SUPREME COURT OF YUKON

Citation: *The First Nation of Nacho Nyak Dun v. Yukon (Government of)*, 2014 YKSC 69

Date: 20141202
S.C. No. 13-A0142
Registry: Whitehorse

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

And

THE GWICH'IN TRIBAL COUNCIL

Intervener

Before Mr. Justice R.S. Veale

Appearances:

Thomas R. Berger, Q.C. Margaret D. Rosling C. Patricia S. Riley	Counsel for the plaintiffs
John L. Hunter, Q.C. Mark Radke	Counsel for the defendant
Jeff Langlois	Counsel for the intervener

REASONS FOR JUDGMENT

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INTRODUCTION

[1] The plaintiffs are two First Nations: the First Nation of Na-Cho Nyak Dun ("Na-Cho Nyak Dun") and the Tr'ondëk Hwëch'in; two environmental organizations: Yukon Chapter-Canadian Parks & Wilderness Society ("CPAWS") and Yukon Conservation Society ("YCS"); and two residents of Whitehorse, Yukon: Gill Cracknell and Karen Baltgailis, who are the Executive Directors of CPAWS and YCS, respectively. The plaintiffs initially commenced this action against the Government of Yukon to obtain a declaration that the Final Recommended Plan of the Peel Watershed Planning Commission dated July 22, 2011 (the "Final Recommended Plan") is the approved regional land use plan for the Peel Watershed, pursuant to ss. 11.6.0 and 11.7.0 of the Final Agreements of the plaintiff First Nations. This position is supported by the intervener, the Gwich'in Tribal Council, which represents a Gwich'in First Nation based in the Northwest Territories but with Traditional Territory in the Peel Watershed.

[2] The Government of Yukon pleads that the plaintiffs' action should be dismissed with the result that the Government's Peel Watershed Regional Land Use Plan of January 2014 (the "Government approved plan") is the approved plan pursuant to s. 11.6.3.2 of the Final Agreements.

[3] At the end of the hearing in July 2014 and at the subsequent remedies hearing on October 24, 2014, the plaintiffs abandoned the declaration they initially sought. They now seek a declaration that the Government approved plan be quashed and that the final consultation pursuant to s. 11.6.3.2 be re-conducted with a specific court direction limiting the modifications of the Government of Yukon.

[4] The Government of Yukon denies that the Government approved plan should be quashed. But in the event it is, the Government of Yukon submits that the planning process be returned to the stage of proposed modifications with reasons pursuant to s. 11.6.3, requiring the Government of Yukon's modifications to be resubmitted as proposed modifications to the Peel Watershed Planning Commission (the "Commission").

[5] The Peel Watershed consists of approximately 68,000 square kilometres, representing 14% of the Yukon. It covers six major river systems: the Ogilvie, the Blackstone, the Hart, the Wind, the Bonnet Plume, and the Snake, all of which run into the Peel River, which drains into the MacKenzie River and ultimately the Beaufort Sea. (see attached Map A)

[6] The First Nations of Na-Cho Nyak Dun, Tr'ondëk Hwëch'in, Vuntut Gwitchin and Tetlit Gwich'in all have Traditional Territory in the Peel Watershed. The settlements of Keno, Mayo, Dawson City and Fort McPherson surround the watershed and are all outside its boundaries.

[7] The renewable resources use consists of subsistence harvesting, trapping, big game outfitting and recreational tourism.

[8] Although there are no mines within the Peel Watershed, there is considerable interest in mineral development. As of July 11, 2011, there were 8,428 active quartz claims. There are two mineral deposits of significant economic size: the Crest iron deposit and the Bonnet Plume coal deposit. To a large extent the area is unexplored, but it is considered to have a large portion of the Yukon's oil and gas potential.

[9] The Commission was formed to develop a comprehensive land use plan for the Peel Watershed under a process contemplated by the Final Agreements of Yukon First Nations with Traditional Territory in the area. The Commission observed that the Peel Watershed is unusual in Yukon, Canada and the world, as it is remote and relatively undeveloped in that it is largely devoid of roads and infrastructure.

[10] As a result of Yukon First Nations land claims agreements, the Government of Yukon largely controls over 97.3% of the Peel Watershed and the First Nations 2.7%, subject to the Land Use Planning provisions in Chapter 11 of the First Nation Final Agreements, which are at issue in this case. The precise wording to be considered is found in s. 11.6.0 of the Final Agreements ("Approval Process for Land Use Plans"), and the issue to be resolved is essentially whether the Government of Yukon is limited in its ability to modify the Final Recommended Plan as it was presented by the Commission at the end of the land use planning process.

[11] To be clear, the role of the Court in this proceeding is not to determine whether more or less protection for the Peel Watershed is appropriate. Rather, the Court's job is to interpret whether the planning process envisioned in the Final Agreements has been followed and to determine the appropriate remedy if it has not.

[12] I wish to make a comment regarding the procedure that counsel have chosen to bring this matter to a hearing. Historically, such matters would proceed on lengthy oral evidence and documents. More recently, that procedure has changed in that affidavit evidence is filed instead of oral evidence. This case, and I commend counsel for it, proceeded on an agreed list of documents and correspondence which adequately provides the background and context to decide the issues raised. The documents were

placed on a USB key and were shown on a screen as they were referred to in court, which assisted both the Court and the public observing the proceeding.

BACKGROUND

[13] This background in sections A through D follows the plaintiffs' brief as it gives a useful general overview. The details of the Commission proceedings are set out in sections E and F.

A) The Umbrella Final Agreement

[14] On May 29, 1993, Canada, the Government of Yukon, and the Yukon First Nations as represented by the Chairperson of the Council for Yukon Indians signed the Umbrella Final Agreement ("UFA"). The UFA was duly ratified by all parties. The ratification of the UFA by the parties signified their mutual intention to negotiate Yukon First Nation Final Agreements and provided the framework for settlement of individual Yukon First Nation land claims and for self-government agreements. It also provided a blueprint for future land use planning in the Yukon.

[15] Whenever a Yukon First Nation signs a Final Agreement, the provisions of the UFA are incorporated into that Final Agreement. There are also additional provisions that are specific to each First Nation.

[16] Section 11.6.0 was incorporated without change into the Final Agreements of each of the First Nations of Na-Cho Nyak Dun, the Tr'ondëk Hwëch'in and the Vuntut Gwitchin.

B) The Yukon First Nation Final Agreements

[17] The present case concerns three Final Agreements executed by Canada, the Government of Yukon, and the First Nations with Traditional Territory in the Peel

Watershed, namely: the First Nation of Na-Cho Nyak Dun Final Agreement, the Tr'ondëk Hwëch'in Final Agreement and the Vuntut Gwitchin First Nation Final Agreement. The Yukon Transboundary Agreement executed by the Gwich'in Tribal Council is also implicated, as the Tetlit Gwich'in of the Northwest Territories have Traditional Territory in the Peel Watershed. The Vuntut Gwitchin First Nation has not joined in this court action.

[18] Pursuant to s. 6(1) of the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, a Final Agreement or a transboundary agreement is a land claims agreement under s. 35 of the *Constitution Act*, *1982*. All rights assumed under land claims agreements are, by virtue of s. 35(3) of the *Constitution Act, 1982*, "treaty rights" within the meaning of s. 35(1). First Nations' rights held under treaty have constitutional protection: see Binnie J. in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, at para. 2.

[19] Additionally, no law enacted by the Government of Yukon is enforceable if it is inconsistent with a Final Agreement. Under s. 13(2) of the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 35:

> (2) In the event of a conflict or inconsistency between a final agreement or transboundary agreement that is in effect and any federal or territorial law, including this Act, the agreement prevails to the extent of the conflict or inconsistency.

C) The Land Use Planning Process

[20] The Final Agreements established new constitutional arrangements for Yukon, Canada and Yukon First Nations, including provisions for land use planning under Chapter 11. The provisions incorporated from the UFA provide for land use planning

commissions, that may be established jointly by the Government of Yukon and any affected Yukon First Nation, to develop land use plans for discrete regions of Yukon.

[21] Chapter 11 (“Land Use Planning”) of the Final Agreements sets out the objectives of land use planning, which include the following:

> 11.1.1.1 to encourage the development of a common Yukon land use planning process outside community boundaries;
>
> 11.1.1.2 to minimize actual or potential land use conflicts both within Settlement Land and Non-Settlement Land and between Settlement Land and Non-Settlement Land;
>
> …
>
> 11.1.1.6 to ensure that social, cultural, economic and environmental policies are applied to the management, protection and use of land, water and resources in an integrated and coordinated manner so as to ensure Sustainable Development.

[22] Under the heading Land Use Planning Process, s. 11.2.0 of the Final Agreements provides:

> 11.2.1 Any regional land use planning process in the Yukon shall:
>
> 11.2.1.1 Subject to 11.2.2, apply to both Settlement and Non-Settlement Land throughout the Yukon;
>
> 11.2.1.2 be linked to all other land and water planning and management processes established by Government and Yukon First Nations minimizing where practicable any overlap or redundancy between the land use planning process and those other processes;
>
> …

[23] Section 11.3.0 establishes a Yukon Land Use Planning Council, with Government and First Nation representation. The Council:

> 11.3.3 … shall make recommendations to Government and each affected Yukon First Nation on the following:
>
> 11.3.3.1 land use planning, including policies, goals and priorities, in the Yukon;
>
> 11.3.3.2 the identification of planning regions and priorities for the preparation of regional land use plans;
>
> 11.3.3.3 the general terms of reference, including timeframes, for each Regional Land Use Planning Commission;
>
> 11.3.3.4 the boundary of each planning region; and
>
> 11.3.3.5 such other matters as Government and each affected Yukon First Nation may agree.

[24] Regional Land Use Planning Commissions may be established to develop regional land use plans:

> 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.
>
> …
>
> 11.4.4 Each Regional Land Use Planning Commission shall prepare and recommend to Government and the affected Yukon First Nation a regional land use plan within a timeframe established by Government and each affected Yukon First Nation.

[25] Section 11.4.5 provides that in developing a regional land use plan, a Regional Land Use Planning Commission:

> 11.4.5.1 [W]ithin its approved budget, may engage and contract technical or special experts for assistance and may establish a secretariat to assist it in carrying out its functions under this chapter;
>
> 11.4.5.2 may provide precise terms of reference and detailed instructions necessary for identifying regional land use planning issues, for conducting data collection, for performing analyses, for the production of maps and other materials, and for preparing the draft and final land use plan documents;
>
> 11.4.5.3 shall ensure adequate opportunity for public participation;
>
> 11.4.5.4 shall recommend measures to minimize actual and potential land use conflicts throughout the planning region;
>
> 11.4.5.5 shall use the knowledge and traditional experience of Yukon Indian People, and the knowledge and experience of other residents of the planning region;
>
> 11.4.5.6 shall take into account oral forms of communication and traditional land management practices of Yukon Indian People;
>
> 11.4.5.7 shall promote the well-being of Yukon Indian People, other residents of the planning region, the communities, and the Yukon as a whole, while having regard to the interests of other Canadians;
>
> 11.4.5.8 shall take into account that the management of land, water and resources, including Fish, Wildlife and their habitats, is to be integrated;
>
> 11.4.5.9 shall promote Sustainable Development; and

> 11.4.5.10 may monitor the implementation of the approved regional land use plan, in order to monitor compliance with the plan and to assess the need for amendment of the plan.

D) Regional Land Use Plans

[26] Chapter 11 of the Final Agreements also sets out the approval process for regional land use plans developed by planning commissions.

[27] Specifically, s. 11.6.0 sets out the procedure for First Nation and Government approval of land use plans for Settlement and Non-Settlement Land. First Nations and the Government of Yukon must engage in intergovernmental consultation during the approval process, but the requirements differ in that the Government of Yukon is obliged to consult not only with affected Yukon First Nations but also any affected Yukon community about plans for Non-Settlement Land. Yukon First Nations need only consult with the Government of Yukon when Settlement Land is at issue. The dispute in the case at bar concerns the approval process for Non-Settlement Land contained within the Peel Watershed.

[28] Sections 11.6.1 through 11.6.3.2 set out the following procedure for Government approval of a regional land use plan on Non-Settlement Land:

> **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 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 community.

Sections 11.6.4 through 11.6.5.2 have the mirroring provisions applicable to the First Nations.

[29] If all of the requirements of the approval process are observed, and the land use plan is approved, s. 11.7.0 relating to implementation, applies:

> 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 land use plan approved by Government under 11.6.2 or 11.6.3.

[30] The equivalent limitation on the discretion of First Nations, once a plan is approved, is found at s. 11.7.2.

[31] “Consultation” is defined within the Final Agreements in Chapter 1:

> “Consult” or “Consultation” means to provide:

> (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
>
> (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
>
> (c) full and fair consideration by the party obliged to consult of any views presented.

[32] I will use a capital “C” in these Reasons when referring to Consultation as required by and defined in the Final Agreements.

[33] Because the planning process is incorporated into the Final Agreements, the regional land use planning commissions and their plans have a constitutional dimension. Once a recommended plan is developed, there is a requirement for initial Government Consultation with First Nations and the affected communities. The Government of Yukon must give written reasons for rejection of a commission’s recommended plan or, if the Government of Yukon proposes modifications, written reasons for the proposed modifications. The commission must then reconsider and provide its own written reasons along with the final recommended plan in response. There then follows the final Consultation with First Nations and affected communities before the plan is rejected or implemented, either intact or with modifications.

[34] After the approval process has been properly carried out, the plan governs land use in the region and places limits on the Government of Yukon and First Nations with respect to granting interests in or authorizing uses of the land. However, in s. 12.17.0, the Final Agreements set out the relationship of Land Use Planning to the Development Assessment Legislation now called the *Yukon Environmental and Socio-Economic*

Assessment Act, S.C. 2003, c. 7 ("*YESAA*"). Projects that do not conform with a regional land use plan may nevertheless proceed as follows:

> Regional land use plans
> 44. (1) If a regional land use plan is in effect in a planning region established under a final agreement, a designated office, the executive committee or a panel of the Board shall, when conducting an assessment of a project proposed in the planning region, request the planning commission established under the final agreement to advise it as to whether the project is in conformity with the regional land use plan, unless such a request has already been made in relation to the project.
>
> Non-conformity with plan
> (2) A designated office, the executive committee or a panel of the Board shall, if advised by the planning commission for a planning region, before or during its assessment of a project, that the project is not in conformity with the regional land use plan, consider the regional land use plan and invite the planning commission to make representations to it with respect to the project.
>
> Recommendation for project
> (3) Where a designated office, the executive committee or a panel of the Board recommends that a project referred to in subsection (2) be allowed to proceed, it shall, to the extent possible, recommend terms and conditions that will bring the project into conformity with the regional land use plan.

E) The Peel Watershed Regional Planning Commission

[35] In 2004, the Commission was established under Chapter 11 of the relevant Final Agreements to develop a regional land use plan for the Yukon portion of the Peel Watershed.

[36] General Terms of Reference were finalized for the Commission on March 19, 2004. They were developed through a process of consultation, and consensus was reached with the Yukon Land Use Planning Council, Yukon Government, Vuntut

Gwitchin First Nation, Tr'ondëk Hwëch'in Han Nation, Na-Cho Nyak Dun First Nation and the Gwich'in Tribal Council.

[37] The General Terms of Reference stated, among other things:

> It is recognized that the planning process can only succeed with the full participation of all the Agencies [defined as the First Nation and non-First Nation governments] based on a process involving consultation and consensus, and that there must be clear support for the plan by those involved in its development and affected by it.

[38] The mandate of the Commission was limited to land use planning for the Yukon. However, the *Yukon First Nations Land Claims Settlement Act*, the First Nation Final Agreements, and the Yukon Transboundary Agreement all make provision to protect the interests of the Tetlit Gwich'in who live in the Northwest Territories but have Traditional Territory in the Yukon.

[39] In accordance with s. 11.4.0 of the Yukon First Nation Final Agreements and the Yukon Transboundary Agreement, the Commission consisted of six members, including one Na-Cho Nyak Dun nominee, one Gwich'in Tribal Council nominee, a joint Government of Yukon and Vuntut Gwitchin nominee, a joint Government of Yukon and Tr'ondëk Hwëch'in nominee and two Government of Yukon nominees. The nominees are not delegates of the nominating body.

[40] Appendix A to the General Terms of Reference created a Technical Working Group which was mandated to provide coordinated technical information and support to the Commission. The Technical Working Group included members from Government of Yukon, the First Nations, the Commission and the Yukon Land Use Planning Council.

[41] Appendix B to the General Terms of Reference established a Senior Liaison Committee, with a senior representative from each of the three First Nations, the

Gwich'in Tribal Council and the Government of Yukon. The Senior Liaison Committee was formed to participate in the regional land use planning process for the Peel Watershed by providing input and advice to the Commission regarding relevant governmental issues, policies, programs and initiatives.

[42] In the Fall of 2005, the Commission issued its Statement of Intent:

> The goal of the Peel Watershed Regional Land Use Plan is to ensure wilderness characteristics, wildlife and their habitats, cultural resources, and waters are maintained over time while managing resource use. These uses include, but are not limited to, traditional use, trapping, recreation, outfitting, wilderness tourism, subsistence harvesting, and the exploration and development of non-renewable resources. Achieving this goal requires managing development at a pace and scale that maintains ecological integrity. The long-term objective is to return all lands to their natural state. (quoted from p. 1-4 of the Recommended Plan, footnotes omitted)

[43] The Statement of Intent was accepted by the parties without reservation. (Foreword p. IX, Final Recommended Plan)

[44] Between May and November 2005, the Peel Watershed Planning Commission held public consultations to gather "interests and issues" in the planning process. On December 22, 2005, the Commission published an Issues and Interests Report which had input from the parties, in this case including five different branches of the Government of Yukon, various departments of the affected First Nations, and also from businesses, non-governmental organizations and lobby groups.

[45] The Government of Yukon responded to the Interests and Issues Report on May 23, 2006. The Deputy Minister of Energy, Mines and Resources largely concurred with the "overall direction of the planning process" but noted its expectation for a "highly balanced plan that deals with the diversity of needs and issues in the region". The

Deputy Minister confirmed the Government of Yukon's support for sustainable development as the cornerstone of the regional planning model which, in their view, included the identification of areas suitable for resource development with required access corridor and management direction. He also specifically stated: "From our perspective it is inappropriate for the Commission to single out or favour one value or economic sector over another."

[46] A report entitled *Strategic Overview of Possible Mineral Development Scenarios – Phase 1 Peel River Watershed Planning Region,* prepared for Economic Development, Government of Yukon, dated September 2006 concluded:

> As the Peel River planning region is remote, exploration has been limited and the geology and minerals are not well understood. The area is known to contain significant mineral resources, particularly for iron, copper, lead, zinc and gold. For example, the Crest iron deposit is one of the largest in North America and the Bonnet Plume coal deposits contain 85% of Yukon's known coal reserves. The planning region also contains areas with potential for further discoveries in the future.
>
> There are four different kinds of mining operations that could be proposed in the area in the future: iron ore; coal; iron-oxide copper gold; and a lead-zinc mining operation. It is important to note that no mining will take place without several important conditions being met. These include: finding a suitable deposit; sufficient metal prices; appropriate technology for mining processing; infrastructure necessary to support the mining operation. In addition, environment and regulatory requirements would also have to be met.

[47] On April 1, 2008, the Commission arranged for a report entitled "Water Resources Assessment for the Peel Watershed".

[48] In September 2008, the Commission published a Resource Assessment Report. As with the Issues and Interests Report, this 90-page report had contributions from

Government of Yukon branches and agencies, as well as First Nations, Government of Canada, expert and individual input.

[49] In September 2008 the Commission designed and directed a 125-page Conservation Priorities Assessment Report.

[50] It is clear from the introductory text to the Recommended Plan and the Final Recommended Plan that various other reports and documents were also received and prepared in contemplation of the Recommended Plan and that extensive information-gathering was undertaken prior to the drafting of the Plans.

F) The Chapter 11 Approval Process for Land Use Plans

***The Recommended Plan* (s. 11.6.1)**

[51] The Commission submitted its Recommended Peel Watershed Regional Land Use Plan (the "Recommended Plan") on December 2, 2009 (revised in minor detail in January 2010).

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

[53] A Draft Plan, which was substantially different than the December 2, 2009 Recommended Plan, was not before the Court but is referred to in the Introduction to the Recommended Plan and in the Foreword to the Final Recommended Plan. The Commission stated that it attempted to create "an integrated land-use management plan" that employed the Yukon land-use planning framework. However, during the

review of the Draft Plan, virtually everyone challenged the conceptual framework. In its Final Recommended Plan, the Commission stated:

> 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 (pp. ix-x).

[54] In the Recommended Plan, the Commission speaks about shifting its focus after the poor reception of the Draft Plan (p. 1-6):

> … Instead, the Commission focused upon an "ecosystem-based and compatible land use" approach that considers allowable uses and enabling an ongoing process of reviewing for Plan conformity. Further impetus for its approach is drawn from the Commission's review of the UFA's definition of sustainable development:
>
> **Sustain ecosystem integrity first.** Conserving land, its living things, and its processes is the fundamental priority: lose this and all else crumbles. Ecosystem integrity involves

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

[55] The Commission has repeatedly stated that “Sustainable Development” is a cornerstone of the generated Plans. Indeed, this concept is one that is rooted in the Final Agreements themselves, with references in Chapter 11 and the following definition contained in Chapter 1:

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

[56] The major planning tool that the Commission used is the Landscape Management Unit. The Peel Watershed was divided up into a number of Landscape Management Units, each of which consists of a distinct area of land that typically has well-defined ecological boundaries (i.e. landforms, vegetation, and drainage) and also common characteristics, such as use in wildlife migration, land-use activity, and aquatic stewardship.

[57] The Recommended Plan proposed that approximately 80.6% of the planning region be given a high degree of protection as designated Special Management Areas

while the remainder of the planning region be designated as Integrated Management Areas.

[58] Management of Special Management Areas is provided for by Chapter 10 of the Final Agreements. Special Management Areas are defined in s. 10.2.0:

> "Special Management Area" means an area identified and established within a Traditional Territory pursuant to this chapter and may include:
>
> (a) national wildlife areas;
>
> (b) National Parks, territorial parks, or national park reserves, and extensions thereof, and national historic sites;
>
> (c) special Wildlife or Fish management areas;
>
> (d) migratory bird sanctuaries or a wildlife sanctuary;
>
> (e) Designated Heritage Sites;
>
> (f) watershed protection areas; and
>
> (g) such other areas as a Yukon First Nation and Government agree from time to time.

[59] As to the 80.6% of the region to be included in Special Management Areas, it was divided in this way:

- Heritage management	2.1%
- Fish and wildlife management	19.6%
- Watershed management	27.7%
- General environmental protection	31.2%
	80.6%

[60] The Commission stated in the Recommended Plan at 3.3.1 on p. 3-7:

> Management direction for land use in all SMAs is intended to reduce long-term resource-use conflict by limiting the surface footprint to a minimum acceptable level. Existing land-use tenures (i.e. mineral claims, oil and gas dispositions, and related activities) will be allowed to continue as non-conforming use, but will be subject to specific management conditions. Land-use management conditions may be similar in all SMAs regardless of management emphasis, but may differ for any given [Landscape Management Unit] based upon area-specific rationales.
>
> In all SMAs, new surface access (all-season or winter road, rail, etc.) is prohibited even where a mineral claim, coal license, or oil and gas disposition already exists. No new industrial (surface or subsurface) uses or tenures (including infrastructure, facilities and waste disposal operations) will be permitted in an SMA. A formal Plan amendment would be required to change any of these core Plan recommendations.

[61] The Integrated Management Areas, constituting 19.4% of the planning region, would be open to mineral and oil and gas development, pursuant to specific parameters set out in the Recommended Plan.

[62] The Commission set out the Landscape Management Units individually with a map and a description of what activities would be allowable, prohibited or not applicable for each unit. It gave a Rationale for Designation followed by Key Management Objectives, Management Conditions and a list of ecological resources, heritage, cultural and scientific resources and economic development. This part of the Plan is detailed and readable.

[63] The Commission commented on development of land in Integrated Management Areas at para. 3.3.2:

> This designation permits existing and future surface uses and subsurface resource extraction while limiting land-use conflicts and maintaining long-term ecosystem function.

> IMAs still have very high ecological and heritage/cultural values within sensitive biophysical settings. However, the Commission believes these zones can accommodate industrial resource development in a working landscape. The overarching "no winter or all-season road access" condition will remain for all IMAs. However, the Plan provides an amendment process if industrial development can meet the environmental and socio-economic goals of the Plan (see 3.5).

***Consultation on the Recommended Plan* (ss. 11.6.2, 11.6.4)**

[64] After receiving the Recommended Plan in December 2009, the three First Nations, the Gwich'in Tribal Council and Government of Yukon signed a "Joint Letter of Understanding on Peel Watershed Regional Land Use Planning Process" dated January 25, 2010 (the "2010 LOU").

[65] The 2010 LOU contains a number of objectives and principles, and I have highlighted three as follows:

1. A joint commitment to establish a coordinated process for responding to the Recommended Plan;

2. Acknowledgment of the parties' Consultation obligations, and an agreement to conduct joint community consultations.

3. Agreement to endeavour to achieve consensus on a coordinated response to the Recommended Plan, and to be guided by the objectives of the Final Agreements in crafting that response.

[66] In terms of the procedure, the 2010 LOU considered that the parties would each conduct an internal review, which would be followed up with a collaborative review with input from the Technical Working Group and the Senior Liaison Committee. This review was intended to inform the subsequent Consultation.

[67] The Consultation process contemplated initial community consultations in affected communities, followed by the "formal intergovernmental Consultation" process.

The intention was that a joint response would then be developed by the parties to the Recommended Plan. It was left open to the parties to submit individual responses on aspects of the plan for which there was no consensus of opinion.

[68] The Senior Liaison Committee was given responsibility for joint communications.

[69] It is clear from letters exchanged prior to the formal intergovernmental Consultation that there would be difficulty achieving a consensus position with respect to access to non-renewable resources.

***Responses to the Recommended Plan* (ss. 11.6.3, 11.6.5)**

[70] The joint response of all the parties, including the Government of Yukon, to the Recommended Plan is contained in a letter dated February 18, 2011 and authored by the Chair of the Senior Liaison Committee. The letter stated that the views presented were held in common and intended to provide guidance to the Commission as it considered input from the parties in developing the Final Recommended Plan. It stated:

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

[71] The February 18, 2011 letter from the Senior Liaison Committee then addresses further matters:

> Implementation and Role of the Parties
>
> a) The Recommended Plan proposes that the Commission remain active after the regional land use plan has been approved to review all requests for plan variances and amendments, and to determine project conformity with

the plan under the *Yukon Environmental And Socio-economic Assessment Act* (YESAA) assessments It is the collective responsibility of the Parties to determine how and when the plan should be reviewed, varied or amended. The Parties have an opportunity to develop a collaborative approach to plan implementation as demonstrated in the North Yukon regional planning process.

Notwithstanding 12.17.1 of the First Nation Final Agreements, it is our view that the Parties will determine whether a proposed project is in conformity with the approved Peel Watershed land use plan. The Yukon Land Use Planning Council may provide assistance in determining conformity, if agreed by the Parties. We believe these views accord with Chapter 11.2.0, and we encourage the Commission to develop a Final Recommended Plan that incorporates these views.

b) The Recommended Plan proposes that up to 19 subsequent plans may be required after the regional land use plan has been approved.

   While acknowledging that further planning will be required for specific areas, the Parties would prefer that the regional land use plan contain the key management guidance for the region. This will enable the Parties to effectively implement the regional plan, and simplify the management regime for land and resource managers and stakeholders who have responsibilities and interests within the region.

c) The Recommended Plan proposes frequent plan review, variance, and amendment.

   Recognizing that a regional land use plan requires periodic review, the Parties are seeking a land use plan that provides clear and consistent guidance over a longer term. We recognize that amendments or variances will be necessary over time, but feel that the plan should only change if there are substantial reasons for doing so. We encourage the Commission to reconsider its proposed approach of frequent plan variances and amendments.

Complexity and Usability of the Plan

(a) The recommended management regime is complex, with the region subdivided into 24 Land Management Units (LMUs), with significant similarities amongst the LMUs with regards to management intent.

To improve plan clarity and enable the Parties to effectively use the plan, we encourage a re-evaluation of the zones and associated management recommendations and ask the Commission to explore opportunities to consolidate some of the LMUs. Consolidating LMUs will assist in any subsequent planning exercises deemed necessary by the Parties.

(b) We believe the Recommended Plan is difficult to follow due to its level of detail and the organization of the content.

In order to ensure the Parties and public can effectively use the plan; we encourage the Commission to work towards a simplified and more streamlined document that focuses on providing clear guidance for land and resource management.

We encourage the Commission to consider these joint Party comments in your development of a Final Recommended Plan.

As a number of steps remain in your process of developing a Final Recommended Plan, and subsequent approval of a Final Land [u]se 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 period.

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.

[72] A joint First Nations response is also dated February 18, 2011. It encourages 100% protection of the region, with the exception of the Dempster Highway corridor.

[73] By letter dated February 21, 2011, Patrick Rouble, Minister of Energy, Mines and Resources wrote a four-page response on behalf of Government of Yukon proposing modifications to the Recommended Plan, which he grouped into themes and summarized as follows:

> 1. Re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan.
>
> 2. Develop options for access that reflect the varying conservation, tourism and resource values throughout the region.
>
> 3. Simplify the proposed land management regime by re-evaluating the number of zones, consolidating some of the land management units and removing the need for future additional sub-regional planning exercises.
>
> 4. Revise the plan to reflect that the Parties are responsible for implementing the plan on their land and will determine the need for plan review and amendment.
>
> 5. Generally, develop a clear, high level and streamlined document that focuses on providing long term guidance for land and resource management.
>
> We understand that the Parties' responses to the plan will require significant deliberation by the Commission in considering its work ahead. Modifying the plan will take time and resources, and we look forward to working with the Commission in developing a reasonable work plan, timeline, and associated budget for completion of a Final Plan. Our Technical Working Group (TWG) member should be contacted if the Commission wishes further elaboration on any part of the response or technical references therein.

[74] Minister Rouble attached a 16-page "Detailed Yukon Government Response to the Recommended Peel Watershed Plan" (the "Detailed Yukon Government

Response"). Some of the points made within that document are editorial suggestions, while others build on the five points summarized in his letter. The five points have assumed significant importance in this case, and will be referred to as "Yukon proposed modifications 1 through 5". It is agreed that Yukon proposed modifications 3, 4 and 5 largely parallel the recommendations made in the joint response authored by the Senior Liaison Committee.

[75] Minister Rouble elaborated on Yukon proposed modifications 1 and 2 as follows:

> Balance Conservation and Development Interests
>
> The Yukon government recognizes that the Peel watershed is a unique area that includes many areas of environmental and cultural significance as well as identified non-renewable resources. We are seeking a Final Recommended Plan ("the Final Plan") that recognizes, accommodates and balances society's interest in these different features of the region.
>
> Yukon government supports the internationally recognized concept of the "precautionary principle" and the objectives outlined in Chapter 11 of the First Nation Final Agreements. Based on Principle #15 of the *Rio Declaration* and the land use planning objectives, we feel that the Commission should consider recommending some cost-effective measures for managing land uses and preventing degradation in some parts of the Peel region. The planning region has a mix of values and resources. We believe that there is an ability to accommodate mixed uses that meet society's need, while erring on the side of caution on the basis of a determined level of risk.
>
> The plan proposed that a large portion of the region be designated as Special Management Areas. <u>While government believes there should be areas where development is excluded in the Peel, more work needs to be done by the Commission to identify and develop a rationale for these areas.</u>
>
> We request that the Commission re-examine the location, nature and potential extent of current and future conflicts between the values of conservation, non-consumptive

> resource use and resource development. During this review, Yukon's existing legislation, regulation, laws of General Application, government policies and the *Yukon Environmental and Socio-economic Assessment Act (YESAA)* and Water Board processes should be considered as they regulate development and are important tools in conserving land and mitigating risk.
>
> The Yukon government recognizes that managing surface access (winter and all-season roads) can be challenging but not impossible. We believe a ban on surface access is not a workable scenario in a region with existing land interests and future development potential. We would like to see a range of access options developed which consider the various conservation and resource values throughout the region and also take into account existing regulatory tools and best management practices which can be used to mitigate risk and limit other user's access. (emphasis added)

***Final Recommended Plan* (ss. 11.6.3.1, 11.6.5.1)**

[76] Pursuant to ss. 11.6.3.1 and 11.6.5.1, the Commission is required to reconsider the Recommended Plan based upon the parties' proposed modifications and written reasons and formulate the Final Recommended Plan with written reasons for both Government (s. 11.6.3.1) and the affected First Nations (s. 11.6.5.1).

[77] The Commission released the Final Recommended Plan on July 22, 2011: See attached Map B entitled Final Recommended Plan. Under the heading "Plan Revisions", the Commission responded to the joint response, the First Nations' responses and Yukon proposed modifications. This reads, in part (p. I, Foreword):

> The Final Recommended Plan contains minor revisions to all sections to improve clarity and organization, and factual or grammatical errors have been identified and resolved. Other revisions are substantial – most notably, the land use designation system has been revised and simplified, the number of landscape management units (LMUs) has been reduced and implementation concepts have been streamlined. Cumulative effects management concepts for

> the Integrated Management Area have also been re-introduced.
>
> While many substantive changes have been incorporated into this version of the Plan, the general management direction of the Recommended Plan has not been altered significantly. How the Commission addressed the Parties conflicting concepts of balance and opportunities for new surface access and resource development, and the rationale for its decisions, are addressed in the message from the Commission, included in the foreword of the Final Recommended Plan. The following table outlines substantive changes to the Recommended Plan. They are organized based on comments received from the Parties joint response (Senior Liaison Committee) to the Recommended Plan.

[78] The Table referred to also includes changes made in response to Yukon proposed modifications 3 through 5. The key changes to the Final Recommended Plan, apart from its streamlining and re-organization, were the creation of a new “Wilderness Area” designation with interim protected area status and a reduction in the number of Landscape Management Units, which would simplify future planning and amendment/variance processes.

[79] In response to Yukon proposed modifications 1 and 2, the Commission wrote as follows (at p. xi of the Foreword):

> The Yukon Government stated that it was providing its General Response per the process set out in UFA Section 11.6.3. It gave a broad critique of the Plan and requested a number of specific modifications. The Commission dealt with these specific requests in its Plan revision. The Yukon Government also addressed in a general way the amount of protected areas and provisions for managing access. Without specifying, the Yukon Government response urges the Commission to re-think and re-write the rationale for each SMA; revisit its assessment of resource conflicts between the values of conservation, non-consumptive resource use, and resource development; and reconsider its ban on surface access in much of the planning area.

> The Yukon Government's response stated in general terms what it wanted, but it did not discuss why it wanted these changes and where it felt they might be appropriate. It did not discuss locations of concerns, or what modifications it sought. The Commission noted these general desires and interpreted the thrust of the Yukon Government response to be the amount of land protected. For the Commission to adequately address this general critique, it would have to go "back to the drawing board" and return to a much earlier stage in the planning process, a step for which there was no provision.
>
> In preparation of this Final Recommended Plan, the Commission fully considered the Yukon Government response concerning the amount of land protected. After much deliberation, the Commission concluded that its rationale for protecting these areas was sound, in view of its determination to preserve society's future options and the outstanding wilderness and cultural values documented in these landscapes. The Commission also reconsidered its recommendations on surface access in view of industry's rejections of full restoration of access roads and of the impacts access roads create in the Yukon under its current regulatory regime. Our decision was that since surface access is typically a permanent development, the responsible choice in the Peel region is to preserve options by denying new surface access across much of the area until society is clear on this highly controversial matter. In our modified land use designation system, 80 percent of the region is termed "Conservation Area", where new surface access is not allowed. Fifty five percent of these lands are SMAs. The Commission provided for flexibility in future land use options by recommending that 45 percent of the land zoned as "Conservation Area" is given interim protection, to be reviewed periodically, as part of the formal Plan review process. These areas are termed "Wilderness Areas".

***Consultation on Final Recommended Plan* (ss. 11.6.3.2, 11.6.5.2)**

[80] Pursuant to s. 11.6.3.2, the Government of Yukon is again required to Consult with affected Yukon First Nations and any affected Yukon community before approving, rejecting or modifying the Final Recommended Plan as it pertains to Non-Settlement Land. Similarly, under s. 11.6.5.2, the affected First Nations shall consult with

Government before approving, rejecting or modifying the Plan with respect to Settlement Land.

[81] In anticipation of this step in the process, the three First Nations, the Gwich'in Tribal Council and the Government of Yukon entered into a second Joint Letter of Understanding dated January 20, 2011 (the "2011 LOU"), prior to the release of the Final Recommended Plan.

[82] The 2011 LOU contemplated the process for Consultation and decision on the Final Recommended Plan. This 2011 LOU acknowledged the various Consultation obligations and guiding principles in similar language to what was used in the 2010 LOU. The parties again agreed that they would conduct joint Consultations and provide a coordinated response, guided by the objectives of the Final Agreements.

[83] In a letter dated September 2, 2011, the Yukon Land Use Planning Council wrote to the Senior Liaison Committee about its review of the Final Recommended Plan. The Council concluded, among other things that:

> - The alterations the Commission made to the Recommended Plan were largely done *without a cohesive message from all the Parties or clear and specific direction regarding the nature of changes the Parties desired to ensure its approval and implementation.* Without these, the Commission relied on their best judgment as an independent body in putting forward their Final Plan;
>
> - The lack of a cohesive response from the Parties at the Recommended Plan stage indicates that there are still divergent opinions between the First Nations and the Yukon Government. First Nations have made their preferences and position clear; the Yukon Government has not. The net result is an impasse that put the Peel Commission in an untenable position. They believe their Final Recommended Plan honours both the letter and the spirit of the land

> claims agreements; (emphasis in italics in original, underlining mine)

[84] There was a period of several months following the issuance of the Final Recommended Plan on July 22, 2011, when there was not a great deal of correspondence between the three First Nations, the Gwich'in Tribal Council and the Government of Yukon. While counsel did not raise it, I take judicial notice of the fact that there was a territorial election on October 11, 2011, which did not change the overall leadership in the Government of Yukon but resulted in changes to the relevant ministries.

[85] In a letter dated December 2, 2011, Brad Cathers, the new Minister of Energy, Mines and Resources, reconfirmed the Government of Yukon's "commitment to working with the parties to develop a shared position on the plan and a final plan that all parties can support and approve".

[86] On February 14, 2012, Minister Cathers met with the three Chiefs and Gwich'in Tribal Council President to discuss the Government of Yukon's response to the Final Recommended Plan. That same day, the Government of Yukon issued a News Release as follows:

> The Government of Yukon has developed eight core principles that will be used to guide modifications and completion of the Peel Watershed Regional Land Use Plan, Premier Darrell Pasloski announced today.
>
> "The Yukon government continues to support an approach that balances access for industry and other users while establishing protection in key habitat areas in the Peel region," Pasloski said. "The principles will provide guidance for the timely completion of the remaining steps in this important land use planning process."

> Working in collaboration with the Peel Plan parties, Yukon government will use the principles to guide strategic modifications to the draft Peel Plan. Details on the proposed modifications will be included in the next round of public consultation on the plan, scheduled for this spring.
>
> "Yukon government's guiding principles support special protection for key areas and active management of the landscape rather than prohibitions to use and access," Environment Minister Currie Dixon said.
>
> The Government of Yukon principles are:
>
> 1. Special Protection for Key Areas
> 2. Manage Intensity of Use
> 3. Respect the First Nation Final Agreements
> 4. Respect the Importance of all Sectors of the Economy
> 5. Respect Private Interests
> 6. Active Management
> 7. Future Looking
> 8. Practical and Affordable
>
> (emphasis added)

[87] Chief Taylor, Chief Mervyn, Chief Kassi and President Nerysoo responded by a letter dated February 17, 2012, indicating their shared view that the Government of Yukon had overstepped in its response to the Final Recommended Plan. The leaders set out their view, for the first time, that the ability of the Government of Yukon to modify the Final Recommended Plan was limited to the proposed modifications submitted earlier in the process and considered by the Commission.

[88] On March 20, 2012, Minister Cathers (Energy, Mines and Resources) and Minister Dixon (Environment) responded to the letter of February 17, 2012. They stated that the Government of Yukon's view was that it had followed the planning process and had worked in good faith to keep First Nations informed about its expectations. They also wrote that "[a]s 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".

[89] On September 14, 2012, the Government of Yukon provided its Peel Watershed Regional Land Use Plan "update" to Senior Liaison Committee which included, among other things:

> 2c. Planning Issues
>
> - Key planning issues:
>
> - Ensure ecological integrity is maintained
>
> - Visual integrity of major river corridors and important viewscapes (activity corridors)
>
> - Manage and coordinate air traffic and camps associated with mineral exploration activity (manage use conflicts between mining, wilderness tourism/recreation users, and outfitters)
>
> - New surface access (new roads and trails, and their use)
>
> 2d. Expanded Toolkit
>
> - Assess potential levels of risk
>
> - Proposed land use designation system (LUDS)
> - Examine current regulations and processes
> - Develop new approaches that provide additional management tools (RUWA)
>
> - Apply expanded toolkit to achieve goals
>
> …
>
> - **Restricted Use Wilderness Area (RUWA)**
>
> - To protect values in Wilderness River Corridors, withdraw new surface and subsurface rights
> - Mandatory reporting of all Class 1 mineral exploration activities

- Low levels of allowable surface disturbance
- Higher standards for reclamation and security
- No public access; temporary private only
- Coordinating air traffic
- Others?

3. New Concepts

- Apply land use designations in various concepts

  - Apply land use designations to achieve goals based on identified values
  - Have generally maintained existing LMUs
  - If desired, many other options possible
  - For discussion only (emphasis already added)

[90] The "update" ended with four maps, Proposed Concept A, B, C and D.

[91] On October 15, 2012, the three Chiefs of the Yukon First Nations and the President of the Gwich'in Tribal Council wrote Ministers Cathers and Dixon objecting to the introduction of a new land use designation system and concepts as, in their view, it amounted to a "rejection of the constitutionally protected land use planning process" provided for in the Final Agreements.

[92] The Government of Yukon responded on October 19, 2012, stating:

> 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 Agreement 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.

[93] On October 23, 2012, the Government of Yukon issued a News Release on the commencement of its public consultation up to February 25, 2013, which included an invitation for Yukoners to "provide input on a suite of land use designation tools which could be applied in the Peel Watershed Region".

[94] On the same date, the three First Nations and the Gwich'in Tribal Council received a formal "Notice of Consultation", pursuant to s. 11.6.3.2, with regard to the Final Recommended Plan and Government of Yukon's response to that Plan. The Consultation period was indicated to run from October 23, 2012, to March 15, 2013.

[95] The public consultation, carried out by the Government of Yukon between October 23, 2012 and February 25, 2013, was supported by a 15-minute DVD, a 12-page "We want to hear from you" document and a 12-page media package. The latter documents were entitled "Consultation on the Peel Watershed Regional Land Use Plan".

[96] In an undated document on the Peel Consultation website (Document #43, p. 4/7) Frequently Asked Questions, the following questions were posed and answered:

> **What is the Government of Yukon's opinion on the Final Recommended Plan?**
>
> Overall, the Government of Yukon supports and accepts the goals and many of the recommendations presented in the Final Recommended Plan.
>
> However, we believe the proposed new land use designations better reflect our expectations for a balanced

> plan that addresses the diversity of needs and issues in the Peel Watershed Region.
>
> …
>
> **Do these new land use designations and concepts honour the work completed by the Peel Watershed Planning Commission?**
>
> The Government of Yukon sees its proposed ideas as building on the work completed by the Peel Watershed Planning Commission.
>
> The Government of Yukon supports and accepts the goals and many of the recommendations presented in the Final Recommended Plan.
>
> However, we believe the proposed new land use designations better reflect our expectations for a balanced plan that addresses the diversity of needs and issues in the Peel Watershed Region.

[97] On November 30, 2012, the three Yukon Chiefs and the Gwich'in Tribal Council President wrote Ministers Cathers and Dixon requesting the feedback received by the Government of Yukon in its Peel Watershed Regional Land Use Plan Consultations. This request was repeated on March 6 and March 27, 2013.

[98] Premier Pasloski responded by letter dated April 5, 2013, noting that the community and public consultations concluded on February 25, 2013, and comments received along with a summary document were available on the Peel Consultation website. Premier Pasloski agreed to an extension of the intergovernmental Consultation period beyond his proposed date of March 25, 2013. He also reiterated the Government of Yukon's position that its ability to approve, reject or modify the Recommended Plan was unfettered, and indicated that "[t]he Yukon Government is not prepared to accept,

without change, that part of the final recommended plan that applies to Non-Settlement Land".

[99] A 27-page report entitled "Peel Watershed Regional Land Use Plan Public Consultation 2012-2013 What We Heard Report" (the "What We Heard Report"), prepared by J.P. Flament Consulting Services (undated), summarized what was heard with the following headings:

> Major Perspectives of Respondents
>
> Perspective 1: The Peel Watershed is an irreplaceable global asset
>
> Perspective 2: The Final Peel Recommended Plan (FRP) is fair and balanced
>
> Perspective 3: The Yukon government is not following the rules
>
> Perspective 4: The Yukon government must balance development with protection

[100] The author concluded:

> There can be little doubt that Yukoners, Canadian and people from across the world are passionate about the future of the Peel Watershed. Overall 10,175 submissions were received over the course of the four months of public consultations and of those 2,781 originated in Yukon. And respondents were not limited to Canada or the United States, but represented virtually every corner of the globe, with submissions from individuals and organizations from North America, Europe, Asia and Australia.

[101] The Yukon Land Use Planning Council read the "What We Heard Report" and on April 7, 2013, commented as follows:

> …The "What We Heard" summary reinforces our concern that "courageous leadership" will be required to restore public confidence in, and credibility of, regional planning as a governance tool; trust in the process itself; and

> understanding of the role of the commissions in plan preparation. The consultation report clearly demonstrates a public perception that the Government of Yukon did not follow either the spirit or intent of the rules established in Chapter 11 of the Umbrella Final Agreement and hijacked the process. Whether that is true or not is largely irrelevant at this point. A conclusion needs to be reached on the Peel one way or another, and the Parties as a whole have to determine what it will be.

[102] The Yukon Land Use Planning Council expressed the belief the regional land use planning process was in trouble for the following stated concerns:

> Concern #1: The approval process did not follow key sections of the Letter of Understanding that the Parties agreed to in January of 2011.
>
> Concern #2: The development and release of the Plan Principles was done independent of any consultation with First Nations or input from the Yukon Land Use Planning Council .
>
> Concern #3: The proposed modifications were not based on consultation outcomes but cobbled together with little "supporting evidence as to their validity".
>
> Concern #4: It is desirable that the Land Designation System used across all Yukon Regional Plans should be relatively consistent in terms of definition and application. The approved North Yukon Regional Land Use Plan provided a guide to build upon.

[103] On June 6, 2013, the Government of Yukon prepared a slide show or power point presentation (Document #57) entitled "Government of Yukon Proposed Approach to the Final Recommended Peel Watershed Regional Land Use Plan, Government to Government Consultation as per Chapter 11.6.3.2 of the Affected First Nation Final Agreements". At pages 23 and 24, the Government of Yukon summarized its proposed approach as follows:

i) Designate the four main rivers (Hart, Wind, Bonnet Plume, and Snake) as a new class of park pursuant to the Parks and Lands Certainty Act that will focus on maintaining wilderness river values.

ii) Designate the North Richardson Mountains (LMU 12), the two adjacent areas to Tombstone (LMU 2 and 4) and the confluence of the four rivers and the downstream Peel main stem, including the Turner and Chappie Wetlands and the Snake headwaters (LMU 11, 14 and part of 9) as protected areas.

iii) Use anticipated tools to implement active management in areas designated Restricted Use Wilderness Area. This includes – permitting of Class 1 activity, new resource roads regulations, and off road regulations.

iv) Expand the width of the Wind River Corridor to better reflect the natural viewscape and wilderness tourism use of area.

v) Work with First Nations to put in place appropriate protection on First Nation settlement land if requested.

vi) Recognize existing mineral rights and access to those rights in all areas of the Peel.

vii) Establish a Peel Watershed Implementation Committee with First Nation governments.

[104] On October 1, 2013, the Government of Yukon wrote the three affected First Nations and the Gwich'in Tribal Council to provide a summary of the Consultations to date from July 2011, Yukon proposed Plan modifications and the timeframe for conclusion of the Consultations on the final recommended Peel Watershed Regional Land Use Plan.

[105] The Government's letter continued:

> Yukon government's proposed modifications have been incorporated into the plan and two copies are 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 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 based on the major river corridors and their viewscapes, addressing issues related to the environment, wilderness tourism and recreation;

- Site specific interests – minor changes to some Land Management Unit boundaries to better accommodate site specific interests related to industry and conservation values;
- Increased management tools for industrial activity – proposed changes to the Quartz Mining Act and the Territorial Lands (Yukon) Act will allow for better management of competing activities in wilderness areas to minimize land use impacts and provide better tools to identify and protect environmental and cultural values.

Before making a final decision on the Plan, Yukon wishes to conclude the consultation by hearing from affected 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. This 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.

[106] In addition to changing the land use designation system, the Government of Yukon stated in the attached Final Recommended Land Use Plan - Proposed Modifications - Section Notes:

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

[107] There are also specific changes to Section 4 – General Management Direction and Section 5 – Land Use Designation and Landscape Management Units. There were no changes to Section 6 – Plan Implementation and Revision.

[108] In a letter dated October 21, 2013, the three affected First Nations and the Gwich'in Tribal Council again wrote Ministers Kent (Energy, Mines and Resources) and Dixon (Environment) voicing their objections to the planning process, and stating that

the proposals “amount to a new Plan and, as such, violate the terms of [the] constitutionally-protected Final Agreements”.

[109] On January 20, 2014, the Government of Yukon informed the three affected First Nations and the Gwich’in Tribal Council that the government had decided to approve a regional land use plan applying on Non-Settlement Land in the Peel Watershed planning region i.e. the Government approved plan. (see attached Map C)

[110] A News Release dated January 21, 2014, made the Government approved plan public and stated:

> “This land use plan creates vast new Protected Areas that total 19,800 square kilometres,” Minister of Environment Currie Dixon said. “This will increase the amount of land protected in Yukon to almost 17 per cent of its land base, greater than any other province or territory in Canada.”
>
> “By creating protected areas along the corridors of the Peel, Hart, Wind, Bonnet Plume and Snake Rivers, this land use plan responds to the wilderness tourism values in the region,” Minister of Tourism and Culture Mike Nixon said. “The creation of new Wild River Parks means the stunning views and wilderness experience of the rivers will be protected for Yukoners and visitors alike.”
>
> Protected Areas make up 29 per cent of the region, while the remaining public land in the region is divided between 44 per cent of the Restricted Use Wilderness Areas, which allow for low levels of carefully managed land use activity, and 27 per cent of Integrated Management Areas, where most land use activities may occur. In the latter two types of areas, mineral staking and proposed commercial activities will be subject to enhanced regulatory and permit processes.
>
> As of tomorrow, the Yukon government has replaced the temporary mineral claim staking withdrawal with a permanent staking withdrawal in the Protected Areas, as outlined in the land use plan. Staking is now permitted in 71 per cent of the Peel Watershed region.

FINDINGS OF FACT

[111] I find the following facts:

1. The Government of Yukon, the First Nations of Na-Cho Nyak Dun, Vuntut Gwitchin, Tr'ondëk Hwëch'in and the Gwich'in Tribal Council entered into the Peel Watershed land use planning process with an understanding that it would be a collaborative process, guided by the objectives in the First Nation Final Agreements and compliant with the process set out in those Agreements.
2. It was clear from the reception of the Draft Plan in April 2009 that any plan generated by the Commission would be unable to satisfy all interests and resource users in the Peel Watershed region. The Recommended Plan was based on the Commission's conclusion that the best plan for the present would "preserve society's options" in the future. The Commission noted that once a decision to develop an area was made, "we cannot return to a pristine ecosystem and landscape".
3. In the 2010 LOU signed after the receipt of the Recommended Plan, the parties established a coordinated process to conduct Consultations and present a joint response to the Recommended Plan. This process was followed. The First Nations, Gwich'in Tribal Council and the Government of Yukon participated in the joint response authored by the Senior Liaison Committee and also submitted individual responses reflecting their differing views on aspects of the Plan.

4. In the individual responses, the First Nations indicated their view that the Peel Watershed should be 100% protected.

5. The Government of Yukon proposed five modifications in its individual response. Yukon proposed modifications 3 through 5 largely mirrored the comments made by the Senior Liaison Committee in its February 18, 2011 letter. These were addressed to the satisfaction of the parties as reflected in Table at pages (ii) and (iii) of the Foreword to the Final Recommended Plan.

6. Yukon proposed modifications 1 and 2 are at issue in this case:

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

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

7. Yukon proposed modifications 1 and 2 were framed as a general criticism of the Recommended Plan, without the identification of specific Landscape Management Units or planning measures. While some elaboration was provided in Minister Rouble's letter, the Commission found that it could not address Yukon proposed modifications 1 and 2 without returning to an earlier stage in the planning process. However, at least partly in response to Yukon proposed modifications 1 and 2, the Final Recommended Plan changed the designation of the overall 80% protected area from "SMA" to "Conservation Area", of which 55% was Special Management Area, as that term is understood by the Final Agreements. The other 45% was

termed “Wilderness Area” and given interim protection subject to periodic review as part of the formal Plan review process.

8. The 2011 LOU was agreed to by all parties and set out the same coordinated process to conduct consultations and present a joint response to the Final Recommended Plan as the 2010 LOU did for the Recommended Plan. This process was not followed.

9. After the release of the Final Recommended Plan on July 22, 2011, the Government of Yukon announced on February 14, 2012, that it had developed eight core principles to guide modifications and completion of the Peel Watershed Regional Land Use Plan. These principles were not in the Final Recommended Plan nor were they included in any correspondence about the Recommended Plan, including the February 21, 2011 letter containing the Yukon proposed modifications.

10. On February 17, 2012, the three affected First Nations and Gwich’in Tribal Council advised the Government of Yukon that, in their view, the authority to “approve, reject or modify” the Final Recommended Plan was limited to the “proposed modifications” that it advanced in the written reasons required under s. 11.6.3, and that any proposal of further modifications would undermine the Chapter 11 process. This has been their position since that time and was presented at this trial.

11. On September 14, 2012, the Government of Yukon gave a presentation to the Senior Liaison Committee, in which it expanded on its modifications by introducing an “Expanded Toolkit” with new land use designations. The

Government of Yukon had also shifted the balance of protection so that roughly 29% of the Non-Settlement Land in the Peel Watershed would be preserved as wilderness while 71% would be open to mineral exploration and/or mine development, subject to existing or enhanced regulatory regimes.

12. The modifications advanced by the Government of Yukon were not part of its proposed modifications to the Recommended Plan, and the Peel Watershed Planning Commission did not have an opportunity to address the new concepts before the release of its Final Recommended Plan.

13. The Government of Yukon put the “toolkit” and the new concepts forward during its Consultations on the Final Recommended Plan under s. 11.6.3.2 of the Final Agreements, effectively changing the focus of the Consultations from the Final Recommended Plan to the Government’s modified Plan.

14. On June 6, 2013, the Government of Yukon began government-to-government Consultation with the affected First Nations. Contrary to the terms of the 2011 LOU, the First Nations had not been involved in the Government of Yukon’s community consultations. As with the community consultations, the focus of the intergovernmental consultations was the Government’s modified Plan.

15. In subsequent correspondence between Government of Yukon and First Nations, the First Nations took the position that the consultations were outside what was contemplated by the Final Agreement process, as the

"proposed modifications" amounted to a new Plan rather than consultation on the Final Recommended Plan. Consultation with Tr'ondëk Hwëch'in and Na-Cho Nyak Dun was brought to an end without any discussion about the substantive points in the plan. Consultation with Gwich'in Tribal Council ended after a face-to-face meeting on January 14, 2014. Consultation with the Vuntut Gwitchin ended after some adjustments were made to the Landscape Management Units in that First Nation's Traditional Territory.

16. On January 21, 2014, the Government of Yukon announced its Peel Watershed Regional Land Use Plan on Non-Settlement Land (the "Government approved plan"). The Government approved plan is significantly different than the Final Recommended Plan created by the Commission, in that it both changed the land designation system and shifted the balance of protection dramatically. Under the Government approved plan, 71% of the Peel Watershed is open for mineral exploration with 29% protected compared to 80% protected and 20% open for mineral exploration under the Final Recommended Plan.

17. The Government approved plan was not reviewed by the Commission.

POSITIONS OF THE PARTIES

[112] The First Nations and the Government of Yukon have widely divergent views on the interpretation to be placed upon s. 11.6.3.2 and the words "approve, reject or modify".

[113] Counsel for the plaintiffs submits, as it did in correspondence with the Government of Yukon, that s. 11.6.3.2 must be interpreted to confine the Government of Yukon to addressing only the “proposed modifications” put forward previously under s. 11.6.3. Counsel submits that this purposive interpretation is required since, as noted in *Reference re Senate Reform*, 2014 SCC 32, at para. 26, that “the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding and application of the text.” Thus, the plaintiffs say that while the government can choose to modify the Final Recommended Plan under s. 11.6.3.2, it cannot ignore the previous steps of the process and make modifications that were not proposed and reviewed under s. 11.6.3.1. The plaintiffs further submit that Yukon proposed modifications 1 and 2 were not valid and therefore not permissible modifications at either s. 11.6.3 or s. 11.6.3.2, based on the fact that they were too vague to address as set out by the Commission and Yukon Land Use Planning Council.

[114] In summary, the plaintiffs submit that the Government of Yukon has gone off on a “frolic of its own” and essentially replaced the Final Recommended Plan with a new plan, through a process that is not contemplated in s. 11.6.0.

[115] The Government of Yukon begins its interpretation with the premise that a plain reading of s. 11.6.3.2 permits the Government to retain decision-making power over its Non-Settlement Land and empowers it to make the final decision with respect to what regional land use plan applies to Non-Settlement Land. Consistent with this interpretation, the First Nations have the same decision-making authority with respect to Settlement Land. The Government of Yukon relies on s. 12 of the *Interpretation Act*, R.S.Y. 2002, c. 125, which requires such a fair, large and liberal interpretation to attain

the object of s. 11.6.0. Ultimately, the Government of Yukon submits that the Final Recommended Plain requires its approval. This is buttressed by the wording of s. 11.7.1 entitled 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.

[116] In other words, there can be no implementation of a regional land use plan without the Government of Yukon's approval. Counsel for the Government of Yukon submits its position concisely:

> The complexity with which the Plaintiffs have attempted to clothe these straightforward provisions masks a simple reality – on Non-Settlement Land the Government has the final word. The fact that on a plain reading of Article 11.6.3.2 the Government can modify the Final Recommended Plan, irrespective of what position the Government took on the Recommended Plan, demonstrates the simplicity of this case.

[117] Thus, the Government of Yukon submits that s. 11.6.3.2 cannot be ignored or read down in the guise of a large and liberal interpretation. It submits that the Government of Yukon has the authority to approve, reject or modify the Final Recommended Plan of the Commission on Non-Settlement Land without any restriction imposed by the process.

[118] As an alternative submission, the Government of Yukon says that the modifications made to the Final Recommended Plan before approval were Yukon's attempt to achieve balance after the Commission failed to do so in its Final Recommended Plan. On this submission, the Government of Yukon states that its modifications to the Final Recommended Plan are consistent with its proposed

modifications to the Recommended Plan, in that they are derived from Yukon proposed modifications 1 and 2. The Government of Yukon submits the Commission erred in not addressing Yukon proposed modifications 1 and 2. It says the Commission had the ability to address the Yukon's concerns about balance and access but failed to do so.

[119] In my view, the proper interpretation of s. 11.6.0 requires a consideration of the principles governing the interpretation of Yukon First Nation Final Agreements, which in turn requires a consideration of the law surrounding modern land claims agreements and the honour of the Crown.

INTERPRETATION OF LAND CLAIMS AGREEMENTS

[120] In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, Binnie J. for the Supreme Court of Canada observed, at para. 2, that the Umbrella Final Agreement followed twenty years of negotiations between Canada, Yukon First Nations and Government of Yukon, and was "a monumental achievement". He added that the eleven treaties or Final Agreements entered into with specific First Nations fall within the protection of s. 35 of the *Constitution Act, 1982*. The *Little Salmon/Carmacks* case involved the Yukon's duty to consult a First Nation before the disposition of a small parcel of land in the Traditional Territory of Little Salmon/Carmacks First Nation.

[121] Section 35 of the *Constitution Act, 1982* reads:

> Recognition of existing aboriginal and treaty rights
>
> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> …

> Land claims agreements
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

[122] Binnie J. elaborated on the “grand purpose of s. 35” at para. 10 of *Little Salmon/Carmacks*:

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[123] He then set out the interpretive principles for modern treaties, which result from lengthy negotiations between well-resourced and sophisticated parties:

> 12 …Modern comprehensive land claim agreements, on the other hand, starting perhaps with the James Bay and Northern Québec Agreement (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of ad hoc remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a

> timely way. To the extent the Yukon territorial government argues that the Yukon treaties represent a new departure and not just an elaboration of the status quo, I think it is correct. However, as the trial judge Veale J. aptly remarked, the new departure represents but a step -- albeit a very important step -- in the long journey of reconciliation (para. 69).

[124] At para. 33, Binnie J. commented on the significance of the constitutional entrenchment of land claims agreements:

> The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance. This duality is particularly striking in the Yukon, where about 25 percent of the population identify themselves as Aboriginal. The territorial government, elected in part by Aboriginal people, represents Aboriginal people as much as it does non-Aboriginal people, even though Aboriginal culture and tradition are and will remain distinctive.

[125] The *Little Salmon/Carmacks* decision also provided an analytical framework for the interpretation of the Final Agreements of Yukon First Nations:

> 127 The analysis of the treaty that must be conducted in this case has three steps. To begin, it will be necessary to review the general framework of the treaty and highlight its key concepts. The next step will be to identify the substantive treaty rights that are in issue here, namely, on the one hand, the Crown's right the exercise of which raises the issue of consultation and, on the other hand, the right or rights of the Aboriginal party, which could be limited by the exercise of the Crown's right. Finally, and this is the determining factor, it will be necessary to discuss the formal rights and duties that result from the consultation process provided for in the treaty.

[126] The *Little Salmon/Carmacks* decision recognizes in para. 36 that First Nations surrendered all undefined Aboriginal rights, title, and interests in their Traditional Territories in exchange for defined rights and interests which include, amongst others, special management areas (Chapter 10), rights to harvest fish and wildlife (Chapter 16), rights to harvest forest resources (Chapter 17), rights to involvement in land use planning (Chapter 11) and development assessment (Chapter 12).The concept of Traditional Territory is important to understanding the First Nation Final Agreements. It is defined as “the geographic area within the Yukon identified as that First Nation’s Traditional Territory”. It consists of the large area that the First Nation traditionally used before colonization, and it is broken down into Settlement and Non-Settlement land within the Final Agreements.

[127] In para. 132 of *Little Salmon/Carmacks*, Binnie J. explains the distinction between Settlement Land and Non-Settlement Land. In that case, Mr. Paulsen was applying for the transfer of a piece of land on Non-Settlement Land where the treaty did not specifically provide for Consultation. The Court found there was nonetheless a duty to consult, as the common law or constitutional duty applies in a modern treaty context and exists alongside any consultation obligations set out within the treaty itself. In so finding, the Court discussed the significance of Traditional Territory at para. 132:

> 132 … Another concept used in the Umbrella Agreement is that of "traditional territory", which transcends the distinction between settlement land and non-settlement land (ch. 1 and Division 2.9.0). This concept of "traditional territory" is relevant not only to the possibility of overlapping claims of various Yukon First Nations, but also to the extension of claims beyond the limits of Yukon and to the negotiation of transboundary agreements (Division 2.9.0). As we will see, it is also central to the fish and wildlife co-management system established in Chapter 16 of the Final Agreement. The land

> that was in question in the decision of the Director of Agriculture dated October 18, 2004 in respect of Mr. Paulsen's application is located within the traditional territory of the Little Salmon/Carmacks First Nation, and more specifically in the northern part of that territory, in a portion that overlaps with the traditional territory of the Selkirk First Nation.

[128] With respect to the rights of First Nations to their Traditional Territory, Binnie J. described the treaties as an “orthodox exchange of rights” as follows:

> 146 In short, in providing in s. 2.2.4 that, subject to certain restrictions, "Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them", the parties could only have had an orthodox exchange of rights in mind...

[129] The land use planning process, as it applies to both Settlement and Non-Settlement Land, must be interpreted in the context of an exchange of rights, including the rights of First Nations within their Traditional Territory.

[130] The argument of the Government of Yukon in *Little Salmon/Carmacks* stressed the principle that the First Nation Final Agreements must provide certainty. Binnie J. addressed that argument directly:

> 133 The appellants' argument is based entirely on the principle that the agreement provides certainty. More precisely, it is based on an interpretation according to which that principle is indistinguishable from the principle of the "entire agreement". As a result, they have detached a key general provision of the Final Agreement from its context and interpreted it in a way that I do not find convincing. The "entire agreement clause" (s. 2.2.15), the actual source of which is the Umbrella Agreement and on which the appellants rely, provides that "Settlement Agreements shall be the entire agreement between the parties thereto and [that] there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them". This clause is consistent with the

> "out-of-court settlement" aspect of comprehensive land claims agreements. But it is not the only one, which means that such clauses must be considered in the broader context of the Final Agreement, and in particular of the provisions respecting legal certainty, which are set out under the heading "Certainty" (Division 2.5.0).

[131] The *Little Salmon/Carmacks* case elaborated on the contextual interpretation approach in para. 138. The following are some of the interpretive provisions contained within the Final Agreements themselves:

> …
>
> 2.6.3 There shall not be any presumption that doubtful expressions in a Settlement Agreement be resolved in favour of any party to a Settlement Agreement or any beneficiary of a Settlement Agreement.
>
> ...
>
> 2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.
>
> 2.6.6 Settlement Agreements shall be interpreted according to the *Interpretation Act*, R.S.C. 1985, c. I-21, with such modifications as the circumstances require.
>
> 2.6.7 Objectives in Settlement Agreements are statements of the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.
>
> …

[132] The Court in *Little Salmon/Carmacks* addressed these as follows:

> These interpretive provisions establish, inter alia, a principle of equality between the parties (s. 2.6.3) and a principle of contextual interpretation based on the general scheme of the provisions, divisions and chapters and of the treaty as a whole in accordance with its systematic nature (s. 2.6.1). The latter principle is confirmed by the rule that in the event

> of ambiguity, the provisions of the treaty are to be interpreted in light of the objectives stated at the beginning of certain chapters of the treaty (s. 2.6.7). The systematic nature of the treaty is also confirmed by the rule that when defined words and phrases are used, they have the meanings assigned to them in the definitions (s. 2.6.8). In other cases, the rules set out in the federal *Interpretation Act* apply (s. 2.6.6). This, then, is the framework for interpretation agreed on by the parties to the treaty. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

[133] *Little Salmon/Carmacks* makes it clear that the honour of the Crown applies in the implementation of modern treaties. The application of this principle to treaties generally was earlier described in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73:

> 17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting Van der Peet, supra, at para. 31.
>
> …
>
> 19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41)…

[134] In the recent case of *Manitoba Métis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14, Chief Justice McLachlin further elaborated on the duty that flows from the honour of the Crown:

> 74 Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.
>
> 75 By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.
>
> 76 The first branch, purposive interpretation of the obligation, has long been recognized as flowing from the honour of the Crown. In the constitutional context, this Court has recognized that the honour of the Crown demands that s. 35(1) be interpreted in a generous manner, consistent with its intended purpose. Thus, in *Haida Nation*, it was held that, unless the recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982* extended to yet unproven rights to land, s. 35 could not fulfill its purpose of honourable reconciliation: para. 27. The Court wrote, at para. 33, "When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable." A purposive approach to interpretation informed by the honour of the Crown applies no less to treaty obligations. For example, in *Marshall*, Binnie J. rejected a proposed treaty interpretation on the grounds that it was not "consistent with the honour and integrity of the Crown ... . The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown": para. 52.
>
> 77 This jurisprudence illustrates that an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. Thus, the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation.

[135] The *Manitoba Métis* case also confirmed the statement of Binnie J. in *Little Salmon/Carmacks*, at para. 42, that the honour of the Crown has the status of a constitutional principle.

[136] In a case where the allegation is that the honour of the Crown or another constitutional obligation of government was breached, the standard of review is correctness. This was set out in *Little Salmon/Carmacks* at para. 48, as follows:

> In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

[137] In the context of the case at bar, the conduct of the Government of Yukon is similarly reviewable on a standard of correctness. The Government of Yukon is required to act honourably and respect its treaty obligations. If it has not respected the legal and constitutional limits that govern in this context, that is an error in law. While there is an issue with respect to the adequacy of consultation in the late stages in this planning process, the overriding issue is whether the Government of Yukon acted honourably and interpreted its constitutional obligations under the Final Agreements broadly and purposively rather than narrowly, divorcing the words of the Final Agreements from their purpose.

PRINCIPLES OF INTERPRETATION FOR CHAPTER 11 LAND USE PLANS

[138] While the foregoing sets out the general principles applicable to land claims agreements, there is little precedent for interpreting s. 11.6.0, which is at issue here. Section 11.6.0 has three dimensions: the Commission process, the defined duty to Consult and the interpretation of "approve, reject or propose modifications" in ss. 11.6.2 and 11.6.3 and "approve, reject or modify" in s. 11.6.3.2.

[139] I repeat the applicable sections of s. 11.6.0 to be interpreted, because in my view, the legitimacy of the Government of Yukon's modifications at the final stage depend largely on the overall process that is contemplated within s. 11.6.0:

> **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 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.

[140] The Commission met its obligation in s. 11.6.1 to forward a Recommended Plan to the affected First Nations and the Government of Yukon. That document was a substantial and comprehensive report based on extensive research and hearings over a period of approximately five years. In generating the Recommended Plan, the Commission worked within the framework of the unanimously agreed-on General Terms of Reference, utilized a consultative and consensus-driven approach, and took sustainable development as its cornerstone principle, as it was required to do by the Final Agreements themselves.

[141] On receiving the Recommended Plan and after conducting the necessary consultations, the Government of Yukon chose to "propose modifications" to the Plan rather than approve or reject it. That was an important choice in my view because it indicated a significant degree of approval of the Recommended Plan.

[142] A relevant definition of "modification" is found in *The New Shorter Oxford English Dictionary*, Claredon Press: Oxford (1993):

> The action or an act of making changes to something without altering its essential nature or character; partial alteration.

[143] The Government of Yukon also acknowledged in its individual response to the Recommended Plan that overall it supported and accepted the goals and many of the recommendations presented. It said the same thing on the Peel Consultation website as the final Consultation was unfolding.

[144] Following the receipt of the proposed modifications of the parties, the Commission reconsidered the Recommended Plan as required under s. 11.6.3.1. The result was the Final Recommended Plan, which the Government of Yukon was required to Consult on with any affected Yukon First Nation and any affected Yukon community and "approve, reject or modify" that part of the Final Recommended Plan applying to Non-Settlement Land under s. 11.6.3.2. As indicated, the interpretation of this provision is at the heart of this dispute.

Large, liberal and contextual interpretation of s. 11.6.3.2

[145] I have previously set out the words of Chief Justice McLachlin in *Haida Nation* and *Manitoba Métis* as well as those of Binnie J. in *Little Salmon/Carmacks* which stress the importance of interpreting land claims agreements in a manner that furthers the objective of reconciliation. Treaties are as much about building relationships as they are about the settlement of past grievances. They are to be interpreted in a manner that upholds the honour of the Crown. Both parties agree that they must be given a large and liberal interpretation consistent with the objectives of the treaty. But to be consistent with the *Manitoba Métis* judgment, the interpretation must also be in a generous manner consistent with the intended purpose of the Final Agreements to further reconciliation and give meaning and substance to the collaborative and consultative nature of the s. 11.6.0 land use planning process.

[146] As Binnie J. stated in para. 9 of *Little Salmon/Carmacks*, the First Nations surrendered their rights to almost 484,000 square kilometres in exchange for defined treaty rights which include participation in the management of public resources, not just on Settlement Land, but throughout their Traditional Territories.

[147] Professor Hogg stated the following about modern treaties in “Canadian Constitutional Law: Carswell, Vol. 1, pp. 28-35:

> …These land claims agreements reserve large areas of land (settlement land) to the aboriginal signatories as well as considerable sums of money in return for the surrender of aboriginal rights over non-settlement land. As well, however, the agreements constitute sophisticated codes with respect to such matters as development, land use planning, water management, fish and wildlife harvesting, forestry and mining. These codes assure a continuing role for the aboriginal people in the management of the resources of the entire region covered by the agreement, not just their own settlement land.

[148] This passage sets the stage for understanding the different interpretive approaches taken by the First Nations and the Government of Yukon. The First Nations understand the Final Agreements to give them certain rights in their Traditional Territories in exchange for the release of their claim to it. The Government of Yukon sees the Agreements, while requiring Consultation with affected First Nations and Yukon communities, as providing certainty to their right to have the final say in land use planning on Non-Settlement Land.

[149] In my view, the essence of treaty interpretation is set out in the previously quoted statement in the *Little Salmon/Carmacks* case at para. 138:

> These interpretive provisions establish, *inter alia*, a principle of equality between the parties (s. 2.6.3) and a principle of contextual interpretation based on the general scheme of the provisions, divisions and chapters and of the treaty as a whole in accordance with its systematic nature (2.6.1)…

[150] Or, as stated in the *Manitoba Métis* case, an honourable interpretation of a constitutional obligation cannot be a legalistic one that divorces the words from their purpose.

[151] The Objectives of the Land Use Planning Chapter (11.1.1) include encouraging the development of a common Yukon land use planning process, minimizing actual or potential land use conflicts and ensuring Sustainable Development.

[152] Under s. 11.2.0 any regional land use planning process in the Yukon shall among other things, apply to both Settlement and Non-Settlement Land throughout the Yukon.

[153] Under s. 11.4.5, a Regional Land Use Planning Commission shall, among other things, take into account that the management of land, water and resources is to be integrated and shall promote Sustainable Development. Sustainable Development is defined in Chapter 1 of the Final Agreements as “beneficial socio-economic change that does not undermine the ecological and social systems upon which communities and societies are dependent”.

[154] The purpose of Chapter 11 is to encourage the development of a common land use planning process that applies to both Settlement and Non-Settlement Land in the Traditional Territories of the First Nations. That is not to say that the Government of Yukon has to accept a Recommended or Final Recommended Plan as it is presented, but it must respect the process that is set out in s. 11.6.0. The Land Use Planning chapter contemplates a collaborative and consultative approach to developing land use plans throughout the Yukon.

[155] Section 11.6.0 sets out an iterative process by which a land use plan is developed by an independent and objective Commission through a consultative and collaborative process.

[156] The plaintiffs provided a short-hand six-step process that captures the role of the Government of Yukon at the various stages of s. 11.6.0. Counsel for the Government of

Yukon does not take issue with the way the six-step process has been framed. It is as follows, with minor adjustments:

1. At Step 1, the Commission forwards its Recommended Plan to the Government of Yukon. (11.6.1)

2. At Step 2, the Government of Yukon must Consult with any affected Yukon First Nation and any affected Yukon community before approving, rejecting or proposing modifications to the Plan. (11.6.2)

3. At Step 3, the Government of Yukon, if it rejects or proposes modifications to (but not if it accepts) the Recommended Plan, must provide written reasons to the Commission for rejection or modification. (11.6.3)

4. At Step 4, the Commission is to reconsider the Recommended Plan and make a “final recommendation” to the Government of Yukon with written reasons. This is the Final Recommended Plan. (11.6.3.1)

5. At Step 5, the Government of Yukon, before rejection, modification or approval, of the Commission’s “final recommendation”, must Consult with any affected Yukon First Nation and any affected community. (11.6.3.2)

6. At Step 6 the Government of Yukon may approve, reject or modify the Final Recommended Plan as it applies to Non-Settlement Land.

[157] The 2010 and 2011 LOUs set out additional obligations for the parties in terms of collaboration and communication.

[158] The six-step process requires Consultation in each of the Recommended and Final Recommended Plan processes. The Recommended Plan disseminated in Step 1 was nearly five years in the making and involved significant consultation with First Nations, affected communities, interest groups, and government departments and agencies.

[159] Step 2 requires Government to Consult with both First Nations and any affected Yukon community. Consultation, as defined in the Final Agreements, consists of a three-stage process which begins with the Government of Yukon giving notice to a Yukon First Nation “in sufficient form and detail to allow the Yukon First Nation to prepare its views on the matter.” It then requires a reasonable period of time for the Yukon First Nation to prepare its views. Finally the presentation of those views must be given “full and fair consideration” by the Government of Yukon, which I interpret to include accommodation, where appropriate.

[160] At Step 3, the Government of Yukon is required to approve, reject or propose modifications to the Recommended Plan. Any decision made by the Government at this stage must be responsive to the preceding Consultation. If the Government rejects or proposes modifications to the Recommended Plan, it must provide written reasons. The requirement to provide written reasons is significant. The written reasons must be drafted with some precision so that in Step 4, the Commission can reconsider the Recommended Plan and make a final recommendation to Government that addresses the proposed modifications or rejection with reasons. In other words, even in the case of rejection, the Commission prepares a Final Recommended Plan for Government to “approve, reject or modify”.

[161] In Step 5, after the Commission presents its Final Recommended Plan, the Government of Yukon before “approving, rejecting or modifying” the Final Recommended Plan must Consult again, i.e. give notice of any matters in sufficient form and detail, provide time for formulation of First Nation and Yukon community views and finally, offer “full and fair” consideration of those views.

[162] At Step 6, if the Government of Yukon decides to accept the Final Recommended Plan it obviously may do so as its proposed modifications with written reasons or rejection with written reasons have presumably been adequately dealt with by the Commission.

[163] If the Government of Yukon proceeds to modify the Final Recommended Plan, those modifications must be based upon the proposed modifications with written reasons that it put forward to the Commission in Step 3. This is so because at Step 3, the proposed modifications with written reasons signified acceptance of the other parts of the Recommended Plan. If this were not so, at the final Step 6, the Government could thwart the process entirely by imposing new modifications that the Commission has not been able to address. In particular, it is not appropriate at Step 6 to introduce new concepts and modifications that effectively bypass the Commission's consideration.

[164] Finally, the word "reject" in s. 11.6.3.2 does not permit a rejection of the Final Recommended Plan in its entirety when Government has chosen the modification process which necessarily indicates approval of the essential character of the Final Recommended Plan.

[165] The Government of Yukon and Yukon First Nations must respect the process and purpose of the land use planning process set out in s. 11.6.0 and interpret Chapter 11 of the First Nations Final Agreements in a purposive manner to achieve the objectives set out in s. 11.1.0. The final step in the planning process in s. 11.6.3.2 cannot be severed from the previous steps in the process, from Chapter 11 or, indeed, from the Final Agreement as a whole. They are all linked.

[166] In my view, the “approve, reject or propose modifications” in s. 11.6.2 and the s. 11.6.3 requirement of “written reasons” for modifications or rejection is fundamental to the dialogue or exchange of views in the land use planning process. It informs the next step in the process, i.e. the final recommended plan. It is also fundamental to the interpretation of “approve, reject or modify” in s. 11.6.3.2.

FRAMEWORK FOR REVIEWING GOVERNMENT AND COMMISSION CONDUCT

[167] Chapter 11 of the Yukon First Nation Final Agreements has not been previously been interpreted by the Courts, and so Government conduct in that context has not been evaluated in judicial review. There are, however, a number of well-developed principles that apply to other commissions with a constitutional dimension that can provide a starting point for this case. Here I refer to the compensation commissions for Provincial Court Judicial Compensation. I do not suggest that these principles are directly applicable to planning commissions in a treaty context but they are worthy of examination to determine if the principles have some applicability.

[168] In the case of *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General),* 2005 SCC 44, (referred to as the *Provincial Court Judges’* case) the Supreme Court of Canada addressed the issue of judicial independence in the context of judicial remuneration and the need to clarify the principle of the compensation commission process in order to avoid future conflicts.

[169] The judicial compensation commissions considered in the *Provincial Court Judges’* case are constitutionally required to be “independent, objective and effective”.

The appointment process is therefore required to be representative of the parties. The commissions must have a “fair and objective” hearing process in which they must consider all the submissions before making recommendations. Commission reports must explain and justify the position taken on compensation. The Supreme Court of Canada also wrote that the commission’s work must have a “meaningful effect” but not a binding effect. Thus, the government retains the power to depart from commission recommendations provided that it justifies its decision to do so with rational reasons which must be included in the government’s response to the commission’s recommendations.

[170] In para. 25, the Court set out the government’s obligation with respect to commission recommendations:

> The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.

[171] In the judicial compensation context, the reviewing court applies “a limited form of judicial review” based upon “simple rationality”. The reviewing court does not determine

the adequacy of judicial remuneration “but whether the purpose of the commission process has been achieved”. It is a deferential review in that context because the government has the constitutional responsibility for the province’s financial affairs.

[172] In para. 31, the Supreme Court provides the following framework for analyzing the government’s response to a Commission recommendation:

> (1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
>
> (2) Do the government's reasons rely upon a reasonable factual foundation? and
>
> (3) Viewed globally, has the commission process been respected and have the purposes of the commission - preserving judicial independence and depoliticizing the setting of judicial remuneration - been achieved?

[173] The Court reviewed the third stage as follows:

> 38 At the third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, the court must weigh and assess the government's participation in the process and its response in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues. The focus shifts to the totality of the process and of the response.
>
> 39 It is obvious that, on the basis of the test elaborated above, a bald expression of disagreement with a recommendation of the commission, or a mere assertion that judges' current salaries are "adequate", would be insufficient. It is impossible to draft a complete code for governments, and reliance has to be placed on their good faith. However, a

> careful application of the rationality standard dispenses with many of the rules that have dominated the discourse about the standard since the Reference. The test also dispenses with the "rules" against other methods for rejecting a commission's recommendations, such as prohibiting the reweighing of factors previously considered by the commission. The response can reweigh factors the commission has already considered as long as legitimate reasons are given for doing so. The focus is on whether the government has responded to the commission's recommendations with legitimate reasons that have a reasonable factual foundation.
>
> 40 In a judicial review context, the court must bear in mind that the commission process is flexible and that, while the commission's recommendations can be rejected only for legitimate reasons, deference must be shown to the government's response since the recommendations are not binding. If, in the end, the reviewing court concludes that the response does not meet the standard, a violation of the principles of judicial independence will have been made out.

[174] There are a number of obvious differences between the judicial compensation commission process and the land use planning process set out in the Final Agreements.

[175] The commission process itself is different, in that a judicial compensation commission hears submissions and then does its work in making recommendations. Once the commission makes recommendations, the government must accept or reject them with reasons that meet the rationality standard. The *Provincial Court Judges'* case is addressing the government's final response in a different and less elaborate context than s. 11.6.0.

[176] In the planning process set out in the Final Agreements, the government has a Consultative obligation with the affected First Nations and affected Yukon communities. This consultation between the parties and with an external stakeholder is not found in judicial compensation commissions.

[177] There is also a major difference in the process as s. 11.6.0 contemplates two distinct steps or stages in the creation of a recommended land use plan. Rather than a formal hearing with an advocacy-style process leading to a document, the s. 11.6.0 planning process starts with the Commission's independent investigation and gathering of information and the preparation of a recommended plan, which the parties are required to accept, propose modifications, or reject with written reasons. All input from the parties is provided to the Commission, which then amends the recommended plan in response. This iterative process differs from the one used by the judicial compensation commission, which has only one opportunity to recommend a plan. Thus, the land use planning process provides an earlier and more robust opportunity for the parties to provide responses to a recommendation than the judicial compensation commission process does, and the expectation is that the commission will itself consider the feedback given, and, if appropriate, incorporate it into the recommended.

[178] However, while the constitutional purposes are quite different, the obligation placed on government is similar in that the commission process is one that must be respected. In the judicial compensation commission, the constitutional dimension flows from the independence of the judiciary. In this land use planning context, the constitutional dimension is linked to the treaty origins of the Commission. Here, the Commission represents one mechanism by which the Final Agreements facilitate reconciliation. In both cases the need for an independent and objective commission with a representative composition is evident.

[179] Finally, the land use planning process in s. 11.6.0 introduces a significant third choice of proposing modifications in addition to accepting or rejecting. It is the proposed

modifications and ability to modify that are central to the case at bar. The ability to modify introduces a degree of flexibility or partial approval which makes sense given the complexity of the plan being generated.

[180] I conclude that there is some merit to considering the principles applicable to judicial compensation commissions when reviewing the government responses and interpreting land use planning commissions in land claims agreements, but the application of those principles is necessarily subject to the unique and distinct approach called for in the context of First Nation Final Agreements and the complexity of land use planning. I would modify the third factor in the framework established in the *Provincial Court Judges'* case as follows:

> 3. Viewed globally, has the land use planning process been respected and the purpose of reconciliation achieved?

[181] Although counsel did not address the standard of review in any detail, I am of the view that the appropriate standard of review for the interpretation of s. 11.6.0 is correctness. Further, the Government of Yukon's response to s. 11.6.3.2 must be reviewed on a standard of reasonableness. In the case at bar, the Court is interpreting and reviewing the process rather than the content of the Government approved plan.

ANALYSIS

[182] I have concluded that the process adopted by the Government of Yukon to create the Government approved plan was not based upon a contextual interpretation of s. 11.6.0. Nor did it enhance the goal of reconciliation. It was an ungenerous interpretation not consistent with the honour and integrity of the Crown.

[183] The flaw in the Government's interpretation is in applying a plain reading approach to s. 11.6.3.2, which resulted in the Government of Yukon usurping the Commission's role and the planning process by introducing new land use planning tools and concepts at the final stage of the process.

[184] As a matter of interpretation of a constitutionally-entrenched treaty provision, s. 11.6.3.2 cannot be given a plain reading interpretation divorced from the general framework of the Final Agreements. The First Nations have given up their claim to undefined rights, title and interests in their Traditional Territories in exchange for, among other things, a comprehensive land use planning process on that territory. The Government of Yukon agreed to pursue a planning process for the Peel Watershed.

[185] At no time, did the Government of Yukon reject the Recommended Plan. It instead chose to modify it with written reasons. There is no disagreement that the Yukon proposed modifications 3 – 5 have been substantially addressed.

[186] I repeat here the disputed Yukon proposed modifications:

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.

[187] I acknowledge that the summary presented by Minister Rouble was amplified in his letter of February 21, 2011, and that it was clear that the Government of Yukon wanted the Commission to have a "more balanced" plan with options for access throughout the region. However, neither the letter nor the detailed 16-page Detailed Yukon Government Response that was attached provided substantive detail as to how

much land was being referred to or where such access was to be accommodated. The position was summarized as follows:

> The Yukon government recognizes that managing surface access (winter and all-season roads) can be challenging but not impossible. We believe a ban on surface access is not a workable scenario in a region with existing land interests and future development potential. We would like to see a range of access options developed which consider the various conservation and resource values throughout the region and also take into account existing regulatory tools and best management practices which can be used to mitigate risk and limit other user's access.

[188] The First Nations submit that the Yukon proposed modifications 1 and 2 simply stated a preference and lacked any tangible or practical guidance for the Commission. They say that the Commission's response was appropriate in describing the proposed modifications as indicating in general terms what the Government of Yukon wanted but without any details about locations of concerns or what modifications it sought. In other words, it was "back to the drawing board."

[189] The Government of Yukon submits that it was appropriate to address in a general way the amount of protected area and provisions for managing access to the area as a whole. It says that there was no structural or administrative impediment to the Commission in making the changes the Government was seeking. The Government of Yukon submits that it was prepared to support a reasonable work plan, timeline and budget for completion of a Final Recommended Plan. In fact, the Government suggested that their representative on the Technical Working Group be contacted "if the Commission wishes further elaboration on any part of the response or technical reference therein".

[190] The Government of Yukon takes the position that it is not incumbent on the Government to draft the plan for the Commission. The Government of Yukon says that the Commission simply chose not to address Yukon's concerns and present a Final Recommended Plan responsive to its input.

[191] In my view, it is not difficult to understand that the Government of Yukon wanted "a more balanced plan" and increased "options for access". But I see that as the equivalent of saying to a judicial compensation commission that judges are adequately compensated, or should be paid more, without addressing the reasons for the assertion or specific suggestions for an alternative. It is not sufficient in the context of ss. 11.6.2 and 11.6.3, after a commission planning process of seven years, to make the bald suggestion that a more balanced plan with enhanced options for access is required. This response also does not meet the Chapter 1 Consultation requirement of providing notice of a matter in "sufficient form and detail".

[192] The submission of "proposed modifications" with written reasons at this stage requires more. It was incumbent on the Government of Yukon to set out details about which Landscape Management Units it wanted zoned for increased access, along with rationales and suggestions about mechanisms to accomplish the proposed modifications. If the Government of Yukon wanted to propose protected river corridors and permit mining access beyond that, the Commission should have had an opportunity to consider such a proposal before issuing its Final Recommended Plan.

[193] The Government of Yukon's assertion that it would finance a reasonable work plan and make its representative on the Technical Working Group available is a flawed understanding of the process in s. 11.6.3.2. That process is to be open and inclusive,

and any elaboration or concrete suggestions are to be disclosed during Consultations on the proposed modifications, prior to the submission to the Commission pursuant to s. 11.6.3.

[194] There is another aspect to this exchange or dialogue. If there is to be a meaningful Consultation with First Nations, the Government is obligated to put something on the table and consider the First Nations response to that offering, before submitting the proposed modifications to the Commission. In my view, the proposed modifications must be addressed in the Consultation process preceding the response to the Commission. The Government of Yukon must fully and fairly consider the views of the First Nations on the proposals and turn its mind to possible accommodations before it submits proposed modifications with written reasons to the Commission.

[195] There is a further reason for a detailed exchange at this stage of the planning process. The Government of Yukon must engage the Commission in a way that respects the process. If the Commission only knows the Government of Yukon's proposed modifications in a general way, it has no way of gauging whether it is responding appropriately. In my view, this exchange or dialogue stage must disclose to both the Commission and the First Nations why and how the Government wants to modify the Recommended Plan. For example, if the government wants to designate the four main rivers as a new class of park and implement "active management" in Restricted Use Wilderness Areas, it must say so in an open and frank way during s. 11.6.3 Consultations in order to give the Commission a chance to do its work in assessing and considering the proposed modifications in the context of the Recommended Plan and all the background work leading up to that Plan.

[196] I therefore conclude that the Yukon proposed modifications 1 and 2 for more balance and access were bald expressions of preference not sufficiently detailed to permit the Commission to respond in a meaningful way. The Commission responded in a general way by providing for future review some of the Landscape Management Units previously zoned as Special Management Areas, and this general response was entirely appropriate.

[197] I have concluded that the process followed by the Government of Yukon in the final stage of s. 11.6.3.2 did not respect the planning process. Its interpretation and execution pursuant to s. 11.6.3.2 is impermissibly flawed.

[198] The Government of Yukon did not simply implement its proposed modifications when it reviewed the Final Recommended Plan. It effectively usurped the planning process and the role of the Commission by developing eight new core principles and new land use designations that were never considered by the Commission.

[199] The final Consultation diminished the planning process and the work of the Commission, when the Government of Yukon developed a different Plan based on greater access and resource extraction which it had not spelled out in sufficient detail to permit the Commission to address in its Final Recommended Plan.

[200] I conclude that viewed globally the Government of Yukon process in s. 11.6.3.2 after the Final Recommended Plan neither respected the land use planning process nor interpreted the land use planning process in the honourable way expected of the Crown under First Nations Final Agreements.

REMEDIES

[201] In the *Provincial Court Judges'* case, the Supreme Court of Canada addressed the issue of remedies as follows:

> Remedies
>
> 42 The limited nature of judicial review dictates the choice of remedies. The remedies must be consistent with the role of the reviewing court and the purpose of the commission process. The court must not encroach upon the commission's role of reviewing the facts and making recommendations. Nor may it encroach upon the provincial legislature's exclusive jurisdiction to allocate funds from the public purse and set judicial salaries unless that jurisdiction is delegated to the commission.
>
> 43 A court should not intervene every time a particular reason is questionable, especially when others are rational and correct. To do so would invite litigation, conflict and delay. This is antithetical to the object of the commission process. If, viewed globally, it appears that the commission process has been effective and that the setting of judicial remuneration has been "depoliticized", then the government's choice should stand.
>
> 44 In light of these principles, if the commission process has not been effective, and the setting of judicial remuneration has not been "depoliticized", then the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option. This reflects the conclusion in Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 405, 2002 SCC 13, that it is "not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers" (para. 77).

[202] As indicated earlier, the *Provincial Court Judges'* case largely addressed the substantive detail of the government acceptance or rejection of the Commission recommendations. In other words, the Commission had completed its decision and recommendations in a process quite distinct from the provisions of s. 11.6.0. In the case at bar, the Court is reviewing the Government of Yukon's process of modifying the Final Recommended Plan when significant modifications were never put to the Commission for consideration. It is not the Commission whose process was flawed. In my view, the guidance provided by the Supreme Court of Canada in para. 44 above must be applied to the facts of this case in light of *Little Salmon/Carmacks* and the principle of contextual interpretation based on the general scheme of the treaty.

POSITIONS OF THE PARTIES ON REMEDIES

[203] The Government of Yukon, while not agreeing with the interpretation I have given to s. 11.6.0 and maintaining that the plaintiffs' case should be dismissed, submits that the appropriate remedy given this interpretation is to order the Government of Yukon to return to the "proposed modification" stage under ss. 11.6.2 and 11.6.3. To be clear, the Government of Yukon proposes an alternative remedy:

> … in the event that the hearing judge concludes that something went awry in the process of following Article 11.6 that requires correction by the Court. The Government does wish to emphasize that while an alternative remedy will be proposed, the Government is not submitting that this remedy be adopted. It is only if, contrary to the Government's position, the Court is satisfied that the Article 11.6 process has not been followed that the alterative remedy should be imposed.

[204] Counsel for the Government of Yukon cites the *Provincial Court Judges'* case and submits that the proper remedy, if the Commission process has not been effective,

is to send the matter back to the Government for reconsideration. In this remedy, if the Government of Yukon was not sufficiently concrete in its proposed modifications, the Court should remit the matter to the Government with the direction that its proposed modifications must be more specific but allow the Government to decide "which approach it prefers". The main theme of this proposal is that the proper remedy is reconsideration without tying the hands of the decision-maker. Specifically, counsel for the Government of Yukon submits that:

> The central position of the Yukon Government is that if the Court is of the view that the commission process has not been effective, the deficiency should be identified and the matter remitted for reconsideration, either by the Yukon Government or the Commission depending on the nature of the deficiency, without direction as to the result of the reconsideration.

[205] The First Nations, CPAWS, YCS and the Gwich'in Tribal Council submit that the stage of the process for proposed modifications has been completed and the only step that remains outstanding is s. 11.6.3.2 where the Government must approve or modify the Final Recommended Plan according to the valid Yukon proposed modifications 3, 4 and 5.

[206] Counsel for the plaintiffs submit that it would be inconsistent with the honour of the Crown to permit the Government of Yukon to go back and repeat the proposed modifications stage under ss. 11.6.2 and 11.6.3 with specific proposed modifications taken from the flawed process. Counsel submits that, as in tribunal hearings, the matter that is being returned for further hearing should be returned to the tribunal at the point where the error in the proceeding occurred. See *Little Narrows Gypsum Co. Ltd. v. Labour Relations Board (Nova Scotia) and International Union of Operating Engineers,*

Local 721B (1977), 82 D.L.R. (3d) 693 (N.S.S.C.A.D.), at paras. 6 and 24; *Watco v. St. Clements (Rural Municipality)* (1979), 98 D.L.R. (3d) 96 (M.B.Q.B.), at para. 14; *Nicholson and Haldimand-Norfolk Regional Board of Commissioner of Police* (1980), 31 O.R. (2d) 195 (C.A.) and *Francella v. Canada (Attorney General)*, 2003 FCA 441, at para. 9.

[207] The plaintiffs submit that remitting the matter back to s. 11.6.2 where the Government of Yukon elected to propose modifications would be repeating a stage of the planning process already lawfully conducted.

[208] The plaintiffs acknowledge that the Government of Yukon has a measure of discretion under s. 11.6.3.2 to determine which of its proposed modifications it will insist upon. But they submit that as in judgments that review tribunal decisions, a court may issue directions. This is stated in Blake, *Administrative Law in Canada,* 5th Ed. (2011) at p. 228:

> In addition to quashing an order, a court may refer the matter back to the tribunal to be reconsidered. If the court issues directions to be followed on reconsideration, the directions must clearly state what the tribunal may or may not do. A direction is too vague if it simply requires the tribunal to reconsider the matter in accordance with the court's reasons. Directions may be given to avert unfair procedure or excess of power, but not to direct the result of the tribunal's reconsideration on the merits.

[209] A similar principle was adopted by *University of British Columbia v. British Columbia College of Teachers*, 2002 BCCA 310.

[210] Accordingly, the plaintiffs seek the following remedy:

1. a declaration that the Government of Yukon did not properly conduct the final Consultation under s. 11.6.3.2;

2. an order that the Government approved plan be quashed; and

3. an order that the Government of Yukon hold the final Consultation with the First Nations and affected Yukon communities under s. 11.6.3.2 based upon Yukon proposed modifications 3, 4 and 5 and approve or modify according to those proposed modifications.

ANALYSIS ON REMEDIES

[211] The dilemma presented to the Court is that the plaintiffs' remedy effectively prevents the Government of Yukon from presenting its proposed modifications on access and balance to the Commission and from modifying the Final Recommended Plan in a manner that reflects them. If the Government of Yukon's remedy is accepted, the planning process is returned to the Commission to redo a completed stage, requiring the plaintiffs to bear the costs and delay of repeating the planning process. For the purpose of this discussion, I will assume that the proposed re-hearing under ss. 11.6.2 and 11.6.3 would permit the Government of Yukon, after Consultation, to present its Government approved plan of January 2014 to the Commission for consideration in its Final Recommended Plan.

[212] Returning to ss. 11.6.2 and 11.6.3 has the advantage of ensuring that the Government of Yukon has the opportunity to put its proposed recommendations to the Commission for consideration in greater detail. This presumably is advantageous to both the Commission and the Government of Yukon.

[213] However, the Commission released its Recommended Plan in December 2009 and its Final Recommended Plan on July 22, 2011, over three years ago. The Government's remedy would in effect take it back to the drawing board and permit the

Government of Yukon to benefit from its flawed process. As well, remitting the matter to the s. 11.6.3.2 stage of the process, without Yukon proposed modifications 1 and 2, more closely parallels the approach to remedy in the *Provincial Court Judges* case. The problem with the process here can be traced to the Government of Yukon, and s. 11.6.3.2 is the point at which the Government of Yukon began to deviate from s. 11.6.0 of the Final Agreements.

[214] To resolve this remedy issue, I return to the *Little Salmon/Carmacks* and *Manitoba Métis* judgments. The key principle is that modern treaties must be interpreted in a manner that fosters a positive long-term relationship between First Nations and Government of Yukon as well as between Aboriginal and non-Aboriginal communities. In this context, the Government of Yukon's adoption of a plain language reading of s. 11.6.3.2 was, in my view, an untenable interpretation that is a significant departure from the contextual interpretation prescribed by *Little Salmon/*Carmacks and from the previous collaborative process that the plaintiffs and the Government of Yukon had mutually pursued. The Government of Yukon was well aware of the Yukon First Nations' interpretation and proceeded to ignore the 2011 LOU and usurp the role of the Commission and the planning process. I note that the Government of Yukon now frames its case as a failure of the Commission to do its work. However, I have concluded that the Commission did not err. Rather the Government of Yukon did in its flawed interpretation of the Chapter 11 planning process and of s. 11.6.3.2 in particular.

[215] I also consider it of some interest that the Yukon Land Use Planning Council, an appointed body consisting of one First Nation representative and two Government of Yukon representatives concluded that:

> … The consultation report [prepared at the request of the Government of Yukon] clearly demonstrates a public perception that the Government of Yukon did not follow either the spirit or intent of the rules established in Chapter 11 of the Umbrella Final Agreement and hijacked the process …

[216] In my view, this is more than a perception. The process became impermissibly flawed when the Government of Yukon embarked on its plain-reading approach to s. 11.6.3.2. The Government of Yukon usurped the Commission's role in the planning process and introduced new substantive proposed modifications that were neither consulted on in s. 11.6.2 nor put to the Commission for consideration.

[217] It is not the intention of these reasons to vilify the Government of Yukon or its Government approved plan. Nevertheless, the goal of reconciliation and the honour of the Crown remain paramount. The process the Government has chosen, after seven years of collaboration, was a profound and marked departure from its previous approach. In my view, damage has been done to the process of reconciliation, but it is not by any means irreparable.

[218] To return the planning process to the stage of proposed modifications would permit the Government of Yukon to propose its Government approved plan to the Commission for its review. This, in my view, would endorse a flawed process with approval. The flawed process has been unrolling since February 2012 despite the concern expressed by the First Nations and the Yukon Land Use Planning Council.

CONCLUSION

[219] I conclude that it is not appropriate to return the process to the s. 11.6.3 stage and allow the Government of Yukon to put its Government approved plan to the Commission as "proposed modifications". At the appropriate time to propose these

modifications in February 2011, the Government of Yukon was content to put a general preference to the Commission without enough concrete detail to permit a detailed response. The Government of Yukon had the option of dealing with the Commission response in a collaborative manner as set out in the 2011 LOU or seeking a court interpretation upon receipt of the Final Recommended Plan. However, it instead took over two years to pursue this flawed process, which betrayed the spirit of the Final Agreements and was criticized by both the public and by the Land Use Planning Council. In my view, it would be inappropriate to give the Government the chance to now put its January 2014 plan to the Commission.

[220] The road to reconciliation has been a long one - from the promise in the 1870 Rupert's Land and North-Western Territory Order to the Umbrella Final Agreement in 1993 - and it continues in the process of treaty interpretation.

[221] The Government of Yukon is entitled to modify the Final Recommended Plan in accordance with s. 11.6.3.2. If it wishes to modify the Final Recommended Plan according to Yukon proposed modifications 3, 4 and 5 and the 16-page Detailed Yukon Government Response, it can do so, should it not be satisfied with the Commission's Final Recommended Plan in that regard. It is not entitled to revisit Yukon proposed modifications 1 and 2. These statements of preference for more balance and access were too vague and general, and failed to give detail sufficient for the Commission to address them.

[222] I therefore make the following declaration and order:

1. A declaration that the Government of Yukon failed to act in conformity with the land use plan approval process for the Peel Watershed under

s. 11.6.3.2 in that it did not properly conduct the final Consultation and it introduced new proposed modifications that were not presented to the Commission.

2. An order:

   a. To quash the final Consultation and the Government approved plan of January 2014;

   b. To remit the matter for reconsideration to the Government of Yukon, requiring the Government of Yukon to hold final Consultations with the First Nations and affected communities under s. 11.6.3.2, based on the Yukon proposed modifications 3, 4 and 5 and the 16-page Detailed Yukon Government Response advanced by Minister Rouble on February 21, 2011, the written reasons of the Commission, and the Commission's accompanying Final Recommended Plan, dated July 22, 2011, and thereafter to approve or modify, the Final Recommended Plan pursuant to s. 11.6.3.2; and

   c. That should the Government of Yukon elect to modify the Final Recommended Plan pursuant to s. 11.6.3.2, such modifications are to be limited to the Detailed Yukon Government Response and the Yukon proposed modifications 3, 4, and 5 as follows:

      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.

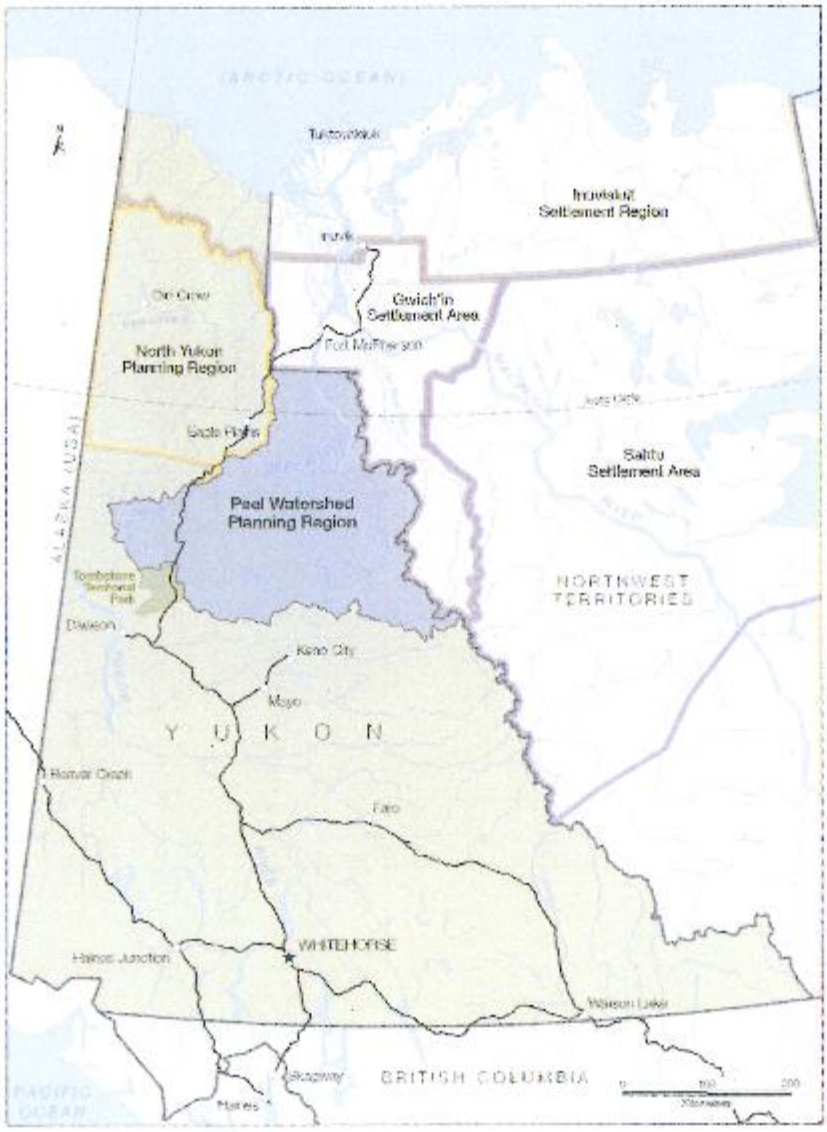
5. Generally, develop a clear, high level and streamlined document that focuses on providing long term guidance for land and resource management.

[223] Costs may be spoken to, if necessary.

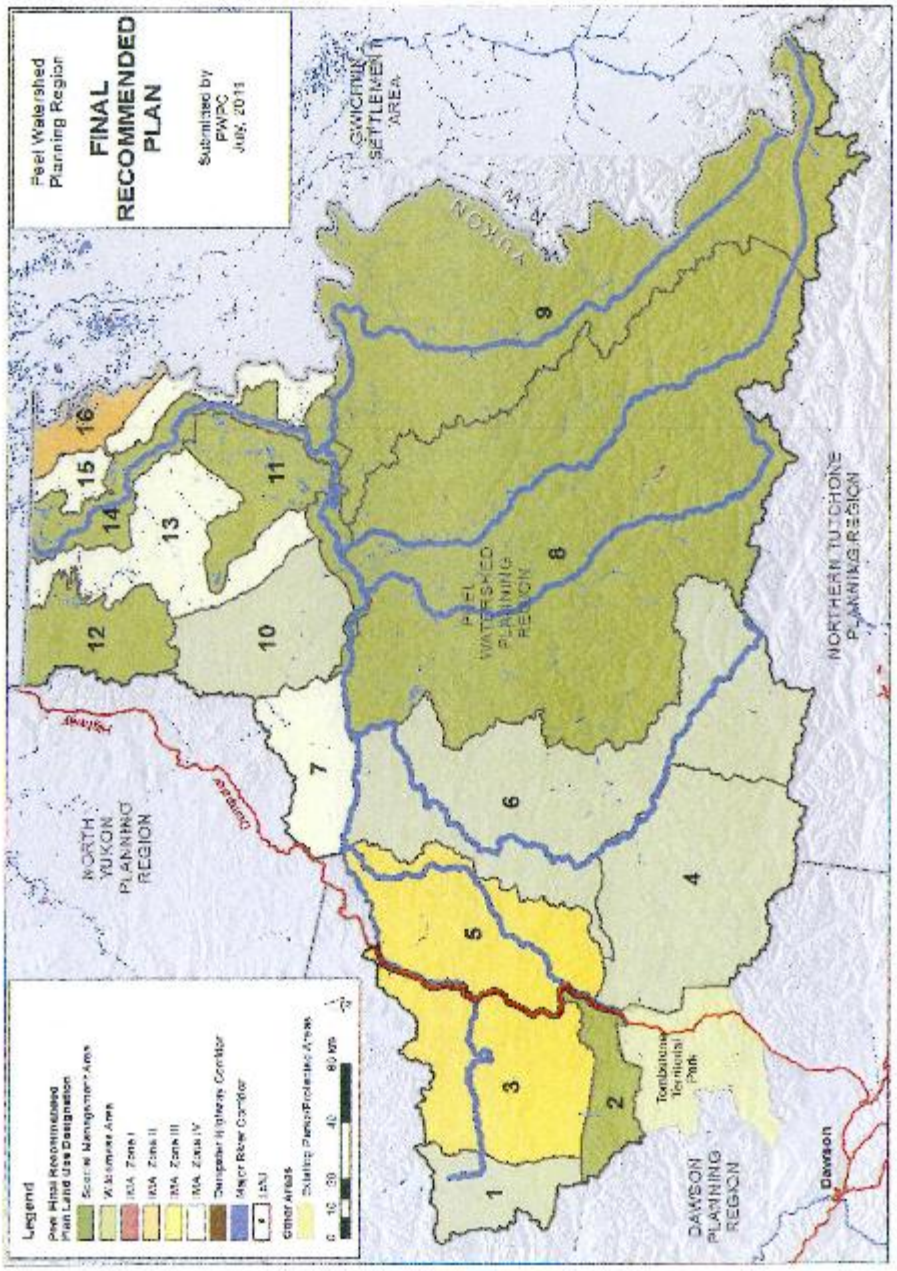
_____
VEALE J.

Map A

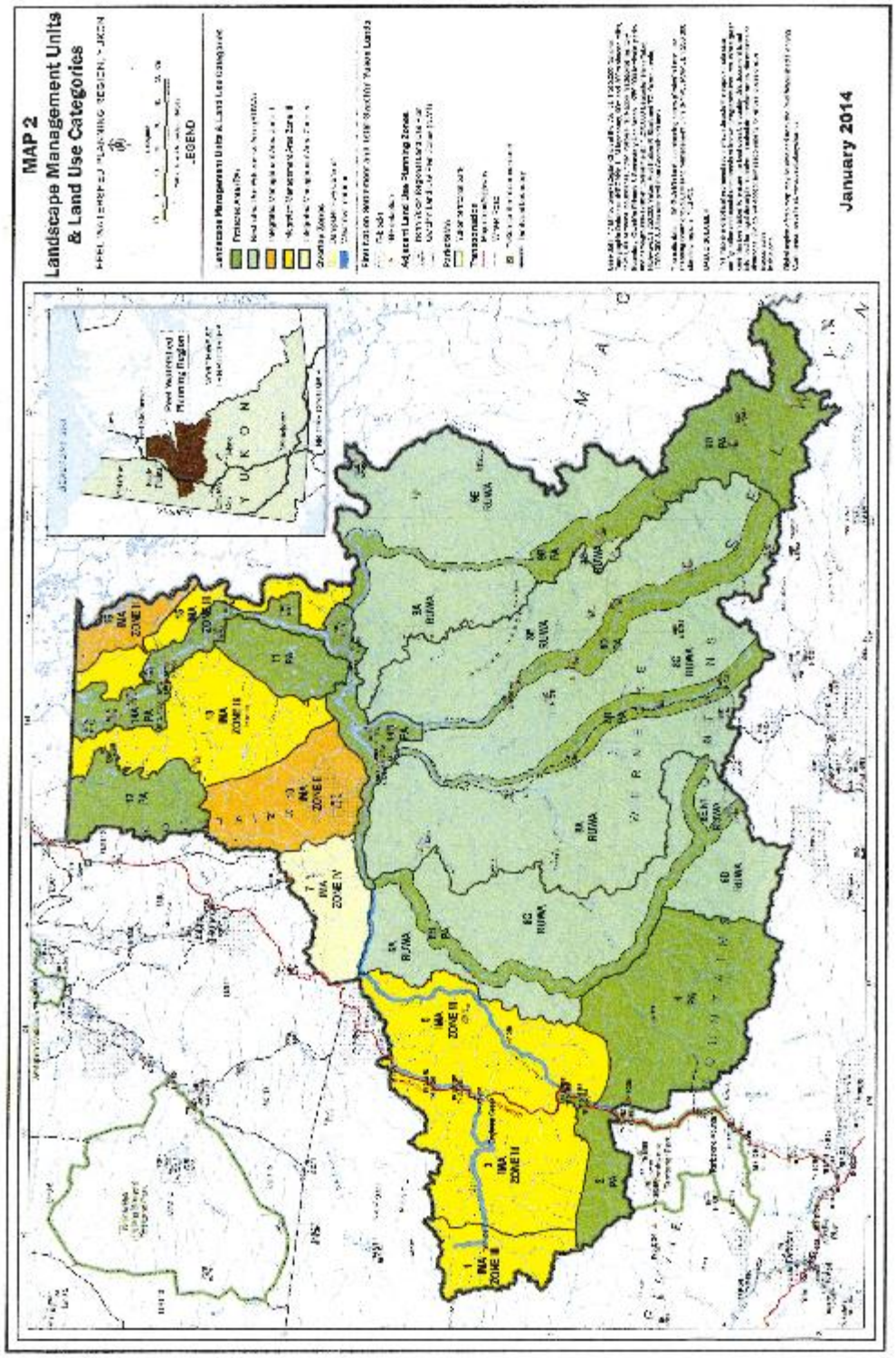
Map 1. Regional Overview: Yukon/NWT



Map B



Map C


MAP 2
Landscape Management Units
& Land Use Categories
January 2014