpreted generously to achieve the "grand purpose" of reconciliation.<sup>129</sup> "However, unlike historical treaties, modern treaties are the product of negotiations between sophisticated, resourced parties. As a result, in interpreting modern treaties the negotiated text warrants close attention."<sup>130</sup> Failing to accord proper attention to detailed, negotiated text undermines reconciliation.<sup>131</sup> Yukon noted the importance of contextual and purposive approaches to interpreting modern treaties.<sup>132</sup>

### **3.4 Implications of the Peel Case for Yukon**

Consideration of the implications of the Peel case for Yukon requires consideration of the multifaceted nature of its history, as discussed above: its issues around environmental protection, Aboriginal rights and law, treaty interpretation, political strategy, and to an extent, litigation strategy.

#### **3.4.1 Content of PWRLUP**

With respect to environmental protection, the substantive outcome of the Peel case could be significant. The Recommended Final Plan provided for 80% conservation, and the Yukon Final Plan provided for closer to 29% protection. Potential economic implications are not quantified but may be significant.<sup>133</sup> However, the outcome of the litigation will not have a substantive impact on environmental protection or development, as discussed above. The court judgment will direct a return to the consultative process, at which the plan's ultimate contents will be negotiated.

#### **3.4.2 Political Activism**

The political dimension will also not be determined by the outcome of litigation. Politically, litigation has had some impact: to an extent, activism caused the Final Plan to be suspended while litigated, and Yukon had a government and policy change during the course of litigation. However, that was not an outcome of the judgment of any court. The intensity and organization of environmental and First Nation activism may influence future political decisions and future activism. As discussed in section 3.1, above, the public political and activist dimensions of the Peel matter have been significant. However, these matters are separate from the litigation.

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<sup>129</sup> *Nacho Nyak Dun SCC Respondent Factum*, *supra* note 110 at para 49-50

<sup>130</sup> *Ibid* at para 51

<sup>131</sup> *Ibid* at para 51, citing Professor Dwight Newman

<sup>132</sup> *Ibid* at para 52

<sup>133</sup> Sources reviewed in this research indicated that resource potential in the region is unknown or indeterminate

There has been polarity and distrust involved in stakeholder position during and after the creation of the impugned Peel plans. Polarity in the planning process led to the incompatibility of the Recommended Final Plan and the Yukon Final Plan. An early Draft Plan was described as an

attempt at balance between development and conservation [but] No one wanted this. [...] Society was clearly divided on the matter of landscape preservation and resource development. The Commission faced a dilemma, since “managed and restored development” pleased no one. [...] Since development and access in wilderness is largely a one-way gate (barring a commitment to fully restoring land to its natural state), the Commission determined to take a cautious, conservative approach.<sup>134</sup>

Kiri Staples et al wrote an article in the Northern Review regarding the PWRLUP process noting the polarization involved,<sup>135</sup> describing the viewpoints involved, and the area’s history of government-First Nations relationship characterized by colonization and denial of rights and participation in decision-making.<sup>136</sup> The article discusses an “erosion of public faith” in the LUP process. However, the article took the position that it was “not the polarizing nature of these perspectives that has caused land use planning for the Peel region to break down; rather, it is a broken decision-making process that to date has failed to secure the common interest.”<sup>137</sup> They write:

One of the primary factors that has shaped the Peel Watershed planning process is the diversity of perspectives that have been expressed. The key participants in this process, including individuals, groups, and institutions, each bring their own set of beliefs, opinions, values, and strategies for influencing the decision process. Determining how these perspectives overlap or conflict can be difficult, as they are not monolithic but change over time and have internal differences. In the context of the Peel, the range of perspectives being voiced has often been presented by media, politicians, organizations, and individuals as “polarizing,” with conservation on one side and development on the other. While the presence of these divergences may be a cause for conflict, it is up to those leading the decision process to find a way to reach common ground within these differences (Clark 2011). Moreover, claiming rationality and balance in resource management discourse, while demonizing dissent, is an effective tactic to delegitimize alternative views and ideas; this prevents a full and unbiased realization of the common interest, and making any common ground much harder to discern (Davidson and Mackendrick 2004).<sup>138</sup>

Polarity and distrust in institutions has been further noted in Yukon’s environmental affairs. A Yukon panel in consultation regarding risks and benefits of hydraulic fracturing (fracking) in 2013 found problematic divisions and distrust in the government. Their consultations occurred in the context of the contested Peel LUP process. Neville and Weinthal wrote of the experience:

In early 2014, the former Chair of the Peel Planning Commission wrote a letter to the editor of the Yukon News, a widely circulated newspaper in the territory, calling the government’s plan for the Peel watershed “divisive, dishonest, and likely illegal” (Loeks, 2014). [...]

Public comments around the planning process and court case suggest that the government’s perceived disregard for public views and participation would have repercussions beyond the Peel. [...]

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<sup>134</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 53, citing the PRPC

<sup>135</sup> Kiri Staples et al, “Fixing Land Use planning in the Yukon Before It Really Breaks: A Case Study of the Peel Watershed” (Fall 2013) 37 *The Northern Review* 143-165

<sup>136</sup> *Ibid* at 148

<sup>137</sup> *Ibid* at 143

<sup>138</sup> *Ibid* at 149-50

As seen here, participatory processes are iterative and interactive, especially in places with small communities and long public memories. Prior processes can initiate a breakdown in government trust, especially if the public felt misled previously (also see Jasanoff, 1997). The cost of a poorly received public process may not only be the rejection of a particular development plan, but increased resistance to future projects and proposals, and a broader loss of confidence in institutions of government and industry.<sup>139</sup> [footnotes omitted]

The Yukon Land Use Planning Council commented on the nature of consultations, responding to the “What We Heard Report” which summarized consultations during the PWRLUP planning process, as follows:<sup>140</sup>

...The “What We Heard” summary reinforces our concern that “courageous leadership” will be required to restore public confidence in, and credibility of, regional planning as a governance tool; trust in the process itself; and understanding of the role of the commissions in plan preparation. The consultation report clearly demonstrates a public perception that the Government of Yukon did not follow either the spirit or intent of the rules established in Chapter 11 of the Umbrella Final Agreement and hijacked the process. Whether that is true or not is largely irrelevant at this point. A conclusion needs to be reached on the Peel one way or another, and the Parties as a whole have to determine what it will be.<sup>141</sup>

Outside of the Peel Case, perceived polarity and distrust in institutions has increasingly characterized other Canadian matters involving environmental protection and First Nations rights as well.<sup>142</sup> A disturbing parallel trend in other matters regarding energy and environment has been the decline in deference to expertise amid an abundance of disconnected and inconsistently sourced information.<sup>143</sup> For example, in a December 2016 column regarding public response to federal approval of the TransMountain and Line 3 pipeline projects and denial of the Northern Gateway pipeline, journalist Deborah Yedlin lamented that “the response [...] has exposed the lack of energy literacy in Canada that’s exacerbated by a fragmented media and convenient ignorance of Alberta’s climate plan.”<sup>144</sup> Yedlin related her experience of participants in a media panel lacking recognition of certain facts, and describes as “fascinating [that a mayor and First Nation Chief] believe to know more than the federal cabinet, the National Energy Board and all the experts who presented evidence on the projects’ impacts”,<sup>145</sup> among other concerns.

It is keenly important in modern times that stakeholders maintain collaborative spirits and respect the institutions in which their democratic participation is an essential component, and that those institutions respect those stakeholder voices, to preserve the integrity of those institutions and protect the rule of law.

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<sup>139</sup> Kate J. Neville and Erika Weinthal, “Mitigating Mistrust? Participation and Expertise in Hydraulic Fracturing Governance” (2016) 33:6 Review of Policy Research 578 at 589-90

<sup>140</sup> *Nacho Nyak Dun YKSC*, *supra* note 8 at para 101, referring to the “Peel Watershed Regional Land Use Plan Public Consultation 2012-2013 What We Heard Report” prepared by JP Flament Consulting Services

<sup>141</sup> *Ibid* at para 101

<sup>142</sup> Speaking generally. I am thinking, for example, of the Northern Gateway pipeline, TransMountain pipeline, and the Oil sands, as well as influence from the USA including their recent/ongoing demonstrations against DAPL

<sup>143</sup> I am not asserting that Peel activism has involved uninformed opinions, but rather noting that it is a growing contemporary concern and contemplating future issues that may arise

<sup>144</sup> Deborah Yedlin, “Energy illiteracy alive and well in Canada”, Column, *Calgary Herald* (7 December 2016), online: < <http://calgaryherald.com/business/energy/yedlin-energy-illiteracy-alive-and-well-in-canada> >

<sup>145</sup> *Ibid*

### 3.4.3 Legal Outcome

The direct outcome of the litigation will be clarity on the required procedure for LUP under the UFA, and specifically the point to which the PWRLUP process must be returned. There will be direct implications for the procedural handling of future LUP in the Yukon.

Results may be significant with respect to decision-making power under the UFA, specifically the potential for unilateral decision-making under the UFA. The SCC reasoning and principles may affect future LUP and First Nation consultation in other contexts (to be discussed further below).

The applicants to the SCC action (Plaintiffs) outlined the following issues of public importance to be tried, in their Memorandum of Argument:

- Remedy for breach of modern treaty: the applicants referred to faith in integrity of treaty-mandated processes as being essential in achieving reconciliation, and the concern that the CA judgment would undermine the decision-making roles between government and First Nations.<sup>146</sup>
- The Peel Watershed being of national importance, citing its “wilderness character” and status as a “national treasure”<sup>147</sup>
- Proper remedy after quashing a flawed decision: existing caselaw is limited and relevant to all areas of administrative law.<sup>148</sup>

### 3.4.4 Treaty Interpretation – Duty to Consult

The SCC’s analysis of the duty to consult as derived from the honour of the Crown will be key to the legal outcome, assuming the Court decides to review it. In particular, to what extent should the court impose the duty to consult on top of treaty consultation provisions.

*Little Salmon* has been used as authority for the interpretation of the Crown’s duty to consult in the context of modern treaty in Yukon. In *Little Salmon*,<sup>149</sup> surrendered land was taken up allegedly without adequate consultation to First Nations with hunting rights. The majority, with reasons by Justice Binnie, held that there was a continuing duty to consult, in light of the existence of a modern treaty with provisions for consultation and in the absence of treaty provision for agricultural grants. However, there were concurring minority reasons written by Justice Deschamps (LeBel, J. concurring) which found no legal basis for determining the Crown breached a duty to consult, in light of deference to the terms of a negotiated modern treaty.

David Laidlaw notes that in *Little Salmon*, Justice Deschamps “distinguished between the duty to consult in the context of asserted but unproven rights and the duty to consult in the context of a

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<sup>146</sup> *First Nation of Nacho Nyak Dun, et al v Government of Yukon*, SCC File No. 36779, Application for Leave to Appeal (23 December 2015), Memorandum of Argument at paras 7 & 10

<sup>147</sup> *Ibid* at para 11-12

<sup>148</sup> *Ibid* at para 13

<sup>149</sup> *Little Salmon*, *supra* note 111

Treaty, and suggested that ‘it would be misleading to consider these duties to be one and the same.’:<sup>150</sup>

[...] it is important to make a clear distinction between, on the one hand, the Crown’s duty to consult before taking actions or making decisions that might infringe on Aboriginal rights and, on the other hand, the minimum duty to consult the Aboriginal party that necessarily applies to the Crown with regard to its exercise of rights granted to it by the Aboriginal party to a treaty.<sup>151</sup>

Deschamps was there distinguishing *Mikisew Cree* as *Little Salmon* arose in Yukon and *Mikisew Cree* in Alberta. Deschamps continued his minority reasons at paragraph 122:

Where a treaty provides for a mechanism for consulting the Aboriginal party when the Crown exercises its rights under the treaty — one example would be the participation of the Aboriginal party in environmental and socio-economic assessments with respect to development projects — what the treaty does is to override the common law duty to consult the Aboriginal people; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually.<sup>152</sup> [emphasis mine]

Justice Deschamps considered that Justice Binnie, for the majority, superimposed the common-law duty to consult onto the treaty. The majority found that because there were terms for consultation in the treaty, the scope of the duty of consultation was at the lower end of the spectrum.

Justice Binnie wrote:

The denial by the Yukon territorial government of any duty to consult except as specifically listed in the LSCFN Treaty complicated the Paulsen situation because at the time the Director dealt with the application the treaty implementation provision contemplated in Chapter 12 had itself not yet been implemented. I do not believe the Yukon Treaty was intended to be a “complete code”. Be that as it may, the duty to consult is derived from the honour of the Crown which applies independently of the expressed or implied intention of the parties (see below, at para. 61). In any event, the procedural gap created by the failure to implement Chapter 12 had to be addressed, and the First Nation, in my view, was quite correct in calling in aid the duty of consultation in putting together an appropriate procedural framework.<sup>153</sup>

The First Nation relies in particular on the following statements in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at para. 20:

It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

Further, at para. 32:

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982. [Emphasis added.]<sup>154</sup>

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<sup>150</sup> David Laidlaw and Monique Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook: CIRL Occasional Paper #44* (Calgary: Canadian Institute for Resources Law, March 2014), online: <<http://dspace.ucalgary.ca/jspui/bitstream/1880/50216/1/ConsultationHandbookOP44.pdf>> [Laidlaw OP# 44] at 4

<sup>151</sup> *Little Salmon*, *supra* note 111 at para 119

<sup>152</sup> *Ibid* at para 122

<sup>153</sup> *Ibid* at para 38

<sup>154</sup> *Ibid* at para 40, citing *Haida Nation* at para 32

The minority found that the treaty terms replaced the common-law duty. Justice Deschamps discussed the honour of the Crown:

To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.<sup>155</sup>

In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights. Nor does the Crown act dishonourably if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.<sup>156</sup>

Yukon's factum to the SCC uses a portion of Justice Deschamps' reasons<sup>157</sup> to describe contextual and purposive approaches to interpretation of modern treaties,<sup>158</sup> but does not belabour the point.

Should the SCC in the Peel case analyze this question of treaty interpretation, as it arises on the third issue before them, on Yukon's power to reject the final recommended plan, they may well clarify the Crown's duty to consult in the context of modern treaty, in light of the specific land use planning provisions of the UFA.

### **Delineations of the duty to consult**

While a generous and liberal interpretation of the duty to consult and honour of the Crown are well established, other broadly related questions delineating the honour of the Crown, including the duty to consult on legislation and whether the duty to consult invokes a duty to agree, have arisen in caselaw.

*Canada v Courtoreille* (2016 FCA) [*Courtoreille*]<sup>159</sup> determined that legislative action does not trigger the duty to consult and accommodate. In *Courtoreille*, the question of the Crown's obligation to consult when creating legislation that may adversely affect treaty rights was before an appellate court for the first time. Specifically, the Misikew Cree (Chief of) claimed that Canada had breached duty to consult the Misikew Cree on the development and introduction in Parliament of two omnibus bills (2012's C38 *Jobs, Growth & Long-Term Prosperity Act*, C-45, *Jobs and Growth Act 2012*, which repealed CEAA and enacted CEAA 2012, and amended *Species at Risk Act*, *CEPA 1999*, *Navigable Protection Act*) that "reduced federal regulatory oversight (environmental assessment) on works and projects that might affect their treaty rights to hunt, fish

<sup>155</sup> *Ibid* at para 107

<sup>156</sup> *Little Salmon*, *supra* note 111 at para 109

<sup>157</sup> *Nacho Nyak Dun SCC Respondent Factum*, *supra* note 110, citing *Little Salmon* at para 138

<sup>158</sup> *Nacho Nyak Dun SCC Respondent Factum*, *supra* note 110 at para 52

<sup>159</sup> *Courtoreille v Canada (Canada (Governor General in Council) v Courtoreille*, 2016 FCA 311] [*Courtoreille*]

and trap.”<sup>160</sup> The trial judge said there was a breach, and the CA granted the appeal, holding there was no subject for judicial review, no duty to consult. The court held,

[In particular, I find that] [l]egislative action is not a proper subject for an application for judicial review under the *Federal Courts Act*, RSC 1985, cF-7, and that importing the duty to consult to the legislative process offends the separation of powers doctrine and the principle of parliamentary privilege.<sup>161</sup>

A concurring opinion by Justice Pelletier made a distinction between legislation of general application and legislative action impacting a specific aboriginal community, where the Crown’s obligations are greater.<sup>162</sup> In the context of legislation of general application, “the duty [to consult] must be found in the decisions by which such legislation is operationalized.”<sup>163</sup>

Nigel Bankes commented in an ABlawg post that *Courtoreille* does not address delegated legislative decisions, including LUP. He wrote:

This decision is very much a decision about the (non) application of the duty to consult in the parliamentary process (and in the provinces, the legislative assembly process); it does not speak more generally and inclusively to that category of decisions known as delegated legislative decisions, i.e. rule-making whether in the form of regulations, rules, adoption of land use plans etc. While there is conflicting authority as to whether or not the duty to consult applies to such decisions, there is little if anything in this judgement to support the view that delegated legislative decisions do not attract the duty to consult. Such decisions cannot benefit from arguments of parliamentary privilege and such decisions are in principle subject to judicial review in the ordinary course – albeit not usually on procedural grounds: see *Att. Gen. of Can. v. Inuit Tapirisat et al.*, [1980] 2 SCR 735, 1980 CanLII 21 (SCC); *Homex Realty v. Wyoming*, [1980] 2 SCR 1011, 1980 CanLII 55 (SCC).<sup>164</sup> [emphasis mine]

Bankes noted that issues in the case arise from tensions between the separation of powers doctrine and the duty to consult, noting:

the principal problem with the doctrine of the separation of powers is that it simply doesn’t recognize a role for indigenous peoples; they are not comprehended in the terms legislative, judicial and executive branches of government. The Court needs to find a way to read that doctrine in a way that recognizes a role for indigenous peoples.<sup>165</sup>

The same separation of powers issues do not apply in matters such as LUP.

*Courtoreille*<sup>166</sup> was also considered by Supriya Tandan in the CBA National Magazine.<sup>167</sup> She wrote, “the Trudeau government’s arguments against aboriginal consultation on legislation are at odds with pledges it has made on the international stage,”<sup>168</sup> and suggested the position may

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<sup>160</sup> *Ibid*, para 1, also para 5 & 6

<sup>161</sup> *Ibid*, para 3

<sup>162</sup> *Ibid*, para 97

<sup>163</sup> *Ibid*, para 97

<sup>164</sup> Nigel Bankes “The Duty to Consult and the Legislative Process: But What About Reconciliation?” (21 December, 2016), online: ABlawg, < [http://ablawg.ca/wp-content/uploads/2016/12/Blog\\_NB\\_Courtoreille\\_MCFN\\_FCA.pdf](http://ablawg.ca/wp-content/uploads/2016/12/Blog_NB_Courtoreille_MCFN_FCA.pdf) >

<sup>165</sup> *Ibid*

<sup>166</sup> *Courtoreille*, *supra* note 152

<sup>167</sup> Supriya Tandan, “The Crown has no duty to consult when legislating... for now”, *CBA National Magazine* (11 January 2017), online: < <http://www.nationalmagazine.ca/Articles/January-2017/The-Crown-has-no-duty-to-consult-when-legislating%E2%80%A6.aspx> >

<sup>168</sup> *Ibid*, citing Carpenter, Bakker and Miller writing for Blakes

conflict with the United Nations Declaration on the Rights of Indigenous Peoples “on the role of Indigenous Peoples in the development of legislation that might affect them – provisions that the new government expressly adopted earlier in the year.”<sup>169</sup>

The UNDRIP is comprised of 46 articles “that are essentially best practices for countries to adopt with respect to their treatment of, and engagement with, Indigenous peoples,” including “the right to free, prior and informed consent (FPIC) when it comes to industrial development on their traditional territories,”<sup>170</sup> such rights being “subject only to such limitations as are determined by law.”<sup>171</sup>

Further, recent caselaw has clarified that the duty to consult does not equate to a duty to agree or to a veto on the part of the consulted. Another 2016 FCA case, *Gitxaala Nation v Canada [Gitxaala]*<sup>172</sup> quashed the Order in Council approving the Northern Gateway Pipeline proposal. *Gitxaala* addressed the Crown’s duty to consult Aboriginal peoples. Its analysis reviewed existing caselaw, stating,

“[t]he consultation process does not dictate a particular substantive outcome. Thus, the consultation does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation. Put another way, perfect satisfaction is not required. The question to be answered is whether the regulatory scheme, when viewed as a whole, accommodates the Aboriginal right in question: *Haida Nation*, at paragraphs 42, 28 and 62.”<sup>173</sup> [emphasis mine]

Sharon Mascher noted that in *Gitxaala*, the First Nation parties to the proceeding had unproven territorial claims, potentially affecting the principles for the court to apply.<sup>174</sup> Application has been sought for leave to appeal *Gitxaala Nation v Canada* to the SCC.<sup>175</sup> The context of *Gitxaala* is considerably different from land use planning under modern treaty but may pertain more to land use planning in the context of numbered treaties, discussed later in this paper.

## 4.0 Alberta

### 4.1 Constitutional Context and Consultation

The Province of Alberta has no modern treaties in place. Rather, parts of the province are held under Numbered Treaties 6, 7, and 8. There are 45 First Nations in the three treaty areas, 140

<sup>169</sup> *Ibid*

<sup>170</sup> Meagan Wohlberg, “‘Without Qualification’ – Canada and UNDRIP”, *Edge North* (10 May 2016), online: < <https://edgenorth.ca/article/without-qualification-canada-and-undrip> >

<sup>171</sup> *Ibid*. Analysis of UNDRIP is outside the scope of this paper.

<sup>172</sup> *Gitxaala Nation v Canada*, 2016 FCA 187 (CanLII)

<sup>173</sup> *Ibid* at para 179

<sup>174</sup> Sharon Mascher, “Note to Canada on the Northern Gateway Project: This is NOT What Deep Consultation With Aboriginal People Looks Like” (12 August 2016), online: ABLawg, < <http://ablawg.ca/2016/08/12/northern-gateway-deep-consultation-with-aboriginal-people/> >

<sup>175</sup> SCC docket 37201, as *Raincoast Conservation Foundation v Her Majesty the Queen, et al.*, see <http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37201>

reserves, and approximately 812,771 hectares of reserve land in the Province.<sup>176</sup> Treaty 8 was signed in 1899, Treaty 6 signed in 1876, and Treaty 7 signed in 1877.<sup>177</sup>

Government responsibilities towards First Nations flow from section 35(2) of the *Constitution Act, 1982*, section 91(24) of the *Constitution Act, 1867*, and the *Indian Act*, RSC 1985, cI-5.

In the absence of modern treaties, the common law directs the Crown's duty to consult in Alberta. The duty to consult and accommodate stems from the "honour of the Crown" (the Crown's duty of honourable dealing), a "core precept" of aboriginal law.<sup>178</sup> This is described in *Haida Nation* as follows:

that the duty to consult and accommodate is grounded in the *honour of the Crown* which arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in control of that people. [...] The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."<sup>179</sup>

This duty was extended to a treaty context, specifically Alberta, by *Mikisew Cree* in 2005.<sup>180</sup> David Laidlaw writes that the duty to consult is a subset of:

the right of all persons under Canadian law to be dealt with the Crown in a manner that is procedurally fair and reasonable and in accordance with the common law procedural and substantive elements on administrative law.<sup>181</sup> [...]

With regard to Aboriginal peoples, this duty has additional sources, such as the Crown's fiduciary relationship with Aboriginal peoples, the need to justify infringements of Aboriginal rights under subsection 24(1) of the *Constitution Act, 1982* and the "honour of the Crown", which amplify and describe the duty to consult with them and if necessary accommodate their interests.<sup>182</sup>

The legal test for determining whether there is a duty to consult is set out in *Haida Nation*,<sup>183</sup> by first determining whether the Crown has actual or constructive knowledge of actual or potential existence of an aboriginal rights, and second determining whether the Crown is contemplating conduct that might adversely affect that right. The scope of the duty to consult depends on both the strength of the case demonstrating the aboriginal right, and the potential severity of adverse effects on that right. The prevailing law governing the duty to consult was set out in a trilogy of cases: *Haida Nation v British Columbia* (2004 SCC), *Taku River First Nation v British Columbia* (2004 SCC), and *Mikisew Cree First Nation v Canada* (2005 SCC).

The Alberta Government has put policies in place to clarify consultation responsibilities, namely *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural*

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<sup>176</sup> Indigenous and Northern Affairs Canada, *First Nations in Alberta*, online: <<https://www.aadnc-aandc.gc.ca/eng/1100100020670/1100100020675> >

<sup>177</sup> *Ibid*

<sup>178</sup> *Haida Nation*, *supra* note 115 at para 16

<sup>179</sup> *Haida Nation*, *supra* note 115 at para 32, as quoted in Laidlaw OP# 44, *supra* note 143

<sup>180</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69

<sup>181</sup> Laidlaw, CIRL OP# 44, *supra* note 146 at 3 citing Isaac & Knox article

<sup>182</sup> *Ibid* at 2

<sup>183</sup> *Haida Nation*, *supra* note 115

*Resource Management, 2013*<sup>184</sup> [Consultation Policy], and *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, 2014* [Guidelines].<sup>185</sup> In addition, Alberta gave a Second Consultation Direction to the AER, and *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (JOP#2)* in June 2015. Alberta established the Aboriginal Consultation Office (ACO) in November 2013.<sup>186</sup>

The Consultation Policy and Guidelines set out the test for Alberta's duty to consult and accommodate in keeping with the three-part test set out in *Haida Nation*.<sup>187</sup> The Guidelines state: Various decisions made by the Supreme Court of Canada and the Court of Appeal of Alberta have confirmed that a duty to consult may be triggered when the Crown contemplates conduct that could have an adverse impact on the exercise of Treaty rights. The Guidelines are intended to be consistent with case law and demonstrate a practical approach to meeting the requirements established by the courts.<sup>188</sup>

Under the Policy and Guidelines, a proponent may be delegated procedural aspects of consultation, while the ACO or Responsible Ministry must handle substantive aspects of consultation.<sup>189</sup>

Laidlaw notes that one type of decision that may produce a trigger for consultation with First Nations is "Land use planning that provides a long-term framework for Crown decisions."<sup>190</sup>

## 4.2 Land Use Planning in Alberta

The Alberta government is developing a comprehensive land use planning program for the province. In response to pressures from population growth and multiple demands on finite resources, Alberta set out an overarching Land Use Framework [LUF]<sup>191</sup> policy in 2008. The *Alberta Land Stewardship Act [ALSA]*<sup>192</sup> was enacted in 2009 to implement the LUF. The LUF divides the province into seven planning regions based loosely on major river basins. Each regional plan is to have duration of 10 years, and anticipate 50 years. The regional plans themselves exist as Regulations made under *ALSA*, portions being policy direction and portions (the regulatory details) being legally binding. To date Alberta has completed two of seven planned regional plans, the Lower Athabasca Regional Plan [LARP],<sup>193</sup> completed in 2012, and the South

<sup>184</sup> Alberta, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resources Management, 2013* (3 June 2013), online: < <http://www.indigenous.alberta.ca/policy-guidelines.cfm> >

<sup>185</sup> Alberta, *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, July 28, 2014*, online: < <http://www.indigenous.alberta.ca/policy-guidelines.cfm> > [Guidelines]

<sup>186</sup> See discussion in Laidlaw OP# 53, *infra* note 185

<sup>187</sup> See Laidlaw OP# 53, *infra* note 185 at 20

<sup>188</sup> Guidelines, *supra* note 181 at 1

<sup>189</sup> David Laidlaw, *Alberta First Nations Consultation & Accommodation Handbook – Updated to 2016: CIRL Occasional paper #53* (Calgary: Canadian Institute for Resources Law, March 2016), online: < <http://www.cirl.ca/files/cirl/consultationupdateop53.pdf> > [Laidlaw OP# 53] at 37, citing Guidelines at 8

<sup>190</sup> *Ibid* at 38-9, citing Guidelines at 8

<sup>191</sup> LUF, *supra* at 9

<sup>192</sup> *Alberta Land Stewardship Act*, SA 2009, cA-26.8 [ALSA]

<sup>193</sup> Alberta, *Lower Athabasca Regional Plan 2012-2011* (Alberta: 2012), online: < <https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%202012-2022%20Approved%202012-08.pdf> > [LARP]

Saskatchewan Regional Plan [SSRP],<sup>194</sup> completed in 2014. Both regions include First Nations reserves and communities. This approach to land use planning is innovative and ambitious, and new to Alberta and to Canada, and has been controversial in design and implementation.

First Nations concerns and involvement are a key component of land use planning under LUF. The LUF notes specifically:

The aboriginal peoples of Alberta have an historic connection to Alberta's land and environment. Alberta recognizes that those First Nations and Metis communities that hold constitutionally protected rights are uniquely positioned to inform land-use planning.

The Government of Alberta has the constitutional mandate to manage lands in the province for the benefit of all Albertans. However, 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.

To support meaningful consultation in the province, Cabinet approved *The Government of Alberta's First Nation Consultation Policy on Land Management and Resource Development* in 2005. This policy is a key step towards engaging First Nations in land management decision-making. Ongoing review and monitoring of the policy with the intent of changing and improving it will ensure that it meets the needs of Albertans, First Nations and industry. To address specific implementation challenges, Alberta has created a "trilateral process" involving senior key representatives from industry, First Nations and government.

Efforts to build First Nations capacity have been underway for several years and include programs such as the Traditional Use Studies Program and the First Nations Consultation Capacity Investment Program, which are administered by the Ministry of Aboriginal Relations. By investing in the gathering and maintenance of information on First Nations land uses, Alberta has also helped prepare First Nations for increased dialogue in regional planning. Aboriginal peoples will be encouraged to participate in the development of the seven regional land-use plans.<sup>195</sup>

One of ALSA's key purposes is "(b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;"<sup>196</sup> In addition, one of the LUF's seven land use management strategies is "inclusion of aboriginal peoples in land-use planning."<sup>197</sup> As well, the ACO is one of seven main players in Alberta's Integrated Resource Management System, the Land Use Secretariat being another.<sup>198</sup>

### **Lower Athabasca Regional Plan**

LARP covers a portion of northeastern Alberta, including the oil sands region around Fort McMurray. The LARP was the first regional plan created under LUF and ALSA. LARP contains considerable provision for aboriginal engagement and consultation.

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<sup>194</sup> Alberta, *South Saskatchewan Regional Plan 2014-2024: An Alberta Land-use Framework Integrated Plan, amended February 2017* (Alberta: 2014) online: < <https://www.landuse.alberta.ca/LandUse%20Documents/South%20Saskatchewan%20Regional%20Plan%202014-2024%20-%20February%202017.pdf> > [SSRP]

<sup>195</sup> LUF, *supra* note 9 at 41

<sup>196</sup> ALSA, *supra* note 8 at s.1(2)(b)

<sup>197</sup> LUF, *supra* note 9 at 3ff

<sup>198</sup> Giorilyn Bruno, "Alberta's 'Integrated Resource Management System: Where Are We Now?'" (December 23, 2015), *ABlawg* (University of Calgary Faculty of Law blog), online: < <http://ablawg.ca/2015/12/23/albertas-integrated-resource-management-system-where-are-we-now/> > [Bruno, IRMS]

Within the Strategic Planning's section on Inclusion of Aboriginal Peoples in Land-use Planning, LARP provides:

Aboriginal culture, with its connection to the land and environment, provides a unique opportunity for engagement in land planning, conservation, recreation and tourism initiatives.

Within a framework of respecting heritage and natural spaces and ensuring sustainable efforts will benefit future generations, engagement of Alberta's aboriginal communities presents opportunities to achieve lasting partnerships while providing opportunities for employment, careers and increased economic activities. As such, the Alberta government will look for opportunities to engage these communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning in this region. For example, the regional parks plan for the Lower Athabasca Region will explore and present potential new approaches to draw on the rich cultural, ecological and historical knowledge and stewardship practices of these communities into planning for new and existing parks within the provincial parks system.

The Alberta government will invite First Nations who have expressed an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations – Richardson Backcountry Stewardship Initiative (or Richardson Initiative). The Alberta government will also work with aboriginal people to identify tourism and cultural experiences which could provide economic opportunities to aboriginal communities.

In accordance with applicable government policy as it may be from time to time, the Government of Alberta will continue to consult with aboriginal peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the input from such consultations continues to be considered prior to the decision.”<sup>199</sup>

LARP's Outcome of Inclusion of Aboriginal Peoples in Land-use Planning lists the following Strategies:

- Meaningful consultation
- Engage aboriginal communities in development of Lower Athabasca Regional Trail System Plan, surface water quantity management framework for the Lower Athabasca River, initiatives to support tourism development
- Invitation to be involved in sub-regional initiative called the First Nations-Richardson Backcountry Stewardship Initiative
- Work with Alberta in developing biodiversity management framework and landscape management plan<sup>200</sup>

The *Land-use Framework Regional Plans Progress Report: a review of our progress in 2014*<sup>201</sup> reviewed progress under LARP. The report reviews successes of each supporting indicator and of strategies. The report listed LARP outcome #7, “Inclusion of aboriginal peoples in land-use planning” as on track / ongoing, reproduced below.<sup>202</sup>

“Continue to consult with aboriginal peoples in a meaningful way when government decisions may adversely affect the continued exercise of their constitutionally protected rights (*Alberta Environment and parks, Alberta Energy, Alberta Culture and Tourism, Alberta Aboriginal Relations – implementation is ongoing*)

“LARP reaffirms Alberta's commitment to honour the constitutionally protected rights of aboriginal peoples and seeks opportunities to engage with aboriginal communities by inviting them to share

<sup>199</sup> LARP, *supra* note 189 at 34

<sup>200</sup> *Ibid* at 63-4

<sup>201</sup> Alberta, *Land-use Framework Regional Plans Progress Report: a review of our progress in 2014* (Alberta: printed July 2016), online: < <https://landuse.alberta.ca/LandUse%20Documents/Land-use%20Framework%20Regional%20Plans%20Progress%20Report%202014.pdf> > [Progress Report 2014]

<sup>202</sup> *Ibid* at 17

traditional knowledge to inform land and natural resource planning. In accordance with applicable government consultation policy, the Government of Alberta remains committed to meeting its duty to consult with First Nations on decisions related to land-use, which may adversely affect the exercise of treaty rights. In 2013 and 2014, Alberta Environment and Parks continued to consult and engage with First Nations on implementation aspects of LARP including the Regional Strategic Assessment for South Athabasca Oil Sands area, development of a Biodiversity Management Framework, development of a Landscape Management Plan, and development of the Moose Lake Access Management Plan. The Government of Alberta continues to engage with First nations on proposed initiatives that may have the potential to adversely impact First Nation treaty rights or traditional uses, as per the Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013.

“Continue to invite First Nations expressing an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations Richardson Backcountry Stewardship Initiative (Richardson Initiative) (*Alberta Environment and Parks, Alberta Energy, Alberta Culture and Tourism, Alberta Aboriginal Relations – implementation is ongoing*)

“First nations are invited to be involved in a sub-regional initiative for the area. This initiative is intended to consider the impact to treaty rights to hunt, fish, and trap for food, fish and wildlife management, access management and economic business opportunities, and management of new wildland provincial parks and public land areas for recreation and tourism. LARP recognizes the cultural and economic importance of the land for continued traditional hunting, fishing and trapping. This will be aligned with landscape management planning in the region. Meetings and discussions with First Nations were held in 2014 and are continuing in 2015.”<sup>203</sup>

The progress report also considered under Supporting Indicators “Participation Rate of First Nations in the Richardson Initiative” and “Aboriginal Peoples Continue to be Consulted When Government of Alberta Decisions May Adversely Affect their Continued Exercise of their Constitutionally Protected Rights, and the Input from such Consultations Continues to be Reviewed Prior to the Decision”<sup>204</sup>

### **South Saskatchewan Regional Plan**

SSRP covers southern Alberta, a relatively densely populated, relatively dry region. The SSRP contains considerable provision for aboriginal engagement and consultation, although Aboriginal consultation is itself outside the scope of the SSRP.<sup>205</sup>

The SSRP's Implementation section includes “Aboriginal Inclusion in land-use planning” as one of its desired regional outcomes.<sup>206</sup> (The Implementation comprises policy direction under the SSRP). It lists strategies to that end, as follows:<sup>207</sup>

7.1 In accordance with applicable government policy as it may be from time to time, the Government of Alberta will continue to consult with aboriginal peoples in a

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<sup>203</sup> *Ibid* at 17

<sup>204</sup> Progress Report 2014, *supra* note 194 at 37 & 38

<sup>205</sup> Government of Alberta, *Terms of Reference for Developing the South Saskatchewan Region* (Land-use Framework: Alberta, November 2009, online:

<[https://landuse.alberta.ca/Documents/SSRP Terms of Reference for Developing the South Saskatchewan Region Report-P1-2009-11.pdf](https://landuse.alberta.ca/Documents/SSRP_Terms_of_Reference_for_Developing_the_South_Saskatchewan_Region_Report-P1-2009-11.pdf)> [SSRP TOR]

<sup>206</sup> SSRP, *supra* note 190

<sup>207</sup> *Ibid* at 100-102

- meaningful way when government decisions may adversely affect the continued exercise of their constitutionally protected rights and the input from such consultations continues to be considered prior to the decision.
- 7.2 Explore and present potential approaches to draw on the rich cultural, ecological and traditional land-use knowledge and stewardship practices of aboriginal communities.
  - 7.3 Establish a South Saskatchewan Region Land Sub-Table with First Nations with an interest in the region. This initiative will consider:
    - Development of a mechanism for engagement and strategic consideration.
    - [...]
  - 7.4 Continue First Nation involvement in the following watershed management planning initiatives: [...]
  - 7.5 Engage aboriginal peoples on initiatives to support tourism development [...]
  - 7.6 Promoting the economic, social and cultural well-being of aboriginal communities.
    - Strike the appropriate balance between development and protection of the environment, with due regard to aboriginal peoples perspectives on such balance.”
  - 7.7 Encourage and facilitate information sharing and education opportunities between First Nations with an interest in the region and the Government of Alberta. [...]<sup>208</sup>

Aboriginal peoples are mentioned in the SSRP Vision as a group sharing responsibility for land stewardship, and with reference to their traditional knowledge of the region,<sup>209</sup> and in the SSRP Purpose, in reference to engagement.<sup>210</sup> Indicators of Inclusion of Aboriginal Peoples in Land-use Planning include participation in Treaty 7 tourism development, in the SSR Land Sub-Table, and in implementation of the regional plan, and that “Aboriginal peoples continue to be consulted when Government of Alberta decisions may adversely affect their continued exercise of their constitutionally protected rights and the input from such consultation continues to be reviewed prior to the decision.”<sup>211</sup>

These inclusions in the SSRP indicate strong Crown support for meaningful consultation and accommodation, and appear to meet and exceed the requirements of the common law and Alberta policy as discussed above. A substantial report on traditional knowledge and use in the region was prepared for the development of SSRP.<sup>212</sup> However, as policy direction, it is to be determined whether and how terms of the SSRP relating to aboriginal consultation and engagement will be adequately implemented into the land use planning process and resultant plans in fact. Research did not uncover any formal challenges to date of adequacy of crown consultation with respect to the SSRP.

### 4.3 Issues Relating to Land Use Planning and First Nations in Alberta

Despite apparently extensive provision for First Nations consultation in the land use planning process, issues have arisen. Specifically, there have been concerns raised about the adequacy of

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<sup>208</sup> *Ibid* at 100-102

<sup>209</sup> *Ibid* at 38

<sup>210</sup> *Ibid* at 2

<sup>211</sup> *Ibid* at 102

<sup>212</sup> Neil Mirau & Dorothy First Rider, *South Saskatchewan Regional Plan (SSRP) Traditional Use Studies Project*, prepared for Alberta Environment (Lethbridge, Alberta: Arrow Archaeology Limited & First Rider Consultants and Associates, March 2009), online: <[www.environment.gov.ab.ca/info/home.asp](http://www.environment.gov.ab.ca/info/home.asp)>

LARP by First Nations groups in that region. A significant outcome of the resultant review was the recommendation of creating a Traditional Land Use Management Framework under the regional plan. This recommendation could likely translate to each regional plan.

The *Review Panel Report 2015: Lower Athabasca Regional Plan*<sup>213</sup> [Review Panel Report 2015] was released in response to requests for review of LARP by six First Nations groups. Under *ALSA*,<sup>214</sup> persons “directly and adversely affected by a regional plan” may request a review of that regional plan, within 12 months of its coming into force.<sup>215</sup> Upon such a request, Alberta must convene a review panel, which then reports back to the Stewardship Minister who then reports with recommendations to the Executive Council.<sup>216</sup>

Six First Nations groups and one Metis group, namely the Athabasca Chipewyan First Nation, Mikisew Cree First Nation, Cold Lake First Nations, Onion Lake Cree Nation, Fort McKay First Nation and Fort McKay Metis Community Association, and Chipewyan Prairie Dene First Nation, filed Requests for Review. The Stewardship Minister convened the Lower Athabasca Regional Plan Review Panel on June 23, 2014, and the panel submitted their report, being the Review Panel Report 2015, on June 22, 2015.<sup>217</sup> The process involved the panel reviewing applications, written responses from Alberta, applicants’ replies to those responses, and panel requests for information.<sup>218</sup>

### LARP Review Panel Findings

The Review Panel Report 2015 supported for the requests for review. As Laidlaw noted, it “criticized the handling of First Nation consultation in the development of LARP and recommended the implementation of a Traditional Land Use Management Framework.”<sup>219</sup> The CBC described the findings of the Review Panel Report 2015 as “damning” and finding that “[Alberta’s] attempt to balance competing interests in the oilsands region has failed to protect aboriginal rights, lands and health from industrial development. [and concluded that LARP] has been used by both industry and government to erode traditional land use in favour of economic interests.”<sup>220</sup> CBC quoted Professor Martin Olszynski saying “[the report] validates almost entirely First Nations concerns.”<sup>221</sup>

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<sup>213</sup> Alberta, *Review Panel Report 2015: Lower Athabasca Regional Plan* (22 June 2015), online at: <[https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations\\_2016-06-22.pdf](https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations_2016-06-22.pdf)> [LARP RPR 2015]

<sup>214</sup> *ALSA*, *supra* note 188 s19.2

<sup>215</sup> *Ibid*, s.19.2(1)

<sup>216</sup> *Ibid* s.19.2, *Alberta Land Stewardship Regulation*, Alta Reg. 179/2011. Alberta also refers to the *ALSA* Rules of Practice for Conducting Reviews of Regional Plan, March 2014, and the Code of Conduct for Panels Established Under Section 19.2 of the *Alberta Land Stewardship Act*, March 19, 2014, online at <

<https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/LARPRequestReview/Pages/default.aspx> >

<sup>217</sup> <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/LARPRequestReview/Pages/default.aspx>, and LARP RPR 2015, *supra* note 209

<sup>218</sup> *Ibid*

<sup>219</sup> Laidlaw OP# 53, *supra* note 185 at 28-9

<sup>220</sup> Bob Weber, “Alberta failing aboriginal people in the oilsands area: report”, CBC News (2 February 2016), online: <[www.cbc.ca/news/canada/edmonton/alberta-failing-aboriginal-people-in-the-oilsands-area-report-1.3430762](http://www.cbc.ca/news/canada/edmonton/alberta-failing-aboriginal-people-in-the-oilsands-area-report-1.3430762)>

<sup>221</sup> *Ibid*

CBC noted specific concerns about conservation areas, scope of panel review, and inadequate consideration of cumulative effects.<sup>222</sup> Concerns also arose about project approvals continuing while the panel review was underway. Environment Minister Shannon Phillips was quoted as acknowledging flaws in LARP, but added:

there are a lot of babies in this particular bathwater and it's not in the public interest to completely scrap the process. What is in the public interest is to hear loud and clear what is said about the relationship with indigenous people and work together collaboratively in order to improve on those very clear shortcomings.<sup>223</sup>

The Review Panel Report 2015 addressed a number of issues, some of which are outside the scope of this paper, including whether parties were directly and adversely affected by LARP, and much of the jurisdiction of the review panel. The panel did note that cumulative effects management is a “fundamental theme throughout the LARP.”<sup>224</sup>

The Review Panel reported that “[m]ost of the First Nation Applicants, in their written arguments, maintained that although the LARP proposed a “balancing of interests” through the cumulative effects management model set out in the document, their interests were not incorporated in the LARP in any meaningful way.”<sup>225</sup> The Review Panel recommended development of a Traditional Land Use (TLU) Management Framework, to address issues relating to location and boundaries of TLU.

The Review Panel could not directly evaluate Crown consultation during LARP creation or implementation for jurisdictional reasons, but was able to “look to” consultation in its review.

The Review panel, Alberta, and First Nations are in agreement that the Panel has no jurisdiction to address questions related to the adequacy of Crown consultation. The Review Panel lacks the authority to answer questions of law, a necessary prerequisite to performing an assessment of the adequacy of consultation. The Review Panel notes that section 5 of the ALSA required consultation in the development of the LARP. That term is not defined in the ALSA but the Review Panel finds that it refers to the planning process, and *not* the consultation requirement imposed by case law, when the Crown undertakes actions which may infringe Aboriginal or Treaty rights.

The Review Panel’s position is that it may look to the LARP consultation record for the purpose of assessing whether a harm to “health, property, income, or quiet enjoyment of property” exists, or will likely occur, and to make recommendations to the Stewardship Minister on mitigation those harms. A review of the LARP consultation record may inform the Review Panel in the formulation of any recommendations that it makes to the Stewardship Minister.<sup>226</sup> [emphasis mine]

Similarly, the Review Panel could not take jurisdiction on matters of Constitutional Law, being “decisions impacting the rights of persons.” However, it “should take notice of existing constitutional rights in the course of its review [...] Whether Aboriginal rights or Treaty rights fall within the scope of this legislation is a statutory interpretation question for the Review Panel to answer.”<sup>227</sup>

The Review Panel ultimately noted:

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<sup>222</sup> *Ibid*

<sup>223</sup> *Ibid*

<sup>224</sup> LARP RPR 2015, *supra* note 209 at 4

<sup>225</sup> *Ibid* at 5

<sup>226</sup> *Ibid* at 23

<sup>227</sup> *Ibid* at 23

It seems clear to the Review Panel that there is a consistent theme throughout the six First Nations' Applications to these proceedings. That theme is that their constitutionally protected rights, under either their respective treaties or under section 35 of the *Constitution Act, 1982*, have not been taken into account in the derivation of any thresholds or frameworks under the LARP.<sup>228</sup>

The Review Panel noted LARP's Strategy 7 and Outcome of Inclusion of Aboriginal People in land-use planning. They noted the reference to TLU in LARP with references to continued consultation when government decision may affect constitutionally protected rights.<sup>229</sup> The Review Panel made the following observation:

The LARP sets out a **vision** that is inclusive of Aboriginal Peoples and, in fact, goes above and beyond expectations for First Nation consultation. The review panel observes, however, that the actual implementation of this vision falls short, as it doesn't integrate First nations in finding a solution. To be frank, what Alberta said it would do, and what it actually did, are very different things. The Panel suggests that government integrate Aboriginal peoples' input into the implementation and suggests that a TLU management framework is the best way to achieve this.<sup>230</sup> [emphasis mine]

And recommended:

[F]or any effective land-use planning to proceed in the Lower Athabasca Region, the Government of Alberta must initiate plans to develop a Traditional Land Use Management Framework. Failing to implement such a framework leaves industry, regulators, stakeholders, governments and First Nations asking important questions about Aboriginal Peoples' constitutionally protected rights in their Traditional Land Use territories, which conflict with future development activities in the Lower Athabasca Region.<sup>231</sup>

### Consultation Jurisdiction

ESRD has jurisdiction to carry out the Crown's duty to consult in the LUP context. Laidlaw observes "[t]he Guidelines state that the ERSD Stewardship Branch will lead Crown consultation on "initiatives" such as:

- ESRD provincial/regional policy development and implementation;
- ESRD management frameworks, sub-regional plans, and other planning initiatives (e.g. caribou range planning and similar species-at-risk plans); and
- Implementation of regional plans.<sup>232</sup>

The Guidelines also provide that First Nations Consultation may be triggered by "land use planning that provides a long-term framework for Crown decisions."<sup>233</sup> Laidlaw notes "there is no provision for First Nations to initiate consultation, or to compel Alberta to respond or make determinations."<sup>234</sup>

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<sup>228</sup> *Ibid* at 184

<sup>229</sup> *Ibid* at 174

<sup>230</sup> *Ibid* at 183

<sup>231</sup> *Ibid* at 183

<sup>232</sup> Laidlaw OP# 53, *supra* note 185 at 28-9, citing Guidelines, *supra* note 178 at 4

<sup>233</sup> Guidelines, *supra* note 181 at 8

<sup>234</sup> Laidlaw OP# 53, *supra* note 185 at 38

As noted above, the Review Panel did not have jurisdiction to evaluate the adequacy of First Nations' consultation, but took notice that the best way to address concerns about inadequate consultation would be by the creation of a TLU Management Framework.

#### 4.4 Implications of the Peel Case for Alberta

The land use planning frameworks in Alberta and Yukon differ in many ways. Yukon is a Territory, and the entire land use planning process is set out in the terms of modern treaty, while Alberta is a Province and the land use planning process is governed by provincial law and policy, with numbered treaties in place, and obligations to comply with common law and provincial policy with respect to consultation of First Nations.

The Peel judgment will not directly apply in Alberta. However, the SCC judgment may, depending on its approach, affect the Alberta approach to first nations consultation in the land use planning process. There may be implications with respect to treaty interpretation, in particular the question of the honour of the Crown when the consultation process is already set out, as discussed in section 3.4.4 above. Alberta might find guidance if determining adequacy of consultation once a land use plan with directions on consultation are in place, or particularly if a TLU Management Framework were to be put in place, as that circumstance might closer resemble the nature of a modern treaty. There are many variables in this scenario.

The SCC judgment may thus influence the ability of Alberta to unilaterally make land use planning decisions, if it directs deference to negotiated consultation provisions over recourse to the common law honour of the Crown. It is well established that the Crown will not lose its duty to consult, but in broader discussions, courts have delineated this duty, as discussed above: found that this duty does not extend to a duty to agree or to recognize a first nations "veto". While legislation is not subject to the duty to consult, delegated decision-making including land use planning does invoke the duty.<sup>235</sup> Again, direct application will not squarely arise, but the court's reasons may be informative.

### 5.0 Land Use Planning – First Nations Connection

A few notes on the natures of First Nations traditional knowledge and land planning should be included for their broader bearing on the subject. First Nations traditional use and knowledge has been considered to lend well to the concept of land use planning.

Martin Olszynski noted a point of law arising in *Tsilhqot'in Nation v British Columbia*,<sup>236</sup> that the "inherent limit" relating to restrictions of aboriginal title to pre-sovereignty uses lent well to "creating and implementing a land-use plan for their title-lands that would allow for some development while at the same time preserving the land's benefits for future generations. By doing so at the outset, title-holding groups would reduce the uncertainty associated with the "inherent limit", as any reviewing court would be loathe to interfere with land-use decisions properly based

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<sup>235</sup> Bankes, *supra* note 160

<sup>236</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

on such a scheme.”<sup>237</sup> Olszynski noted that the issues around the LARP Review Panel 2015 and the Peel case “suggest that First Nations better understand the principles and processes behind land use planning better than provincial and territorial governments do.”<sup>238</sup>

Laidlaw and Passelac-Ross discussed arguments for joint stewardship agreements in Alberta in *Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples*,<sup>239</sup> citing a number of joint management agreements and opportunities between Alberta and Aboriginal peoples.<sup>240</sup> Laidlaw and Passelac-Ross note:

Governments have a constitutional duty to consult and accommodate First nations when they have knowledge of a decision that may adversely affect their aboriginal and treaty rights. An effective joint stewardship arrangement could satisfy the duty to consult and accommodate within the geographical area that it encompasses.<sup>241</sup>

In “Indigenous Legal Traditions and the Future of Environmental Governance in Canada,”<sup>242</sup> Clogg et al discuss indigenous law and contemporary approaches to environmental management. Their paper “comments on the significance [of the] revitalization of Indigenous legal traditions and their application to contemporary environmental problems in light of federal environmental deregulation in Canada.”<sup>243</sup> Their first case study is the Gitanyow Lax’yip Land Use Plan, a British Columbia case, in which the Gitanyow and BC concluded the *Gitanyow Huwilp Recognition and Reconciliation Agreement* in 2012, including the *Gitanyow Lax’yip Land Use Plan*, which “commits the Parties to collaborative implementation of the plan ‘according to the Parties’ respective laws, policies, customs, traditions and decision-making processes.”<sup>244</sup> The paper demonstrated through three case studies, “three examples of Indigenous peoples that effectively applied their own laws in order to address complex, contemporary challenges to the integrity of their respective territories. While each of these nations created unique strategies based on the substantive content of their own particular legal traditions, and tailored them to the specific threat(s) facing their territories, certain more broadly applicable insights may be gleaned from them.”<sup>245</sup>

## 6.0 Resultant Issues in Yukon and Alberta

This section summarizes key implications of the Peel litigation.

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<sup>237</sup> Martin Olszynski, “The ‘Inherent Limit’ Post-Tsilhqot’in: Where Indigenous Law and Land-Use Planning Meet” (10 July 2014), online: ABLawg < <http://ablawg.ca/2014/07/10/the-inherent-limit-post-tsilhqotin-where-indigenous-law-and-land-use-planning-meet/> >

<sup>238</sup> *Ibid*

<sup>239</sup> David Laidlaw and Monique M. Passelac-Ross, *Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples: CIRL Occasional Paper #38* (Calgary: Canadian Institute for Resources Law, March 2012), online: < <http://dspace.ucalgary.ca/bitstream/1880/48941/1/CoManagementOP38w.pdf> >

<sup>240</sup> *Ibid* at 51-2

<sup>241</sup> *Ibid* at 52

<sup>242</sup> Jessica Clogg et al, “Indigenous Legal Traditions and the Future of Environmental Governance in Canada” (2016) 29 J Env L & Prac 227

<sup>243</sup> *Ibid* at 231

<sup>244</sup> *Ibid* at 239

<sup>245</sup> *Ibid* at 255

The case raises broader questions around environmental protection, given the case's notable elements of broad community mobilization (both Aboriginal and public), and dramatic environmental implications turning on treaty consultation provisions – Yukon environmental law evidently not being inconsistent with opening up 71% of the PWR's pristine wilderness for development. The Peel case certainly raises the question of conflation of Aboriginal and treaty rights with environmental protection, in modern and possibly historical treaty contexts, and the implications, accuracy and adequacy thereof, and questions around whether such conflation has potential for advancing reconciliation or entrenching false dichotomies. Examination of this issue is outside the scope of this paper but is an important subject for further exploration.

### **6.1 Status of Land Use Planning Consultation as a Treaty Right**

Aside from the specific procedural questions before the SCC in the Peel case, the issue to be determined is of treaty interpretation. Determination of this question may have implications for both jurisdictions.

In the Yukon, LUP consultation is clearly set out within the UFA and FAs (see section 3.2, above) and is therefore a treaty right.

In Alberta, LUP is not a treaty right, although LUP triggers consultation.<sup>246</sup> Consultation arises in terms of whether First Nations are directly and adversely affected by Crown action (see section 4.2, above).

### **6.2 Procedural vs. Substantive Breaches of the Duty to Consult**

Discussion of the duty to consult and its substantive dimensions can be found above at sections 3.4.4 and 4.1.

The Peel case has been consistent at all levels that the litigation is about the procedural and not substantive content of the PWRLUP.

There is little implication for Alberta in this regard. It would be a stretch of reasoning to apply the analysis of the Peel case's procedural breach to the Alberta context, as the treaty context and LUP frameworks are so different.

### **6.3 Potential for Unilateral Crown Decision-making and the Honour of the Crown**

The honour of the Crown has been discussed earlier in this paper (see sections 3.3.5 and 3.4.4, above). There is potentially room in the Peel case for the Court to revisit whether to "superimpose" the common-law duty to consult on top of specific consultation terms for land use planning in the context of a modern treaty, or to defer to the negotiated terms, perhaps at a level beyond "plain reading" but short of the extent due in the absence of such terms. The more eager the court is to defer to negotiated terms, the more support there is for unilateral Crown decision-making in that

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<sup>246</sup> Guidelines, *supra* note 181 at 8, as discussed earlier in this paper

context. This has obviously direct implication for future consultation in land use planning in Yukon.

As discussed, Alberta has a different land use planning and First Nations consultation structure, making SCC guidance on this point less applicable. In Alberta, the honour of the Crown creates the duty to consult (see section 4.1, above). In Alberta, as a result of the application of common law and provincial Policy, the Crown may make decisions unilaterally provided that proper consultation was conducted.<sup>247</sup> However, if regional LUPs included something like a TLU Framework, especially if negotiated with First nations, guidance from the Peel case on this point could be more applicable (see section 4.3, above). If litigation had followed the Review Panel Report 2015, there might be better judicial guidance on the duty to consult in the LUP process in Alberta.

The Peel case may provide guidance relevant to Alberta context, but again, it will be indirect as the treaty and LUP contexts are different.

## 7.0 Conclusions

The Peel litigation has led to a significant land use planning and First Nations consultation case, judgment pending from the Supreme Court of Canada. The events around the Peel case have had considerable varied dimensions including environmental protection, Aboriginal rights and law, political strategy, and to an extent, litigation strategy; in addition to the treaty interpretation and procedural matters subject of the litigation. The case occurs in the context of considerable distinctions between parties in implications for environmental protection, and in the context of the respective powers of the Crown and First Nations under modern treaty. The case will largely involve specific procedural points of interpretation, but may address a larger issue about the scope of the duty to consult in the context of specific land use planning provisions in a modern treaty, and whether the court might prefer to impose the honour of the Crown in that circumstance or defer to negotiated terms. The case will have implications for the Peel Watershed Region and for future land use planning in the Yukon. Depending on the SCC's approach, and depending on Alberta's future approach to First Nations involvement in land use planning, the case may have significant implications for the different land use planning and First Nations consultation structures in Alberta. The Supreme Court of Canada decision is expected later in 2017. We will monitor these outcomes as they unfold.

## 8.0 Addendum – the SCC Decision in 2017

Judgment of the Supreme Court of Canada was rendered on December 1, 2017.<sup>248</sup> The Court determined that their role was to assess the legality of the Crown's decision, as a matter of judicial review with judicial forbearance subject to constitutional compliance; quashed Yukon's Final Plan on the basis that Yukon exceeded the proper scope of its authority to modify the Final Recommended Plan under the terms of the UFA; and, based on a contextual reading of the modern treaty, returned the parties to the prescribed process at the s.11.6.3.2 stage.

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<sup>247</sup> See *Gitxaala*, *supra* note 168 regarding the duty to consult not equating to a duty to agree or a veto

<sup>248</sup> *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 <online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16890/index.do> , <http://canlii.ca/t/hp2d8> > [*Nacho Nyak Dun SCC*]

**Treaty Interpretation and the Honour of the Crown:** The SCC’s re-characterization of the role of the Court and the nature of modern treaties reframed the question of the honour of the Crown in a modern treaty context. The honour of the Crown was invoked in carrying out the process prescribed by modern treaty in good faith and in accordance with the honour of the Crown<sup>249</sup> (here, in carrying out consultation as robustly defined under the UFA<sup>250</sup>), rather than recognizing a common-law duty to consult beyond the terms of the treaty. Justice Karakatsanis did not expressly consider whether the terms of the treaty replaced the common-law duty to consult, but noted the “sui generis nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship.”<sup>251</sup> She noted:

Modern treaties are intended to renew the relationship between Indigenous peoples and the Crown to one of equal partnership [... and] 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 [with the qualification that] judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.<sup>252</sup>

Treaty interpretation in this context requires deference to text. Justice Karakatsanis wrote:

The provisions of Chapter 11 must be interpreted in light of the modern treaty interpretation principles set out in this Court’s jurisprudence and the interpretation principles in the Final Agreements (ss. 2.6.1 to 2.6.8). 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, 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).

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 (*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) 475). Furthermore, while courts must “strive to respect [the] handiwork” of

<sup>249</sup> *ibid* at para 52

<sup>250</sup> *ibid* at para 41

<sup>251</sup> *ibid* at para 22

<sup>252</sup> *ibid* at paras 33-4

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).

By applying these interpretive principles, courts can help ensure that modern treaties will advance reconciliation. [...] <sup>253</sup>

Writing for a unanimous court, Justice Karakatsanis re-characterized the issues before the SCC as follows:

- (a) What is the appropriate role of the court in these proceedings?
- (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? <sup>254</sup>

On the first question, Karakatsanis determined the role of the court as that of judicial review: one of judicial forbearance, <sup>255</sup> subject to “scrutiny of Crown conduct to ensure constitutional compliance,” <sup>256</sup> as opposed to supervision of the conduct of the parties.

On the second question, Yukon’s approval of its Final Plan was not authorized by s.11.6.3.2 of the Final Agreements. Yukon exceeded its authority to modify the Final Recommended Plan (although such modifications need not be limited to those suggested at the first stage), <sup>257</sup> and therefore the Court quashed the approval of Yukon’s Final Plan. Yukon further failed to follow the Commission’s agreed process, thereby “usurp[ing] the planning process and the role of the Commission,” <sup>258</sup> conduct not becoming the honour of the Crown. <sup>259</sup> The Court noted,

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 Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 73; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, 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. <sup>260</sup>

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<sup>253</sup> *ibid* at paras 36-8

<sup>254</sup> *ibid* at para 31

<sup>255</sup> *ibid* at para 33

<sup>256</sup> *ibid* at para 34

<sup>257</sup> *ibid* at paras 48-50

<sup>258</sup> *ibid* at para 57, citing *Nacho Nyak Dun YKSC* at para 198

<sup>259</sup> *ibid* at para 57

<sup>260</sup> *ibid* at para 52

On the third question, the proper remedy by administrative law was to return the parties to “the position they were in prior to the making of the invalid decision,”<sup>261</sup> that being at the s.11.6.3.2 stage. YKCA erred in returning the matter to the earlier stage, as the court’s role is to determine legality of a decision, not assess conduct.<sup>262</sup>

**Resolution:** The SCC judgment was welcomed by both sides of the litigation. This was surely a high point in the litigation and reconciliation, and a treat for those of us who have followed the case closely. The appellants celebrated the decision as a “victory for the Peel Watershed, First Nations, and all Yukoners.”<sup>263</sup> The respondent Yukon’s Premier issued a statement that:

The Supreme Court of Canada’s decision marks a pivotal point for our territory. I believe that when people look back at this moment, they will see it as the beginning of a new era for Yukon based on reconciliation. Today’s decision is a victory for Yukon. We now have the clarity needed to move forward with the Peel regional land use plan.<sup>264</sup>

**Future Rejection Potential:** The court interpreted the scope of Yukon’s ability to modify a recommended final plan, but not the court’s ability to reject a recommended final plan,<sup>265</sup> as recommended by the Attorney General of Canada.<sup>266</sup> The court noted:

[I]t 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.<sup>267</sup>

Indeed, the term “modify” was considered in part with respect to its juxtaposition to the word “reject,”<sup>268</sup> and the court considered the different consequences of rejection from modification:

[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.<sup>269</sup>

In the end, the result is that Yukon was obliged to consult in good faith and in accordance with the honour of the Crown in creating the plan. The question of whether Yukon is permitted to reject a plan once created through good faith consultation, in the modern treaty context, is left for

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<sup>261</sup> *ibid* at para 58

<sup>262</sup> *ibid* at para 60

<sup>263</sup> Protect the Peel, “BREAKING: A unanimous ruling” (1 December 2017), posted on *Protect the Peel*, online: Facebook <

[www.facebook.com/ProtectPeel/photos/a.980121068773374.1073741829.962694307182717/1484209221697887/?type=3&theater](http://www.facebook.com/ProtectPeel/photos/a.980121068773374.1073741829.962694307182717/1484209221697887/?type=3&theater) >

<sup>264</sup> Government of Yukon, News Release #17-258, “Statement from the Government of Yukon regarding the decision in the Peel regional land use planning case” (1 December 2017), online: < <http://www.gov.yk.ca/news/17-258.html> >

<sup>265</sup> *Nacho Nyak Dun SCC* at paras 5 & 63

<sup>266</sup> Discussed *infra*

<sup>267</sup> *ibid* at para 63

<sup>268</sup> *ibid* at para 49

<sup>269</sup> *ibid* at para 49

another day, particularly in light of the court's deference to the terms of the modern treaty, subject to scrutiny for constitutional compliance, including the honour of the Crown.

## Appendix 1

Umbrella Final Agreement Between The Government Of Canada,  
The Council For Yukon Indians And The Government Of The Yukon<sup>270</sup>  
Signed at Whitehorse, Yukon, the 29<sup>th</sup> day of May 1993

### Chapter 1 - Definitions

In the Umbrella Final Agreement, the following definitions shall apply unless otherwise provided in a particular chapter.

[...]

"Consult" or "Consultation" means to provide:

1. 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;
2. 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
3. full and fair consideration by the party obliged to consult of any views presented.

[...]

### Chapter 11 - Land Use Planning

#### 11.1.0 Objectives

11.1.1 The objectives of this chapter are as follows:

11.1.1.1 to encourage the development of a common Yukon land use planning process outside community boundaries;

11.1.1.2 to minimize actual or potential land use conflicts both within Settlement Land and Non-Settlement Land and between Settlement Land and Non-Settlement Land;

11.1.1.3 to recognize and promote the cultural values of Yukon Indian People;

11.1.1.4 to utilize the knowledge and experience of Yukon Indian People in order to achieve effective land use planning;

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<sup>270</sup> *Umbrella Final Agreement between The Government of Canada, The Council for Yukon Indians, and The Government of Yukon* (29 May 1993), online: < <https://www.aadnc-aandc.gc.ca/eng/1297278586814/1297278924701>> and < [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al\\_ldc\\_ccl\\_fagr\\_ykn\\_umb\\_1318604279080\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf)> [UFA]

11.1.1.5 to recognize Yukon First Nations' responsibilities pursuant to Settlement Agreements for the use and management of Settlement Land; and

11.1.1.6 to ensure that social, cultural, economic and environmental policies are applied to the management, protection and use of land, water and resources in an integrated and coordinated manner so as to ensure Sustainable Development.

## **11.2.0 Land Use Planning Process**

11.2.1 Any regional land use planning process in the Yukon shall:

11.2.1.1 subject to 11.2.2, apply to both Settlement and Non- Settlement Land throughout the Yukon;

11.2.1.2 be linked to all other land and water planning and management processes established by Government and Yukon First Nations minimizing where practicable any overlap or redundancy between the land use planning process and those other processes;

11.2.1.3 provide for monitoring of compliance with approved regional land use plans;

11.2.1.4 provide for periodic review of regional land use plans;

11.2.1.5 provide for procedures to amend regional land use plans;

11.2.1.6 provide for non-conforming uses and variance from approved regional land use plans in accordance with 12.17.0;

11.2.1.7 establish time limits for the carrying out of each stage of the process;

11.2.1.8 provide for public participation in the development of land use plans;

11.2.1.9 allow for the development of sub-regional and district land use plans;

11.2.1.10 provide for planning regions which, to the extent practicable, shall conform to the boundaries of Traditional Territories;

11.2.1.11 provide, to the extent practicable, for decisions of the Yukon Land Use Planning Council and the Regional Land Use Planning Commissions to be made by consensus; and

11.2.1.12 apply to the process of establishing or extending National Parks and national historic parks and commemorating new national historic sites.

11.2.2 This chapter shall not apply to:

11.2.2.1 national park reserves established or national historic sites commemorated prior to Settlement Legislation, National Parks or national historic parks once established, or national historic sites once commemorated;

11.2.2.2 subdivision planning or local area planning outside of a Community Boundary; or

11.2.2.3 subject to 11.2.3, land within a Community Boundary.

11.2.3 In the event a Community Boundary is altered so as to include within a Community Boundary any land subject to an approved regional land use plan, the regional land use plan shall continue to apply to such land until such time as a community plan is approved for such land.

### **11.3.0 Yukon Land Use Planning Council**

11.3.1 The Land Use Planning Policy Advisory Committee established by the "Agreement on Land Use Planning in Yukon", dated October 22, 1987, shall be terminated as of the effective date of Settlement Legislation and replaced by the Yukon Land Use Planning Council on the same date.

11.3.2 The Yukon Land Use Planning Council shall be made up of one nominee of the Council for Yukon Indians and two nominees of Government. The Minister shall appoint the nominees.

11.3.3 The Yukon Land Use Planning Council shall make recommendations to Government and each affected Yukon First Nation on the following:

11.3.3.1 land use planning, including policies, goals and priorities, in the Yukon;

11.3.3.2 the identification of planning regions and priorities for the preparation of regional land use plans;

11.3.3.3 the general terms of reference, including timeframes, for each Regional Land Use Planning Commission;

11.3.3.4 the boundary of each planning region; and

11.3.3.5 such other matters as Government and each affected Yukon First Nation may agree.

11.3.4 The Yukon Land Use Planning Council may establish a secretariat to assist the Yukon Land Use Planning Council and Regional Land Use Planning Commissions in carrying out their functions under this chapter.

11.3.5 The Yukon Land Use Planning Council shall convene an annual meeting with the chairpersons of all Regional Land Use Planning Commissions to discuss land use planning in the Yukon.

### **11.4.0 Regional Land Use Planning Commissions**

11.4.1 Government and any affected Yukon First Nation may agree to establish a Regional Land Use Planning Commission to develop a regional land use plan.

11.4.2 Settlement Agreements shall provide for regionally based Regional Land Use Planning Commissions with one third representation by nominees of Yukon First Nations, one third representation by nominees of Government, and one third representation based on the demographic ratio of Yukon Indian People to the total population in a planning region.

11.4.3 The majority of nominees of Yukon First Nations and the majority of nominees of Government on a Regional Land Use Planning Commission shall be Yukon residents with a long term familiarity with the region or regions being planned.

11.4.4 Each Regional Land Use Planning Commission shall prepare and recommend to Government and the affected Yukon First Nation a regional land use plan within a timeframe established by Government and each affected Yukon First Nation.

11.4.5 In developing a regional land use plan, a Regional Land Use Planning Commission:

11.4.5.1 within its approved budget, may engage and contract technical or special experts for assistance and may establish a secretariat to assist it in carrying out its functions under this chapter;

11.4.5.2 may provide precise terms of reference and detailed instructions necessary for identifying regional land use planning issues, for conducting data collection, for performing analyses, for the production of maps and other materials, and for preparing the draft and final land use plan documents;

11.4.5.3 shall ensure adequate opportunity for public participation;

11.4.5.4 shall recommend measures to minimize actual and potential land use conflicts throughout the planning region;

11.4.5.5 shall use the knowledge and traditional experience of Yukon Indian People, and the knowledge and experience of other residents of the planning region;

11.4.5.6 shall take into account oral forms of communication and traditional land management practices of Yukon Indian People;

11.4.5.7 shall promote the well-being of Yukon Indian People, other residents of the planning region, the communities, and the Yukon as a whole, while having regard to the interests of other Canadians;

11.4.5.8 shall take into account that the management of land, water and resources, including Fish, Wildlife and their habitats, is to be integrated;

11.4.5.9 shall promote Sustainable Development; and

11.4.5.10 may monitor the implementation of the approved regional land use plan, in order to monitor compliance with the plan and to assess the need for amendment of the plan.

### **11.5.0 Regional Land Use Plans**

11.5.1 Regional land use plans shall include recommendations for the use of land, water and other renewable and non-renewable resources in the planning region in a manner determined by the Regional Land Use Planning Commission.

### **11.6.0 Approval Process for Land Use Plans**

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:

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.

### **11.7.0 Implementation**

11.7.1 Subject to 12.17.0, Government shall exercise any discretion it has in granting an interest in, or authorizing the use of, land, water or other resources in conformity with the part of a regional land use plan approved by Government under 11.6.2 or 11.6.3.

11.7.2 Subject to 12.17.0, a Yukon First Nation shall exercise any discretion it has in granting an interest in, or authorizing the use of, land, water or other resources in conformity with the part of a regional land use plan approved by that Yukon First Nation under 11.6.4 or 11.6.5.

11.7.3 Nothing in 11.7.1 shall be construed to require Government to enact or amend Legislation to implement a land use plan or to grant an interest in, or authorize the use of, land, water or other resources.

11.7.4 Nothing in 11.7.2 shall be construed to require a Yukon First Nation to enact or amend laws passed pursuant to self-government Legislation to implement a land use plan or to grant an interest in, or authorize the use of, land, water or other resources.

### **11.8.0 Sub-Regional and District Land Use Plans**

11.8.1 Sub-regional and district land use plans developed in a region which has an approved regional land use plan shall conform to the approved regional land use plan.

11.8.2 The provisions of an approved regional land use plan shall prevail over any existing sub-regional or district land use plan to the extent of any inconsistency.

11.8.3 Subject to 11.8.4 and 11.8.5, a Yukon First Nation may develop a sub-regional or district land use plan for Settlement Land and Government may develop a sub-regional or district land use plan for Non-Settlement Land.

11.8.4 If Government and a Yukon First Nation agree to develop a sub-regional or district land use plan jointly, the plan shall be developed in accordance with the provisions of this chapter.

11.8.5 If Government and a Yukon First Nation do not agree to develop a sub-regional or district land use plan jointly, only 11.8.1 and 11.8.2 of this chapter shall apply to the development of the plan.

### **11.9.0 Funding**

11.9.1 Each Regional Land Use Planning Commission, after Consultation with each affected Yukon First Nation, shall prepare a budget for the preparation of the regional land use plan and for carrying out its functions under this chapter and shall submit that budget to the Yukon Land Use Planning Council.

11.9.2 The Yukon Land Use Planning Council shall, on an annual basis, review all budgets submitted under 11.9.1 and, after Consultation with each affected Regional Land Use Planning Commission, propose a budget to Government for the development of regional land use plans in the Yukon and for its own administrative expenses.

11.9.3 Government shall review the budget submitted under 11.9.2 and shall pay those expenses which it approves.

11.9.4 If Government initiates the development of a sub-regional or district land use plan by a planning body, the planning body established to prepare that plan shall prepare a budget for the preparation of the plan which shall be subject to review by Government, and Government shall pay those expenses which it approves.

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