File No._____

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF YUKON)

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

Applicants
(Respondents)

And

GOVERNMENT OF YUKON

Respondent
(Appellant)

MEMORANDUM OF ARGUMENT

(Filed by the Applicants pursuant to Section 40 of the *Supreme Court Act*, RSC 1985, c S-26, and Rule 25 of the *Rules of the Supreme Court of Canada)*

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A. ISSUES OF PUBLIC IMPORTANCE

i. Remedies for Breach of Modern Treaties

1. This case deals with the interpretation and implementation of a number of related land claims agreements, or modern treaties, between Aboriginal peoples in Yukon and the Crown. More specifically, it deals with determining the appropriate remedy when the Crown breaches its obligations in respect of a joint process established under a modern treaty.

2. While each modern treaty, beginning with the James Bay and Northern Quebec Agreement in 1975, and including the most recent agreements reached in the last few years, is unique, they all include processes under which the Aboriginal signatories participate with the federal and territorial or provincial governments in respect of ongoing decisions and consultation about a variety of matters, including decisions about the use and development of lands.

3. For example, the Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada,[1] the Gwich'in Comprehensive Land Claim Agreement[2] and the Sahtu Dene and Metis Comprehensive Land Claim Agreement[3] all provide for the establishment of independent bodies to develop land use plans for regions defined under those agreements. The Land Claims and Self-Government Agreement among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada provides that the Government of the Northwest Territories, the Tłı̨chǫ Government and the Tłı̨chǫ community governments must consult with each other during the preparation of land use plans for any part of the Wek'èezhìi (an area defined in that Agreement) and may by

[1] See Article 11 of the Agreement between the Inuit of Nunavut Settlement Area and Her Majesty the Queen in Right of Canada.
[2] See s. 24.2 of the Gwich'in Comprehensive Land Claim Agreement.
[3] See s. 25.2 of the Sahtu Dene and Metis Comprehensive Land Claim Agreement.

agreement establish a land use planning body for the preparation of a land use plan for all of the Wek'èezhìi.[4] The Inuvialuit Final Agreement contemplates a land use planning process for the Inuvialuit Settlement Region with the equal participation of government and the Inuvialuit.[5]

4. The James Bay and Northern Quebec Agreement provides for consultative bodies established under the agreement to advise the provincial and federal governments concerning the formulation of laws and regulations relating to matters concerning the environment and social protection as well as Cree and Inuit participation in the evaluation of projects.[6] It also provides for a comprehensive fish and wildlife co-management regime.[7]

5. Under the Nisga'a Final Agreement, the parties undertake cooperative planning and conduct of Nisga'a fisheries and enhancement initiatives and cooperative management of wildlife throughout the treaty areas.[8]

6. As Binnie J. put it in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103, which also concerned the Umbrella Final Agreement and a Yukon modern treaty:

> [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

[4] See s. 22.5 of the Land Claims and Self-Government Agreement among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada.
[5] See s. 7(82) of the Inuvialuit Final Agreement.
[6] See ss. 22 and 23 of the James Bay and Northern Quebec Agreement.
[7] See s. 24 of the James Bay and Northern Quebec Agreement.
[8] See Chapter 8, paras. 77-82, and Chapter 9, paras. 45 to 51, of the Nisga'a Final Agreement.

> than the past. A canoeist who hopes to make progress faces forwards, not backwards.

7. In order for the "grand purposes" of reconciliation to be achieved, it is essential that the participants in treaty-mandated processes have faith in the integrity of those processes, and reason to believe that it is worthwhile to participate in them, actively and in good faith. Otherwise reconciliation will not be achieved, and the hard fought for relationships will inevitably deteriorate.

8. In this case, both the Supreme Court of Yukon and the Court of Appeal of Yukon ruled that the Government of Yukon breached its obligations under the Yukon modern treaties in respect of the establishment of a regional land use plan. The Court of Appeal however disagreed with the Supreme Court of Yukon in respect of the appropriate remedy. The applicants say that both the choice of remedy and the underlying interpretation of the Umbrella Final Agreement that led the Court of Appeal to its remedy are inconsistent with the approach to be taken to modern treaties adopted by this Court and to the underlying purpose of the land use planning provisions.

9. The Umbrella Final Agreement contemplates that regional land use planning commissions may be established in every region of Yukon. The process will likely extend over several decades. The Court of Appeal's judgment will stand as the template for subsequent land use planning throughout Yukon if it is not set aside.

10. If allowed to stand, the reasoning of the Court of Appeal will inevitably undermine the careful balance between the respective roles in future decision-making of non-Aboriginal Governments and Aboriginal peoples that has been so assiduously negotiated and set out not only in the Yukon modern treaties, but in similar modern treaties across Canada.

ii. The Peel Watershed is of National Importance

11. The Peel Watershed, the area at issue in the case at bar, is located in northeast Yukon, covers approximately 67,000 square kilometres or 14% of the entire Yukon land base and extends into the Northwest Territories. It contains six major rivers which flow northward towards the Peel River, which flows into the Mackenzie River and ultimately, the Beaufort Sea. The Peel Watershed has no permanent residents, few roads and only limited development, creating a wilderness character different from most watersheds of its size in North America. Tab 5D, paras. 3 and 6.

12. The Peel Watershed is a national treasure in the custodianship of the Government of Yukon and First Nations. The future of the Peel Watershed is a matter of importance not only to Yukoners but to all Canadians.

iii. Proper Remedy after Quashing a Flawed Decision

13. The existing case law regarding remedies in respect of quashing a flawed decision and then remitting a matter back for reconsideration is limited. The divergence in the views of the Yukon Supreme Court and the Court of Appeal in the case at bar illustrates the need for guidance from this Court.This is a matter of public importance that extends to all areas of administrative law in respect of commission proceedings, not just those pertaining to proceedings established by modern treaties.

B. STATEMENT OF FACTS

14. The facts of the case at bar are set out in the Reasons for Judgment of the Yukon Supreme Court at paras. 13-111 and in the Reasons for Judgment of the Court of Appeal at paras. 7 - 83.

15. On May 29, 1993, Her Majesty the Queen in Right of Canada, the Government of Yukon and the Yukon First Nations, represented by the Council for Yukon Indians, entered into the Umbrella Final Agreement (the "UFA"). The UFA was the product of two decades of negotiations and, while not itself legally binding, it is incorporated into the eleven individual Final Agreements, including those of the applicants.[9] In *Beckman*, (*supra*), Binnie J. described the UFA, at para. 2, as a "monumental achievement."

16. Under the Yukon modern treaties, First Nations surrendered their Aboriginal rights in almost 484,000 kilometres of land, in exchange for defined treaty rights including Settlement Land of approximately 41,595 square kilometres,[10] approximately 8.5% of the Yukon land base. All land and water outside the modern treaty areas is Non-Settlement Land. Tab 5A, p. 5.

17. Chapter 11 of the UFA and Chapter 11 of each of the Final Agreements provide for a collaborative comprehensive land use planning process which applies to Settlement and Non-Settlement Lands and features specified consultation between the Government of Yukon and First Nations and also with "affected Yukon communities". Tab 5A, ss. 11.2.1.1, 11.6.2, and 11.6.3.2.

18. In each planning region, affected First Nations and the Government of Yukon may establish, by agreement, a Regional land Use Planning Commission. Once a Regional Land Use Planning Commission is established it must prepare and recommend a regional land use plan to the Government of Yukon and the affected First Nations. Section 11.6.0 of Chapter 11 sets out the procedure for the approval of a regional land use plan by the Government of Yukon. Tab 5A, s. 11.6.0.

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[9] The Final Agreements of the three First Nation applicants are the First Nation of Na-cho Nyak Dun Final Agreement (1993), Tr'ondëk Hwëch'in Final Agreement (1998), and Vuntut Gwitchin First Nation Final Agreement (1993). Hereafter, for ease of reference, whenever a reference is made to a section of the Final Agreements, this Memorandum of Argument will cite the relevant section of the UFA.

[10] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 33, [2010] 3 SCR 103 at para. 9.

19. This case is about the work of the Regional Land Use Planning Commission established for the Peel Watershed region: the Peel Watershed Planning Commission (the "Commission"). The Commission was established in 2004 by agreement of the Government of Yukon and four First Nations, (collectively, the "four First Nations"), three of whom are applicants.

20. On December 2, 2009, the Commission delivered its 300 page Recommended Peel Watershed Regional Land Use Plan (the "Recommended Plan") to the Government of Yukon and the four First Nations.[11] It concluded that approximately 80% of the region should be given a high degree of protection with no new industrial uses or tenures and no new surface access and that approximately 20% of the region should be open to mineral and oil and gas development. Tab 5, p. vii.

21. After considering the Recommended Plan for over a year, the Government of Yukon provided its response under s. 11.6.2 of the UFA by way of a letter from Patrick Rouble, Minister of Energy, Mines and Resources, dated February 21, 2011. Minister Rouble's letter stated that the Government of Yukon was seeking modifications to the Recommended Plan and included a summary of its five revised modifications. Tab 5B, p.1 and 4.

22. There is no dispute that items 3, 4 and 5 at p. 4 of Minister Rouble's letter were indeed proposed modifications and written reasons were provided for those modifications. On the other hand, items 1 and 2 at p. 4 of Minister Rouble's letter were not modifications at all; they were mere statements of preference as to development and access in the Recommended Plan. They were not specific; they lacked detail and were not accompanied by written reasons, as stated by the Court of Appeal:

> [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). …
>
> [149]… Yukon's [first two] 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. …

[11] The Recommended Plan was revised in minor detail by the Commission in January 2010.

23. On July 22, 2011, the Commission released its Final Recommended Peel Watershed Regional Land Use Plan (the "Final Recommended Plan"). In respect of items 1 and 2 in Minister Rouble's letter relating to development and access, the Commission wrote in its foreword to the Final Recommend Plan:

> 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. Tab 5C, p. xi.

24. All that then remained was for the Government of Yukon to undertake its final consultation with affected communities and thereafter to "approve, reject or modify" the plan, (s.11.6.3.2). The applicants submit that at that final stage the only options open to the Government of Yukon were to approve the Final Recommended Plan or modify it in relation to the modifications it had proposed at the earlier stage under s. 11.6.2. Instead, the Government of Yukon proceeded, over the objections of the four First Nations, to final consultation, not in respect of its three proposed modifications advanced earlier with written reasons, but on the basis of entirely new modifications never previously advanced in the process.

25. Thereafter, on January 21, 2014, the Government of Yukon released its "approved" Peel Watershed Regional Land Use Plan (the "Government Plan"). The Government Plan included substantial changes to the Final Recommended Plan in respect of development and access. Under the Government Plan, 71% of the region was open for mineral exploration and a mere 29% of the region was protected.

26. This action was commenced on January 27, 2014, in the Supreme Court of Yukon.[12] At trial the plaintiffs asked for a declaration that the Government Plan be quashed and that the

[12] The Gwich'in Tribal Council, representing the Tetlit Gwich'in, though based in the Northwest Territories and not a signatory to the UFA, intervened on the basis of their participation in the land use planning process as provided for

matter be remitted to the point at which, under s. 11.6.3.2, the Government of Yukon had received the Final Recommended Plan. The applicants argued that it was at that point that the Government of Yukon breached its obligations under the Final Agreements by purporting to consult the four First Nations and affected communities about an entirely new plan.

27. The trial judge, Veale J., held that, having elected to propose modifications at the earlier stage under s. 11.6.2, the Government of Yukon had no authority at the stage of final consultation to present new modifications, amounting virtually to a new plan, which it had never submitted to the Commission, and that the Government of Yukon had no authority to approve the Government Plan. Accordingly, Veale J. quashed the Government Plan. [See Veale J.'s Reasons, paras. 163, 199 and 222]

28. Veale J. went on to order, at para. 222, that the process be remitted to the stage of s. 11.6.3.2, that is, to the point at which the time had come for the Government of Yukon to engage in final consultation with the four First Nations and the affected communities, and then make its final modifications to the Final Recommended Plan or approve it as it stood. Importantly, Veale J. ordered that any modifications to the Final Recommended Plan had to be based upon those modifications properly advanced by the Government of Yukon under s. 11.6.2 that is, items 3, 4 and 5 in Minister Rouble's letter.

29. The Government of Yukon appealed the judgment of Veale J., and on November 4, 2015 the Court of Appeal of Yukon allowed the appeal in part. The Court of Appeal upheld Veale J.'s order quashing the Government Plan. However, the Court ordered that the matter be remitted to the point at which, under s. 11.6.2, the Government of Yukon had received the Recommended Plan.

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in Yukon Transboundary Agreement between Her Majesty the Queen in right of Canada and the Gwich'in Tribal Council, Appendix C to the Gwich'in Comprehensive Land Claim Agreement.

30. The Court of Appeal also held that even though the Government of Yukon had elected at the stage of s. 11.6.2 only to propose modifications, it could, nevertheless, at the stage of final consultation, after the process had been exhausted, reject the Final Recommended Plan altogether at step 11.6.3.2.

31. The applicants submit that the Court of Appeal's judgment fundamentally misinterprets Chapter 11 and grants a remedy that undermines or effectively nullifies the entire collaborative process set out in Chapter 11 of the UFA and the Final Agreements.

PART II – ISSUES

32. The applicants submit that the Court of Appeal erred in law by:

a) ruling that the Government of Yukon's breach of its obligations under Chapter 11 occurred when it did not properly set out its detailed modifications at the stage of s. 11.6.2 and that the matter should therefore be remitted to the stage set out in that section;

b) ruling that, upon receipt of the Government of Yukon's proposed modifications under s. 11.6.2, the Commission ought to have gone back to the Government of Yukon to voice its concern about the lack of detail to the Government of Yukon's proposed modifications in respect of development and access; and

c) ruling that the Government of Yukon had the ability to reject a commission's final recommendation in its entirely even if under s. 11.6.2 it had only proposed modifications to some of the recommended plan.

PART III – STATEMENT OF ARGUMENT

33. The appeal herein, if leave is granted, will be restricted to remedy. Both Courts below agreed that the Government of Yukon breached Chapter 11 and that the matter should be

returned to the point at which the breach occurred. They disagreed on when the breach occurred. The applicants submit that the Court of Appeal's error in its choice of remedy resulted from, first, its finding that it was the Government of Yukon's failure to exercise its right to propose modifications under s. 11.6.2 that constituted the breach of Chapter 11, and second, its finding that the Commission did not properly follow its own procedure under s. 11.6.3.1.

34. The appeal will also seek a determination of the Court as to the authority of the Government of Yukon, having elected to propose modifications to only some of a recommended plan under s. 11.6.2, to thereafter reject a final plan in its entirety under s. 11.6.3.2.

A. THE NATURE OF THE BREACH OF CHAPTER 11

35. The Court of Appeal found that Veale J. was essentially correct in reasoning that the Government of Yukon failed to comply with the process under s. 11.6.0 and was, accordingly, in breach of Chapter 11. However, the Court of Appeal differed with Veale J. on a matter of central importance in the proceedings, that is, the point at which the breach occurred. Writing for the Court, Bauman C.J. said:

> [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. [Emphasis added.]

36. Bauman C.J. rejected Veale J.'s finding that the breach occurred at the stage of s. 11.6.3.2:

> [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. [Emphasis added.]

37. It is submitted that the Court of Appeal erred in ruling that the breach occurred at the stage of s. 11.6.2, that is, the point where the Government of Yukon's failed to properly exercise its right to advance modifications as to development and access. With respect, Veale J. correctly identified the breach as occurring under s. 11.6.3.2 when the Government of Yukon introduced new substantive proposed modifications that had neither been consulted on at stage s. 11.6.2 nor put to the Commission for consideration.

38. The Government of Yukon has the obligation under s. 11.6.2 to respond to the recommendations of a commission. It must approve, reject or propose modifications to a recommended plan. If it chooses to reject or propose modifications, it must provide written reasons. That obligation was fulfilled in this case. The Government of Yukon chose not to approve or reject the Recommended Plan. Instead it decided to propose three modifications.[13] It provided written reasons for those modifications. It had no further obligation at that stage of the process.

39. The Court of Appeal held, at para. 149, that Yukon's development and access "modifications"[14] "… were put forward in such general terms as to lack such specificity that they were effectively not formulated or disclosed." This means that those so-called modifications were not proposed modifications at all; they were, as found by Veale, J. at para 196, merely "bald expressions of preference".

40. Of course the Government of Yukon had the right to decide what modifications it wanted to propose to the Recommended Plan. It chose to advance three modifications. It chose to advance no others. It had no obligation under s. 11.6.2 to address development and access in proposing modifications. Accordingly it had not yet breached any duty.

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[13] Items 3, 4 and 5 in Minister Rouble's letter. Tab 5B, p. 4
[14] Items 1 and 2 in Minister Rouble's letter. Tab 5B, p.4

41. There is no jurisprudential basis for holding that a failure to exercise a right under an agreement is a breach of the agreement.

42. Nevertheless the Court of Appeal held that the process should be sent back to the point when the Government of Yukon chose not to exercise its right to advance proposed modifications regarding development and access. This ruling would now allow the Government of Yukon to advance modifications that it had not "formulated or disclosed" in 2011, which it only formulated sometime between 2011 and 2014, and which it did not disclose until 2014.

43. Even if the Court of Appeal was correct in characterizing the Government of Yukon's failure to properly propose modifications as to development and access as a breach, the remedy it ordered is altogether inappropriate. It leads to a result that is inconsistent with the honour of the Crown.

44. In *Manitoba Metis Federation v. Canada,* 2013 SCC 14, [2013] 1 SCR 623, this Court enunciated two basic duties that arise in the context of constitutional obligations undertaken by the Crown to Aboriginal peoples, stating:

> [75] By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.[15]

45. The Court of Appeal held at para. 129 that once a decision is taken to establish a regional land use planning commission, the affected First Nations have the right to meaningful participation in the planning process. But that purpose is frustrated if the Government of

[15] Professor Brian Slattery has described the above-noted duties globally as "the duty of diligent performance" in Slattery, Brian "The Royal Proclamation of 1763 and the Aboriginal Constitution", in Terry Fenge and Jim Aldridge, eds., *Keeping Promises*. Montreal: McGill-Queen's University Press, 2015, 14 at 29.

Yukon, having decided under s. 11.6.2 to propose modifications to a recommended plan, rather than approving or rejecting it, is not required to act diligently in proposing all of its desired modifications.

46. The Court of Appeal's remedy allows the Government of Yukon to go back and repeat stages of the process under s. 11.6.0 which had already been completed, owing solely and entirely to its own failure to diligently exercise its discretion in proposing modifications. In this case, the remedy allows the Government of Yukon to hold up the process for three years to enable it to formulate additional modifications which ultimately emerged in finalized form in January 2014. Allowing the Government a "do-over" works to the great advantage of the Government, and to the great disadvantage and expense of the four First Nations, Yukoners, and the process.

47. If the Court of Appeal's remedy is allowed to stand, there could be no certainty in the land use plan approval process. The process would be open-ended. The Government of Yukon (or First Nations in respect of Settlement Land) could restart the process at any time after they have proposed modifications with written reasons under s. 11.6.2 by announcing that they have formulated further plan modifications never advanced before, which they now want to be considered. All that would be necessary would be to raise a general concern or "bald expression of preference" about any issue. There would never be any certainty or predictability or sense of resolution of issues through participation, dialogue, compromise, or persuasion. First Nations' participation in the planning process would not be meaningful. There would be little motivation for First Nations or affected Yukoners to bother participating if, at the end, the Government would have the untrammelled ability to roll the matter back to an earlier stage in the proceeding. The whole process would become utterly unworkable.

B. CONDUCT OF THE COMMISSION

48. The Court of Appeal held at para. 152 that the conduct of the Commission was relevant in considering the remedy in the case at bar. The applicants submit that the conduct of the

Commission can have no bearing on the issue of when the Government of the Yukon breached Chapter 11.

49. Bauman C.J. wrote, at para. 153 that he "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". With respect, there is no basis for suggesting that the Commission had a duty, once it had received the Government of Yukon's response to the Recommended Plan, to take it upon itself to see if the Government wished to change its statements of preference into modifications with written reasons.

50. The Commission's obligations are exhaustively set out in Chapter 11. Under s. 11.6.3.1, upon receiving the Government of Yukon's proposed modifications and written reasons, the Commission "shall reconsider the plan and make a final recommendation for a regional land use plan." There are no further requirements of a commission under Chapter 11; no obligation to go back and elicit proper modifications when none have been forthcoming. There is no basis for concluding that the Commission was in any way responsible for the Government of Yukon's failure to act diligently.

51. The Court of Appeal was also critical at para. 151 of the Commission's statement 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." Describing this as a "complaint", Bauman C.J. says, at para. 155:

> [155] …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.

52. But Bauman C.J.'s findings are at odds with other findings in his judgment. Bauman C.J. acknowledged at para. 150, that in order to properly reconsider a Recommended Plan, the Commission required properly formulated proposed modifications with written reasons.

53. His findings also misconstrue the procedure prescribed under Chapter 11. The Commission, having received the Government of Yukon's proposed modifications, was obliged to reconsider the Recommended Plan on the basis of those proposed modifications. It could not prepare a new Recommended Plan.

54. Bauman C.J.'s reference, at para 155, to what the Commission did in respect of the April 2009 Draft Plan evinces a misunderstanding of the process. The preparation of the Draft was prefatory to the actual land use plan approval process prescribed under s. 11.6.0. The Draft Plan was put together by the Commission in advance of producing its Recommended Plan, in an attempt to see if all parties could come to an agreement. They could not. So the Commission prepared its Recommended Plan. At no time in these proceedings has it been suggested that the Government of Yukon was misled into thinking it was not required to submit properly formulated modifications at stage s. 11.6.2. The applicants submit that the Court of Appeal had no power to superimpose additional obligations on the Commission or steps in the land use plan approval process for which there is no provision under Chapter 11.

C. AUTHORITY TO REJECT THE FINAL RECOMMENDED PLAN

55. The remaining issue concerns what happens at the final stage of the land use plan approval process. The question is: once the process recommences, (whether at s. 11.6.2, as ordered by the Court of Appeal, or s. 11.6.3.2, as ordered by Veale J.), can the Government of Yukon, though unable to include additional modifications at the stage of s. 11.6.3.2 (as both Veale J. and Bauman C.J. ruled), nonetheless reject the entire Final Recommended Plan? This of course has not happened in the present case, but the question was addressed by both courts below and will be of central importance to land use planning in Yukon in the future.

56. Bauman C.J. wrote:

> [113] … In particular, I do not accept the trial 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.

57. Bauman C.J. went on to state, at para. 159, that:

> [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. [Emphasis added.]

58. If the Court of Appeal's decision is upheld the Government of Yukon could propose modifications and thereafter abort the whole process at the 11th hour, and reject the entire plan, leaving no plan at all for the region. The applicants say that this is inconsistent with the purpose and scheme of the land use plan approval process set out in the UFA.

59. The Court of Appeal itself states that such an outcome would not be in the public interest:

> [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.

60. With respect, Veale J. set out the proper approach to be taken to interpreting the UFA. Relying on *Manitoba Metis Federation*, (*supra*), he said:

> [145] … to be consistent with the *Manitoba Métis* judgment, the interpretation must also be in a generous manner consistent with the intended purpose of the Final Agreements to further reconciliation and give meaning and substance to the collaborative and consultative nature of the s. 11.6.0 land use planning process.
> …
> [150] Or, as stated in the *Manitoba Métis* case, an honourable interpretation of a constitutional obligation cannot be a legalistic one that divorces the words from their purpose.

61. At paras. 162 to 164 of his Reasons, Veale J. found that where the Government of Yukon has decided to propose modifications to a recommended plan, it cannot reject the plan in its entirety at the final stage under s. 11.6.3.2. Veale J. emphasized at para. 165:

> [165] The Government of Yukon and Yukon First Nations must respect the process and purpose of the land use planning process set out in s. 11.6.0 and

> interpret Chapter 11 of the First Nations Final Agreements in a purposive manner to achieve the objectives set out in s. 11.1.0. The final step in the planning process in s. 11.6.3.2 cannot be severed from the previous steps in the process, from Chapter 11 or, indeed, from the Final Agreement as a whole. They are all linked. [Emphasis added.]

62. Veale J.'s approach is consistent with the modern rules of statutory and constitutional interpretation. *See Interpretation Act*, RSC 1985, c. 1-21, s. 12; *Manitoba Métis Federation* (*supra*), para. 76*; and Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para. 21.

63. The applicants submit that in ruling that the Government can reject the Final Recommended Plan at the stage of s. 11.6.3.2 the Court of Appeal has misinterpreted the process for the approval of land use plans under Chapter 11 and has erred in four key ways.

64. First, the Court of Appeal found that proposing modifications at the stage of s. 11.6.2 does not mean that the remainder of the recommended plan is implicitly approved. This is at odds with the scheme of Chapter 11 and introduces substantial uncertainty into the process. The applicants submit that if under the land use plan approval process, the Government of Yukon does not reject or approve a recommended plan but instead provides detailed modifications to parts of the recommended plan with written reasons, it must be taken to have accepted the balance of the plan.

65. Moreover, if at the stage of s. 11.6.2 the Government of Yukon may withhold concerns in respect of a recommended plan, while not rejecting the plan altogether or proposing modifications to address those concerns, there will be substantial uncertainty in the dialogue to follow and in the consultation with the First Nations and affected communities.

66. Second, Bauman C.J. reasoned, at para 159, that the Government of Yukon must retain the right to reject the plan at s. 11.6.3.2 because a commission "might put forward a final recommendation which on the whole is objectionable to Yukon…. because of new changes to the plan which Yukon had not previously considered". But this misconstrues the powers and role of commissions in the land use plan approval process. Under s. 11.6.2, a

commission must reconsider its plan based on those proposed modifications. Indeed, Bauman C.J. acknowledged, at paras. 149 and 150, that if proposed modifications are not even formulated or disclosed then a commission cannot reconsider and respond under s. 11.6.3.1.

67. A commission cannot go off on a frolic of its own and introduce new changes which the Government of Yukon has not previously considered. If a commission were to exceed its mandate at the stage of s. 11.6.3.1 and respond to the proposed modifications in a way that is not satisfactory to the Government of Yukon, the Government of Yukon retains the right at s. 11.6.3.2 to "modify" the final recommendation so that it conforms to its earlier proposed modifications to the recommended plan.

68. Third, Bauman C.J. fails to recognize that no written reasons are required at the stage of s. 11.6.3.2. The Government of Yukon is required to provide written reasons in support of its decision to either modify or reject the recommended plan at s. 11.6.2, but no such requirement exists at the final stage under s. 11.6.3.2. The Court of Appeal's decision has the effect of allowing the Government of Yukon to reject the entirety of the Final Recommended Plan without any written reasons or justification at all. Under such an interpretation, the Commission, the First Nations and the affected communities who engaged in the land use plan approval process diligently and in good faith throughout, could receive a decision from the Government of Yukon that rejects years of work with no explanation required.

69. Fourth, Bauman C.J. reasons that because establishing a commission and entering the land use plan approval process is not mandatory, but rather consensual, the Government of Yukon must therefore retain the right to reject the plan in its entirety at the stage of s. 11.6.3.2. But this overlooks the fact that once the Chapter 11 process is set in motion, the Government of Yukon has the right, on review of a commission's recommended plan at the stage of s. 11.6.2 to reject it entirely. If it decides not to reject at that stage, and instead approves or proposes modifications to the recommended plan, the Government has thereby

consented to there being a plan, subject to its proposed modifications which, at the end of the process, it is entitled to insist on. It cannot at the final stage, turn around and decide that there will be no plan whatsoever. This is the point made by Veale J., which he found was "central to the case at bar":

> [179] Finally, the land use planning process in s. 11.6.0 introduces a significant third choice of proposing modifications in addition to accepting or rejecting. It is the proposed modifications and ability to modify that are central to the case at bar. The ability to modify introduces a degree of flexibility or partial approval which makes sense given the complexity of the plan being generated.

70. The genius of Chapter 11 lies in its provision of the third choice. The Government's decision at the stage on 11.6.2 is not limited to approving or rejecting – it can propose modifications to avoid these two opposite choices. But if it does so it is bound to its proposed modifications. The effect of the Court of Appeal's decision to enable the Government to propose additional modifications and return the process to 11.6.2, and then to reject the Final Recommended Plan altogether, frustrates the third choice, and undermines the dialogue and relationship created by Chapter 11.

D. PROPER REMEDY

71. The question of the appropriate remedy in the case at bar is a matter of public importance that extends to all areas of administrative law in respect of commission proceedings, not just those pertaining to proceedings established by modern treaties. The existing case law regarding remedies in respect of quashing a flawed decision and then remitting a matter back for reconsideration is limited.

72. The Courts below agreed that, having quashed the Government of Yukon's Final Recommended Plan, the matter should be returned to the point of the breach. This is consistent with the authorities. The divergence in the views of the Yukon Supreme Court and the Court of Appeal as to the point at which the breach occurred and the appropriate remedy illustrates the need for guidance from this Court.

73. If leave to appeal is granted, this Court has the opportunity to clarify that proceedings that have been lawfully conducted and completed should be upheld and should not be permitted to be repeated. *See Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); and others* 2005 SCC 44, [2005] 2 S.C.R. 286; and *Little Narrows Gypsum v Labour Relations Board (Nova Scotia) and International Union of Operating Engineers, Local 721B,* [1977] NSJ No 603 (CA).

74. In sending the matter back to the stage of s. 11.6.3.2, the Court of Appeal would require the Commission, the Government, First Nations and the affected communities to redo all of the steps lawfully completed, an approach that is inconsistent with established principles for determining what follows upon the quashing of a decision as a result of a breach of procedure.

PART IV – SUBMISSIONS ON COSTS

75. The applicants request the costs of this leave application.

PART V – ORDER SOUGHT

76. The applicants seek an order granting leave to appeal, with costs.

ALL OF WHICH IS SUBMITTED THIS 23RD DAY OF December, 2015.

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Per: Thomas R. Berger, Q.C.
Margaret D. Rosling
C. Patricia S. Riley

PART VI – TABLE OF AUTHORITIES

Case **Paragraph**

Treaties, Agreements and Secondary Sources

PART VII – STATUTORY PROVISIONS

Interpretation Act, RSC 1985, c I-21, s. 12

Enactments deemed remedial
12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Loi d'interprétation, LRC 1985, c I-21, s. 12

Principe et interprétation
12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.