COURT OF APPEAL OF YUKON

Citation: *The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18

Date: 20151104
Docket: 14-YU752

Between:

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

Respondents (Plaintiffs)

And

Government of Yukon

Appellant (Defendant)

And

The Gwich'in Tribal Council

Intervenor

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Smith
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of Yukon, dated December 2, 2014 (*The First Nation of Nacho Nyak Dun v. Yukon (Government of)*, 2014 YKSC 69, Whitehorse Docket 13-A0142).

Counsel for the Appellant:	J.B. Laskin, J. Terry, J. Roth, M. Radke
Counsel for the Respondents:	T.R. Berger, Q.C., M.D. Rosling, C.P.S. Riley
Counsel for the Intervenor:	J. Langlois
Place and Date of Hearing:	Whitehorse, Yukon August 20, 21, 2015
Place and Date of Judgment:	Vancouver, British Columbia November 4, 2015

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Madam Justice Smith
The Honourable Mr. Justice Goepel

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Summary:

The Government of Yukon appeals the declaration, and related orders, that it failed to act in conformity with its treaty obligations under the land use planning process for the Peel Watershed. Canada and Yukon entered into an Umbrella Final Agreement with the Yukon First Nations, the terms of which were adopted in Final Agreements with the Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin First Nations. These terms established a consultative and collaborative process for the development of land use plans in various regions, including the Peel Watershed. The process required an independent planning Commission to create an initial Recommended Plan, and Yukon to consult on that plan before approving, rejecting, or proposing modifications to it (s. 11.6.2). The Commission was then required to reconsider the plan and propose a Final Recommended Plan, followed by another obligation on Yukon to consult on that plan before final approval, rejection, or modification of it (s. 11.6.3.2).

Yukon provided very general suggestions at the 11.6.2 stage, and then proposed its own plan at the s. 11.6.3.2 stage. The trial judge concluded that Yukon usurped the Commission's role by introducing new and substantive modifications that were neither consulted on nor put to the Commission for consideration. The judge quashed Yukon's plan and remitted the process to the s. 11.6.3.2 stage for consultation on the Commission's Final Recommended Plan.

Held: Appeal allowed in part. The Final Agreements are treaty rights for the purposes of s. 35 of the Constitution Act, 1982, and the standard of review is correctness. Yukon failed to honour the letter and spirt of its treaty obligations. At the s. 11.6.2 stage, Yukon failed to reveal its extensive plan modifications, and failed to provide the requisite details or reasons in support of its general comments. This undermined the dialogue and left the Commission ill-equipped to advance the process. At the s. 11.6.3.2 stage, Yukon proposed a new plan disconnected from its earlier comments. This effectively denied the Commission performance of its treaty role to develop a land use plan for the Peel Watershed. The appropriate remedy for Yukon's failure to honour the treaty process is to return the parties to the point at which the failure began. That point is the s. 11.6.2 stage. It was there that Yukon derailed the dialogue essential to reconciliation as envisioned in the Final Agreements.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Introduction

[1] The Nacho Nyak Dun, Tr'ondëk Hwëch'in and Vuntut Gwitchin are among the First Nations who have lived on this land for thousands of years before Europeans arrived and Canada was founded. They have traditional territory in the Peel Watershed, which covers approximately 68,000 square kilometers representing 14% of the Yukon.

[2] On 29 May 1993, Canada, Yukon and the Yukon First Nations, represented by the Council for Yukon Indians, entered into an Umbrella Final Agreement ("UFA"). Its terms were incorporated into the Final Agreements of Canada and Yukon with various First Nations including Nacho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin.

[3] The Final Agreements set out a consultative and collaborative process for the development of land use plans. That process began for the Peel Watershed in 2004 and led to the creation of a draft plan in late 2009. The process broke down in 2012 when Yukon changed the plan over the objections of the First Nations, who took the position that Yukon did not have the authority under the Final Agreements to make the changes it had made.

[4] The Nacho Nyak Dun, Tr'ondëk Hwëch'in and others commenced an action against Yukon. The trial judge, Mr. Justice Veale of the Supreme Court of Yukon, agreed with the plaintiffs that Yukon had breached the Final Agreements when it changed the land use plan for the Peel Watershed.

[5] Yukon now appeals. For the following reasons, I would allow the appeal in part.

II. Facts

[6] The facts, none of which are in dispute, were canvased extensively by the trial judge (at paras. 13-111).

Umbrella Final Agreement

[7] The UFA among Canada, Yukon and the Council for Yukon Indians was the product of two decades of negotiations. The UFA is not itself legally binding. It provides a framework for individual Final Agreements with each First Nation. Whenever a First Nation signs a Final Agreement, the provisions of the UFA are incorporated into that Final Agreement (with any agreed modifications) along with additional provisions specific to that First Nation.

Individual Final Agreements

[8] The First Nations of Nacho Nyak Dun, Tr'ondëk Hwëch'in, and Vuntut Gwitchin have each entered into a Final Agreement with Canada and Yukon. 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)).

[9] Mr. Justice Binnie explained the essential bargain of the Final Agreements in *Little Salmon* (at para. 9):

> 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.

[10] At issue in this appeal is the First Nations' treaty right to "participat[e] in the management of public resources."

[11] A number of concepts in the Final Agreements are important in the present appeal. As the judge explained, "Traditional Territory" "consists of the large area that the First Nation traditionally used before colonization" (at para. 126).

[12] Traditional Territory is subcategorized into “Settlement Land” and “Non-Settlement Land”, with different provisions of the Final Agreement applying to each type of land. 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 present dispute involves Non-Settlement Land.

[13] Finally, the concept of a “Special Management Area” was 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” (s. 10.1.1).

Chapter 11 Land Use Planning Process

[14] The Final Agreements at issue in this appeal incorporate without modification Chapter 11 of the UFA. That chapter sets out a process for developing land use plans.

[15] As noted by the judge (at para. 21), Chapter 11 lists the objectives of land use planning, including the following:

> 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;
>
> …
>
> 11.1.1.6 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.

[16] “Sustainable Development” is defined in Chapter 1:

> beneficial socio-economic change that does not undermine the ecological and social systems upon which communities and societies are dependent.

[17] First Nations and Yukon may establish Regional Land Use Planning Commissions to develop regional land use plans (s. 11.4.1). 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.

[18] A regional land use plan is subject to a detailed approval process. First, the Regional Land Use Planning Commission submits a recommended plan to Yukon and to each affected First Nation (s. 11.6.1). Sections 11.6.2 to 11.6.3 set out Yukon's power to approve, reject or modify the recommended plan as it applies to Non-Settlement Land:

> 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.

[19] Sections 11.6.4 to 11.6.5.2 are mirroring provisions which set out the First Nations' power to modify the recommended plan in respect of Settlement Land.

[20] "Consultation" is defined in Chapter 1 as providing:

> (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.

[21] Once a regional land use plan is finalized (as it applies to Non-Settlement Land) by Yukon under s. 11.6.3.2, Yukon must "exercise any discretion it has in granting an interest in, or authorizing the use of, land, water or other resources in conformity with" the plan (s. 11.7.1). In some circumstances, projects that do not conform to a regional land use plan may proceed nonetheless (see *Yukon Environmental and Socio-Economic Assessment Act*, S.C. 2003, c. 7, s. 44).

Peel Watershed

[22] The Peel Watershed covers approximately 14% of northeast Yukon and a small portion of the Northwest Territories. Six major river systems—the Ogilvie, the Blackstone, the Hart, the Wind, the Bonnet Plume and the Snake, as they are known in English—drain north into the Peel River, which in turn drains into the Mackenzie

River and ultimately the Beaufort Sea and Arctic Ocean. The landscape is wild and diverse, ranging from high and rugged mountains to low and flat taiga forests.

[23] There are no settlements within the Peel Watershed. Keno and Mayo lie to the south and Dawson City to the southwest, with Fort McPherson and Tsiigehtchic to the north (in the Northwest Territories).

[24] The Peel Watershed hosts subsistence harvesting, trapping, big game outfitting and recreational tourism. There is only one significant road: a gravel highway in the west. There are no mines, though there is considerable interest in mineral development. There are thousands of active quartz claims and at least two significant mineral deposits: the Crest iron deposit and the Bonnet Plume coal deposit. Oil and gas resources are unexplored but potentially significant.

[25] Under the Final Agreements, 97.3% of the Peel Watershed is Non-Settlement Land under primary authority of Yukon. The remaining 2.7% is Settlement Land under primary authority of First Nations.

Peel Watershed Regional Planning Commission

[26] The Peel Watershed Regional Planning Commission (the “Commission”) was created in 2004 to develop a regional land use plan for the Peel Watershed (excluding the small portion in the Northwest Territories). The Commission consists of six members: a Nacho Nyak Dun nominee, a Gwich’in Tribal Council nominee, a joint Yukon and Vuntut Gwitchin nominee, a joint Yukon and Tr’ondëk Hwëch’in nominee and two Yukon nominees.

[27] A Technical Working Group was constituted to provide technical information and support to the Commission. Its members include nominees of the First Nations, Yukon and the Commission itself.

[28] A Senior Liaison Committee was constituted to provide input and advice to the Commission. Its members include senior representatives from the First Nations and Yukon.

[29] Pursuant to s. 11.4.5.2, the Commission developed terms of reference which included the following passage (A.B., vol. 10, p. 2010):

> It is recognized that the planning process can only succeed with the full participation of [Yukon and the First Nations] based upon a process involving consultation and consensus, and that there must be clear support for the plan by those involved in its development and affected by it.

[30] In 2005, the Commission issued a statement of intent (quoted in the Recommended Plan at 1-4; A.B., vol. 14, p. 2687):

> The goal of the Peel Watershed Regional Land Use Plan is to ensure wilderness characteristics, wildlife and their habitats, cultural resources, and waters are maintained over time while managing resource use. These uses include, but are not limited to, traditional use, trapping, recreation, outfitting, wilderness tourism, subsistence harvesting, and the exploration and development of non-renewable resources. Achieving this goal requires managing development at a pace and scale that maintains ecological integrity. The long-term objective is to return all lands to their natural state.

[31] The judge noted that all parties accepted this statement of intent "without reservation" (at para. 43).

[32] The Commission established three major goals to achieve the components of its Terms of Reference, its Statement of Intent, its Principles and Plan Framework, and the Umbrella Final Agreement (Recommended Plan at 1-7; A.B., vol. 14, p. 2690):

> * Enable stewardship of Peel region ecosystems including aquatic, fish, wildlife, plant, and terrain resources.
> * Provide for the social well-being of affected First Nations and other Yukoners through consideration of heritage, culture, employment, and quality of life objectives.
> * Realize sustainable development opportunities while maintaining traditional First Nation livelihoods.

[33] In support of these goals, the Commission articulated six guiding principles that underlie its development of a plan and recommendations: "Independence and Impartiality", "Sustainable Development", "First Nations Traditional and Community Resource Use", "Conservation", "Adaptive Management", and the "Precautionary Principle" (Recommended Plan at 1-7 - 1-8; A.B., vol. 14, pp. 2690-2691).

[34] From May to November 2005, the Commission held a number of public Consultations. In December 2005, it published an *Issues and Interests Report* with input from five different branches of the Yukon government, various departments of the affected First Nations, non-governmental organizations and lobby groups.

[35] Yukon responded to the Issues and Interests Report in May 2006. The Deputy Minister of Energy, Mines and Resources largely concurred with the "overall direction of the planning process" but sought a "highly balanced plan that deals with the diversity of needs and issues in the region" (A.B., vol. 10, p. 2050).

[36] In September 2006, Yukon published a report: *Strategic Overview of Possible Mineral Development Scenarios — Phase 1 Peel River Watershed Planning Region*. The report offered the following conclusion (A.B., vol. 11, p. 2092):

> As the Peel River planning region is remote, exploration has been limited and the geology and minerals are not well understood. The area is known to contain significant mineral resources, particularly for iron, copper, lead, zinc and gold. For example, the Crest iron deposit is one of the largest in North America and the Bonnet Plume coal deposits contain 85% of Yukon's known coal reserves. The planning region also contains areas with potential for further discoveries in the future.
>
> There are four different kinds of mining operations that could be proposed in the area in the future: iron ore; coal; iron-oxide copper gold; and a lead-zinc mining operation.

[37] Between April and September 2008, the Commission published more reports including a *Water Resources Assessment for the Peel Watershed*, a *Resource Assessment Report* and a *Conservation Priorities Assessment Report*.

Recommended Plan (s. 11.6.1)

[38] As contemplated by s. 11.6.1, the Commission submitted a Recommended Plan on 2 December 2009 (revised in minor detail in January 2010).

[39] The judge introduced the Recommended Plan as follows (at para. 52):

> The Recommended Plan was unanimous and represented the culmination of over four years of research and consultation with the parties, the public and affected communities. Consultation formed an integral part of the process of developing the Recommended Plan.

[40] The introduction of the Recommended Plan refers to an earlier Draft Plan of April 2009. The Draft Plan attempted to create "an integrated land-use management plan" (at 1-4; A.B., vol. 14, p. 2687). The Commission understood this to be a compromise approach (A.B., vol. 16, p. 3091):

> We offered the *Draft Plan* as a compromise, a balance between development and conservation. It would have involved additional expenses and new ways of operating for industry. It would also have required acceptance and reduced expectations from First Nations, wilderness tourism, the "environmental community", and from much of the public. They would have to be patient as impacted sites and roadbeds recovered over time through state-of-the-art restoration. [Emphasis added.]

[41] But it was not well received (see the Final Recommended Plan at ix.-x; A.B., vol. 16, p. 3091):

> No one wanted this. Not industry, not the First Nations, not wilderness businesses, not environmentalists, and apparently, not the Yukon public. 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. The Parties disagreed on their objectives and Yukon society was polarized. [Emphasis added.]

[42] In response to what it saw as polarization, the Commission decided to take an approach that would preserve options (see the Final Recommended Plan at ix.-x; A.B., vol. 16, pp. 3091-3092):

> The Commission decided that when society is divided, the responsible approach to take is the one that best preserves options. 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. Its next plan [*i.e.*, the Recommended Plan] recommended preserving much of the Peel landscape with the understanding that society could always choose to develop in the future if there was agreement on this. [Emphasis added.]

[43] This idea — "when society is divided, the responsible approach to take is the one that best preserves options" — may be understood as a variant of the "precautionary approach" which was emphasized in the Recommended Plan (A.B., vol. 14, p. 2696). The Commission focused on an "ecosystem-based and compatible land use" approach (at 1-6; A.B., vol. 14, p. 2689). This drew on the UFA's definition

of sustainable development in setting out a hierarchy of uses (at 1-6; A.B., vol. 14, p. 2689):

> **Sustain ecosystem integrity first.** Conserving land, its living things, and its processes is the fundamental priority: lose this and all else crumbles. Ecosystem integrity involves maintaining a state of harmony between people and the land.
>
> **Sustain communities and cultures next.** Preserving communities and cultures relies on achieving success with the first priority. Sustainable communities and sustainable ecosystems are intertwined.
>
> **Foster sustainable economic activities third.** There are two kinds of sustainability here: activities that do not degrade the land or undermine communities and can be sustained indefinitely; and activities that deplete resources, but from which the land can recover. Not all economic activities fit in this region.

[44] The Recommended Plan divided the Peel Watershed into 21 Landscape Management Units ("LMUs") based on ecological boundaries (such as landmarks, vegetation and drainage) and common characteristics (such as wildlife migration and land use).

[45] The Recommended Plan proposed that 80.6% of the Peel Watershed be designated as Special Management Areas ("SMAs"), a concept developed in the UFA and Final Agreements. The Recommended Plan provided a breakdown: "Heritage Management (2.1%), Fish and Wildlife Management (19.6%), Watershed Management (27.7%), and General Environmental Protection (31.2%)" (at v; A.B., vol. 14, p. 2674).

[46] The Recommended Plan explained that SMAs would be given a high degree of protection. Existing tenures would continue as non-conforming uses, but new surface access would be prohibited (at 3-8; A.B., vol. 14, p. 2731):

> Management direction for land use in all SMAs is intended to reduce long-term resource-use conflict by limiting the surface footprint to a minimum acceptable level. Existing land-use tenures (i.e. mineral claims, oil and gas dispositions, and related activities) will be allowed to continue as non-conforming use, but will be subject to specific management conditions. Land-use management conditions may be similar in all SMAs regardless of management emphasis, but may differ for any given LMU based upon area-specific rationales.

> In all SMAs, new surface access (all-season or winter road, rail, etc.) is prohibited even where a mineral claim, coal license, or oil and gas disposition already exists. No new industrial (surface or subsurface) uses or tenures (including infrastructure, facilities and waste disposal operations) will be permitted in an SMA. A formal Plan amendment would be required to change any of these core Plan recommendations. [Emphasis added.]

[47] The remaining 19.4% of the Watershed would be designated Integrated Management Areas ("IMAs") and open to mineral and oil and gas development, subject to parameters set out in the Recommended Plan including that there generally be no winter or all-season surface (road) access (at 3-11; A.B., vol. 14, p. 2734):

> This designation permits existing and future surface uses and subsurface resource extraction while limiting land-use conflicts and maintaining long-term ecosystem function. IMAs still have very high ecological and heritage/cultural values within sensitive biophysical settings. However, the Commission believes these zones can accommodate industrial resource development in a working landscape. The overarching "no winter or all-season road access" condition will remain for all IMAs. However, the Plan provides an amendment process if industrial development can meet the environmental and socio-economic goals of the Plan[.] [Emphasis added.]

Consultation and Response to Recommended Plan (ss. 11.6.2, 11.6.3)

[48] As contemplated by s. 11.6.2, Yukon entered into Consultation regarding the Recommended Plan with the First Nations and other affected local communities.

[49] On 25 January 2010, Yukon and the First Nations signed a Joint Letter of Understanding on Peel Watershed Regional Land Use Planning Process (the "2010 LOU"). The 2010 LOU sets out the parties' intentions, including "to endeavour to achieve consensus on a coordinated response to the Peel Watershed Commission on the Recommended Plan, and to be guided by the objectives of the Final Agreements in crafting that response" (A.B., vol. 15, pp. 3009-3010). The parties would each conduct an individual internal review, which would be followed by a collaborative review with input from the Technical Working Group and Senior Liaison Committee.

[50] The Chair of the Senior Liaison Committee wrote a letter to the Commission dated 18 February 2011 setting out the parties' joint response (the "Joint Response"). It included the following passage (A.B., vol. 15, p. 3056):

> All Parties participating in this regional land use planning process agree that the Peel watershed is a unique area that encompasses many areas of cultural and environmental significance; and that, given the values and the largely pristine state of the region; selected areas will be excluded from development and afforded high levels of protection.
>
> In addition to this joint response, each Party will send supplementary comments that are specific to their interests and responsibilities.

[51] The Joint Response rejected the Recommended Plan's proposal that the Commission remain active after the planning process to review requests for variances and amendments, and expressed a desire for a plan that provides guidance over the long-term. It suggested that the plan be simplified and the number of LMUs be reduced.

[52] The First Nations' supplementary responses called for complete protection of the entire area, with the exception of the existing gravel highway (the "First Nations' Responses"). The First Nations' Responses included detail and provided specific reasons, often grounded in traditional knowledge, for specific LMUs to be protected. The following examples are indicative. The Tr'ondëk Hwëch'in explained that the area north of Tombstone Park (LMUs 5a and 6a) is of high cultural significance and, as an Elder put it, "the food cupboard" for future generations (A.B., vol. 15, p. 3036). The Teetl'in Gwich'in Council identified Daliglish Creek (LMU 4) as part of the fall migration and wintering grounds of the Porcupine caribou (A.B., vol. 15, p. 3040). The Nacho Nyak Dun described Blackstone River (LMU 3) as "extremely sensitive" and urged protection (A.B., vol. 15, p. 3051):

> LMU 3 is zoned as IMA in the Recommended Plan. This is not acceptable as it has the potential of cutting off caribou migration and/or movements and habitat within the Hart River and Porcupine caribou ranges. This LMU also has peregrine falcon nesting sites … [and] critical fish spawning and overwintering areas[.]

[53] Yukon's supplementary response took the form of a four-page letter from the Minister of Energy, Mines and Resources with a 16-page appendix ("Yukon's

Response"). The letter included a summary of Yukon's five proposed modifications (A.B., vol. 15, p. 3062):

> 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.
> 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.

[54] Yukon's Response is of considerable significance in this appeal. I will call items 1 and 2 the "Development and Access Modifications". The parties agree that items 3 through 5 essentially duplicate the Joint Response.

[55] The letter includes the following explanation for the Development and Access Modifications (A.B., vol. 15, pp. 3059-3060):

> The Yukon government recognizes that the Peel watershed is a unique area that includes many areas of environmental and cultural significance as well as identified non-renewable resources. We are seeking a Final Recommended Plan ("the Final Plan") that recognizes, accommodates and balances society's interest in these different features of the region.
>
> Yukon government supports the internationally recognized concept of the "precautionary principle" and the objectives outlined in Chapter 11 of the First Nation Final Agreements. Based on Principle #15 of the *Rio Declaration* and the land use planning objectives, we feel that the Commission should consider recommending some cost-effective measures for managing land uses and preventing degradation in some parts of the Peel region. The

> planning region has a mix of values and resources. We believe that there is an ability to accommodate mixed uses that meet society's need, while erring on the side of caution on the basis of a determined level of risk.
>
> The plan proposed that a large portion of the region be designated as Special Management Areas. While government believes there should be areas where development is excluded in the Peel, more work needs to be done by the Commission to identify and develop a rationale for these areas.
>
> We request that the Commission re-examine the location, nature and potential extent of current and future conflicts between the values of conservation, non-consumptive resource use and resource development. During this review, Yukon's existing legislation, regulation, laws of General Application, government policies and the *Yukon Environmental and Socio-economic Assessment Act (YESAA)* and Water Board processes should be considered as they regulate development and are important tools in conserving land and mitigating risk.
>
> The Yukon government recognizes that managing surface access (winter and all-season roads) can be challenging but not impossible. We believe a ban on surface access is not a workable scenario in a region with existing land interests and future development potential. We would like to see a range of access options developed which consider the various conservation and resource values throughout the region and also take into account existing regulatory tools and best management practices which can be used to mitigate risk and limit other user's access. [Emphasis added.]

[56] The Development and Access modifications were, in the words of the trial judge, "bald expressions of preference not sufficiently detailed to permit the Commission to respond in a meaningful way" (at para. 196). The appendix to Yukon's letter offered specific comments that corrected references, suggested consolidating certain LMUs, stressed the environmental protections already offered by Yukon and federal legislation, and criticized the Recommended Plan for failing to "be cognizant and realistic of the cost" of some of its proposals for regulating development (A.B., vol. 15, pp. 3063-3078).

[57] Yukon's Response did not specifically propose how and why particular LMUs might be suitable for development. Yukon's position was that the Commission had to do "more work … to identify [LMUs] and develop a rationale" for restricting development in those LMUs (A.B., vol. 15, p. 3060).

[58] As contemplated by s. 11.6.3.1, the Commission reconsidered the Recommended Plan in light of the Joint Response, the First Nations' Responses and

Yukon's Response. The Commission submitted a Final Recommended Plan on 22 July 2011.

[59] The Final Recommended Plan responded to the parties' comments and proposed modifications as follows (at i, xi; A.B., vol. 16, pp. 3083, 3093):

> The Final Recommended Plan contains minor revisions to all sections to improve clarity and organization, and factual or grammatical errors have been identified and resolved. Other revisions are substantial – most notably, the land use designation system has been revised and simplified, the number of landscape management units (LMUs) has been reduced and implementation concepts have been streamlined. Cumulative effects management concepts for the Integrated Management Area have also been re-introduced.
>
> While many substantive changes have been incorporated into this version of the Plan, the general management direction of the Recommended Plan has not been altered significantly.
>
> …
>
> The Yukon Government stated that it was providing its General Response per the process set out in UFA Section 11.6.3. It gave a broad critique of the Plan and requested a number of specific modifications. The Commission dealt with these specific requests in its Plan revision. The Yukon Government also addressed in a general way the amount of protected areas and provisions for managing access. Without specifying, the Yukon Government response urges the Commission to re-think and re-write the rationale for each SMA; revisit its assessment of resource conflicts between the values of conservation, non-consumptive resource use, and resource development; and reconsider its ban on surface access in much of the planning area.
>
> The Yukon Government'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. It did not discuss locations of concerns, or what modifications it sought. 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.
>
> In preparation of this Final Recommended Plan, the Commission fully considered the Yukon Government response concerning the amount of land protected. After much deliberation, the Commission concluded that its rationale for protecting these areas was sound, in view of its determination to preserve society's future options and the outstanding wilderness and cultural values documented in these landscapes. The Commission also reconsidered its recommendations on surface access in view of industry's rejections of full restoration of access roads and of the impacts access roads create in the Yukon under its current regulatory regime. Our decision was that since surface access is typically a permanent development, the responsible choice in the Peel region is to preserve options by denying new surface access

> across much of the area until society is clear on this highly controversial matter. In our modified land use designation system, 80 percent of the region is termed “Conservation Area”, where new surface access is not allowed. Fifty five percent of these lands are SMAs. The Commission provided for flexibility in future land use options by recommending that 45 percent of the land zoned as “Conservation Area” is given interim protection, to be reviewed periodically, as part of the formal Plan review process. These areas are termed “Wilderness Areas”. [Emphasis added.]

[60] The Commission was of the view that it would have had to go “back to the drawing board” to adequately address Yukon’s Development and Access Modifications. The Commission interpreted these proposed modifications as a “general critique” and expressed some frustration that Yukon had not explained *why* it wanted more scope for development and all-season surface access or *where* in particular it thought such activities could best be accommodated. The Commission ultimately chose to maintain the overall approach of the Recommended Plan, founded on the precautionary principle: preserve options while society is divided by protecting most of the Watershed, and recognize that development is difficult to ‘undo’ but can always proceed in the future if society so chooses.

[61] That said, the Commission did make significant changes in the Final Recommended Plan. The number of LMUs was reduced from 21 to 16. The Recommended Plan had called for approximately 80% of the Watershed to be designated SMAs but this was reduced to only 44% in the Final Recommended Plan. Another 36% would be designated “Wilderness Areas” (“WAs”) and given only interim protection, to be reviewed periodically. As in the Recommended Plan, the remaining roughly 20% would be designated IMAs and open for regulated development.

Consultation and Response to Final Recommended Plan (s. 11.6.3.2)

[62] Section 11.6.3.2 contemplates that Yukon would consult with the First Nations and other affected local communities before responding to the Final Recommended Plan. On 20 January 2011, in anticipation of the Final Recommended Plan, the First Nations and Yukon signed a second Joint Letter of Understanding on how the Consultation would proceed (the “2011 LOU”). It largely mirrored the language of the

2010 LOU. The parties again agreed they would conduct joint Consultations and submit a joint response in addition to individual supplementary responses.

[63] However, Consultation did not begin immediately.

[64] On 11 October 2011, there was a territorial election.

[65] On 14 February 2012, before undertaking any Consultation, Yukon issued a news release (A.B., vol. 17, p. 3299):

> The Government of Yukon has developed eight core principles that will be used to guide modifications and completion of the Peel Watershed Regional Land Use Plan, Premier Darrell Pasloski announced today.
>
> "The Yukon government continues to support an approach that balances access for industry and other users while establishing protection in key habitat areas in the Peel region," Pasloski said. "The principles will provide guidance for the timely completion of the remaining steps in this important land use planning process."
>
> Working in collaboration with the Peel Plan parties, Yukon government will use the principles to guide strategic modifications to the draft Peel Plan. Details on the proposed modifications will be included in the next round of public consultation on the plan, scheduled for this spring.
>
> "Yukon government's guiding principles support special protection for key areas and active management of the landscape rather than prohibitions to use and access," Environment Minister Currie Dixon said.
>
> The Government of Yukon principles are:
>
> 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
>
> [Emphasis added.]

[66] On 17 February 2012, the First Nations wrote to Yukon to say Yukon had overstepped in its response to the Final Recommended Plan. The First Nations took the position that Yukon's authority under s. 11.6.3.2 to modify the Final

Recommended Plan was limited in the sense that such modifications must have been first proposed under s. 11.6.2 in response to the Recommended Plan, so the Commission could consider them and respond.

[67] On 20 March 2012, Yukon responded to the First Nations. It said it had followed the treaty process and was acting in good faith.

[68] On 14 September 2012, Yukon gave a presentation to the Senior Liaison Committee to propose a new land use designation system. The new system would maintain the concept of an IMA but replace SMA and WA with three new concepts: "Protected Area", and "Restricted Use Wilderness Area - Wilderness River Corridor" and "Restricted Use Wilderness Area". Protected Areas would be withdrawn from new industrial land use. Restricted Use Wilderness Areas would be open for development but subject to active environmental management, with higher standards in Wilderness River Corridors. Existing mineral claims and other rights would be 'grandfathered' and access would be granted to those rights. Yukon included maps setting out four different options of how the various LMUs could be designated under the new system. In all four options, 26% would fall under IMAs. Between 14% and 36% would be in a Protected Area, while the balance would fall in Restricted Use areas (A.B., vol. 17, pp. 3321-3324).

[69] On 15 October 2012, the First Nations wrote Yukon to object to the introduction of a new land use designation system. In their view, Yukon's new plan undermined the Chapter 11 process and amounted to a "rejection of the constitutionally protected land use planning process" set out in the Final Agreements (A.B., vol. 17, p. 3328).

[70] On 19 October 2012, Yukon responded to say again that it believed it was acting within its authority under the Final Agreements.

[71] On 23 October 2012, Yukon issued a news release indicating that it would begin Consultation (which would run until 25 February 2013). Yukon provided to the

public a 15-minute DVD, a 12-page "we want to hear from you" document and a 12-page media package.

[72] Yukon maintained a website for its Consultations on the Peel Watershed which included a "frequently asked questions" page. This page addressed Yukon's new land use designation system (A.B., vol. 17, pp. 3344-3347):

> **Why is Government of Yukon proposing new land use designations?**
>
> The Government of Yukon has been clear in expressing its concern throughout the planning process. Government also outlined its five main concerns to the Planning Commission. However, the Final Recommended Plan does not address government's concerns surrounding access and balance.
>
> The government also realized that the land use designations proposed in the Final Recommended Plan are polarized and focus on either end of the spectrum. There is nothing in the middle to address multiple users of an area.
>
> As a result, the Government of Yukon is proposing a new land use designation system that includes a new tool which proposes to actively manage multiple uses while protecting the values identified in the area.
>
> …
>
> **What is the Government of Yukon's opinion on the Final Recommended Plan?**
>
> Overall, the Government of Yukon supports and accepts the goals and many of the recommendations presented in the Final Recommended Plan.
>
> However, we believe the proposed new land use designations better reflect our expectations for a balanced plan that addresses the diversity of needs and issues in the Peel Watershed Region.
>
> …
>
> **Were the new land use designations and concepts developed with the affected First Nations?**
>
> The ideas for the new land use designation and concepts were developed during the Government of Yukon's review of the Final Recommended Plan.
>
> …
>
> **Do these new land use designations and concepts honour the work completed by the Peel Watershed Planning Commission?**
>
> The Government of Yukon sees its proposed ideas as building on the work completed by the Peel Watershed Planning Commission.
>
> The Government of Yukon supports and accepts the goals and many of the recommendations presented in the Final Recommended Plan.

> However, we believe the proposed new land use designations better reflect our expectations for a balanced plan that addresses the diversity of needs and issues in the Peel Watershed Region. [Emphasis added.]

[73] Several other answers repeated Yukon's concern that the land use concepts in the Recommended Plan and Final Recommended Plan were "polarized" and incapable of balancing the needs of multiple users.

[74] On 30 November 2012, the First Nations wrote to Yukon to request copies of the public comments it had received. This request was repeated on 6 March 2013 and again on 27 March 2013.

[75] Yukon eventually responded on 5 April 2013, stating that the public comments were available on the consultation website.

[76] On 6 June 2013, Yukon circulated a document containing a more detailed summary of its proposed approach (A.B., vol. 17, pp. 3444-3445):

1. Designate the four main rivers (Hart, Wind, Bonnet Plume, and Snake) as a new class of park pursuant to the *Parks and Lands Certainty Act* that will focus on maintaining wilderness river values.
2. Designate the North Richardson Mountains (LMU 12), the two adjacent areas to Tombstone (LMU 2 and 4) and the confluence of the four rivers and the downstream Peel main stem, including the Turner and Chappie Wetlands and the Snake headwaters (LMU 11, 14 and part of 9) as protected areas.
3. Use anticipated tools to implement active management in areas designated Restricted Use Wilderness Area. This includes – permitting of Class 1 activity, new resource roads regulations, and off road regulations.
4. Expand the width of the Wind River Corridor to better reflect the natural viewscape and wilderness tourism use of area.
5. Work with First Nations to put in place appropriate protection on First Nation settlement land if requested.
6. Recognize existing mineral rights and access to those rights in all areas of the Peel.
7. Establish a Peel Watershed Implementation Committee with First Nation governments.

[77] Yukon explained that its concern with the Final Recommended Plan was that it "does not manage multiple uses in the region and limits future economic activity" (A.B., vol. 17, p. 3427).

[78] On 1 October 2013, Yukon provided more information about its priorities and proposals in a letter which enclosed a copy of the Final Recommended Plan with Yukon's proposed modifications. The letter included the following summary of Yukon's priorities (A.B., vol. 18, pp. 3452-3453):

- Better management of access – new tools are being developed to control and manage access to protect environmental, cultural and wilderness values;
- Protection of river corridors and their viewscapes – proposed protected areas based on the major river corridors and their viewscapes, addressing issues related to the environment, wilderness tourism and recreation;
- Site specific interests – minor changes to some Land Management Unit boundaries to better accommodate site specific interests related to industry and conservation values;
- Increased management tools for industrial activity – proposed changes to the *Quartz Mining Act* and the *Territorial Lands (Yukon) Act* will allow for better management of competing activities in wilderness areas to minimize land use impacts and provide better tools to identify and protect environmental and cultural values.

[79] To achieve these priorities, Yukon indicated that it proposed to make a number of "substantive changes" to the Final Recommended Plan (A.B., vol. 18, p. 3594):

- Replace Conservation Area designation (includes Special Management and Wilderness Area) with Protected Area;
- Propose "Wild River Park" as a new class of protected area to be created on the *Parks and Land Certainty Act*;
- Add new land use designation entitled Restricted Use Wilderness Area (RUWA);
- Provide greater clarity on allowable and prohibited uses by land use category; and
- Provide greater clarity on proposed rules and management restriction in RUWA (table 3.4). These largely reflect proposed changes to Class 1 mineral exploration activity as well as pending changes to the Lands Act to provide greater oversight of ORVs and resource roads.

Yukon also proposed to alter the boundaries of a number of LMUs and listed the LMUs it proposed to re-designate (A.B., vol. 18, p. 3595).

[80] On 21 October 2013, the First Nations voiced their objections to Yukon, stating that its proposals "amount to a new Plan and, as such, violate the terms of constitutionally-protected Final Agreements" (A.B., vol. 19, p. 3597).

[81] On 20 January 2014, Yukon finalized the plan ("Yukon's Final Plan"). A news release issued the next day provided this summary (A.B., vol. 19, pp. 3637-3638):

> "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. [Emphasis added.]

Commencement of Action

[82] On 27 January 2014, the Nacho Nyak Dun and Tr'ondëk Hwëch'in commenced an action against Yukon with four co-plaintiffs: the Yukon Chapter of the Canadian Parks & Wilderness Society and its Executive Director Gill Cracknell, and the Yukon Conservation Society and its Executive Director Karen Baltgailis. The plaintiffs initially sought a declaration that the Final Recommended Plan (unmodified by Yukon) is the binding land use plan under the Final Agreements. The plaintiffs

also sought a declaration that the Development and Access Modifications did not comply with s. 11.6.2.

[83] The Gwich'in Tribal Council was granted leave to intervene in support of the plaintiffs. It represents a Gwich'in First Nation based in the Northwest Territories with traditional territory that extends to the Yukon portion of the Peel Watershed. The Vuntut Gwitchin First Nation was not a party to the action, but it has been added as a respondent in this appeal.

III. Decision Under Appeal

Interpretation of Chapter 11

[84] The judge began his analysis by reviewing the principles that govern the interpretation of modern First Nations treaties. He quoted (at para. 123) Mr. Justice Binnie in *Little Salmon* (at para. 12):

> Modern comprehensive land claim agreements …, while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way.

[85] The judge also quoted several of the interpretive provisions contained in the Final Agreements themselves, including the following (at para. 131):

> 2.6.3 There shall not be any presumption that doubtful expressions in a Settlement Agreement be resolved in favour of any party to a Settlement Agreement or any beneficiary of a Settlement Agreement.
>
> ...
>
> 2.6.7 Objectives in Settlement Agreements are statements of the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.

[86] The judge stated (at para. 133) that treaties must be interpreted consistently with the honour of the Crown, citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 19; *Manitoba Métis Federation Inc. v. Canada*

(Attorney General), 2013 SCC 14 at paras. 74-77. As Chief Justice McLachlin and Madam Justice Karakatsanis wrote in *Manitoba Métis*, "the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation" (at para. 77).

[87] The judge concluded that the "overriding issue" was whether Yukon "acted honourably and interpreted its constitutional obligations under the Final Agreements broadly and purposively" (at para. 137).

[88] Turning to the interpretation of Chapter 11 itself, the judge remarked that the Chapter "sets out an iterative process by which a land use plan is developed by an independent and objective Commission through a consultative and collaborative process" (at para. 155).

[89] The Recommended Plan submitted under s. 11.6.1 was "a substantial and comprehensive report based on extensive research and hearings over a period of approximately five years" (at para. 140). The Commission had worked within the framework of agreed terms of reference and employed a "consultative and consensus-driven approach" (at para. 140).

[90] On the meaning of s. 11.6.3.2, the judge concluded that Yukon's modifications must be "based upon" modifications it proposed under s. 11.6.2 (at para. 163). In other words, the trial judge held that Yukon's power under s. 11.6.3.2 to "modify" the Final Recommended Plan is limited in the sense that Yukon's modifications must first have been proposed under s. 11.6.2 in response to the Recommended Plan. He provided two reasons to prefer this interpretation.

[91] First, by proposing modifications (rather than rejecting) under s. 11.6.2, Yukon "indicated a significant degree of approval" (at para. 141). Yukon impliedly accepted those portions of the Recommended Plan that it did not propose to modify. It would be inconsistent for Yukon to then reject the Final Recommended Plan or propose entirely new modifications under s. 11.6.3.2.

[92] Second and more importantly, if Yukon could propose entirely new modifications under s. 11.6.3.2, this would "thwart the process entirely" (at para. 163). The judge elaborated as follows (at paras. 194-195):

> If there is to be a meaningful Consultation with First Nations, the Government is obligated to put something on the table and consider the First Nations response to that offering, before submitting the proposed modifications to the Commission. In my view, the proposed modifications must be addressed in the Consultation process preceding the response to the Commission. The Government of Yukon must fully and fairly consider the views of the First Nations on the proposals and turn its mind to possible accommodations before it submits proposed modifications with written reasons to the Commission.
>
> There is a further reason for a detailed exchange at this stage of the planning process. The Government of Yukon must engage the Commission in a way that respects the process. If the Commission only knows the Government of Yukon's proposed modifications in a general way, it has no way of gauging whether it is responding appropriately. In my view, this exchange or dialogue stage must disclose to both the Commission and the First Nations why and how the Government wants to modify the Recommended Plan. [Emphasis added.]

[93] In other words, the Consultations with First Nations would effectively be meaningless and the work of the Commission would effectively serve no purpose, if Yukon could make any changes it liked under s. 11.6.3.2 (at paras. 194-195). In effect, the judge concluded, s. 11.6.2 empowers Yukon to propose any and all modifications to the Recommended Plan it deems appropriate. The Commission then considers those proposals under s. 11.6.3.1 and, if it declines to adopt any, it provides reasons to Yukon. Finally, under s. 11.6.3.2, Yukon considers the Commission's reasons for declining to adopt its proposals and decides whether to impose them nonetheless (but cannot impose new proposals).

[94] In the judge's view, Yukon usurped the role of the Commission in proposing entirely new land use planning tools and concepts at the final stage of the process (at para. 183). Yukon's interpretation of its treaty obligations to the First Nations was not broad, purposive and contextual. "Nor did it enhance the goal of reconciliation. It was an ungenerous interpretation not consistent with the honour and integrity of the Crown" (at para. 182). Yukon had failed to respect the treaty process.

Development and Access Modifications

[95] Turning to the Development and Access Modifications, the judge concluded they were invalid. The purpose of s. 11.6.2 was to ensure that the Commission could consider and respond to Yukon's Response. But the Development and Access Modifications were too vague and general for the Commission to respond meaningfully (at para. 192):

> It was incumbent on the Government of Yukon to set out details about which Landscape Management Units it wanted zoned for increased access, along with rationales and suggestions about mechanisms to accomplish the proposed modifications.

[96] Yukon chose not to do this. In the judge's view, Yukon missed its opportunity at s. 11.6.2 to seek more scope for development and all-season access and breached the Final Agreements by imposing such changes at s. 11.6.3.2.

Remedy

[97] In their statement of claim, the plaintiffs sought a declaration that the (unmodified) Final Recommended Plan was the final, binding land use plan for the Peel Watershed. However, the plaintiffs later scaled back their request and sought an order quashing Yukon's Final Plan and remitting the process to s. 11.6.3.2 for Yukon to make its final modifications.

[98] Yukon, on the other hand, maintained that s. 11.6.3.2 permitted them to modify the Final Recommended Plan irrespective of any position they had taken on the Recommended Plan. If that interpretation was not accepted by the Court, Yukon submitted that the appropriate remedy would be to remit the process to ss. 11.6.2 and 11.6.3.

[99] The judge noted that he was faced with a dilemma (at para. 211):

> The dilemma presented to the Court is that the plaintiffs' remedy effectively prevents the Government of Yukon from presenting its proposed modifications on access and balance to the Commission and from modifying the Final Recommended Plan in a manner that reflects them. If the Government of Yukon's remedy is accepted, the planning process is returned to the Commission to redo a completed stage, requiring the plaintiffs to bear

> the costs and delay of repeating the planning process. For the purpose of this discussion, I will assume that the proposed re-hearing under ss. 11.6.2 and 11.6.3 would permit the Government of Yukon, after Consultation, to present its Government approved plan of January 2014 to the Commission for consideration in its Final Recommended Plan.

[100] In other words, granting the plaintiffs' desired remedy would effectively prevent Yukon from modifying the Final Recommended Plan to permit more development and access. On the other hand, granting Yukon's desired remedy would leave the parties in the same position they were in after Yukon's breach of the Final Agreements: Yukon's Final Plan, or something very much like it, would ultimately become the new final plan.

[101] The judge reasoned by analogy from judicial reviews of Ministerial decisions made on the advice of Provincial Court Judicial Compensation Commissions. The judge observed that there are many important differences between these contexts but nonetheless found the analogy helpful because "the obligation placed on government is similar in that the commission process is one that must be respected" (at para. 178). The judge quoted *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44 at para. 44 ("*Provincial Court Judges*"):

> if the commission process has not been effective, … then the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option.

[102] The judge reasoned that remitting the process to s. 11.6.2 would take the Commission "back to the drawing board" and permit Yukon "to benefit from its flawed process" (at para. 213). It would amount to an endorsement of Yukon's treaty-breaching conduct (at para. 218). By contrast, remitting the process to s. 11.6.3.2 would follow *Provincial Court Judges*. Yukon was responsible for the

breakdown in the treaty process and s. 11.6.3.2 was the point at which Yukon began to deviate from the process. The judge remarked that "after seven years of collaboration, [Yukon's Final Plan] was a profound and marked departure from its previous approach" (at para. 217). Ultimately, the judge reasoned (at para. 219):

> The Government of Yukon had the option of dealing with the Commission response in a collaborative manner as set out in the 2011 LOU or seeking a court interpretation upon receipt of the Final Recommended Plan. However, it instead took over two years to pursue this flawed process, which betrayed the spirit of the Final Agreements and was criticized by both the public and by the Land Use Planning Council. In my view, it would be inappropriate to give the Government the chance to now put its January 2014 plan to the Commission.

[103] In the result, the judge ordered that the process be remitted to s. 11.6.3.2 for Yukon to consult and then make its final modifications to the Final Recommended Plan. Importantly, the judge ordered that Yukon's final modifications had to be based upon the original Yukon's Response (with the exception of the invalid Development and Access Modifications), the Commission's response and, of course, the Final Recommended Plan itself.

IV. Grounds of Appeal

[104] Yukon appeals and submits the judge erred in finding that it had breached the Final Agreements. Alternatively, if Yukon did breach the Final Agreements, it submits the judge erred in remitting the process to s. 11.6.3.2 rather than s. 11.6.2.

V. Submissions

Interpretation of Chapter 11

[105] Yukon submits that its power under s. 11.6.3.2 to modify the Final Recommended Plan is entirely unconstrained. The plaintiffs submit that Yukon's power under s. 11.6.2 to propose modifications to the Recommended Plan is unconstrained, but its power under s. 11.6.3.2 is limited to finalizing the modifications first proposed under s. 11.6.2 and considered by the Commission.

[106] Yukon offers the following reasons to prefer its interpretation of the Final Agreements. It says the language of s. 11.6.3.2 does not expressly limit its right to

make modifications to the Final Recommended Plan. If that had been the intention, language could have been employed to that effect, as was done in other sections of the Final Agreements. Yukon also submits that its interpretation better fosters long-term reconciliation by ensuring the range of issues and concerns that can be addressed through Consultation is not artificially limited. Moreover, Yukon says, the alternative interpretation has at least two untenable implications. If the Commission chose to make the Final Recommended Plan radically different from the Recommended Plan (in a way that did not respond to the parties' comments and proposals), Yukon would have no opportunity to modify the Final Recommended Plan. Also, if there was an election between s. 11.6.2 and s. 11.6.3.2 (as in fact there was in this case), the new government would be bound by the old government's planning priorities. In the event this Court agrees with the trial judge's interpretation of s. 11.6.3.2, Yukon submits, in the alternative, that its Final Plan did not breach s. 11.6.3.2 because it was consistent with the Development and Access Modifications first proposed under s. 11.6.2.

[107] The plaintiffs, supported by the intervenor, respond that Yukon's interpretation renders wholly meaningless the process of dialogue and Consultation leading up to s. 11.6.3.2. The plaintiffs say that Yukon has authority to shape the plan for Non-Settlement Land, but this authority must be exercised through the treaty process; Yukon cannot disregard the work of the Commission and impose at the 11th hour what amounts to an entirely new plan. 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 disregarded the process and, in imposing its Final Plan, left unfulfilled the broader purpose of the Final Agreements: long-term reconciliation.

Development and Access Modifications

[108] Yukon submits the judge erred in finding the Development and Access Modifications to be invalid. In Yukon's submission, they conveyed enough information about Yukon's views for the Commission to be able to respond meaningfully. There is no evidence that the Commission sought elaboration from

Yukon about the meaning of the Development and Access Modifications. Ultimately, Yukon's position is that it was the Commission's responsibility to use the principles entailed by the Development and Access Modifications to make specific changes to the Recommended Plan. Yukon insists it had no obligation to identify specific LMUs and explain why they would be suitable for development.

[109] The plaintiffs respond that the Development and Access Modifications were invalid for non-compliance with s. 11.6.2. The amount of land to be protected and the provision for access were the two main issues before the Commission. The Commission dedicated years of study and consideration to these issues; the Recommended Plan was the result. To be valid, the Development and Access Modifications had to be supported by written reasons (s. 11.6.3). The purpose of this requirement was to ensure the Commission could respond to Yukon's proposals and make an informed decision about whether to incorporate them into the Final Recommended Plan. Yukon merely indicated dissatisfaction without providing any specific suggestions, identifying any particular LMUs or providing reasons for its position. In essence, the plaintiffs' position is that Yukon was required at s. 11.6.2 to propose actual modifications rather than simply indicate in a general manner how it would like the Commission to modify the plan.

Remedy

[110] In the event the trial judge was correct that Yukon breached the Final Agreements and that the Development and Access Modifications were invalid, it submits, in the alternative, that the judge erred in remitting the process to s. 11.6.3.2 rather than s. 11.6.2. Yukon submits it is an established principle that the breaching party should be put in the position it occupied prior to its breach, so it can "perform constitutionally what the court deemed to be unconstitutional". If the Development and Access Modifications (proposed under s. 11.6.2) were invalid, Yukon should be returned to s. 11.6.2 so it can articulate its priorities in a valid manner. The judge's remedy, in Yukon's submission, was unfair, failed to respect Yukon's duty to represent the people of Yukon and did not serve the goal of reconciliation.

[111] The plaintiffs respond that the process should be remitted to the point of Yukon's breach, which was not s. 11.6.2 but s. 11.6.3.2. Three of Yukon's Modifications under s. 11.6.2 were valid. Although the Development and Access Modifications were invalid, that does not mean they breached the treaty; it means only that they had no effect, and in particular that they could not later be imposed over the objections of the First Nations under s. 11.6.3.2. Accordingly, Yukon's breach occurred at s. 11.6.3.2 (when Yukon imposed an entirely new plan) rather than at s. 11.6.2. Remitting the process to s. 11.6.2 would repeat stages of the process that have been lawfully conducted. The plaintiffs submit it is inconsistent with the honour of the Crown for Yukon to argue that it should be permitted to reconsider the proposals it made years ago in December 2009.

VI. Analysis

[112] I begin by stating my conclusion on the proper construction of the "Approval Process for Land Use Plans" established in s. 11.6.0 to s. 11.6.5 of the UFA. Yukon alleges two errors of law. First, that there was no breach of the planning process. Second, that if there was a breach, the remedy ordered by the trial judge was not in accordance with the Final Agreement. The allegations concern the proper construction of a constitutional document, and hence the standard of review is correctness: *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2014 NUCA 2 at paras. 25, 73; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 58.

[113] In my view, the judge was essentially correct in reasoning that Yukon did not honour the process as properly interpreted. The Development and Access Modifications were not a valid exercise of Yukon's right under s. 11.6.2 to "approve, reject or propose modifications to that part of the recommended regional land use plan applying on Non-Settlement Land". But I do differ with the judge in respect of a number of nuances to his construction of these provisions. In particular, 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.

[114] Further, and of central importance to this appeal, I find that the judge erred in granting the remedy he did. The appropriate remedy for Yukon's failure to honour the process is to return the parties to the point at which the failure began. As I will explain, 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.

Interpretation of the UFA and Final Agreements

[115] The analysis must, of course, start by acknowledging the general principles that guide the Court in interpreting the UFA as incorporated into the Final Agreements. The judge did this by noting the guidance provided by Mr. Justice Binnie for the Court in *Little Salmon*, a decision which concerns the very UFA at bar.

[116] Of essential importance is the fact that the Final Agreements are "treaty rights" for the purposes of s. 35 of the *Constitution Act, 1982*. That provision is at the core of the process for reconciliation in Canada. As Mr. Justice Binnie said at para. 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 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.

[117] It is also to be stressed that the UFA and the Final Agreements are modern treaties, "the product of lengthy negotiations between well-resourced and sophisticated parties" (at para. 9). Modern treaties represent "a quantum leap beyond the pre-Confederation historical treaties" (at para. 12):

> The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way. To the extent the Yukon territorial government argues that the Yukon treaties represent a new departure and not just an elaboration of the *status quo*, I think it is correct. However, as the trial judge Veale J. aptly remarked, the new departure represents but a step -- albeit a very important step -- in the long journey of reconciliation (para. 69).

[118] 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.”

[119] In my view, Yukon’s stark submission that the s. 11.6.3.2 words “approve, reject or modify” accorded a power that is entirely or even virtually unconstrained respects neither the context of the words, nor the need for a generous administration of the agreement; as the judge concluded such an interpretation does not uphold the honour of the Crown.

[120] The Supreme Court of Canada’s decision in *Haida Nation* gives content to the principle of the “honour of the Crown”. As Chief Justice McLachlin said (at para. 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.

[121] The Chief Justice further observed (at para. 19) that the honour of the Crown infuses treaty making as well as treaty implementation:

> In making and applying treaties, the Crown must act with honour and integrity avoiding even the appearance of ”sharp dealing”… .

[122] The “honour of the Crown” was discussed as well by the Court in *Manitoba Métis*. The majority wrote (at para. 66):

> The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director*), 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24:
>
> > The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. 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. [Emphasis added.]

[123] This is the general context one must be alive to in considering how the land use planning process contemplated by Chapter 11 of the UFA is to be interpreted and implemented.

[124] There is, as well, a specific context to that inquiry, 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 (see *Little Salmon* at para. 9).

[125] 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.

[126] This is made clear in the objectives which introduce Chapter 11 of the UFA. I note in particular these objectives:

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

[127] When one considers the nature and scope of the land use planning process established by Chapter 11 in the context of the fact situation before the Court, one must give substance to the right bargained for by the First Nations to participate in the management of public resources, here the land use of fully 14% of the land area of the Yukon.

Obligations Under Chapter 11

[128] With that context, I turn to expand upon my conclusion affirming the trial judge's finding that Yukon did not honour the letter or spirit of Chapter 11 in the planning process.

[129] I begin by qualifying 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. The planning process under scrutiny here began with the creation of the Peel Watershed Regional Planning Commission. Under s. 11.4.1, the creation of that body was discretionary; it required the agreement of Yukon and any affected Yukon First Nations. While the affected First Nations under the UFA and the Final Agreements acquired the right to meaningful participation in the planning process once the Commission was established by agreement of the parties, they did not acquire the threshold right to the development of regional land use plans. The process leading to the development of the plans first requires the agreement of Yukon to set it in motion under Chapter 11.

[130] If Yukon were to reject a Final Recommended Plan then there would be no land use plan for that particular region. Yukon would then have responsibility for the Non-Settlement Lands without the guidance or certainty of a regional plan. Such an outcome is not in the best interests of any of the parties.

[131] Once constituted, the purpose of the Commission was "to develop a regional land use plan". I stress that it is the Commission, not the parties, that is charged with developing the plan. And in doing so, it is directed in various matters by s. 11.4.5.

[132] Section 11.5.1 provides:

> 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.

[133] Again, the recommendations for the uses of the resources within the plan area, here the Peel Watershed, are "in a manner determined by the … Commission".

[134] This brings us to the central provision before the Court, s. 11.6.0, which established the approval process for the Commission's recommended regional land use plan.

[135] The Commission is directed to forward its recommended plan to the "Government" and each affected First Nation.

[136] Sections 11.6.2 and 11.6.3 then provide:

> 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: …

[137] I approach the consideration of the content of these sections against the backdrop of Yukon's Development and Access Modifications, modifications

proposed by Yukon in the supposed exercise of its power under s. 11.6.2. These "modifications" were stated in very general terms; they lacked detail and specificity; and they were wholly conclusory, pointing to a general result rather than a detailed alternative plan.

Consultation

[138] In this context, it is important to note that Yukon's right to propose modifications to the recommended plan applying to Non-Settlement Land was required to be preceded by "Consultation" with any affected Yukon First Nation and any affected Yukon community, and accompanied by "written reasons" for the proposed modifications. Like the trial judge, I see these requirements as contemplating a much more fulsome set of proposed modifications than was offered here. This was necessary not only to allow the Commission to fully comprehend Yukon's response, but also to allow the consulted parties to provide meaningful feedback on Yukon's proposals.

[139] Such an intent is reflected in the 2010 LOU. Yukon agreed to identify and scope issues arising from the Recommended Plan before carrying out Consultation (A.B., vol. 15, p. 3010). Yukon was then to consult with First Nations and affected Yukon communities (A.B., vol. 15, p. 3009). Post-Consultation, Yukon was to engage in intergovernmental Consultation aimed at preparing a joint response, and ultimately to submit its own response where it differs from the joint response (A.B., vol. 15, p. 3013). In other words, disclosure of Yukon's position was required prior to Consultation, and any submission to the Commission was to be informed by the feedback received during Consultation.

[140] The purpose of the UFA requirement for Consultation with affected bodies before the proposed modifications by Yukon is to allow those bodies, primarily the affected First Nations, to enjoy the fruits of their bargain – meaningful participation in the management of public resources in the area, here, of the Peel Watershed (*Little Salmon* at para. 9).

[141] As I have mentioned, “Consultation” is a term defined in the UFA and Final Agreements:

> “Consult” or “Consultation” means 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.

[142] Again, I stress the notion of “notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter”.

[143] Here, the “matter to be decided” was the extensive modifications to the Recommended Plan which Yukon eventually set out in Yukon’s Final Plan. It was those modifications which had to be disclosed as part of the Consultation so as to allow the affected First Nations and communities to prepare and communicate their views on the “matter”. That type of Consultation, arguably, did occur or was attempted (I need not decide) after the Commission forwarded its Final Recommended Plan to the parties. But it was at this stage of s. 11.6.2, indeed, before Yukon actually proposed modifications to the Commission, that it was intended to occur on any version of a “generous” and honourable interpretation of the section.

[144] Here, Yukon did not provide the First Nations and affected communities with an opportunity to prepare their views on Yukon’s proposed modifications. Even after Consultation, Yukon did not reveal the extent to which their proposals would ultimately diverge from the Recommended Plan. How could the individual bodies to be consulted “prepare its views” on a modification described by Yukon in these very general words:

> The planning region has a mix of values and resources. We believe that there is an ability to accommodate mixed uses that meet society's need, while erring on the side of caution on the basis of a determined level of risk.
>
> The plan proposed that a large portion of the region be designated as Special Management Areas. While government believes there should be areas where development is excluded in the Peel, more work needs to be done by the Commission to identify and develop a rationale for these areas.
>
> We request that the Commission re-examine the location, nature and potential extent of current and future conflicts between the values of conservation, non-consumptive resource use and resource development. …
>
> The Yukon government recognizes that managing surface access (winter and all-season roads) can be challenging but not impossible. We believe a ban on surface access is not a workable scenario in a region with existing land interests and future development potential. We would like to see a range of access options developed which consider the various conservation and resource values throughout the region and also take into account existing regulatory tools and best management practices which can be used to mitigate risk and limit other user's access.

[145] Indeed, the lack of early disclosure during Consultation fed a subsequent public perception that Yukon "did not follow either the spirit or intent of the rules established in Chapter 11 of the Umbrella Agreement and hijacked the process" (Yukon Land Use Planning Council, 17 April 2013, A.B., vol. 17, p. 3414).

Written Reasons

[146] Post-Consultation, s. 11.6.3 required that if Yukon wished to propose modifications it was directed to forward the proposed modifications (with written reasons) to the Commission. The scope of the judicial duty to give reasons is well-established in the jurisprudence. At a minimum, those reasons must offer a basis for meaningful appellate review: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23 at para. 46.

[147] I do not mean to import that jurisprudence into the construction of "written reasons" in s. 11.6.3, but it does offer some guidance and it does echo or parallel the duty to "Consult" as defined in the UFA, viz "notice of a matter to be decided in sufficient form and detail to allow" for the recipient to prepare its views on the matter.

[148] But here, Yukon's Development and Access Modifications were not accompanied by reasons when forwarded to the Commission. Nor did they offer a concrete hint of the scope and extent of what was to come later.

[149] Neither the Development and Access Modifications themselves nor the detailed Yukon response, which was attached to the Minister's letter to the Commission of 21 February 2011, offer anything that could be considered "reasons" for the proposed modifications. Yukon's modifications were put forward in such general terms as to lack such specificity that they were effectively not formulated or disclosed. One cannot offer intelligible reasons for modifications which are not even formulated or disclosed. The purpose of the UFA's requirement for "written reasons" to accompany the transmission of proposed modifications to the Commission is so that the Commission might properly exercise its duties under s. 11.6.3.1 to "reconsider the plan and make a final recommendation for a regional land use plan to Government, with written reasons".

[150] The judge and the respondents spoke of Chapter 11 creating an opportunity for dialogue between the parties and the Commission and that is the intent here. Under s. 11.6.3.1, armed with Yukon's proposed modifications and its reasons therefor, the Commission is expected to intelligently reconsider the plan and make its final recommendation. But Yukon's failure to properly exercise its power to propose modifications under s. 11.6.2 and s. 11.6.3 effectively prevented the Commission from reconsidering and responding. Indeed, the Commission expressed its frustration in this regard in its Letter of Transmittal of 22 July 2011 (A.B., vol. 16, p. 3093):

> The Yukon Government'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. It did not discuss locations of concerns, or what modifications it sought. The Commission noted these general desires and interpreted the thrust of the Yukon Government response to be about 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.

[151] In the same letter, the Commission went on to say that it "fully considered the Yukon Government response concerning the amount of land protected" and reconsidered its "recommendations on surface access…". But that was a reconsideration in a vacuum. The Commission was denied the opportunity to consider its recommendations in these matters against Yukon's actual proposed modifications as they were eventually fully disclosed in Yukon's Final Plan. The dialogue contemplated by s. 11.6.2 and s. 11.6.3 could not, and did not, occur.

[152] I interject here to make two observations that will be relevant in the consideration of the remedy ordered by the judge. They center on the conduct of the Commission.

[153] First, I would have expected the Commission to have gone back to Yukon to voice its concern about the lack of detail to Yukon's proposed modifications. Instead, the Commission appears to have suffered in silence until it sent the Final Recommended Plan to the parties. In this regard, I note the Commission apparently did not take up Yukon's offer of further elaboration set out in its letter of 21 February 2011:

> 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.

[154] Second, the Commission in its Letter of Transmittal suggested that for it to "adequately address" Yukon's very 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 is no provision.

[155] With respect, I do not understand this complaint as there is no legal impediment under the UFA and the Final Agreements so constraining the Commission. Indeed, the Commission did go "back to the drawing board" after it received the responses to its initial Draft Plan of April 2009.

Final Approval

[156] I proceed next to a critical section in Chapter 11, s. 11.6.3.2. After receipt of the Commission's final recommendation, along with its reasons , Yukon is given "the last word" in these terms:

> 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.

[157] The judge made two important points here. First, because Yukon had purported to propose modifications at the s. 11.6.2 stage, it was precluded from rejecting the Final Recommended Plan because choosing the modification process "necessarily indicates approval of the essential character of the Final Recommended Plan" (at para. 164). Second, Yukon's modifications under s. 11.6.3.2 must be "based upon" modifications it proposed in s. 11.6.2 (at para. 163).

[158] I disagree with the first conclusion and agree with the second but offer some qualifications.

[159] In my view, there is nothing in the UFA and the Final Agreements constraining the right of Yukon (or the First Nations under their mirroring provisions) to reject the Commission's final recommendations. This right is necessary since the Commission in its reconsideration under s. 11.6.3.1 might put forward a final recommendation which on the whole is objectionable to Yukon. This may arise because of new changes to the plan which Yukon had not previously considered. Such a right is also consistent with the notion that the entire planning process begins, as I earlier discussed, with the voluntary agreement of the parties. Neither party is entitled to a regional land use plan as of right.

[160] But I agree with the judge's second conclusion. The judge described s. 11.6.3.2 as "Step 6" in the process. He suggested that the modifications at Step 6 must be based upon the proposed modifications at the s. 11.6.2 stage (at para. 163):

> If this were not so, at the final Step 6, the Government could thwart the process entirely by imposing new modifications that the Commission has not

> been able to address. In particular, it is not appropriate at Step 6 to introduce new concepts and modifications that effectively bypass the Commission's consideration.

[161] I agree with this observation. Respecting the Commission's role in the development of the Regional Land Use Plan reflects an interpretation which gives life to the promise in the UFA and the Final Agreements of meaningful participation for affected First Nations in the management of public resources. This is the iterative process which both sides agreed on. It rationalizes the dialogue between the parties and the Commission contemplated by s. 11.6.0 and the Approval Process for Land Use Plans. It allows the Commission to perform its ultimate function under that process to "develop" a final recommendation for a regional land use plan for the Peel Watershed.

[162] Turning to what occurred here, Yukon's Final Plan, as detailed above, cannot be said to be based upon its modifications proposed under s. 11.6.2. This flows inevitably from the conclusion that Yukon simply did not properly exercise its right to propose modifications at that stage. Yukon's Final Plan modifications cannot be said to be based upon modifications not made at the earlier stage of the process.

Remedy

[163] This brings us to an appropriate remedy.

[164] The trial judge remitted the process to the stage of s. 11.6.3.2 for Yukon to consult and then make its final modifications to the Final Recommended Plan. But the judge ordered that Yukon's final modifications had to be based upon the original Yukon's Response with the exception of what he found to be the invalid Development and Access Modifications. I have related why the judge resolved the "dilemma presented to the Court" (at para. 211) in this way:

> The dilemma presented to the Court is that the plaintiffs' remedy effectively prevents the Government of Yukon from presenting its proposed modifications on access and balance to the Commission and from modifying the Final Recommended Plan in a manner that reflects them. If the Government of Yukon's remedy is accepted, the planning process is returned to the Commission to redo a completed stage, requiring the plaintiffs to bear the costs and delay of repeating the planning process. For the purpose of this

> discussion, I will assume that the proposed re-hearing under ss. 11.6.2 and 11.6.3 would permit the Government of Yukon, after Consultation, to present its Government approved plan of January 2014 to the Commission for consideration in its Final Recommended Plan.

[165] The judge reasoned that remitting the process to the stage of s. 11.6.2 would take the Commission "back to the drawing board" and permit Yukon "to benefit from its flawed process" (at para. 213). It would amount to an endorsement of Yukon's treaty breaching conduct (at para. 218). I respectfully disagree with these sentiments.

[166] First, remitting the matter to the s. 11.6.2 stage would not permit Yukon "to benefit from its flawed process"; it would allow the process to unfold as it was meant to.

[167] Yukon has been found to have failed to honour the planning process contemplated by Chapter 11, but this does not provide a benefit to Yukon if the matter is remitted back to s. 11.6.2. Yukon would not be permitted to simply submit Yukon's Final Plan as its response to the Commission's Recommended Plan. Rather, the requirement at s. 11.6.2 is that Yukon consult and then respond to the Commission's Recommended Plan. Doing so with the requisite detail will allow the planning process to unfold as envisioned. With respect, it is not the court's role to speculate on the extent to which any final plan emerging from a properly completed process would mirror Yukon's Final Plan.

[168] Second, the matter should be returned to the point of the breach. The trial judge found that to be at the stage of s. 11.6.3.2 when Yukon proposed a wholly new plan not based upon modifications it proposed at the stage of s. 11.6.2. I think that this is a selective view of matters. It seems to me that a more compelling argument can be made in support of the submission that the "breach" began when Yukon did not properly set out its detailed modifications at the stage of s. 11.6.2. That is the *status quo ante*, or state that existed before the breach, to which the "breaching" party should be returned to allow it to perform its duties appropriately:

> See e.g. *Provincial Court Judges* at para. 44, BOA, Vol. 2, Tab 18; *Fédération Franco-Ténoise v. Canada (Attorney General*), 2008 NWTCA 6 at paras. 90-91, leave to appeal refused, [2008] S.C.C.A. No. 432, BOA, Vol. 2, Tab 19*;* Kent Roach*, Constitutional Remedies in Canada*, 2d ed., loose-leaf (Toronto: Canada Law Book, 2014), at 3-19 - 3-21, BOA, Vol. 5, Tab 41.

[169] And it is a *status quo ante* which best serves the goals of achieving reconciliation. The remedy crafted by the trial judge would put in place a plan that emerged from a flawed process. I do not see how that serves reconciliation.

Reconciliation

[170] Reconciliation is understood as a process, "not a final legal remedy in the usual sense" (*Haida Nation* at para. 32). That process seeks "reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty" (*R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 49).

[171] As the Truth and Reconciliation Commission of Canada put it: "Reconciliation is not about "closing a sad chapter of Canada's past," but about opening new healing pathways of reconciliation that are forged in truth and justice" (Truth and Reconciliation Commission of Canada, "What We Have Learned: Principles of Truth and Reconciliation" (2015) at 117).

[172] Reconciliation involves both parties (see Bradford W. Morse, "Aboriginal and Treaty Rights in Canada" (2013) 62 *Sup Ct L Rev* (2d) 569 at 673; Joshua Nichols, "Claims of Sovereignty – Burdens of Occupation: William and the Future of Reconciliation" (2015) 48 *UBC L Rev* 221 at 236). It takes into account both the Aboriginal perspective and the perspective of the common law: "True reconciliation will, equally, place weight on each" (*Van der Peet* at para. 50).

[173] As Mr. Justice Binnie wrote in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1, "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions." In that sense, it is a two-way street. The Crown must act honourably in asserting its rights (*Haida Nation* at para. 32), and the Aboriginal group must accept justifiable

infringement on its rights (*R. v. Sparrow*, [1990] a S.C.R. 1075 at 1109; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 139).

[174] An important vehicle for both parties to jointly advance reconciliation is through the negotiation of a modern treaty. In fact, such negotiated settlements are the "preferred process for achieving ultimate reconciliation" (*Haida Nation* at para. 38).

[175] In the case at bar, Yukon and the First Nations codified many of their rights and responsibilities into the UFA and the Final Agreements. The UFA and the Final Agreements thus embody a plan for achieving reconciliation. The terms are treaty rights with constitutional protection (*Little Salmon* at para. 2), and the honour of the Crown demands that they be adhered to (*Mikisew Cree* at para. 51).

[176] When reconciliation is sought in the form of a modern treaty, the parties must act diligently to advance their respective interests (*Little Salmon* at para. 12). In particular, the Crown must act diligently to ensure fulfillment of the purposes behind its various treaty obligations (*Manitoba Métis* at para. 83). As Mr. Justice Binnie explained, the purpose of modern treaties is to further reconciliation by "creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities" (*Little Salmon* at para. 10).

[177] Yukon undermined reconciliation by failing to honour the letter and spirt of its treaty obligations. As I have said, it did so in three ways. First, during Consultation at the s. 11.6.2 stage of the process, Yukon failed to reveal its extensive plan modifications. This undermined the dialogue central to the plan for reconciliation in Chapter 11. Second, Yukon's Development and Access Modifications were not accompanied by the requisite details or reasons when forwarded to the Commission. This left the Commission ill-equipped to advance the dialogue with a Final Recommended Plan that considered Yukon's position. Third, at the s. 11.6.3.2 stage, Yukon proposed a new plan disconnected from its earlier s. 11.6.2 proposals. This effectively denied the Commission performance of its ultimate role under the

treaty: to “develop” a final recommendation for a regional land use plan for the Peel Watershed.

VII. Disposition

[178] In the result, I would allow the appeal to the extent of declaring the Development and Access Modifications proposed under s. 11.6.2 to be an invalid exercise of Yukon’s power thereunder and I would remit the matter back to that stage so as to allow Yukon to articulate its priorities in a valid manner.

[179] Costs have not been spoken to and I would invite the parties to make any necessary submissions thereon.

“The Honourable Chief Justice Bauman”

I agree:

“The Honourable Madam Justice Smith”

I agree:

“The Honourable Mr. Justice Goepel”