SCC File No. 36779

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)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(GOVERNMENT OF YUKON, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview of Position on Public Importance

1. The applicants seek leave to appeal a unanimous decision of the Yukon Court of Appeal. The application raises only one issue, which relates to the remedy ordered by the Court of Appeal: to what stage in a joint regional land use planning process for the Peel Watershed region of Yukon must the parties return to correct a failure in the process? This is not an issue of public or national importance warranting the attention of this Court.

2. The joint regional planning process is set out in modern treaties between Canada, Yukon and certain Yukon First Nations. As the treaties gave them the option to do, the Government of Yukon and the applicant First Nations jointly convened a regional land use planning commission for the Peel region. When Yukon proposed general modifications to the regional land use plan recommended by the planning commission, and subsequently made more detailed modifications to the commission's final recommended plan, the applicants objected to Yukon's interpretation of the treaty process.

3. Both courts below concluded that Yukon did not comply with the regional land use planning process set out in the treaties when it proposed its modifications to the commission's recommended plan. Both courts agreed that, to remedy the breach, the parties should be returned to the point in the regional land use planning process at which the breach occurred, to complete the process in accordance with the courts' interpretation of the treaties.

4. The courts below disagreed on the specific point at which the regional land use planning process should resume. The trial judge would have remitted the process to a late stage, effectively implementing the product of a flawed process and precluding Yukon from addressing its concerns with the plan recommended by the planning commission. The Court of Appeal ordered that the process resume at an earlier stage – at the point at which it found Yukon's breach occurred. Unlike the trial judge's remedy, the remedy ordered by the Court of Appeal allows the planning process to run its intended course.

5. The issue of the precise point at which Yukon breached its treaty obligations is not an issue of national or public importance – or even of application beyond the specific context of this

case. It is factual in nature, and case-specific: it turns on the particular sequence of events in this case.

6. The Court of Appeal's decision on remedy is in the nature of an interlocutory order, since it remits the matter to the parties to complete the planning process contemplated by the treaties. It does not establish any particular outcome for the Peel Watershed; that is for the parties to achieve, following the treaty process with the assistance of the land use planning commission.

7. Although the applicants focus their proposed appeal on the question of remedy, they also raise two further issues unrelated to the remedy ordered by the Court of Appeal. First, the applicants submit that the Court of Appeal erred in making two observations critical of the planning commission. Second, they submit that the Court of Appeal erred in taking the position that Yukon's authority under the treaties to reject a plan finally recommended by a planning commission is unconstrained.

8. Neither of these points justifies the attention of this Court either. The Court of Appeal's observations on the conduct of the planning commission were non-dispositive, and have no relevance beyond the circumstances of this case. And the second point – the scope of Yukon's ability to reject a commission's final recommendations – is purely hypothetical at this stage. Yukon did not attempt to reject the plan finally recommended by the commission, and has not evinced an intention to reject the plan that the commission will ultimately recommend when the process resumes. In any event, the Court of Appeal considered this issue with reference to principles recently settled by this Court.

9. The application for leave to appeal should be dismissed.

The UFA and the Final Agreements

10. On May 29, 1993, following 20 years of negotiations, Canada, Yukon and the Council for Yukon Indians entered into the Umbrella Final Agreement ("UFA"). Although the UFA was not legally binding, it provided a framework for the negotiation of individual treaties ("Final Agreements") between Canada, Yukon and Yukon First Nations. The terms of the UFA were

incorporated into the Final Agreements, along with additional provisions specific to each First Nation.[1]

11. Each of the applicant First Nations – the First Nation of Nacho Nyak Dun, the Tr'ondëk Hwëch'in and the Vuntut Gwitchin First Nation – has concluded a Final Agreement with Canada and Yukon (collectively, the "Final Agreements").[2] The Final Agreements are lengthy, comprehensive documents. They are also land claims agreements for the purposes of s. 35(3) of the *Constitution Act, 1982*, and the rights they set out enjoy constitutional protection.[3]

12. In the Final Agreements, Yukon First Nations surrendered undefined Aboriginal rights in exchange for defined treaty rights and a quantum of settlement land, access to Crown land, harvesting rights, heritage resources, compensation and participation in the management of public resources.[4]

13. The Final Agreements distinguish between Settlement Land, comprising less than three percent of the region at issue in this appeal, and Non-Settlement Land, comprising the remaining 97 percent.[5] With respect to regional land use planning, the First Nations have decision-making authority over Settlement Land, and Yukon has decision-making authority over Non-Settlement Land. This dispute concerns Non-Settlement Land.[6]

The land use planning process

14. The Final Agreements incorporate Chapter 11 of the UFA, which sets out a land use planning process. By s. 11.4.1, Yukon and affected Yukon First Nations may, but need not, establish regional land use planning commissions to develop regional land use plans. Section 11.4.1 is discretionary; it requires the agreement of the parties.[7] The First Nations have no "threshold right" to the development of regional land use plans.[8]

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[1] Appeal Reasons, paras. 2, 7, Application for Leave to Appeal ("Application"), Tab 3C, pp. 103-04
[2] Appeal Reasons, para. 8, Application, Tab 3C, p. 104
[3] Appeal Reasons, para. 8, Application, Tab 3C, p. 104
[4] Appeal Reasons, para. 9, Application, Tab 3C, p. 104
[5] Appeal Reasons, para. 25, Application, Tab 3C, p. 108
[6] Appeal Reasons, para. 12, Application, Tab 3C, p. 105
[7] Appeal Reasons, para. 129, Application, Tab 3C, p. 137
[8] Appeal Reasons, para. 129, Application, Tab 3C, p. 137

15. If the parties agree to establish a regional land use planning commission, the approval process for the land use plan developed by the commission, insofar as it relates to Non-Settlement Land, proceeds as follows.

(a) The commission must submit to Yukon and each affected Yukon First Nation a recommended land use plan (s. 11.6.1).[9]

(b) After consultation[10] with any affected Yukon First Nation and any affected Yukon community, Yukon must approve, reject or propose modifications to the recommended plan as it applies to Non-Settlement Land (s. 11.6.2).[11]

(c) If Yukon chooses to reject or propose modifications to the recommended plan, it must forward to the commission either the proposed modifications with written reasons, or written reasons for rejecting the recommended plan (s. 11.6.3).[12]

(d) The commission must then reconsider the plan and make a final recommendation to Yukon for a regional land use plan, with written reasons (s. 11.6.3.1).[13]

(e) Yukon must then approve, reject or modify the final recommended plan as it applies to Non-Settlement Land, after consultation with any affected Yukon First Nation and any affected Yukon community (s. 11.6.3.2).[14]

16. Sections 11.6.4 to 11.6.5.2 set out mirror provisions by which the First Nations have nearly identical rights and obligations in respect of Settlement Land.

The Peel Watershed Regional Land Use Planning Commission

17. The Peel Watershed region covers approximately 68,000 square kilometres, accounting for about 14 percent of the Yukon. While there are no settlements or mines in the region, there are thousands of active mineral claims and at least two deposits of significance. The region also contains potentially significant oil and gas resources.[15]

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[9] Umbrella Final Agreement ("UFA"), s. 11.6.1, Application, Tab 5A, p. 198

[10] Consultation is defined in Chapter 1 of the UFA to require notice of a matter to be decided in sufficient form and detail to allow the party to be consulted to prepare its views on the matter; a reasonable period of time in which the party to be consulted may prepare its views on the matter; an opportunity for the party to be consulted to present its views to the consulting party; and full and fair consideration by the consulting party of any views presented.

[11] UFA, s. 11.6.2, Application, Tab 5A, p. 198

[12] UFA, s. 11.6.3, Application, Tab 5A, p. 198

[13] UFA, s. 11.6.3.1, Application, Tab 5A, p. 198

[14] UFA, s. 11.6.3.2, Application, Tab 5A, p. 199

[15] Appeal Reasons, paras. 22-24, Application, Tab 3C, pp. 107-08

18. In 2004, Yukon and the applicant First Nations, with the participation of the Gwich'in Tribal Council (collectively, the "First Nations"), established the Peel Watershed Regional Land Use Planning Commission ("Commission") to develop a land use plan for the Peel Watershed.[16] Each of the First Nations has traditional territory within the Peel Watershed.

19. From the outset, in response to an Issues and Interests Report developed early on by the Commission, Yukon conveyed that it was seeking a "highly balanced plan that deals with the diversity of needs and issues in the region."[17] It maintained this position throughout the planning process.

The Recommended Land Use Plan

20. In December 2009, the Commission submitted its recommended land use plan under s. 11.6.1 (the "Recommended Plan"). The Recommended Plan divided the region into units based on ecological boundaries and characteristics. It proposed that approximately 80 percent of the region be subject to a high degree of environmental protection. In these areas, existing land use tenures would be permitted, but new surface access would be prohibited, even in areas with existing tenures. New industrial uses and tenures would also be prohibited.[18] The Recommended Plan proposed that the rest of the region – about 20 percent – be open to industrial development, but still generally without winter or all-season roads.[19]

21. The Commission acknowledged in the Recommended Plan that it had rejected the approach set out in its earlier Draft Land Use Plan of April 2009 (the "Draft Plan"). It had proposed the Draft Plan as "a compromise, a balance between development and conservation."[20] Because the balanced Draft Plan had been criticized from all quarters, the Commission decided that it had reached "a fork in the trail," and "had to choose to manage for one cluster of interests

[16] Appeal Reasons, para. 26, Application, Tab 3C, p. 108
[17] Appeal Reasons, para. 35, Application, Tab 3C, p. 110
[18] Appeal Reasons, para. 46, Application, Tab 3C, pp. 112-13
[19] Appeal Reasons, para. 47, Application, Tab 3C, p. 113
[20] Appeal Reasons, para. 40, Application, Tab 3C, p. 111

or the other."[21] It chose conservation. Unlike the Draft Plan, the Recommended Plan took "a cautious, conservative approach."[22]

22. Yukon and the First Nations responded both jointly and separately to the Recommended Plan. In the First Nations' collective response, they asked the Commission to modify the Recommended Plan to prohibit any development throughout the entire region (except for along the existing Dempster Highway).[23] Yukon delivered its individual response by way of a letter from the Minister of Energy, Mines and Resources. The letter attached a 16-page appendix and summarized five modifications proposed by Yukon, the first two of which (the "Development and Access Modifications") were at issue in the courts below:

(a) re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan;

(b) develop options for access that reflect the varying conservation, tourism and resource values throughout the region.[24]

23. Yukon elaborated in its letter on the Development and Access Modifications, reiterating its preference for a land use plan that "recognizes, accommodates and balances society's interest in [the] different features of the region."[25] It stated that "a ban on surface access is not a workable scenario in a region with existing land interests and future development potential."[26] It also invited the Commission to contact its representative on the working group assisting the Commission if it wanted further elaboration on Yukon's response.[27] The Commission did not contact Yukon's representative or otherwise seek further elaboration.[28]

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[21] Recommended Plan, p. vii, Response, Tab 2A

[22] Appeal Reasons, para. 42, Application, Tab 3C, p. 111; Recommended Plan, p. vii, Response, Tab 2A

[23] Appeal Reasons, para. 52, Application, Tab 3C, p. 114

[24] Appeal Reasons, para. 53, Application, Tab 3C, pp. 114-15

[25] Appeal Reasons, para. 55, Application, Tab 3C, pp. 115-16; Letter from Minister Rouble to the Commission dated February 21, 2011, Application, Tab 5B, p. 202

[26] Appeal Reasons, para. 55, Application, Tab 3C, pp. 115-16; Letter from Minister Rouble to the Commission dated February 21, 2011, Application, Tab 5B, p. 203

[27] Letter from Minister Rouble to the Commission dated February 21, 2011, Application, Tab 5B, p. 205

[28] Appeal Reasons, para. 153, Application, Tab 3C, pp. 142-43

The Final Recommended Land Use Plan

24. In July 2011, the Commission submitted its final recommended land use plan under s. 11.6.3.1 (the "Final Recommended Plan"). The Final Recommended Plan did not significantly alter the management direction of the Recommended Plan,[29] though it re-designated a portion of the land that had been designated for a high degree of environmental protection. The re-designated portion would receive interim protection subject to periodic review.[30]

25. The Final Recommended Plan addressed Yukon's Development and Access Modifications. The Commission observed that Yukon's response to the Recommended Plan "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."[31] The Commission concluded that, in order to address Yukon's response, it would have to "go back to the drawing board."[32] In the Commission's opinion, there was no provision for it to do so.[33] The Commission thus decided to maintain the approach it had taken in the Recommended Plan.[34]

Consultation on the Final Recommended Plan

26. Following the release of the Final Recommended Plan, and a territorial election, Yukon developed and released a series of principles to guide its modification of the Final Recommended Plan.[35] Yukon also shared the modifications it proposed to make to the Final Recommended Plan, including revised land use designation concepts that would give more scope for managed development.[36] Yukon explained that it remained concerned that the Final Recommended Plan

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[29] Appeal Reasons, para. 59, Application, Tab 3C, pp. 116-17; Letter of Transmittal for Final Recommended Plan, Application, Tab 5C, p. 224

[30] Appeal reasons, para. 61, Application, Tab 3C, p. 118

[31] Final Recommended Plan, p. xi, Application, Tab 5C, p. 234

[32] Final Recommended Plan, p. xi, Application, Tab 5C, p. 234

[33] Final Recommended Plan, p. xi, Application, Tab 5C, p. 234

[34] Appeal Reasons, para. 60, Application, Tab 3C, p. 118

[35] Appeal Reasons, para. 65, Application, Tab 3C, p. 119

[36] Appeal Reasons, paras. 68, 76, 78, Application, Tab 3C, pp. 120, 122-23

would limit future economic activity,[37] and that its new designation system was intended to achieve a plan that better reflected its expectations for balance in the region.[38]

27. The First Nations objected to Yukon's principles and modifications on the basis that they had not been put to the Commission earlier in the planning process.[39] Yukon conveyed its position that it was acting in accordance with the Final Agreements, and sought consultation.[40] The First Nations maintained their position that Yukon was not entitled to modify the Final Recommended Plan as proposed.[41]

28. In January 2014, Yukon finalized the modified plan reflecting its revised land use designation concepts.[42]

The First Nations' action

29. The applicant First Nations (other than the Vuntut Gwitchin First Nation, which was added as a party in the Court of Appeal), joined by the other applicants, commenced their action shortly afterwards. In their Amended Statement of Claim, they pleaded among other things that the Development and Access Modifications did not comply with s. 11.6.2.[43] The applicants initially sought a declaration making the Final Recommended Plan the binding land use plan for the Peel Watershed, but abandoned their request for this relief at trial. Instead, they sought a declaration quashing Yukon's modified plan and remitting the matter back for consultation on the Final Recommended Plan, excluding any consultation on the Development and Access Modifications.[44]

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[37] Appeal Reasons, para. 77, Application, Tab 3C, p. 122

[38] Appeal Reasons, paras. 72-73, Application, Tab 3C, pp. 120-21

[39] Appeal Reasons, paras. 66, 69, Application, Tab 3C, pp. 119-20

[40] Appeal Reasons, paras. 67, 70, Application, Tab 3C, pp. 119-20

[41] Appeal Reasons, para. 80, Application, Tab 3C, p. 123

[42] Appeal Reasons, para. 81, Application, Tab 3C, pp. 123-24

[43] Appeal Reasons, para. 82, Application, Tab 3C, p. 124; Amended Statement of Claim, para. 100, Response, Tab 2B

[44] Appeal Reasons, para. 82, Application, Tab 3C, p. 124

The trial decision

30. The trial judge agreed with the applicants that Yukon's Development and Access Modifications did not comply with the Final Agreements. He held that, at the s. 11.6.2 stage, Yukon was obligated to provide enough detail for the Commission to consider and respond to its position.[45] The Development and Access Modifications were instead "bald expressions of preference not sufficiently detailed to permit the commission to respond in a meaningful way."[46] Nor, in the trial judge's view, did they comply with the consultation requirement to provide notice of a matter "in sufficient form and detail."[47] The trial judge held that the Commission "should have had an opportunity to consider [Yukon's] proposal before issuing its Final Recommended Plan."[48] In turn, Yukon's subsequent modifications to the Final Recommended Plan were not based on earlier proposed modifications considered by the Commission,[49] which the trial judge interpreted the Final Agreements to require.[50]

31. Despite these conclusions, the trial judge did not remit the matter back to the s. 11.6.2 stage of the planning process, the stage at which Yukon must approve, reject or propose modifications to a recommended plan. Instead, the matter was remitted back to the s. 11.6.3.2 stage, at which Yukon must consult on a final recommended plan. He ordered Yukon to consult, but restricted its ability to modify the Final Recommended Plan by prohibiting modifications relating to development and access. The trial judge also concluded that because Yukon had "indicated a significant degree of approval" of the Recommended Plan by choosing to propose modifications to the Plan, it would not be open to Yukon to reject the Final Recommended Plan.[51] The trial judge ordered this remedy despite acknowledging that it would preclude Yukon from "presenting its proposed modifications on access and balance to the Commission."[52]

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[45] Trial Reasons, para. 195, Application, Tab 3A, p. 83
[46] Trial Reasons, paras. 191, 196, Application, Tab 3A, pp. 82, 84
[47] Trial Reasons, paras. 191, 194, Application, Tab 3A, pp. 82-83
[48] Trial Reasons, para. 192, Application, Tab 3A, p. 82
[49] Trial Reasons, paras. 183, 216, Application, Tab 3A, pp. 80, 91
[50] Trial Reasons, para. 163, Application, Tab 3A, p. 73
[51] Trial Reasons, paras. 141, 164, Application, Tab 3A, pp. 67, 73
[52] Trial Reasons, para. 211, Application, Tab 3A, p. 89

The Court of Appeal decision

32. The Court of Appeal largely agreed with the trial judge's interpretation of the Final Agreements. The Court of Appeal held that the Development and Access Modifications were not sufficiently specific to constitute a valid exercise of Yukon's rights under s. 11.6.2 of the Final Agreements.[53] The failure to comply with s. 11.6.2 "derailed the dialogue essential to reconciliation as envisioned in the Final Agreements,"[54] and precluded the Commission from reconsidering and responding to Yukon's position.[55] Moreover, Yukon could not subsequently modify the Final Recommended Plan as it proposed because it did not properly exercise its right to propose modifications at the s. 11.6.2 stage.[56] However, in the Court of Appeal's view, it remained open to Yukon to reject the Final Recommended Plan regardless of its choice at the s. 11.6.2 stage. This conclusion flowed from, among other things, the fact that the entire planning process is voluntary.[57]

33. In its reasons, the Court of Appeal made two observations about the Commission. First, the Court observed that it "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."[58] Second, the Court observed that, contrary to the Commission's view, there was no legal constraint on the Commission's ability to go "back to the drawing board" following the parties' responses to the Recommended Plan.[59]

34. The Court of Appeal remitted the planning process to the s. 11.6.2 stage – the point at which Yukon's proposed modifications derailed that process, and at which the Court found the breach began.[60] The Court of Appeal characterized the trial judge's finding that the breach did not occur until later, when Yukon proposed modifications to the Final recommended Plan, as "a selective view of matters." It disagreed with the trial judge's view that remitting the process to s.

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[53] Appeal Reasons, paras. 113, 137, Application, Tab 3C, pp. 133, 138
[54] Appeal Reasons, para. 114, Application, Tab 3C, p. 133
[55] Appeal Reasons, para. 150, Application, Tab 3C, pp. 141-42
[56] Appeal Reasons, para. 162, Application, Tab 3C, p. 144
[57] Appeal Reasons, para. 159, Application, Tab 3C, p. 144
[58] Appeal Reasons, para. 153, Application, Tab 3C, pp. 142-43
[59] Appeal Reasons, paras. 154-55, Application, Tab 3C, p. 143
[60] Appeal Reasons, para. 168, Application, Tab 3C, p. 146

11.6.2 would allow Yukon "to benefit from its flawed process"; remitting the process to that stage would merely restore the process that was intended, allowing Yukon to properly perform its obligations.[61]

35. Relying on authorities including the decision of this Court in *Provincial Court Judges' Assn.*,[62] the Court of Appeal described the s. 11.6.2 stage as "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."[63] By contrast to the trial judge's remedy, which would implement the product of a flawed process, remitting the process to s. 11.6.2 would better serve the ultimate objective of reconciliation as reflected in the parties' bargain – the Final Agreements.[64]

PART II – QUESTION IN ISSUE

36. The issue in this application is whether the Court of Appeal's decision respecting remedy raises an issue of national or public importance that should be decided by this Court. For the reasons set out below, it does not.

PART III – STATEMENT OF ARGUMENT

37. None of the three issues raised by the applicants presents a question of national or public importance. First, with respect to the remedy ordered by the Court of Appeal, the Court disagreed with the trial judge on a single, fact-dependent question: the point at which Yukon breached the Final Agreements. That narrow question is not one of national or public importance, and the decision flowing from it is in the nature of an interlocutory order, since that decision remits the planning process to the parties for completion. It does not finally determine the outcome of the planning process for the region. Second, the Court's observations about the Commission were just that, observations; they were not determinative even of the outcome of this case. Third, Yukon's ability to reject a plan finally recommended by the Commission

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[61] Appeal Reasons, paras. 165-68, Application, Tab 3C, pp. 145-46

[62] *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, [2005] 2 S.C.R. 286

[63] Appeal Reasons, para. 168, Application, Tab 3C, p. 146

[64] Appeal Reasons, para. 169, 174-75, Application, Tab 3C, pp. 146-47

remains a hypothetical question. In any event, to arrive at its conclusion on the issue, the Court of Appeal applied settled principles for the interpretation of modern treaties.

No issue of national or public importance respecting the timing of Yukon's breach

38. The timing of Yukon's breach in the specific context of this case is not a matter of national or public importance. No remedial principles are in dispute. The applicants concede, at paragraph 33 of their Memorandum of Argument, that both courts below agreed that Yukon breached its treaty obligations and that the land use planning process should be remitted to the point of the breach. The trial judge concluded that the breach occurred at the s. 11.6.3.2 stage of the planning process, when Yukon modified the Final Recommended Plan.[65] The Court of Appeal found that the trial judge's view was "a selective view of matters," and that the breach began when Yukon responded to the Recommended Plan.[66] The applicants do not dispute that the process should be remitted to the point at which the breach occurred. They simply disagree with the Court of Appeal's conclusion as to when that breach materialized.

39. The precise point at which Yukon breached the Final Agreements is a case-specific issue and not one of general application, let alone public importance. It is a determination that turns on the facts and sequence of events in this case, including Yukon's response to the Recommended Plan and the Commission's stated inability to engage in meaningful dialogue in light of that response. The applicants perhaps state it best when they submit, at paragraph 35 of their Memorandum of Argument, that the point at which the breach occurred is "a matter of central importance *in the proceedings*" (emphasis added). At its highest, the issue is important to the remedial outcome here – and no further.

40. The applicants present a number of other treaties to suggest that the question in this application is broadly relevant because other treaties contain joint processes involving Aboriginal signatories and government. But there is no reason to believe that the particular and highly-specific facts of the Peel Watershed planning process will arise in other planning or treaty contexts. This is particularly true in light of the conclusion of the courts below that Yukon breached its treaty obligations in respect of the land use planning process. To assume that the

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[65] Appeal Reasons, para. 168, Application, Tab 3C, p. 146

[66] Appeal Reasons, para. 168, Application, Tab 3C, p. 146

facts of this case will repeat themselves in other contexts is to assume that governments will ignore the courts' direction and repeat conduct that the courts have found invalid. That is not a reasonable assumption.

41. Nor are the notable features of the Peel Watershed reason enough to grant leave in the absence of any question of public importance. The region is expansive, and significant for its ecological value and economic potential, but these factors alone do not justify appellate review of the Court of Appeal's remedy. That remedy is in the nature of an interlocutory order, since it merely remitted the planning process to allow Yukon to raise its concerns with the Commission's plan in accordance with the Final Agreements. It did not finally determine any land use plan for the Peel Watershed. Rather, the remedy restored the very process to which the parties agreed in the treaties, and left it to the parties to determine the outcome for the Peel Watershed. Unlike the trial judge's remedy, it did not impose a particular outcome for the region.

42. Despite focusing predominantly on the merits rather than the test for leave, the applicants fail to identify any compelling error of principle in respect of the remedy granted by the Court of Appeal. Much of the applicants' argument attempts to characterize Yukon's response to the Recommended Plan as invalid but not a breach, in an attempt to avoid the conclusion that the matter should be remitted to that stage. This is the very same "selective" position that the Court of Appeal rejected.[67] The applicants also submit that the remedy allows Yukon to repeat aspects of the planning process and is thus inconsistent with the honour of the Crown. However, the Court of Appeal considered and rejected the notion that Yukon would benefit from the remedy it ordered.[68] Instead it concluded that its remedy would "allow the process to unfold as it was meant to."[69]

No issue of national or public importance respecting the Court of Appeal's observations about the Commission

43. The applicants do not specify how or why the Court of Appeal's comments on the conduct of the Commission rise to the level of public importance, and it is apparent that they do

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[67] Appeal Reasons, para. 168, Application, Tab 3C, p. 146

[68] Appeal Reasons, para. 167, Application, Tab 3C, pp. 145-46

[69] Appeal Reasons, para. 166, Application, Tab 3C, p. 145

not. Observations about how the Commission conducted itself in the circumstances of this case are not relevant beyond those particular circumstances.

No issue of national or public importance respecting Yukon's ability to reject a final recommended plan

44. Although the applicants purport to limit their application for leave to the issue of the remedy ordered by the Court of Appeal,[70] they proceed to state that 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 thereafter reject a final plan in its entirety under s. 11.6.3.2."[71] The applicants thus raise a question of interpretation of the Final Agreements – whether Yukon can reject the final recommendations of a planning commission if it proposes modifications to the earlier iteration.

45. This is a hypothetical question that does not justify leave to appeal. As the applicants state at paragraph 55 of their Memorandum of Argument, a rejection of the final plan "of course has not happened in the present case." Yukon agrees.

46. Nor will this question necessarily arise when the planning process resumes. The Court of Appeal remitted the planning process back to the s. 11.6.2 stage. Yukon can respond to the Commission's Recommended Plan, and is entitled to propose modifications. Only if it first elects to propose modifications, and later decides to reject the Commission's final plan, does the question of its ability to do so become relevant.

47. Moreover, this case does not implicate any issue concerning the principles of interpretation applicable to modern treaties. In interpreting the Final Agreements, the Court of Appeal applied settled interpretive principles. In *Beckman v. Little Salmon/Carmacks First Nation*,[72] this Court considered the UFA at issue in this case and outlined principles of interpretation applicable to modern treaties. This Court also considered the interpretation of modern treaties in *Quebec (Attorney General) v. Moses*.[73] In those decisions, this Court recognized that though modern treaties must be interpreted in a manner consistent with the

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[70] Applicants' Memorandum of Argument, para. 33, Application, Tab 4, pp. 160-61

[71] Applicants' Memorandum of Argument, para. 34, Application, Tab 4, p. 161

[72] 2010 SCC 53, [2010] 3 S.C.R. 103

[73] 2010 SCC 17, [2010] 1 S.C.R. 557

honour of the Crown, they are detailed and sophisticated documents, negotiated at length by resourced and professionally represented parties, so that in interpreting them attention must be paid to their text.[74] These principles are not in dispute.

48. The Court of Appeal expressly referred to this Court's decision in *Little Salmon*, and applied the interpretive principles established by this Court to reach the conclusion that it did. Consistent with the attention that is owed the text of modern treaties, the Court of Appeal first considered whether anything in the Final Agreements constrained Yukon's ability to reject a plan finally recommended by a commission. The Court of Appeal concluded that it did not.[75] The Court of Appeal next recognized that Yukon's ability to reject a final plan was "necessary" because the Commission might put forward final recommendations unacceptable to Yukon.[76] Finally, the Court of Appeal considered the land use planning process as a whole: it found that an unconstrained right to reject the final plan was consistent with the voluntary nature of the process.[77]

49. The applicants do not quarrel with the interpretive principles established by the decisions of this Court. They may not like the conclusions those principles compel, but that is no basis for leave to appeal, particularly in respect of an issue that has not yet arisen – and may never arise.

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[74] *Beckman v. Little Salmon/Carmacks First Nation*, paras. 12, 54; *Quebec (Attorney General) v. Moses*, paras. 7, 12

[75] Appeal Reasons, para. 159, Application, Tab 3C, p. 144

[76] Appeal Reasons, para. 159, Application, Tab 3C, p. 144

[77] Appeal Reasons, para. 159, Application, Tab 3C, p. 144

PART IV – SUBMISSIONS ON COSTS

50. Yukon requests its costs of this application.

PART V – ORDER SOUGHT

51. Yukon seeks an order dismissing the application for leave to appeal with costs.

February 5, 2016

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Marie-Eve Hajjar, AG agent for

John B. Laskin
John Terry
Jonathan Roth
Mark Radke

Counsel for the Respondent
Government of Yukon

PART VI – TABLE OF AUTHORITIES

Case	Para(s).
Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103	47, 48
Quebec (Attorney General) v. Moses, 2010 SCC 17, [2010] 1 S.C.R. 557	48

PART VII – STATUTORY PROVISIONS

N/A