S.C. No. 13-A0142

SUPREME COURT 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

Plaintiffs

and

GOVERNMENT OF YUKON

Defendant

DEFENDANT'S OUTLINE OF ARGUMENT

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PART I STATEMENT OF FACTS

A. OVERVIEW OF THE DEFENDANT'S POSITION

1. Reconciliation between First Nations and the sovereignty of the Crown with respect to the ownership and use of land is best achieved through the process of honourable negotiation of comprehensive land claims agreements.

2. Three such agreements are the First Nation of Nacho Nyak Dun Final Agreement (NNDFA), the Trondek Hwechin Final Agreement (THFA) and the Vuntut Gwitchin First Nation Final Agreement (VGFA), which are all land claims agreements within the meaning of s. 35 of the *Constitution Act, 1982*. The NNDFA and VGFA both took effect on February 14, 1995 and the THFA took effect September 15, 1998.

3. Together, these 3 Final Agreements reflect the culmination of a process that began in 1973, led to the signing of the Umbrella Final Agreement in 1993 and ultimately to the negotiation and signing of individual Final Agreements with 11 of Yukon's 14 First Nations.

4. The Final Agreements are comprehensive and detailed documents that set out the exchange of undefined aboriginal claims, rights, titles and interests for defined treaty rights in respect of land tenure and quantum of Settlement Land, access to Non-Settlement Land, fish and wildlife harvesting, heritage resources, financial compensation, and participation in the management of public resources, including participation in regional land use planning.

5. Where, as in this case, the parties have entered into modern land claims agreements such as the Final Agreements, which settle, resolve and define their substantive and procedural rights with respect to land ownership, use and management; those rights and obligations should be determined in accordance with the terms of the agreements.

6. The Final Agreements specifically address regional land use planning and the process to be followed if it is undertaken. Chapter 11 of the Final Agreements provides for a joint regional land use planning process for both Settlement Land, which is under the administration and control of individual First Nations and Non-Settlement Land, which is under the administration and control of the Yukon. It does this through the establishment of the Yukon Land Use Planning Council and individual Regional Land Use Planning Commissions. The Peel Watershed Planning Commission was one such commission.

7. Chapter 11 does not require the parties to engage in regional land use planning; rather, its provisions simply enable the process if the Yukon and any affected Yukon First Nation(s) choose to proceed with it[1].

8. Chapter 11 also does not require either the First Nation(s) or the Yukon Government ('Yukon' or 'Government') to adopt a regional land use plan developed under the auspices of the chapter; instead, all parties retain the jurisdiction to 'approve, reject or modify' a plan as it applies to the land under their respective administration and control[2].

9. Put another way, the First Nations retain the jurisdiction to decide what, if any, regional land use plan will apply on Settlement Land and the Yukon retains the jurisdiction to determine what, if any, regional land use plan will apply on Non-Settlement Land.

10. This is consistent with the over-all scheme of the Final Agreements and reflects the parties' agreement with respect to the ownership, administration, and control of Settlement and Non-Settlement Land.

11. The specific issue in this case is whether the words "approve, reject or modify" in s. 11.6.3.2 are to be interpreted narrowly to confine the entity with decision-making authority, here the Government, in its planning decisions. The position of the Yukon Government is that such an interpretation would not be consistent with the scheme of the Final Agreements.

12. When the regional land use planning provisions of Chapter 11 are invoked, the final recommendation of the Regional Land Use Planning Commission is just that – a recommendation. It is open to the Yukon Government to approve the recommendation if it is satisfied with it, or it can reject the final recommendation outright, or it can modify the recommendation.

13. This final decision-making authority applies to the Yukon Government on Non-Settlement Land and to the respective First Nations on Settlement Land. The purpose of Chapter 11 is not to force either the Yukon Government or the First Nations with authority over Settlement Lands to accept a plan they consider inadequate. The purpose is to provide a structure to ensure that each party can participate in the planning process so that the final decision – by the Yukon Government or the First Nations as the case may be – is an informed one and takes place after full

[1] Final Agreements, s. 11.4.1
[2] Final Agreements, ss. 11.6.3.2 and 11.6.5.2

consultation with the other party.

14. It is important to emphasize that these provisions are fully symmetrical. Any constraint on the Yukon Government's authority on Non-Settlement Lands would be a constraint on the First Nations' authority on Settlement Lands. But the purpose of Chapter 11 was not to constrain but to provide a structure for informed decision-making.

15. The case at bar involves almost entirely Non-Settlement Lands. From the beginning, the Yukon Government has been clear that it would only approve a balanced plan that reflected environmental, resource and economic interests. The Commission initially attempted to produce a recommendation that was balanced in its Draft Plan, but later changed its recommendation to one that provided for virtually no resource development. This was not in any sense a balanced plan and the Yukon Government was under no obligation to accept it.

16. Even if the Plaintiffs' narrow view of Chapter 11 – that the ultimate decision-maker was limited to modifications suggested at an earlier stage of the recommendation process – had any merit, the Yukon Government would be fully within its rights to modify the Commission's final recommendation to produce the balanced plan the Government had required from the outset. But the Plaintiffs' narrow view is not consistent with the purpose of Chapter 11, and should be rejected.

17. The Plaintiffs ask the Court to declare that the "Final Recommended Plan" is not a recommended plan at all, but an *approved* plan, even though it is indisputable that the plan has not been approved by the only entity that has the legal authority to approve planning on these lands, the Yukon Government. The invitation should be declined and the action dismissed.

B. THE FINAL AGREEMENTS

18. The Umbrella Final Agreement (UFA) was signed in 1993 and was intended to serve as a template to be used in the negotiation of individual Final Agreements with each Yukon First Nation. The UFA by itself neither creates nor affects legal rights[3].

19. Using the UFA as a template provides for a degree of uniformity to the Yukon Final Agreements, while allowing for the incorporation of clauses specific to each individual First Nation ensures that each First Nation's

[3] UFA, s. 2.1.2 and *Carcross/Tagish First Nation v. Canada*, 2001 FCA 231, [2002] 1 FC3

particular circumstances are addressed.

20. The UFA was used as the template for the THFA, the NNDFA and the VGFA and, following their realization, all 3 of these Final Agreements were implemented pursuant to federal and territorial legislation; specifically, the *Yukon First Nations Land Claims Settlement Act*, RSC 1985, c. 34 and the *Act Approving Yukon Land Claim Final Agreements*, S.Y. 1993, c. 19.

21. Section 6(1) of the *Yukon First Nations Land Claims Settlement Act* provides that the Final Agreements are constitutionally protected under Section 35 of the *Constitution Act, 1982* and section 6(2) makes it clear that they are binding on all persons, and bodies, that are not parties to them.

22. The Final Agreements differ markedly from their antecedents. Unlike historic treaties, Final Agreements are the product of lengthy negotiations between well-resourced and sophisticated parties[4]: those negotiations resulted in detailed, sophisticated agreements that are hundreds of pages in length.

23. The Final Agreements provide that, in exchange for the surrender of undefined aboriginal rights titles and interests, the First Nations receive, among other things:

    a. Title to Settlement Land [Chapters 9 and 15];

    b. Financial compensation [Chapter 19];

    c. Potential for royalty sharing [Chapter 23];

    d. Economic development measures [Chapter 22];

    e. Rights of access to Crown land [Chapter 6];

    f. Special Management Areas [Chapter 10];

    g. Rights to representation and involvement in regional land use planning [Chapter 11];

    h. Rights to harvest fish and wildlife [Chapter 16];

[4] *Beckman* v. *Little Salmon/Carmacks*, [2010] 3 S.C.R. at para 9

i. Rights to harvest forest resources [Chapter 17]; and

j. Rights to representation and involvement in resource management [Chapters 14, 16, 17 and 18].

24. In addition, the Final Agreements provide for the co-management of certain resources and achieve this through the establishment of such entities as the Fish and Wildlife Management Board, the Land Use Planning Council and the Heritage Resources Board.

C. THE LAND USE PLANNING PROCESS

Chapter 11 – Regional Land Use Planning

25. Chapter 11 of the Final Agreements establishes a process for undertaking regional land use planning. It does this through the establishment of the Yukon Land Use Planning Council as well as Regional Land Use Planning Commissions.

26. The Yukon Land use Planning Council was established pursuant to the requirements of section 11.3.0 of the Final Agreements. The Council is charged with the responsibility for making recommendations to the Yukon and affected Yukon First Nations regarding, among other things, the identification of land use planning regions and priorities.

27. Chapter 11 also provides for, but does not require, the establishment of Regional Land Use Planning Commissions. Section 11.4.1 of the Final Agreements states:

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

28. If the Government and any affected Yukon First Nation agree to establish a Regional Land Use Planning Commission, Chapter 11 provides direction on how it is to be constituted[5].

29. Chapter 11 also requires Regional Land Use Planning Commissions to 'prepare and recommend to Government and the affected Yukon First Nation a regional land use plan within a timeframe established by

[5] Final Agreements, ss. 11.4.2 and 11.4.3

Government and each affected Yukon First Nation'[6].

30. Guidance on how a Regional Land Use Planning Commission is to function is also provided. Section 11.4.5 says:

> 11.4.5 In developing a regional land use plan, a Regional Land Use Planning Commission:
>
> 11.4.5.1 within its approved budget, may engage and contract technical or special experts for assistance and may establish a secretariat to assist it in carrying out its functions under this chapter;
>
> 11.4.5.2 may provide precise terms of reference and detailed instructions necessary for identifying regional land use planning issues, for conducting data collection, for performing analyses, for the production of maps and other materials, and for preparing the draft and final land use plan documents;
>
> 11.4.5.3 shall ensure adequate opportunity for public participation;
>
> 11.4.5.4 shall recommend measures to minimize actual and potential land use conflicts throughout the planning region;
>
> 11.4.5.5 shall use the knowledge and traditional experience of Yukon Indian People, and the knowledge and experience of other residents of the planning region;
>
> 11.4.5.6 shall take into account oral forms of communication and traditional land management practices of Yukon Indian People;
>
> 11.4.5.7 shall promote the well-being of Yukon Indian People, other residents of the planning region, the communities, and the Yukon as a whole, while having regard to the interests of other Canadians;
>
> 11.4.5.8 shall take into account that the management of land, water and resources, including Fish, Wildlife and their habitats, is to be integrated;

[6] Final Agreements, s. 11.4.4

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.

31. In addition, Regional Land Use Plans are required to 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[7].

32. Section 11.6.0 sets out the process to be employed in determining whether or not a Regional Land Use Plan will be adopted. Its wording reflects the fact that, ultimately, the affected First Nation and the Yukon are the decision-makers for those lands under their respective administration and control. Section 11.6.0 says:

11.6.0 Approval Process for Land Use Plans

11.6.1 A Regional Land Use Planning Commission shall forward its recommended regional land use plan to Government and each affected Yukon First Nation.

11.6.2 Government, after Consultation with any affected Yukon First Nation and any affected Yukon community, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying on Non-Settlement Land.

11.6.3 If Government rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons, or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon:

11.6.3.1 the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to Government, with written reasons; and

11.6.3.2 Government shall then approve, reject or modify that

[7] Final Agreements, s. 11.5.0

part of the plan recommended under 11.6.3.1 applying on Non-Settlement Land, after Consultation with any affected Yukon First Nation and any affected Yukon community.

11.6.4 Each affected Yukon First Nation, after Consultation with Government, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying to the Settlement Land of that Yukon First Nation.

11.6.5 If an affected Yukon First Nation rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon:

11.6.5.1 the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to that affected Yukon First Nation, with written reasons; and

11.6.5.2 the affected Yukon First Nation shall then approve, reject or modify the plan recommended under 11.6.5.1, after Consultation with Government.

(*Emphasis added*)

33. Government's and First Nation's decision-making authority over lands under their respective administration and control is further confirmed in the provisions dealing with the implementation of Regional Land Use Plans and how Plans are considered in the development assessment process that is established under Chapter 12.

34. Chapter 12 provides the framework for a development assessment regime that applies through-out the Yukon (*i.e.* on both Settlement and Non-Settlement Land). This was effected through the enacting of Development Assessment Legislation[8], namely the *Yukon Environmental and Socio-economic Assessment Act*[9] ('YESAA').

35. YESAA established the Yukon Environmental and Socio-economic Assessment Board (the 'Board'), and also made provision for Designated

[8] 'Development Assessment Legislation' is defined in s.12.20 of the Final Agreements. It 'means Legislation enacted to implement the development assessment process set out in this chapter'.
[9] S.C. 2003, c. 7

Offices[10] which, generally speaking, are charged with the responsibility to undertake environmental and socio-economic assessments of projects proposed for the Yukon.

36. Under YESAA, an environmental and socio-economic assessment is completed and the assessor then issues its recommendation with respect to the project. The decision on whether the project can - or cannot – proceed, and whether conditions should be attached to it, if it does proceed, is then made by a 'decision body'[11] as identified in the Act.

37. First Nations that have entered into Final Agreements and the Government can both be decision bodies under YESAA and whether they are turns on a number of factors (as set out in YESAA), including where the project is proposed to occur (*i.e.* Settlement or Non-Settlement Land) and the authorizations that will be required in order to allow the project to proceed.

38. Sections 11.7.0 and 12.17.0 address the interplay between the implementation of a Regional Land Use Plan and the requirement that projects undertaken in the Yukon are required to go through a development assessment. Read together, they make it clear that the Yukon and any affected Yukon First Nation retain the right to make decisions regarding the granting of any interests, or authorizations with respect to the use of land, water or other resources - notwithstanding the adoption of any Regional Land Use Plan. Those sections read:

11.7.0 Implementation

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

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

11.7.3 Nothing in 11.7.1 shall be construed to require Government

[10] Designated Offices are created pursuant to s. 22 of the *Act*. They are responsible for most of the assessments under the *Act*, although in certain instances assessments can also be undertaken by the Board's Executive Committee or by a panel established by the Board.

[11] Decision Body is defined in YESAA, s. 2.

to enact or amend Legislation to implement a land use plan or to grant an interest in, or authorize the use of, land, water or other resources.

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

(*Emphasis added*)

And

12.17.0 Relationship to Land Use Planning

12.17.1 Where YDAB or a Designated Office receives a Project application in a region where a regional land use plan is in effect, YDAB or the Designated Office, as the case may be, shall request that the Regional Land Use Planning Commission for the planning region determine whether or not the Project is in conformity with the approved regional land use plan.

12.17.2 Where a Regional Land Use Planning Commission is preparing a regional land use plan, YDAB or a Designated Office, as the case may be, shall provide the Regional Land Use Planning Commission with the information it has on any Project in the planning region for which a review is pending and shall invite the Regional Land Use Planning Commission to make representations to the panel or the Designated Office.

12.17.3 Where a panel is reviewing a Project and a Regional Land Use Planning Commission has determined pursuant to 12.17.1 that the Project does not conform with an approved regional land use plan, the panel shall consider the regional land use plan in its review, invite the relevant Regional Land Use Planning Commission to make representations to the panel and make recommendations to the Decision Body that conform so far as possible to the approved regional plan.

12.17.4 <u>Where a Decision Document states that a non-conforming Project may proceed, the Project proponent may proceed with the Project if permitted by and in accordance with</u>

Law.

12.17.5 The Development Assessment Legislation shall set out the relationship between the issuance of a Decision Document for a Project that has not been assessed by YDAB and the grant of a variance from a regional land use plan or the amendment of the land use plan.

(*Emphasis added*)

39. Section 12.17.0 deals with development assessment and whether Projects[12] conform with any regional land use plan that is in place and section 12.17.4 confirms that where a Decision Document[13] states that a non-conforming Project may proceed, the Project proponent may proceed with the Project if permitted by and in accordance with Law.

40. Together, these sections provide that, while the Government and the First Nation(s) are to exercise their discretion in conformity with any regional land use plan that they have approved (sections 11.7.1 and 11.7.2 respectively), under the provisions of s. 12.17.0, they retain the jurisdiction to allow projects to proceed that do not conform the Regional Land Use Plan.

The Peel Watershed Planning Commission

41. The Peel Watershed is approximately 68,000 square kilometers in size (or roughly the size of the province of New Brunswick) and falls within the traditional territories of the Tr'ondëk Hwëch'in, the First Nation of Nacho Nyak Dun, the Vuntut Gwitchin First Nation and the Tetlit Gwich'in First Nation (the 'Four First Nations').

42. Approximately 3% of the Peel Watershed is Settlement Land and approximately 97% is Non-Settlement Land.

43. While largely undeveloped, the Peel Watershed contains known oil and gas reserves as well as known mineral deposits, including two deposits –

[12] 'Project' is defined in Chapter 12 of the Final Agreements. That definition reads:

> "Project" means an enterprise or activity or class of enterprises or activities to be undertaken in the Yukon which is not exempt from screening and review.

[13] '"Decision Document" means the document issued by the Decision Body pursuant to 12.6.3 or 12.12.1.' Final Agreements, Chapter 1, Definitions.

the Crest iron ore deposit and the Bonnet Plume coal deposits - of significant size.[14] The Crest iron ore deposit is considered a world-class size deposit and is the largest of its type in North America.[15] Resource exploration has occurred in the Peel Watershed for many decades.

44. Pursuant to the provisions of Chapter 11 of the THFN, the NNDFA and the VGFNFA, the Peel Watershed Planning Commission (the 'Commission') was established in 2004 to develop a regional land use plan for the Yukon portion of the Peel River Watershed (the 'Peel Watershed').

45. The Commission was comprised of 6 individuals who were, pursuant to section 11.4.2 of the Final Agreements, nominated to the Commission by the Yukon and the Four First Nations. The Tetlit Gwich'in First Nation, while not a Yukon First Nation as defined in the Final Agreements[16], was entitled to nominate an individual to the Commission pursuant to the provisions of their comprehensive land claim agreement with Canada[17], the Gwich'in Comprehensive Land Claim Agreement[18] and section 11.4.2.5 of the NNDFA.

46. Tetlit Gwich'in First Nation, while entitled to nominate an individual to the Commission, does not have the power to 'approve, modify or reject' a regional land use plan pursuant to section 11.6.5, as it is not an affected Yukon First Nation.

47. Further, section 2.12.2 of the Final Agreements makes it clear that the nominees to the Commission were not the delegates of the party that nominated them.

48. General Terms of Reference ('GTOR')[19] were issued for the Commission March 19th, 2004. Appendix A to the GTOR created a Technical Working Group ('TWG'), which was mandated to provide coordinated technical information and support to the Commission. The TWG was, at a minimum, to be comprised of one representative from the Commission, the Yukon Land Use Planning Council, and each of the parties.

49. Pursuant to Appendix B to the GTOR, a Senior Liaison Committee ('SLC')

[14] Peel Watershed Planning Commission, Resource Assessment Report, September 2008 at pages 34- 56. [Document no. 75]
[15] Strategic Overview of Possible Mineral Development Scenarios – Phase 1 Peel River Watershed Planning Region, Gartner Lee Limited, September, 2006 at page 13. [Document no. 76]
[16] 'Yukon First Nation' is defined in the Final Agreements as being one of 14 named First Nations
[17] It should be noted that the Yukon is not a party to this agreement.
[18] See specifically section 7.1 of the Yukon Transboundary Agreement, which is contained in Appendix C to the Agreement.
[19] Document No. 6.

was also created to assist in facilitating the regional land use planning process. The SLC was mandated to provide coordinated, senior level, intergovernmental (territorial, First Nation) input, advice and support to the Commission on issues regarding the preparation of the plan.

50. The establishment of the TWG or the SLC was not required by any of the provisions of the Final Agreements, rather they were established pursuant to agreement between the parties.

51. The Commission commenced its work and issued a Draft Plan in April 2009. In the Foreword contained in the Commission's subsequent Recommended Plan, the Commission explained the Draft Plan thus:

> In our *Draft Plan*, we attempted to incorporate both non-renewable (industrial) and renewable economic activities in most of the planning area. Although wilderness characteristics are the most fragile of landscape qualities to conserve, our Statement of Intent was to maintain them "over time". The Commission believed that the planning region could accommodate conservative levels of industrial activity and that wilderness characteristics could be restored if impacted sites and access roads were returned to their natural state.
>
> 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.
>
> 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. 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 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.
>
> Our Recommended Plan embodied this conservative approach. It emphasized landscape conservation and left options open for development through variance and amendment processes. Our assessment is that the Recommended Plan was largely applauded by First Nations, by the First Nation Parties, and the Yukon public in general. It was criticized by spokespeople for the resource industries, by their supporters among the Yukon public, and by the Yukon Government.[20]

52. The Draft Plan was followed by the Commission's Recommended Plan, which, pursuant to section 11.6.1, was issued on December 2nd, 2009.

53. On January 25, 2010, the Four First Nations and the Yukon entered into a Joint Letter of Understanding (the '2010 LOU'). It confirmed the parties' joint commitment to establish a coordinated process for responding to the Recommended Plan, as well as a commitment by the parties to undertake joint community consultations.

54. The 2010 LOU recognized that, while the parties were endeavouring to achieve consensus on a coordinated response to the Recommended Plan, that may not prove possible with respect to all aspects of it. In that regard, the 2010 LOU said:

> The Parties recognize that they may not be able to achieve consensus on all aspects of the Plan. It this occurs, the Parties may submit individual responses on aspects of the plan for which they could not achieve consensus[21].

55. On October 21, 2010 the parties issued a joint news release. In the release announcing the start of public consultation on the Recommended Plan. The release read, in part:

> The objective of regional land use planning in Yukon is to provide guidance to First Nation and public governments for the integrated management of lands and resources in order to ensure sustainable development and sound environmental stewardship while

[20] From the 'Message from the Commission' contained in the Foreword to the Final Recommended Plan, July 22, 2011, at pages ix-x. [Document No. 9]

[21] Joint Letter of Understanding on Peel Watershed Regional Land Use Planning Process, January 25, 2010, page 3. [Document no. 12]

minimizing land use conflicts.[22]

56. Section 11.6.2 of the Final Agreements required the Yukon to undertake public consultation with any 'affected Yukon community' and as result the Government, in conjunction with the Four First Nations, consulted with the residents of the communities of Whitehorse, Dawson, Mayo and Old Crow.

57. In addition, the Yukon, together with the Four First Nations, also undertook public consultation with the residents of the communities of Fort McPherson, Inuvik, Aklavik and Tsiigehtchic. These communities are all situated in the Northwest Territories and they are, consequently, not 'affected Yukon communit[ies]'.

59. Following delivery of the Recommended Plan and as required by section 11.6.2 of the Final Agreements, the Yukon also undertook consultations with the Four First Nations. Intergovernmental consultation between the Four First Nations and the Yukon took place in October, 2010.

On October 21, 2010 the Four First Nations sent a joint letter to Ministers Rouble and Edzerza with respect to the next steps in the Peel watershed planning process and to provide their initial views on the Recommended Plan. In that regard, they said:

> Please be advised that our position is that the recommended Plan should be modified to provide protection for 100% of the Peel watershed planning region. The only exception to complete protection would be to facilitate the ongoing operation, maintenance and potential reconstruction of the Dempster Highway. The protection we envision would be equally applicable on both Settlement Land and Non-Settlement Land. As per the recommended Plan, we see this protection achieved through the creation of various Special Management Areas designated with the highest level of legislated protection.[23]
>
> (*Emphasis added*)

60. In their October 21st letter, the Four First Nations also suggested that the SLC be tasked with developing a projected timeframe for the conclusion of all aspects of the planning process and they requested that the moratorium on staking in the region be extended.

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[22] News release, January 23, 2010, page 2. [Document no. 13]

[23] Letter from Chief Taylor, Chief Mervyn, Chief Linklater and President Nerysoo to Ministers Rouble and Edzerza dated October 21, 2010. [Document no. 16]

61. On November 18th, 2010 Minister Rouble responded to the Four First Nations. In his letter he indicated that the Government was developing its position and that he anticipated providing that position to them prior to the next SLC meeting. He also indicated his agreement with their proposal that SLC update the timelines (contained in the 2010 LOU) and advised that the Yukon would be making a decision regarding the extension of the mineral and oil and gas withdrawal prior to its expiration in early February.[24]

62. The Yukon's position with respect to the Recommended Plan was communicated to the Four First Nations in Minster Rouble's letter of December 13, 2010[25]. In that letter, Minister Rouble indicated that, as there were several more steps to complete in the process before a Final Plan would be tabled, the Yukon had decided to extend the interim withdrawal for a further one year period. He also said that the Yukon had reviewed the Recommended Plan and suggested modifications on 5 key themes, specifically, 1) Consistency with First Nation Final Agreements, 2) Surface Access, 3) Precautionary Principle, 4) Ecological Values Conservation and Protection, and 5) Implementation.

63. In his December 13th letter Minister Rouble said, among other things, that:

> In proposing a high level of protection for such a large portion of the region, the Commission appears to have interpreted the Chapter 11 objectives and processes in a way that is inconsistent with our view of the Final Agreements. We believe the plan should provide a more balanced consideration of the current and future uses in the region and propose management options that would allow for those uses to continue. We feel that a broader mix of uses is achievable within the definition of Sustainable Development as provided in the Final Agreements. That is, that beneficial socio-economic change can be realized without undermining the ecological and social systems.[26]
>
> [...]
>
> <u>Surface Access</u>
>
> Although access is a challenging management consideration, the

[24] Letter from Minister Rouble to Chief Taylor, Chief Mervyn, Chief Linklater and President Nerysoo, dated November 18, 2010. [Document no. 17]

[25] Letter from Minister Rouble to Chief Taylor, Chief Mervyn, Chief Linklater and President Nerysoo, dated December 13, 2010. [Document no. 18]

[26] *Ibid.* page 2 at paragraph 3.

recommendations on access are problematic for existing interests and future development opportunities. We do not view the plan's access recommendations as being workable scenarios for existing and future land uses and believe access provisions should be consistent with the Final Agreements. Access provisions could vary in the region depending on conservation values and land management zoning and a range of satisfactory options could be developed to address the matter of access. Some consideration should also be given to existing legislative tools and best management practices available to manage the impacts of access. Similarly, Chapter 6 of the Final Agreements provides further reference on how access could be addressed.[27]

64. A further Joint Letter of Understanding was signed by the parties on January 20th, 2011 (the '2011 MOU')[28]. The 2011 MOU, among other things, included updated timeframes within which the next steps were to occur.

65. Pursuant to sections 11.6.4 and 11.6.5 of the Final Agreements, the First Nations provided their written responses to the Recommended Plan to the Commission.

    a. Tr'ondëk Hwech'in provided its written response to the Recommended Plan on February 11, 2011[29]. In its response Tr'ondëk Hwëch'in confirmed that its 'formal response to date has been for 100% protection for the Peel Region, with the exception of the Dempster Corridor which will be subject to sub-regional planning process'[30]. The First Nation then went on to provide what they describe as 'general comments of both substance and form'[31] as well as more specific comments.

    b. Gwich'in Tribal Council provided its written response to the Recommended Plan on February 15, 2011[32]. In its brief response Gwich'in Tribal Council advised that:

> The Tetlit Gwich'in Council has not changed its position regarding the Peel Watershed as communicated to you by our former Chief, Wilbert Firth (see attached). Guided by

[27] *Ibid*, page 2 at paragraph 5.
[28] Document No. 19.
[29] Document No. 20.
[30] *Ibid*, page 1, paragraph 4.
[31] *Ibid*, page 2, paragraph 1.
[32] Document No. 21.

> our Elders, our people and our youth, we reiterate our wish to see 100% of the watershed protected from industrial development and roads.[33]

The GTC also proposed certain other minor modifications to the Recommended Plan.

c. Nacho Nyak Dun provided its written response to the Recommended Plan on February 10, 2011[34]. In its response, also Nacho Nyak Dun proposed that the Recommended Plan be modified to provide for 100% protection through the use of Special Management Areas.

66. The Four First Nations further provided a joint response to the Recommended Plan on February 18, 2014[35]. In their response, they make it clear that it was meant to supplement the joint response provided by the parties to the regional land use planning process (i.e. the SLC response) as well as the individual responses provided by the First Nations. They also confirmed that they were commenting on the Plan as it applies to both Settlement and Non-Settlement Land and they called for 100% of it to be protected through the use of Special Management Areas. Their response, reads, in part:

We know that section 11.6.4 of the Umbrella Final Agreement directs affected Yukon First Nations to,

> "approve, reject or propose modifications to that part of the recommended regional land use plan applying to Settlement Land of the Yukon First Nation"

However, in the spirit of Consultation and collaboration, and in accordance with the Joint Letter of Understanding signed by all Parties to Peel Watershed planning process, we are commenting upon the entire Plan, as it relates to both Settlement Land and Non-Settlement Land.

Though generally excellent, we believe your recommendation could be improved in a few areas. We believe that the entire region

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[33] *Ibid*, page 1, paragraph 2.
[34] Letter from Chief Mervyn to the Commission dated February 18, 2011. [Document no. 22]
[35] Letter from Chiefs Taylor, Mervyn, Kassi and President Nerysoo to the Commission dated February 18, 2011. [Document no. 23]

deserves the very highest level of protection, such as you have accorded in 80% of the regions through Special Management Area designation. In our view none of the land within the watershed should be open to potential industrial development, as might occur in areas designated as Integrated Management Areas. In short, we encourage you to modify your recommendation so as to provide Special Management Area designation to 100% of the region, with the exception of the lands proximate to the Dempster. The protection we envision is equally applicable to both Settlement Land and Non-Settlement Land throughout the planning region[36].

67. Through SLC, the Parties provided a joint response to the Recommended Plan on February 18 2011[37]. That response addressed concerns with respect to whether the Commission would continue to have an ongoing role following completion of the planning process, whether there was the need for as many 19 regional sub-plans, the method through which the Plan could be amended or varied, and the general complexity of the Plan. The SLC's response also advised the Commission that:

> As a number of steps remain in your process of developing a Final Recommended Plan, and subsequent approval of a Final Land use Plan, we wish to inform you that the Yukon government has issued a one-year extension to the interim staking withdrawal of the Peel planning region. Additionally, rights for oil and gas, and coal will not be issued in the region during this region.
>
> The Parties' final positions on a regional land use plan for the Peel Watershed will be determined when our collective obligations under Chapter 11 of the First Nation Final Agreements have been fulfilled and the Parties have concluded a thorough review of the Final Recommended Plan.
>
> In order to see this process through to its conclusion, the Parties have signed an updated Joint Letter of Understanding, with timeline, attached for your information. Please note that we are looking to receive your Final Recommended Plan no later than the first part of July, 2011. Please make best efforts to achieve this timeline.[38]

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[36] *Ibid*, page 2 at paragraph 2.

[37] Letter from Albert Peter, Chair, Senior Liaison Committee, to the Commission dated February 18, 2011. [Document no. 24]

[38] *Ibid*. page 2 at paragraphs 3-5.

68. Subsequent to this consultation, and pursuant to sections 11.6.2 and 11.6.3 of the Final Agreements, the Yukon provided its written response to the Recommended Plan to the Commission on February 21, 2011[39].

69. In its February 21st response, the Yukon advised the Commission that it was seeking certain modifications to the Recommended Plan and invited the Commission to contact its Technical Working Group member if it wished to receive further elaboration with respect to any part of the Government's response.

70. Among other things, Minister Rouble, in his letter to the Commission said:

> 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.[40]
>
> [...]
>
> The plan proposed that a large portion of the region be designated as Special Management Areas. While government believes that 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

[39] Letter from Minister Rouble to Chair, Peel Watershed Planning Commission enclosing 'Detailed Yukon Government Response on the Recommended Peel Watershed Plan, February 21, 2011. [Document no. 25]
[40] *Ibid.* page 1 at paragraph 5.

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.[41]

[...]

In summary, the Yukon government would like the Commission to consider the following when developing the Final Plan:

1. Re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan.

2. Develop options for access that reflect the varying conservation, tourism and resource values throughout the region.

3. Simplify the proposed land management regime by re-evaluating the number of zones, consolidating some of the land management units and removing the need for future additional sub-regional planning exercises.

4. Revise the plan to reflect that the Parties are responsible for implementing the plan on their land and will determine the need for plan review and amendment.

5. Generally, develop a clear, high level and streamlined document that focuses on providing long term guidance for land and resource management[42].

71. On March 15, 2011, Chief Kassi on behalf of the Vuntut Gwitchin First Nation, wrote to the Commission[43]. In her letter, she confirmed the First Nation's views had previously been provided to the Commission through the joint response provided by the SLC as well as the joint response provided by the Four First Nations. In her March 15th letter, the Chief provided certain additional comments with respect to a sub-regional plan for the Dempster Corridor.

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[41] *Ibid*, page 2 at paragraphs 1-3.
[42] Ibid, page 4 at paragraphs 1-2.
[43] Chief Kassi letter to Chair, Peel Watershed Planning Commission dated March 15, 2011. [Document no. 26]

72. On July 22, 2011 the Commission submitted to the Yukon and the Four First Nations its Final Recommended Plan.

73. The Final Recommended Plan incorporated some, but not all, of the modifications sought by the parties. In particular, the Final Recommended Plan failed to address two of the Yukon's primary concerns, that the Plan achieve a balance between conservation values, non-consumptive resource use and resource development, and that it develop options for access that reflect varying conservation, tourism and resource values.

74. On December 2, 2011. Minister Cathers wrote to the Four First Nations[44] and reconfirmed the Yukon's commitment to 'develop a shared position on the plan and a final plan that all of the Parties can support and approve. He also advised that the Yukon had decided to extend the moratorium on mineral staking in the Peel watershed for a further 6 months to September, 2012.

75. Chief Meryvn and Chief Taylor penned a joint response to Minister Cathers on December 14, 2011[45]. That letter reads, in part:

> We are pleased to hear that your government continues to be committed to working with us to finalize a regional land use plan for the Peel Watershed Region. We were particularly encouraged by the minor modifications proposed by the Yukon Government to the Peel Watershed Planning Commission's (the "Commission") Recommended Peel Watershed Land Use Plan (the "Recommended Plan") as set out in it response to the Recommended Plan on February 21, 2011 of this year. As you know, under the Umbrella Final Agreement the Yukon Government's response to the Commission's Final Recommended Peel Watershed Land Use Plan (the "Final Plan") will be limited to addressing the modifications that it proposed to the Recommended Plan, and the Commission's response to those modifications in the Final Plan. We look forward to addressing the Yukon Government's proposed modifications to the Recommended Plan during our intergovernmental consultations.[46]

76. Minister Cathers wrote to the Four First Nations on February 9th,

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[44] Minister Cathers letter to Chiefs Taylor, Mervyn and Kassi and President Nerysoo, dated December 2, 2011. [Document no. 29]

[45] Chief Mervyn and Taylor letter to Minister Cathers dated December 14, 2011. [Document no. 30]

[46] *Ibid*, at paragraph 2.

2012[47]. In his letter he confirmed the parties' intention to meet on February 14th, 2012 and indicated that the Government would be sharing its position with respect to the Final Recommended Plan at that time.

77. Following the February 14th meeting with representatives of the Four First Nations, the Yukon issued a news release with respect to the eight core principles that it had developed to guide modifications and completion of the Peel Watershed Regional Land Use Plan. Those principles were identified as:

a. Special Protection for Key Areas

b. Manage Intensity of Use

c. Respect the First Nation Final Agreements

d. Respect the Importance of all Sectors of the Economy

e. Respect Private Interests

f. Active Management

g. Future Looking

h. Practical and Affordable

78. On February 17th, 2012 the Four First Nations wrote jointly to Ministers Cathers and Dixon[48]. That letter reads, in part:

> We write to respond to the Government of Yukon Guiding Principles for the Peel Watershed Regional Land Use Plan that you conveyed to us on February 14, 2012 and the Yukon Government's news release of that same date. We have considered this very carefully and have sought the advice of legal counsel. We now wish to respond to the Yukon Government's proposal to introduce additional modifications to the Final Plan, not previously raised by

[47] Minister Cathers' letter to Chiefs Taylor, Mervyn and Kassi and President Nerysoo, dated February 9, 2012. [Document no. 31]

[48] Letter from Chiefs Taylor, Mervyn, Kassi and President Nerysoo to Ministers Cathers and Dixon, dated February 17, 2012. [Document no. 33]

the Yukon Government[49].

[...]

Once the Yukon Government has discharged its consultation obligations, it will be required to approve, reject or modify the Final Plan that has been recommended by the Commission. It is our view that the Yukon Government's authority to approve, reject or modify the Final Plan is limited to the "proposed modifications" that it advanced in the written reasons provided under *UFA* 11.6.3 in respect of the Recommended Plan, and which the Commission considered in the Final Plan.

This means that the Yukon Government may not propose further modifications to the Final Plan. Doing so would serve to undermine the entire process contemplated by Chapter 11 of the *UFA* as it would deprive the Commission and affected Yukon First Nations and Yukon communities of any opportunity to comment or properly reconsider the additional modifications. The *UFA* does not grant the Yukon Government the unlimited authority to rewrite the Final Plan.

Furthermore, it is our position that it is no longer open to the Yukon Government to reject the Final Plan. The Yukon Government is limited to the proposed modifications that it made to the Recommended Plan. The Yukon Government cannot at this point assume and authority to deal with any other aspects of the Final Plan. To do so would be inconsistent with the way in which the approval process for land use plans set out in the *UFA* is intended to work, and would serve to undermine the consultation process contemplated by the *UFA*.

Similarly, in carrying out its consultation obligations with the affected Yukon First Nations and affected Yukon communities, the Yukon Government will be limited to addressing the modifications that it proposed to the Recommended Plan, and the Commission's response to those modifications in the Final Plan. It would be inappropriate for the Yukon Government to raise any novel or additional modifications to the Final Plan or to propose an entirely new plan for the Peel Watershed during these consultations. That would clearly be contrary to the requirements of the *UFA*.

[49] *Ibid.* page 1 at paragraph 1.

We also wish to make it clear at this time that any consultations that take place between the Yukon Government and our First Nations will be without prejudice to our ability to assert at a later time that the Yukon Government has not complied with the approval process for land use plans contemplated by the *UFA*, as we have set out above. Our intention is to preserve and, if necessary, enforce our constitutionally protected treaty rights.[50]

79. Ministers Cathers and Dixon subsequently responded to the First Nations on behalf of the Yukon[51]. That letter, dated March 20, 2012, reads, in part:

It is our view that we have followed the planning process dictated by the Final Agreements and we will continue to do so. Having received the final recommended plan from the Commission, Yukon government is now reviewing the plan, and will be initiating the consultation is accordance with the Final Agreements and the joint letters of understanding signed in January 2010 and January 2011.

Yukon government has worked in good faith, at both the officials and political levels to keep the Commission and the First Nations informed as to our expectations concerning the Plan. As early as 2006, in response to the *Issues and Interests Report* prepared by the Commission, we indicated that our expectation was for a highly balanced plan that deals with the diversity of needs and issues in the region[52].

80. The Yukon prepared and provided to the SLC an update on September 14, 2012[53]. It set out Yukon's proposal for modifying the Final Recommended Plan, including an 'Expanded Toolkit' and presented 4 possible concepts with respect to land designation.

81. The Four First Nations again wrote jointly to Ministers Cathers and Dixon[54]. In their October 15th letter they said, among other things:

We write further to the Senior Liaison Committee meeting of September 14, 2012, and the document Government of Yukon

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[50] Ibid, at pages 3 and 4.
[51] Minister Cathers' and Dixon's letter to Chiefs Taylor and Mervyn and to President Nerysoo, dated March 20, 2012. [Document no, 35]
[52] *Ibid*, page 1 at paragraphs 2 and 3.
[53] Peel Watershed Regional Land Use Plan, Update to SLC, September 14, 2012. [Document no. 37]
[54] Letter from Chiefs Taylor, Mervyn, Linklater and President Alexie to Ministers Cathers and Dixon, dated October 15, 2012. [Document no. 38]

tabled at the meeting entitled "Peel Watershed Regional Land Use Plan Update to SLC September 14, 2012" (the "SLC Update").

The SLC Update contains an overview of the Final Recommended Plan, and among other things, includes an "expanded toolkit" which sets out a proposed new land use designation system and an application of that new land use designation system to various concepts. It is our understanding that the proposed new land use designation system and the proposed concepts were put forward for discussion and input by the SLC and that the Government of Yukon intends to present the new land use designation system and proposed concepts during the next phase of consultation under the Umbrella Final Agreement.

The letter then went on confirm that it was the First Nations' position that it was not open to the Yukon Government to propose a new land use system or any new concepts at this time.

82. Ministers Cathers and Dixon responded to the Four First Nations by way of letter dated October 19, 2012. In their letter, they said:

We wish to clearly state that the Yukon government has followed, and will continue to follow, the consultation process set out in the Final Agreements.

We acknowledge that we may have a different understanding of what is required by the provisions of Chapter 11. As parties to the Final Agreements, we will, from time to time, have genuine and principled differences about the meaning of certain clauses. We have considered the matter carefully in light of representations made by you and others and our understanding of our obligations under Chapter 11. It is our view that the land use planning process in the Final Agreements does not fetter the parties' prerogative to approve, reject or modify that part of the recommended plan that applies to the land under their authority. In other words, Government of Yukon and Yukon First Nations have the ultimate authority to determine the land use plan that will apply to Non-Settlement Land and Settlement Land respectively.

Specifically, it is our view that Chapter 11 does not limit the next round of consultation to the modifications that the Yukon government proposed pursuant to 11.6.2 and does not prevent Yukon from consulting on the proposed designation system.

Also, we wish to emphasize that while the Yukon government has an obligation to consult affected Yukon First Nations pursuant to 11.6.3.2 there is a reciprocal duty upon First Nations to participate in that consultation. First Nations will need to determine for themselves how they participate in the consultation process. For our part, we are of the view that we can rely, if it becomes necessary, on the complete consultation record (including the participation of our First Nations) to indicated that we have carried out the consultation process provided for in the Final Agreements[55].

83. Subsequent to this, and, as required by section 11.6.3.2 of the Final Agreements, the Yukon Government again undertook public consultation with the residents of the affected Yukon communities as well as with the residents of Fort McPherson, Inuvik, Aklavik and Tsiigehtchic. That consultation occurred between October 23, 2012 and February 25, 2013[56].

84. The Yukon, in accordance with section 11.6.3.2 of the Final Agreements, also undertook consultation with the Four First Nations and issued a Notice of Consultation to them on October 23, 2012[57].

85. Consultation between the Yukon and the Four First Nations continued through 2013. On October 1, 2013 Minister Kent and Minister Dixon wrote to the Four First Nations[58] setting out the Yukon's summary of the consultation that had occurred to that date. The letter went on to say:

> Yukon government's proposed modifications have been incorporated into the plan and two copies provided with the proposed modifications highlighted.
>
> First Nation questions, comments and requests for further information, along with input from the community consultations and from the Senior Liaison Committee, have assisted Yukon government in refining its proposed approach to that part of the Plan applying on Non-Settlement Land. Yukon government's proposed modifications reflect our Guiding Principles for Regional

[55] *Ibid*, pages 1-2, paragraphs 2 -5. [Document no. 39]
[56] See Yukon's News Release dated October 23, 2012, which sets out the dates of the public consultation period. [Document no. 40]
[57] As an example, see Minister Cathers' letter to Chief Taylor, dated October 23, 2012. [Document no. 41]
[58] Letter from Minister Kent and Dixon to Chief Champion, Taylor, Linklater and President Nerysoo, dated October 1, 2013. [Document no. 58]

Land Use Planning. They address issues and concerns that were raised during community consultation and address Yukon's concerns with the recommended Plan which were not addressed by the Commission in their final recommended plan. These include:

- 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 bases on 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.

Before making a final decision on the Plan, Yukon wishes to conclude the consultation by hearing from affected Yukon First Nations concerning their views as to how YG's proposed Plan modifications may affect treaty rights provided for under the First Nation Final Agreements. The consultation will be for a 45-day period, ending November 15, during which we propose the following:

- A briefing by technical officials on YG's proposed Plan modifications; and

- A meeting of the Principals to discuss YG's proposed Plan modifications and receive feedback from affected First Nations.

The meeting of the Principals will be an opportunity for affected

First Nations to present and discuss their response to Yukon government's proposed modifications to the Plan and also to discuss any modifications the First Nations may want to make to that part of plan applying to their Settlement Land.

Upon conclusion of this consultation on November 15, Yukon government will give full consideration to your comments and, if we are unable to reach agreement on a single plan to apply to both Settlement and Non-Settlement Land, will make a decision on that part of the Peel Watershed Regional Land Use Plan applying on Non-Settlement Land.[59]

86. Further consultation occurred between the Yukon and the Four First Nations and, in their letter of November 15, 2013 Ministers Kent and Dixon, proposed extending the consultation to November 30th to allow consultation to continue[60].

87. In response, the Four First Nations, in their letter of November 21, 2013[61], reiterated their position that the Yukon's authority to modify the Final Recommended Plan was limited to the modifications previously proposed under s. 11.6.3. They went on to say that:

We are prepared to engage in consultations regarding the modifications to the Final Recommended Plan proposed pursuant to 11.6.3 of the UFA, as provided in Minister Rouble's letter of February 21, 2011, and the Commission's Final Plan. We are not prepared to engage in consultations outside the scope of the Approval Process for Land Use Plans, as set out in the UFA, and, in particular, will not engage in any consultations regarding a new Plan proposed by the Yukon Government.

88. Ministers Kent and Dixon responded to the Four First Nations on December 5th. That letter read:

Thank you for your letter of November 21, 2013. We understand your position but as previously outlined in our letters of April 5, 2013 and October 19, 2012 we have a different perspective. We would like to once again extend to you the opportunity to advise us as to how the modifications Yukon is proposing will impact your

[59] *Ibid*, page 2 at paragraphs 2-4.
[60] Letter from Ministers Kent and Dixon to Chiefs Taylor, Champion, Linklater and Vice-President Snowshoe, dated November 15, 2013. [Document no. 60]
[61] Letter from Chiefs Taylor, Champion, Linklater and Vice President Snowshoe to Ministers Kent and Dixon, dated November 21, 2013. [Document no. 61]

treaty rights.[62]

89. Subsequent to this, President Alexie, on behalf of the Gwich'in Tribal Council, wrote to Ministers Kent and Dixon on December 18th, 2013. President Alexie raised several issues in his letter, including issues regarding consultation and the process that had been followed, and he proposed that representatives of the Yukon Government meet with representatives of his First Nation to discuss those issues.

90. A further exchange of letters occurred between Ministers Kent and Dixon and Chief Alexie[63], which led to a meeting between representatives of the Yukon and the Gwich'in Tribal Council on January 14th, 2014.

91. On January 14th, 2014 President Alexie wrote to Ministers Kent and Dixon and advised that:

> As indicated to Yukon consistently since the release of the final recommended plan, the GTC approves the final recommended Peel Watershed Regional Land Use Plan as it relates to the primary use area including the Tetlit Gwich'in lands within that area.[64]

92. Ministers Kent and Dixon subsequently responded to President Alexie on January 17th, 2014[65] and in their letter they indicated that, as no new concerns were identified with respect to the Yukon's proposed modifications, the Yukon had concluded consultation with the Gwich'in Tribal Council[66]. The Ministers concluded their letter by saying that:

> YG will consider the information it has received, and will advise you of its decision for a land use plan for Non-Settlement Land in the Peel Watershed planning region. Once a plan for non-settlement land in the Peel Watershed is approved we hope GTC will participate in the implementation of the plan as it applies to your primary and secondary use areas. Implementation provides another avenue for GTC to ensure its treaty rights, concerns and interest as reflected in

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[62] Letter from Ministers Kent and Dixon to Chiefs Taylor, Champion, Linklater and Vice President dated December 5, 2013. [Document no. 62]

[63] See Letter from Ministers Kent and Dixon to President Alexie, dated December 19, [Document no. 78], Letter from President Alexie to Ministers Kent and Dixon, dated January 7, 2014 [Document 79], and Letter from Ministers Kent and Dixon to President Alexie, dated January 10, 2014 [Document no. 80].

[64] Letter from Chief Alexie to Ministers Kent and Dixon, dated January 14, 2014. [Document no. 84]

[65] Letter from Ministers Kent and Dixon to President Alexie, dated January 17, 2014. [Document no. 85]

[66] *Ibid*, page 1 at paragraph 1.

the plan are respected in implementation activity, as well as existing regulatory and project assessment processes[67].

93. On December 13, 2013, Chiefs Taylor and Champion wrote to Ministers Kent and Dixon seeking a response to their 'offer ... to engage in consultations regarding the modifications to the Recommended Plan pursuant to 11.6.3 of UFA, as provided in Mr. Rouble's letter dated February 21, 2011 and the Commission's Final Plan'[68]

94. By way of letter dated December 19, 2013 Ministers Kent and Dixon notified Tr'ondëk Hwëch'in and Nacho Nyak Dun of the Government's intention to conclude consultation with them regarding the Final Recommended Plan. In doing so, they stated that:

> This letter is to inform you of the Yukon government's ("Yukon") decision to conclude consultation with your First Nation concerning a Peel Watershed Regional Land Use Plan for Non-Settlement Land.
>
> Recent correspondence from your First Nation – a letter dated November 21, 2013 stated that you would not be advising Yukon as to how modifications proposed by Yukon will impact your treaty rights and asked if "there is anything to be gained from further consultation or whether we should consider these consultations to be completed". Your more recent letter of December 13, 2013 did not appear to express a contrary view to your November comments and thus while Yukon is disappointed that your First Nation did not provide us with information on how the modifications proposed by Yukon would impact your treaty rights, given your perspective, we are of the view that – as suggested by you – consultation with your First Nation is completed.
>
> Yukon will now take some time to review its options based upon the information that it has received from your First Nation, as well as input it has received from the Gwich'in Tribal Council and Vuntut Gwitchin First Nation, and will advise you of its decision respecting a land use plan for Non-Settlement Land in the Peel Watershed

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[67] *Ibid*, page 2 at paragraph 2.

[68] Chief Taylor's and Champion's letter to Ministers Kent and Dixon, dated December 13, 2013 at paragraph 4. [Document no. 63]

planning region.[69]

95. Chief Taylor, on behalf of Tr'ondëk Hwëch'in, notified the Yukon of its intention to conclude its consultation with the Government regarding the Final Recommended Plan by way of letter dated January 14, 2014. In his letter, the Chief also advised that 'Tr'ondëk Hwëch'in approves the Final Recommended Peel Watershed Land Use Plan as it relates to both Settlement Land and Non-Settlement Land'.[70]

96. Chief Champion, on behalf of Nacho Nyak Dun, notified the Yukon of its intention to conclude its consultation with the Government regarding the Final Recommended Plan by way of letter dated January 14, 2014. In his letter, the Chief also advised that '[t]he First Nation of Nacho Nyak Dun approves the Final Recommended Peel Watershed Land Use Plan as it relates to both Settlement Land and Non-Settlement Land'.[71]

97. In and around this time, and subsequent to Minister Kent and Dixon's letter to the Four First Nations on December 10, 2013, representatives of the Yukon met with representatives of the Vuntut Gwitchin First Nation. That meeting was held on January 3rd, 2014 and was followed by a letter from Ministers Kent and Dixon to Chief Linklater on January 10th.[72] In that letter, Ministers Kent and Dixon acknowledged process concerns raised by the First Nation and further go on to confirm that:

> At the meeting the general management direction for LMU 7, 10 and 12 was supported by VGFN officials as the designation is consistent with the Peel Commission's Final Recommended Plan and/or the adjacent North Yukon Regional Land Use Plan designation. The important habitat for the Porcupine Caribou Herd in LMU 10 was noted and VGFN officials made three suggestions to improve management direction for LMU to ensure protection of this important habitat and the use of the Herd in this area ...
>
> Yukon concurs with these suggestions and will amend the proposed plan to accommodate these changes. It is further

[69] Letter from Ministers Kent and Dixon to Chiefs Taylor and Champion, dated December 19, 2014. [Document no. 64]
[70] Letter from Chief Taylor to Premier Pasloski and Minsters Kent and Dixon, dated January 14, 2014. [Document no. 65]
[71] Letter from Chief Champion to Premier Pasloski and Ministers Kent and Dixon, dated January 14, 2014. [Document no. 66]
[72] Document no. 82

suggested that once the plan for non-settlement land is approved, VGG and YG enter into a plan implementation Memorandum of Understanding (MOU). The purpose of the MOU would be to clarify our respective roles in implementing the plan including, but not limited to a cumulative effects framework and access management planning in the VGFN TT of the Peel planning region.

We appreciate the opportunity to discuss your concerns and options for addressing them as they pertain to the Peel plan. As for next steps, YG will formally conclude consultation with your First Nation regarding a Peel Watershed Regional Land Use Plan for Non-Settlement Land on January 10, 2014 (as stated in our letter of December 30, 2013).

Once Yukon has concluded consultation with all of the affected First Nations in the Peel planning region, YG will consider the information that it has received, and will advise you of its decision for a land use plan for Non-Settlement Land in the Peel Watershed Planning region.

98. Chief Linklater responded to Ministers Kent and Dixon on January 17th, 2014. While continuing to express concerns, he advised that he looked forward to the parties jointly developing and agreeing to the memorandum of understanding that the Ministers has proposed. He further confirmed that intergovernmental consultation between the Vuntut Gwitchin First Nation and the Yukon Government had been concluded.[73]

99. The Yukon advised the Four First Nations of its approval of a modified regional land use plan by way of letter dated January 20, 2014[74].

[73] Chief Linklater letter to Ministers Kent and Dixon, dated January 17, 2014. [Document no. 86]
[74] Letter from Ministers Kent and Dixon to Chiefs Champion, Linklater, Taylor and President Alexie, dated January 20, 2014. [Document no. 67]

PART II QUESTIONS IN ISSUE

100. The Plaintiffs seek "a *declaration that 'the Final Recommended Plan is the binding regional land use plan pursuant to Chapters 11.6.0 and 11.7.0 of the UFA and the Yukon First Nation Final Agreements, and accordingly the law of the Yukon."*

101. To support such a declaration, the Plaintiffs would have to establish two propositions. First, the plaintiffs would have to establish that the Final Agreements provided for a mandatory planning process to be adopted that could bind the entity with decision-making authority over the lands in question.

102. This first issue is a question of interpretation of s. 11.6.3.2 in the context of the Final Agreement.

103. Secondly, if this interpretation could be demonstrated, the plaintiffs would have to establish that the conditions for this binding recommendation, namely the theory that the final decision-maker could not modify the Commission's recommendation unless it had proposed such a modification at an earlier stage of the planning process, was met in the case at bar.

104. This second issue involves a consideration of the position taken by the Government during the planning process.

105. The position of the Yukon Government is that neither proposition is sound. The Yukon Government is not limited in the matters it can consider when deciding whether to approve, reject or modify the Final Recommended Plan. Where Chapter 11 is invoked, the preconditions for decision-making are procedural only, not substantive and relate to consultation alone.

106. Furthermore, the Yukon Government did propose throughout the process that the Commission modify its recommended plan to make it more balanced. On no reasonable interpretation of Chapter 11 was more required before the Government exercised the authority it had under s. 11.6.3.2 to "approve, reject or modify that part of the plan recommended under 11.6.3.1 applying to Non-Settlement Land..."

PART III ARGUMENT

FIRST ISSUE: THE INTEPRETATION OF S. 11.6.3.2

107. The plaintiffs' case is based on an interpretation of Chapter 11 that would convert a "recommended" plan into a binding plan if the decision-maker – here the Government but in other situations the First Nations – based its rejection or modification of the final recommendation on a consideration not mentioned earlier in the planning process.

108. While the factual premise does not apply in the case at bar, the more fundamental objection to this theory is that there is nothing in the language of chapter 11 that could lead to this conclusion, and such a conclusion would be contrary to the purpose of the planning provisions of chapter 11.

109. Section 11.6.3 of the Final Agreements reads as follows:

> 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 <u>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.</u>
>
> (*Emphasis added*)

110. Nothing in the wording of this section, or its corollary s. 11.6.5.2, is unclear or ambiguous. Section 11.6.3.2 allows Government to 'approve, reject or modify' that part of a Plan that applies on Non-Settlement Land. Similarly, section. 11.6.5.2 affords the same to right any affected Yukon First Nation: they, too, are able to 'approve, reject or modify' the Plan as it applies on Settlement Land.

111. To suggest, as the plaintiffs do, that these words should not be given their plain and natural meaning is to do a disservice to the parties to the Final Agreements.

112. Final Agreements are modern treaties that were negotiated over a period of years, not days. They are lengthy, complex and sophisticated agreements and it is clear, from even a cursory review of them (and the very precise language used) that a significant amount of care has gone into their negotiation.

113. The Final Agreements contain their own provisions that offer direction on their interpretation and, among them, section 2.6.3 expressly negates a presumption often applied to historic treaties.

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.

114. This demonstrates that the parties' desire that the terms of the agreement be interpreted in a normal contractual manner without the court applying a special interpretive principle that could affect the rights under the treaty in an unintended way.

115. It also shows that the parties have confidence in their own ability to set out the terms upon which they wish to agree rather having a court subsequently attempt to apply interpretive principles to the agreement.

116. The parties set out the framework for interpretation as clearly as possible, in the hopes that the expressed intention of the parties would carry some weight.

117. Doing so also provides protection from inadvertent

application of rules – generally devised by the court in another context – from applying to the interpretation of the treaty.

118. The Court's interpretation must reflect the intention and interests of all the parties who signed the treaty and central to the bargain that was made is the right of the parties to manage land under their respective administration and control.

119. Fundamental to the regional land use planning process set out under the terms of the Final Agreement is that the parties retain decision-making power over their respective land, *i.e.* YG makes the final decision with respect to what regional land use plan applies to Non-Settlement Land and the First Nations make the same decision with respect to Settlement Land.

120. The wording and Yukon's interpretation is consistent with the over-all scheme of the Final Agreements, including Chapter 11 and its stated objectives.

121. The Federal Court of Appeal in *Eastmain*[75] said:

> Thus, while the interpretation of agreements entered into with the aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed. To seek ambiguities at all costs – and there will always be room for this in documents of such magnitude – and to interpret any ambiguity systematically in favour of the aboriginal parties would be to invite those parties to use the vaguest terms possible in the hope that they might then apply to the courts and the certainly that, by doing so, they would gain more than the actual fruit of the negotiations. This sort of approach would distort the entire process of negotiating treaties, and the result would be that the courts, on the pretext of interpreting the terms of the compromise reached, would renegotiate the compromise for the benefit of the aboriginal parties and to the detriment of the governments which, it must be recalled, are accountable to the public as a whole and not only to the aboriginals. In all fairness to all the contracting parties, how could a court, faced with such an important compromise as that set out in the Agreement, claiming to find ambiguity, put the 'concessions' made by the aboriginals back on the table without putting the benefits they have obtained back

[75] *Eastmain Band* v. *Canada (Federal Administrator)* (1992), 99 D.L.R. (4th) 16 at p. 28-29, [1993] 1 F.C. 501 (C.A.)

on the table as well? (*Emphasis added*)

122. In keeping with the court's approach in *Eastmain*, the interpretation of the Final Agreements 'while...it must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all parties who signed it and take into account the legal and historical context out of which it developed'.

123. The decision of the Federal Court in *Eastmain* was cited approvingly by the SCC in *R.* v. *Howard* [1994] 2 S.C.R. 299 at para 9.

124. The plaintiffs' interpretation would also remove both Yukon and the First Nations' ability to evolve their thinking and to respond to new information that may come forward in the consultation process.

125. Section 12.17.4 allows government to approve projects that do not conform to a regional land use plan – again, an indication that Government intended to retain ultimate control over what occurs on Non-Settlement Land.

126. In support of their argument, the plaintiffs have invoked section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21. It is imported into the terms of the Final Agreements pursuant to the provisions of section 2.6.6 thereof and it reads:

> 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.

127. Remedial statutes, like treaties, seek to reach a balance between the objectives sought and the safeguards necessary to protect the rights of those who may be affected by operation of the statute. This balance must not be ignored under the guise of a 'large and liberal' interpretation and in this respect, the words of McIntyre J. in *St. Peter's Evangelical Lutheran Church* v. *Ottawa (City)*[76] are particularly apposite:

> [...] This point was taken in the Court of Appeal by Jessup J.A. Section 10 of the *Ontario Interpretation Act*, R.S.O. 1970, c. 225,

[76] [1982], 2 S.C.R. 616 at pages 625-626

provides:

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that it deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In the Ontario Court of Appeal, as well as in the High Court, the purpose of the Act, that is the preservation and protection of Ontario's heritage, was recognized and the statute was characterized as remedial. MacKinnon A.C.J.O. said:

> We are of the view that the matter really comes to a narrow compass on the particular and peculiar facts of this case. It should be said at the opening that the object and the purpose of *The Ontario Heritage Act* is clear. It is to preserve and conserve for the citizens of this country, *inter alia*, properties of historical and architectural importance. The Act is a remedial one and should be given a fair and liberal interpretation to achieve those public purposes which I have recited.

The Ontario Courts have adopted the approach dictated by s. 10 of the *Interpretation Act* and they have construed the statute in the purposive manner. In this they have given effect fully to the avowed purpose of *The Ontario Heritage Act*. Accepting that approach so taken, I am not of the view, however, that in an effort to give effect to what is taken to be the purpose of the statute it is open to the court of construction to disregard certain provisions of the Act. It must be construed to give effect to the purpose above described but also to have regard for many provisions of the Act, particularly ss. 34 and 67, the purpose of which is to protect the interests of the landowner concerned. To ignore these provisions, or to read them down to where they are deprived of any real significance, is not to construe the statute but to decline to assign any meaning to certain of the words that were used by the Legislature.

(Emphasis added)

128. The very precise language contained in the Final Agreements should not be ignored or read-down in the guise of a 'large and liberal' interpretation.

129. For these reasons, the plaintiffs' interpretation of s. 11.6.3.2 should be rejected. The parties agreed in this provision that on Non-Settlement Lands the Yukon Government had the authority to reject or modify the final recommendation of the Commission without being limited by prior proposals, just as First Nations have the authority under s. 11.6.5.2 retain the authority to reject or modify the final recommendations of the Commission in respect of Settlement Lands.

130. This action should be dismissed on that basis.

SECOND OR ALTERNATIVE ISSUE: WHETHER THE MODIFICATIONS MADE WERE OUTSIDE THE SCOPE OF THE GOVERNMENT'S AUTHORITY

131. Since the beginning of the Peel Watershed regional land use planning exercise, the Yukon has been clear in its position that it was seeking a regional land use plan for the Peel Watershed that balanced environmental, resource and economic interests. From as earlier as in 2006, the Government has raised this concern and, in its response to the Commission's Issues and Interests Report, Deputy Minister Robertson stated it expressly. As he said at that time, '[o]ur expectation is for a highly balanced plan that deals with the diversity of needs and issues in the region'[77].

132. The modifications that the Yukon made to the Final Recommended Plan before approving it were Yukon's attempt to achieve balance after the Commission failed to do so. Those modifications were made pursuant to the provisions of s. 11.6.3.2 and, as provided for by that section, and the Final Agreements, Yukon was entitled to make them.

133. The Commission issued its Draft Plan in April, 2009. That Plan, the Commission said, was an attempt to achieve a balance of interests in the planning region but, for whatever the reasons, it was not well received. Facing a back-lash, the Commission then chose to err on the side of conservation when it issued its

[77] Deputy Minister Robertson letter to Brian Johnston, Senior Planner, Peel Watershed Planning Commission, dated May 23, 2006. [Document no. 74]

Recommended Plan on December 2, 2009.

134. The Recommended Plan proposed that 80% of the Peel Watershed be protected and off-limits to development. In issuing the Plan, the Commission said:

> Our Recommended Plan embodied this conservative approach. It emphasized landscape conservation and left options open for development through variance and amendment processes. Our assessment is that the Recommended Plan was largely applauded by First Nations, by the First Nation Parties, and the Yukon public in general. It was criticized by spokespeople for the resource industries, by their supporters among the Yukon public, and by the Yukon Government.[78]

135. As required by the provisions of s. 11.6.3, Yukon provided its comments to the Commission on February 21, 2011[79]. In its response to the Final Recommended Plan, Yukon again reiterated its concerns about achieving balance and it advised the Commission that it was seeking changes to the Plan in order to achieve that balance.

136. Minister Rouble, in his February 21st letter, further requested that the Commission re-evaluate the Plans recommendations based on 4 themes. Those themes, he identified to be (1) Balance Conservation and Development Interests, (2) Plan Complexity of the Land Management Regime, (3) Implementation, and (4) General.

137. In his letter, Minister Rouble outlined the Government's concerns and he concluded it by saying:

> In summary, the Yukon government would like the Commission to consider the following when developing the Final Plan:
>
> 1. Re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan.
>
> 2. Develop options for access that reflect the varying conservation, tourism and resource values throughout the region.

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[78] From the 'Message from the Commission' contained in the Foreword to the Final Recommended Plan, July 22, 2011, at pages ix-x. [Document No. 9]

[79] Supra, note 39

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[80].

138. Accompanying the Ministers letter was a 15 page detailed response to the Final Recommended Plan. The Commission was also invited to contact Yukon's Technical Working Group member if the Commission wished further elaboration on any part of it.

139. Minister Rouble's February 21st letter, it should be noted, was the Yukon's first formal opportunity to respond to the Recommended Plan.

140. On July 22, 2011, the Commission issued its Final Recommended Plan[81]. That Plan, while addressing some of the concerns raised by Yukon, failed to address others. Most significantly, the Final Recommended Plan failed to address Yukon's concerns regarding the need to, 1) achieve balance between conservation and resource use and development, and, 2) develop options for access.

141. As justification for not addressing Yukon's concerns, the Commissioner offered this statement:

> 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

[80] *Ibid*, page 4 at paragraph 1.

[81] Peel Watershed Planning Commission. Final Recommended Peel Watershed Regional Land Use Plan, July 22, 2011. [Document no. 27]

between the values of conservation, non-consumptive resource use and resource development; are 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 about the amount of land protected. For the Commission to adequately address this 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.[82]

142. In this assessment, Yukon says, the Commission was mistaken. No structural or administrative impediments existed that prevented the Commission from making the changes that the Government was seeking and, as indicated in Minister Rouble's letter, it was clear that the Government was prepared to support them in their task. Yukon acknowledged that significant work would be required in addressing the Yukon's (and the other Parties') concerns:

We understand that the Parties' responses to the plan will require significant deliberation by the Commission is 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[83].

143. Yukon offered a clear and detailed response to the Recommended Plan. The Government made it clear they wanted a balanced plan. There is nothing in chapter 11 that suggests that it is incumbent on the Government to *draft* the plan for the Commission. The Commission was provided with the principles the Government wanted respected. Regrettably the Commission declined to present a recommendation that respected these principles.

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[82] *Ibid.* Message from the Commission. Foreword. Final Recommended Plan, page xi at paragraph 3.
[83] Supra, note 39, page 4 at paragraph 2.

144. The Commission had the ability to address Yukon's concerns but simply chose not to do so. Instead, as the Commission itself acknowledged, it chose to 'take a cautious, conservative approach'[84] that favoured conservation over other interests. Conservation, while a laudable goal, was not the only intended outcome of this regional land use planning exercise. The Commission was not being asked to develop a protected areas strategy; rather, it had been tasked with developing a balanced regional land use plan that would guide future use of the land.

145. Faced with the Commission's inaction, the Yukon was then placed in the position of either rejecting the plan outright or modifying it. It chose to modify the Plan based on the principles that it had previously enunciated – that the plan be balanced among environmental, resource and economic interests.

146. On that basis, Yukon undertook consultation with both the affected First Nations and affected communities with respect to both the Final Recommended Plan, as well as a range of options upon which the Plan could be modified to address Yukon's concerns.

147. Following that consultation, and taking into account the views expressed during the consultation, on January 20, 2014 Yukon approved the Peel Watershed Regional Land Use Plan (the 'Approved Plan').

148. The Approved Plan included modifications that addressed the concerns that the Government had raised throughout the regional land use planning process.

YUKON'S MODIFICATIONS

149. The modifications made by Yukon reflected the concerns that Yukon had expressed throughout the regional land use planning process, and explicitly in Minister Rouble's letter of February 21, 2011. They addressed, in particular, the Government's concern that the Final Recommended Plan lacked a balance between conservation values, non-consumptive resource use and resource development and that the Plan failed to provide sufficient options for access.

[84] page x at paragraph 1.

150. These concerns had been expressed by the Government to the Commission and the Four First Nations throughout the regional land use planning exercise but were left unaddressed by the Commission in its Final Recommended Plan.

151. The modifications made by Yukon were the logical outcome of these previously expressed concerns, including those expressed by Minister Rouble in his letter of February 21, 2011. The modifications, as made in the Approved Plan, were necessarily more developed in their form but they were, nonetheless, consistent with the modifications that the Yukon had sought from the outset.

152. The Government's February 21st response to the Recommended Plan outlined two broad concerns. Firstly, it raised the issue of balance and the fact that the Plan favoured conservation over other interests. Yukon suggested that the Commission consider how legislation, regulation and policy could be utilized to regulate development and as tools for conserving land and mitigating risk.[85]

153. The Government further raised concern regarding the Plan's proposed ban on surface access and its impact on existing land interests and future development potential. Again, Government suggested that existing regulatory tools and best management practices could be used to mitigate risk and to limit other user's access[86].

154. Those two broad concerns are reflected in the modifications Yukon has made to the Approved Plan, which:

a. Utilizes 3 landscape management units (LMUs) to manage the landscape, Protected Area (PA), Restricted Use Wilderness Area (RUWA), and Integrated Management Area (IMA);

b. Provides for prescriptive land use direction in the RUWA, where additional rules and management direction will apply; including:

    i. The requirement that all new surface access is to be temporary and requiring proponents to complete a surface access plan - which must include details of proposed mitigation measures, how public access will be managed

[85] *Supra*, note 39, page 2 at paragraph 2.
[86] *Ibid*, page 2 at paragraph 3.

and enforced and how abandonment and reclamation will occur;

ii. The utilization of timing windows during important ecological and wilderness tourism periods

iii. Air access co-ordination, to minimize potential conflicts between users;

iv. The requirement that notice be given of mineral exploration activities, regardless of the size of the exploration program; and

v. A prohibition against off-road vehicles in sensitive areas (as defined in the Plan), restricting use to existing trails in immediate proximity to camps and facilities and the requirement that their use in support of industrial or commercial activities will require a permit.

155. To now suggest, at the plaintiffs do, that Yukon is limited in the scope of the modifications that it can make is to undermine the meaning and the purpose of the Final Agreements, Chapter 11 and of sections 11.6.3 and 11.6.5.

156. Nothing in the wording of s. 11.6.3.2 or 11.6.5.2 suggests that modifications are to be limited in this way and Yukon and the First Nations, as decision-makers, must retain the discretion to introduce further modifications at the Final Recommended Plan approval stage. Doing so, allows them to take into account what they heard during consultation with each other, and with the affected communities.

157. The narrow interpretation proposed by the plaintiffs would also serve to unduly constrain the Commission to only reconsider specific modifications proposed under 11.6.3.1 and 11.6.5.1. This constraint could lead to impractical and unreasonable results as certain modifications may well impact or reverberate on other parts of the Plan and the plaintiffs' interpretation would leave no ability for the Commission or the Yukon and the First Nations - as decision makers - to address those impacts.

158. Had the parties intended the process to be circumscribed in this manner, the Final Agreement would have clearly said this.

THE SCOPE AND ADEQUACY OF CONSULTATION

159. Yukon consulted with the affected First Nations and affected communities with respect to both the Recommended Final Plan, as well as the modifications that Yukon was proposing. Read as a whole, the Final Agreement should not be read so as to limit consultation and, ultimately, Yukon's decision-making ability as the plaintiffs have suggested.

160. The 'plan' referred to in section 11.6.3.2 is the 'entire final recommended plan' and therefor the consultation and the subsequent decision whether to approve, reject or modify the plan is with respect to the entire plan - as it applies to Non-Settlement Land.

161. Had the parties intended consultation to be conducted on a narrower basis, as the plaintiffs contend, the Agreement would have said so.

162. The Supreme Court held in *Haida Nation v British Columbia (Minister of Forests)*[87] that good faith is required of both government and a First Nation at all stages of the consultation process. A First Nation "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached."[88]

163. *Halfway River* is frequently quoted by Canadian courts commenting on what a First Nation must do in the consultation process[89]

> There is a reciprocal duty on Aboriginal Peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They

[87] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [Haida].
[88] *Ibid*, at para 42.
[89] Halfway River First Nation v. British Columbia (Ministry of Forests), [1999] 4 C.N.L.R. 1 at p. 44 The paragraph was cited in *Tzeachten First Nation v Canada (Attorney General)*, [2008] FCJ No 1207 and *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212.

cannot frustrate the consultation process by refusing to meet or participate or by imposing unreasonable conditions..."

CONCLUSION

164. Where, as in this case, the parties have entered into modern land claims agreements such as the Final Agreements, which settle, resolve and define their substantive and procedural rights with respect to land ownership, use and management; those rights and obligations should be determined in accordance with the terms of the agreements.

165. Chapter 11 provides a voluntary planning process that ensures that both Government and First Nations can participate in the process and be consulted with respect to any final proposals, but which leaves the ultimate decision-making authority in the hands of Government for Non-Settlement Lands and First Nations for Settlement Lands.

166. The Peel Lands are almost entirely Non-Settlement Lands. The Yukon Government has consistently stated that it required a balanced approach to planning on these lands. When the Commission declined to provide a recommended plan that was balanced, it was open to the Government, after proper consultation to modify the plan to achieve that balance.

PART IV ORDER SOUGHT

The Defendant, Yukon Government, respectfully submits that the Plaintiffs' action be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2014.

John J.L. Hunter, Q.C.
Counsel for the defendant

[89] Halfway River First Nation v. British Columbia (Ministry of Forests), [1999] 4 C.N.L.R. 1 at p. 44 The paragraph was cited in *Tzeachten First Nation v Canada (Attorney General)*, [2008] FCJ No 1207 and *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212.

PART V LIST OF AUTHORITIES

Beckman v. *Little Salmon/Carmacks*, [2010] 3 S.C.R.

Carcross/Tagish First Nation v. *Canada*, 2001 FCA 231, [2002] 1 FC3

Eastmain Band v. *Canada (Federal Administrator)* (1992), 99 D.L.R. (4th) 16

R. v. *Howard* [1994] 2 S.C.R. 299

St. Peter's Evangelical Lutheran Church v. *Ottawa (City)*, [1982], 2 S.C.R. 616

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73

Halfway River First Nation v. *British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1

PART VI LEGISLATION

Yukon First Nations Land Claims Settlement Act, RSC 1985, c. 34

Act Approving Yukon Land Claim Final Agreements, S.Y. 1993, c. 19.

Yukon Environmental and Socio-economic Assessment Act. S.C. 2003, c. 7