



SUPREME COURT OF CANADA

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

APPEAL HEARD: March 22, 2017
JUDGMENT RENDERED: December 1, 2017
DOCKET: 36779

BETWEEN:

**First Nation of Nacho Nyak Dun, Tr'ondëk Hwëch'in, Yukon Chapter-Canadian
Parks and Wilderness Society, Yukon Conservation Society, Gill Cracknell,
Karen Baltgailis and Vuntut Gwitchin First Nation**
Appellants

and

Government of Yukon
Respondent

- and -

**Attorney General of Canada, Gwich'in Tribal Council and Council of Yukon
First Nations**
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

REASONS FOR JUDGMENT: Karakatsanis J. (McLachlin C.J. and Abella, Moldaver,
(paras. 1 to 64) Wagner, Gascon, Côté, Brown and Rowe JJ. concurring)

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FIRST NATION OF NACHO NYAK DUN v. YUKON

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Tr'ondëk Hwëch'in,
Yukon Chapter-Canadian Parks and Wilderness Society,
Yukon Conservation Society,
Gill Cracknell,
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Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR YUKON

Aboriginal law — Treaty rights — Land claims — Honour of the Crown — Federal and territorial governments and First Nations entered into final land claims agreements setting out consultative and collaborative process for development of land use plans — Modifications submitted by Yukon failed to follow process contemplated by final agreements — Role of courts in resolving disputes arising in context of modern treaty implementation — Whether Yukon's approval of plan authorized by final agreements — Appropriate remedy when government breaches obligation under modern treaty.

The Umbrella Final Agreement, a monumental agreement that set the stage for concluding modern treaties in the Yukon, established a collaborative regional land use planning process that was adopted in modern land claims agreements between Yukon, Canada, and the appellant First Nations. These Final Agreements recognize the traditional territories of the First Nations in the Yukon portion of the Peel Watershed and their right to participate in the management of public resources in that area. In 2004, the Peel Watershed Planning Commission was established to develop a regional land use plan for the Peel Watershed. In 2009, after years of research and consultation, the Commission initiated the land use approval process by submitting its Recommended Peel Watershed Regional Land Use Plan to Yukon and the affected First Nations. Near the end of the approval process, and after the Commission had released a Final Recommended Plan, Yukon proposed and

adopted a final plan that made substantial changes to increase access to and development of the region.

The appellants sought orders quashing Yukon's plan and directing Yukon to re-conduct the second consultation required by s. 11.6.3.2 of the Final Agreements. The appellants also sought orders limiting Yukon's power to modify or reject the Final Recommended Plan going forward. The trial judge declared that Yukon did not act in conformity with the process set out in the Final Agreements and quashed Yukon's second consultation and its plan. By introducing changes that had not been presented to the Commission, the trial judge found that Yukon did not properly conduct the second consultation and invalidly modified the Final Recommended Plan. The Yukon Court of Appeal allowed the appeal in part and set aside the part of the trial judge's order that returned the parties to the second round of consultation. The Court of Appeal found that Yukon had failed to properly exercise its rights to propose modifications to the Recommended Plan and the court returned the parties to the earlier stage in the process where Yukon could articulate its priorities in a valid manner. Before this Court, the parties agree that Yukon did not respect the land use plan approval process set out in the Final Agreements. However, they do not agree on the basis for concluding that Yukon's adoption of its final plan is invalid and the appropriate remedy.

Held: The appeal should be allowed in part. The trial judge's order quashing Yukon's approval of its plan is upheld. The parties are returned to the s. 11.6.3.2 stage of the process. The other parts of the trial judge's order are set aside.

These particular proceedings are best characterized as an application for judicial review of Yukon's decision to approve its land use plan. In a judicial review concerning the implementation of modern treaties, a court should simply assess whether the challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship. Reconciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences. However, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance. Under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine.

The provisions of Chapter 11 of the Final Agreements, which set out the land use planning process, must be interpreted in light of the modern treaty interpretation principles. Compared to their historic counterparts, modern treaties are detailed documents and deference to their text is warranted. 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. While courts must show deference

to the terms of a modern treaty, this is always subject to such constitutional limitations as the honour of the Crown.

Yukon's right to modify a Final Recommended Plan arises from s. 11.6.3.2 of the Final Agreements. The scheme and objectives of Chapter 11, as well as the text of s. 11.6.3.2, show that this provision authorizes Yukon to make modifications to a Final Recommended Plan that are based on those it proposed earlier in the process or respond to changing circumstances. As modifications are, by definition, minor or partial changes, s. 11.6.3.2 does not authorize Yukon to change the Final Recommended Plan so significantly as to effectively reject it. The power to modify (or approve or reject) in s. 11.6.3.2 is also subject to prior "consultation". In order to comply with the robust definition of this term in the Final Agreements, Yukon must provide notice in sufficient form and detail to allow affected parties to respond to its contemplated modifications to a Final Recommended Plan, then give full and fair consideration to the views presented during consultations before it decides how to respond to the Final Recommended Plan. In all cases, Yukon can only depart from positions it has taken earlier in the process in good faith and in accordance with the honour of the Crown. 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*.

In this case, Yukon did not have the authority under s. 11.6.3.2 to make the changes that it made to the Final Recommended Plan. Yukon's changes were

neither partial nor minor. They were not based on modifications it had proposed earlier in the process, nor were they made in response to changing circumstances. Yukon's changes to the Final Recommended Plan did not respect the land use planning process in the Final Agreements and its conduct was not becoming of the honour of the Crown. Yukon's approval of its plan must therefore be quashed. The effect of quashing this approval is to return the parties to the stage in the land use plan approval process where Yukon could approve, reject, or modify the Final Recommended Plan after consultation, as per s. 11.6.3.2 of the Final Agreements. It was not open to the Court of Appeal to return the parties to an earlier stage of the planning process. By assessing the adequacy of Yukon's conduct at an earlier stage of the land use plan approval process, even though the First Nations did not seek to have the approval quashed on that basis, the Court of Appeal improperly inserted itself into the heart of the ongoing treaty relationship between Yukon and the First Nations. Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to properly propose modifications related to access and development to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time.

Cases Cited

Referred to: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Clyde River (Hamlet) v. Petroleum*

Geo-Services Inc., 2017 SCC 40; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Little Narrows Gypsum Co. v. Nova Scotia (Labour Relations Board)* (1977), 24 N.S.R. (2d) 406.

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APPEAL from a judgment of the Yukon Court of Appeal (Bauman C.J. and Smith and Goepel JJ.A.), 2015 YKCA 18, 379 B.C.A.C. 78, 654 W.A.C. 78, 95 C.E.L.R. (3d) 187, [2016] 1 C.N.L.R. 73, [2015] Y.J. No. 80 (QL), 2015

CarswellYukon 81 (WL Can.), allowing in part an appeal from a decision of Veale J., 2014 YKSC 69, 91 C.E.L.R. (3d) 286, [2015] 1 C.N.L.R. 81, [2014] Y.J. No. 85 (QL), 2014 CarswellYukon 102 (WL Can.). Appeal allowed in part.

Thomas R. Berger, Q.C., Margaret D. Rosling and Micah S. Clark, for the appellants.

John B. Laskin, John A. Terry, Nick Kennedy and Mark Radke, for the respondent.

John S. Tyhurst, for the intervener the Attorney General of Canada.

Jeff Langlois and David Wright, for the intervener the Gwich'in Tribal Council.

Lino Bussoli and Tammy Shoranick, for the intervener the Council of Yukon First Nations.

The judgment of the Court was delivered by

KARAKATSANIS J. —

I. Overview

[1] As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the *Constitution Act, 1982*, they have assumed a vital place in our constitutional fabric. Negotiating modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at pp. 3, 10, 40-41 and 56). This case highlights the role of the courts in resolving disputes that arise in the context of modern treaty implementation.

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

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

[4] In my view, this proceeding is best characterized as a judicial review of Yukon's decision to approve its land use plan. In a judicial review concerning the implementation of modern treaties, a court should simply assess whether the challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship. Reconciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences.

[5] At issue in this appeal is the scope of Yukon's authority to "modify" a Final Recommended Plan as it applies to non-settlement lands. In my view, s. 11.6.3.2 of the Final Agreements authorizes Yukon to make modifications to a Final Recommended Plan that (1) are based on those it proposed earlier in the process or (2) respond to changing circumstances. As modifications are, by definition, minor or partial changes, s. 11.6.3.2 does not authorize Yukon to change the Final Recommended Plan so significantly as to effectively reject it. In all cases, Yukon can only depart from positions it has taken earlier in the process in good faith and in accordance with the honour of the Crown.

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

A. *The Final Agreements*

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

[8] Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, which include treaty rights that now exist by way of land claims agreements. Section 6(1) of

the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, states that a Yukon Final Agreement or Transboundary Agreement is in effect a land claims agreement within the meaning of s. 35 of the *Constitution Act, 1982* (see also s. 2.2.1 of the UFA). Thus, these agreements fall within the constitutional protection of s. 35.

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

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

[11] The UFA establishes, and the Final Agreements implement, a land use planning process for the lands designated in each Final Agreement. These Final Agreements and the Transboundary Agreement recognize the traditional territories of

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

the affected First Nations in the Yukon portion of the Peel Watershed and their right to participate in the management of public resources in that area.

B. *The Peel Watershed*

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

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

C. *The Peel Watershed Land Use Planning Process*

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

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

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

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

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

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

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

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

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

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

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

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

[23] Yukon was slow to respond, and when it did so, it did not follow the January 2011 LOU. In February 2012, the Minister of Energy, Mines and Resources issued a news release developing eight core principles to guide its "modification" of the Final Recommended Plan. Within days, the First Nations objected and stated that

Yukon could only modify the Final Recommended Plan in accordance with previously proposed modifications. Yukon responded that it had carried out the process in good faith and acted within the scope of its authority. Several months later, Yukon proposed a new land use designation system. The First Nations objected to the new system, stating that it was a rejection of the land use planning process set out in the Final Agreements. In response, Yukon set out its view that Yukon and the First Nations each had the “ultimate authority” to approve, reject, or modify that part of the Final Recommended Plan that applies to the land under their authority.

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

[25] In October 2013, Yukon sent a letter to the affected First Nations summarizing its anticipated “modifications” to the Final Recommended Plan. The changes were intended to increase development and access. Later that month, the First Nations again objected to this position, stating that it was inconsistent with the process set out in the Final Agreements. In January 2014, Yukon approved its land use plan for non-settlement land in the Peel Watershed (s. 11.6.3.2).

[26] These legal proceedings ensued. The appellants, First Nation of Nacho Nyak Dun, Tr’ondëk Hwëch’in, Yukon Chapter-Canadian Parks and Wilderness Society, Yukon Conservation Society, Gill Cracknell and Karen Baltgailis sought a declaration that Yukon did not properly conduct the second consultation as required

by s. 11.6.3.2 and orders quashing Yukon's plan and directing Yukon to re-conduct the second consultation. The appellants also sought orders limiting Yukon's power to modify or reject the Final Recommended Plan going forward. The Vuntut Gwitchin First Nation did not originally join the court action, but was added as a respondent on the appeal to the Court of Appeal.

II. Decisions Below

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

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

[29] Bauman C.J., writing for Smith and Goepel JJ.A. of the Yukon Court of Appeal (2015 YKCA 18, [2016] 1 C.N.L.R. 73), allowed the appeal in part and set aside the part of the trial judge's order that returned the parties to the second round of consultation. The Court of Appeal found that Yukon had failed to properly exercise its right to propose modifications to the Recommended Plan, and the court returned the parties to the stage in the process where Yukon could remedy this failure (s. 11.6.2). The court agreed with the trial judge that Yukon's authority to modify the Final Recommended Plan was limited to modifications it had previously proposed to the Recommended Plan. The Court of Appeal however, disagreed with the trial judge's interpretation of the scope of Yukon's authority to reject a Final Recommended Plan, and concluded that this authority was broad.

III. Analysis

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

(s. 11.6.2). In contrast, the First Nations agree with the trial judge that the matter should be returned to the s. 11.6.3.2 stage.

[31] The following issues arise in this appeal:

- (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?

A. *The Appropriate Role of the Court in These Proceedings*

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

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

[34] That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

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

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

[36] 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).

[37] 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 the parties to a modern treaty, this is always “subject to such constitutional limitations as the honour of the Crown” (*Little Salmon*, at para. 54).

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

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

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

While the word “modify” is unqualified in this provision, its juxtaposition to “reject” shows that Yukon cannot modify a Final Recommended Plan so significantly as to effectively reject it. The limited nature of “modify” is also supported by the *Oxford English Dictionary* (online) definition of this term: “To make partial or minor changes to; to alter (an object) in respect of some of its qualities, now typically so as to improve it; to cause to vary without radical transformation.” Similarly, “*modifier*” [modify] which appears in the French version of the UFA is defined in the *Grand Robert de la langue française* (2nd ed. 2001) as [TRANSLATION] “to change (a thing) without altering its nature, its essence”. The meaning of the term conveys that a modification is a limited exercise, which involves changing something without altering its fundamental nature.

[40] The power to modify (or approve or reject) in s. 11.6.3.2 is, by the language of the provision, subject to prior “consultation”. The consultation requirement also limits the nature of the modifications authorized by the section.

[41] “Consultation” is a defined term in the UFA and Final Agreements and requires Yukon to provide

- (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and

- (c) full and fair consideration by the party obliged to consult of any views presented.

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

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

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

Recommended Plan (s. 11.6.3.1). After consultation, Yukon then approves, rejects, or modifies this Final Recommended Plan as it applies to non-settlement land (s. 11.6.3.2). Once a plan is approved, it must be periodically reviewed and can be amended (ss. 11.2.1.4 and 11.2.1.5). Each step of the process builds on decisions made at an earlier stage. This process may span many years and government cycles.

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

[45] Consultation is a key component of the approval process. Consultations between the parties and affected community members on the Commission's Recommended and Final Recommended Plans foster meaningful dialogue.

[46] The Chapter 11 process ensures that Yukon First Nations can meaningfully participate in land use planning for both settlement and non-settlement lands. It does so by setting out consultation rights and the authority of First Nations to

approve, reject, and modify land use plans (ss. 11.6.1 to 11.6.5.2).² In the Final Agreements, most traditional territory was designated as non-settlement land. In exchange for comparatively smaller settlement areas, the First Nations acquired important rights in both settlement and non-settlement lands, particularly in their traditional territories (see Chapters 7, 10, 13, 14, 16, 17 and 18; see also *Little Salmon*, at para. 9). Section 9.3.1 recognizes that “[t]he amount of Settlement Land to be allocated . . . has been determined in the context of the overall package of benefits in the Umbrella Final Agreement.” Barry Stuart, the Chief Land Claims Negotiator for the Yukon Territorial Government, explains that it was more important to First Nations that they be able to meaningfully participate in land use management in all of their traditional territory than to acquire vast tracts of their traditional territory as settlement lands:

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

. . .

The Yukon government’s desire to decentralize decision making and create meaningful opportunities for public participation in managing resources complemented First Nation interests in resource management,

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

and served their interests more effectively than increasing settlement land holdings.³

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

[48] Thus, I agree with the lower courts that Yukon's authority to "modify" a Final Recommended Plan is limited by the language of s. 11.6.3.2, with its requirement of consultation, as robustly defined, and by the objectives and scheme of the land use planning process, including the central role of the Commission and the rights of First Nations to meaningfully participate in the process. Chapter 11 sets out a collaborative process for developing a land use plan, and an unconstrained authority to modify the Final Recommended Plan would render this process meaningless, as Yukon would have free rein to rewrite the plan at the end. Interpreting s. 11.6.3.2 in the context of Chapter 11 shows that Yukon cannot exercise its modification power to effectively create a new plan that is untethered from the one developed by the Commission, on which affected parties had been consulted.

[49] I agree with both courts below that Yukon can make modifications to a Final Recommended Plan (s. 11.6.3.2) that are based on those it has proposed to the

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

Recommended Plan (s. 11.6.2), as the Commission has had the chance to consider these modifications. However, I disagree that these are the only modifications Yukon can make. Interpreting “modify” that narrowly would mean Yukon could only respond to changing circumstances that may arise in the land use planning process by rejecting the Final Recommended Plan. A rejection triggers different consequences than a modification — it brings the land use plan approval process to an end. The parties are left with no land use plan for the region, unless they initiate the process again. Yukon’s power to modify in s. 11.6.3.2 was intended to give it some flexibility to respond to changing circumstances.

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

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

[52] Yukon may therefore make modifications that respond to changing circumstances, such as those that may arise from the second consultation and changes

made by the Commission in its reconsideration of the plan. Given that modifications are, by definition, minor or partial changes, Yukon cannot “modify” a Final Recommended Plan so significantly as to effectively reject it. In all cases, Yukon can only depart from positions it has taken in the past in good faith and in accordance with the honour of the Crown (*Manitoba 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*.

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

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

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

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

[56] Furthermore, Yukon’s plan was based upon a second round of consultation that ignored the framework that it had agreed to in the 2011 LOU. This

LOU required Yukon and the affected First Nations to conduct the consultations together and to prepare a joint response to the Final Recommended Plan.

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

C. *The Appropriate Remedy*

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

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

[60] In my view, the Court of Appeal's approach is inconsistent with the appropriate role of courts in a judicial review involving a modern treaty dispute. The court's role is not to assess the adequacy of each party's compliance at each stage of a modern treaty process. Rather, it is to determine whether the challenged decision was legal, and to quash it if it is not. Close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and long-term relationship that these treaties are designed to foster. Judicial restraint leaves space for the parties to work out their understanding of a process — quite literally, to reconcile — without the court's management of that process beyond what is necessary to resolve the specific dispute. By assessing the adequacy of Yukon's conduct at the s. 11.6.2 stage

of the land use plan approval process, even though the First Nations did not seek to have the approval quashed on that basis, the Court of Appeal improperly inserted itself into the heart of the ongoing treaty relationship between Yukon and the First Nations.

[61] Moreover, Yukon's "failure to properly exercise its right to provide modifications", as described by the Court of Appeal, was exactly that: a failure to exercise a right, not a breach of an obligation. This failure therefore had no bearing on the validity of Yukon's approval of its final plan (*Chandler*, at p. 863; see also *Little Narrows Gypsum Co. v. Nova Scotia (Labour Relations Board)* (1977), 24 N.S.R. (2d) 406 (S.C. (App. Div.)), at para. 19). As Binnie J. explained in *Little Salmon*, "[i]t is up to the parties, when treaty issues arise, to act diligently to advance their respective interests" (para. 12). Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time. Accordingly, I agree with the trial judge that "it would be inappropriate to give the Government the chance to now put its January 2014 plan to the Commission" (para. 219). The appropriate remedy was to quash Yukon's approval of its plan, thereby returning the parties to the s. 11.6.3.2 stage of the land use plan approval process. It was not open to the Court of Appeal to return the parties to an earlier stage.

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

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

IV. Conclusion

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

APPENDIX

Final Agreements, Chapter 11, ss. 11.6.1 to 11.6.5.2

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

Appeal allowed in part with costs to the appellants.

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