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Implications and Analysis of the Yukon Court of Appeal Decision in *First Nation of Na-Cho Nyak Dun v. Yukon*

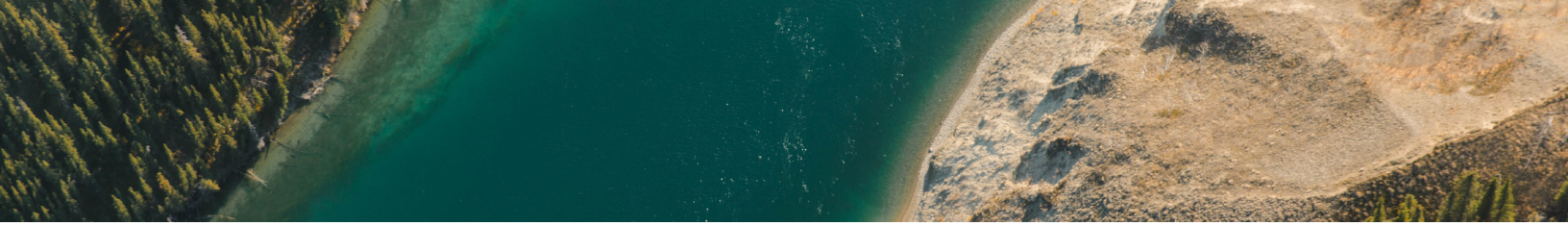
OVERVIEW

On April 9, 2024, the Court of Appeal of Yukon issued its decision in *First Nation of Na-Cho Nyak Dun v. Yukon (Government of)*, 2024 YKCA 5. **The decision was a landmark victory for the First Nation of Na-Cho Nyäk Dun ("FNNND") in a decades-long effort to implement their core Treaty promise of comanaging their Traditional Territory with public government**. In short, the Court of Appeal held that the *First Nation of Nacho Nyak Dun Final Agreement* (the "Treaty") requires—and Yukon Government ("Yukon") had failed to provide—"meaningful participation" for FNNND in the management of land and resources in their Traditional Territory. This clear direction from the Court of Appeal demands a sea change in how resource development decisions are made in FNNND's Traditional Territory.

THE NATION'S PERSPECTIVE

We are very pleased by the Court of Appeal's decision. We entered into our Treaty with the hope and expectation that we would be partners with public government in deciding whether and how our Traditional Territory could be developed. Unfortunately, that core Treaty promise of co-governance has never been lived up to by Yukon Government. **Our territory has been ground zero for mining—over and despite our objections**. The Court of Appeal, like the Yukon Supreme Court before it, heard our concerns that our Treaty was not being respected, and made a decision that upheld the core promises of our Treaty. **We hope this decision sparks a wholesale shift in Yukon Government's approach to Treaty implementation.**

- CHIEF DAWNA HOPE



WHAT LED TO THIS LAWSUIT?

FNNND filed a lawsuit against Yukon in 2021, challenging Yukon's decision to authorize Metallic Mineral Corp.'s proposed mining exploration project (the "Project") in the Tsé Tagé (Beaver River) watershed—a pristine and sensitive part of FNNND's Traditional Territory. **Importantly, the Project was authorized over FNNND's objections and while FNNND and Yukon were in the midst of an ongoing land use planning process for the Tsé Tagé watershed**, based on a 2018 Intergovernmental Agreement between FNNND and Yukon ("Intergovernmental Agreement").

FNNND's lawsuit raised serious concerns that authorizing development before the land use plan was complete would jeopardize the future plan. FNNND's lawsuit also raised concerns around Yukon's failures in consultation, implementation of the Treaty. In short, the lawsuit highlighted the persistent failure of Yukon to uphold the honour of the Crown.

In January 2023, Chief Justice Duncan of the Supreme Court of Yukon issued her decision, setting aside Yukon's approval of the Project and finding:

- **Yukon failed to meet the duty to consult and accommodate FNNND**;
- **Yukon breached its duty to act in a way that accomplishes the intended purposes of the Treaty**, that is, to ensure meaningful participation in the management of land and resources in the Traditional Territory by refusing to consider the effect of the proposed decision on the land use planning process contemplated in Chapter 11 and the ongoing land use planning process for the Tsé Tagé watershed; and
- **Yukon breached its duty of good faith** in the performance of the Intergovernmental Agreement because it did not consider the effect of the proposed decision on the ongoing land use planning process for the Tsé Tagé watershed.

In March 2023, Yukon appealed this decision to the Court of Appeal.

WHAT DID THE COURT OF APPEAL SAY?

The Court of Appeal unanimously affirmed the earlier decision of the Yukon Supreme Court on all substantive issues. The Court of Appeal found:

- **Yukon acted unlawfully and dishonorably** when it authorized the Project;
- **Yukon failed to fulfill its duty to consult FNNND**;
- **Yukon breached its duty to act in a way that accomplishes the intended purpose of the Treaty** by failing to recognize the relevance and applicability of FNNND's Chapter 11 rights and failing to engage with the ongoing land use planning process for the Tsé Tagé watershed.

IN THE COURT'S WORDS

"To accept Yukon's narrow reading of Chapter 11 'as if it were an everyday commercial contract', … would result in a treaty that 'will not accomplish its purpose'—that purpose being to further reconciliation by (among other means) affording the First Nation a right to representation and involvement in land use planning." – DECISION, PARA. 104.

The Court of Appeal affirmed the decision of Chief Justice Duncan to set aside Yukon's approval of the Project. The only change the Court of Appeal made to the earlier decision was to decline to grant two of the three declarations that were issued below, finding that they were no longer necessary since the decision itself provided the necessary guidance and remedy.

WHAT DOES THIS DECISION MEAN?

FNNND's Right to Co-Manage their Traditional Territory

The Court of Appeal agreed with FNNND that a core objective of the Treaty is to ensure FNNND has a meaningful role in managing their Traditional Territory, including through land use planning. The Court held FNNND has a Treaty right to manage the land and resources of their Traditional Territory with Yukon, and this Treaty right cannot be ignored (paras. 103, 145). The Court also noted, "[t]he provisions of Chapter 11 must be interpreted in light of modern treaty interpretation principles, read in light of the treaty as a whole and the treaty's objectives … the 'clear objective' of Chapter 11 is described by the Supreme Court as … 'to ensure First Nations meaningfully participate in land use management in their traditional territories'" (para. 101). **Modern treaty interpretation principles require Yukon to adopt a generous approach to treaties, recognizing they are a floor—not a ceiling. Yukon failed to do this.**

IN THE COURT'S WORDS

"[M]aintenance of the honour of the Crown required Yukon, at a minimum, to … pursue the Chapter 11 purpose of meaningful participation by the First Nation in the management of land and resources in the traditional territory."
–DECISION, PARA. 151.

Yukon had argued that Chapter 11 of the Treaty did not contain any Treaty rights or require Yukon to initiate land use planning with FNNND. Yukon asserted Chapter 11 is simply a right to a process of negotiation that "may" lead to a land use planning process (para 98). The Court of Appeal squarely rejected both arguments. The Court of Appeal criticized Yukon's narrow reading of Chapter 11 and warned that Yukon's approach would ensure the Treaty would not achieve its objective of advancing reconciliation (para. 104).

PST PERSPECTIVE:

Yukon cannot ignore core chapters and promises of treaties at its convenience. Yukon is reminded—once again—that it must take a generous and purposive approach to interpreting and implementing treaties. Yukon must work towards reconciliation by creating space for First Nations to co-manage the land and resources of their territories.

Yukon Must Work to Achieve the Purposes of the Treaty

The Court of Appeal recognized one of the purposes of the Treaty was to share governance over FNNND's land and resources—and Yukon has a duty to work to achieve this core purpose. **The Court of Appeal found that Yukon had breached this duty to work to accomplish the core purpose behind the Treaty**. The Court of Appeal found that the honour of the Crown required Yukon to:

- pursue the Chapter 11 purpose of meaningful participation by FNNND in the management of land and resources in the Traditional Territory, and
- consider and discuss the effect of the Project on a future, potential Chapter 11 planning process and the ongoing Tsé Tagé watershed planning process (para. 151).

Yukon failed on both counts.

PST PERSPECTIVE:

The spirit and intent of treaties matter. The objectives that treaties are meant to achieve matter. Yukon has an affirmative obligation to actively work to achieve the purpose behind treaties: to share governance, lands, and resources between Indigenous and non-Indigenous peoples. And Yukon has been failing to live up to this constitutional obligation. The Court of Appeal was clear that this has to change.

Authorizing Development Risks Jeopardizing Future Land Use Planning Processes

What is the point of a land use plan if all of the land has already been developed? The Court of Appeal recognized that approving development in an area subject to a planning process may jeopardize the planning process and eventual land use plan. The Court of Appeal also criticized Yukon for failing to consult FNNND on the impacts of the Project on the ongoing land use planning process for the Tsé Tagé watershed.

> IN THE COURT'S WORDS
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> "I agree with the First Nation's submission that approval of a development project in an area where land use planning is occurring may undermine the land use planning process, and the s. 35 treaty rights which that process is intended to uphold, because it will reduce the amount of undeveloped land available if and when a land use plan is negotiated and implemented." – DECISION, PARA. 159.

This is significant as most of FNNND's Traditional Territory—and indeed, most of the Yukon—has not undergone a land use planning process. To date, Yukon has refused to implement interim protection to preserve the status quo until land use planning occurs. While the Court of Appeal did not go so far as to require an immediate moratorium on mineral staking and development in FNNND's Traditional Territory, the decision clearly requires Yukon to overhaul its "business as usual" approach to authorizing development in the face of Indigenous opposition. The honour of the Crown and the promises of the Final Agreement require that Yukon seriously consider full or partial moratoria in those parts of the Yukon where land use plans have not been adopted or implemented. At its core, this decision lays the foundation for a new way of making resource management decisions—rooted in the Final Agreements and not in the short-term economic interests of development proponents—to take hold in Yukon.

NOTE: This summary provides an overview of the decision of the Yukon Court of Appeal in *First Nation of Na-Cho Nyak Dun v. Yukon (Government of)*, 2024 YKCA 5. This summary does not constitute legal advice. This summary was prepared by Nuri Frame and Tasha Paramalingam of Pape Salter Teillet LLP, legal counsel to FNNND in this appeal and reflects the opinions of the authors. www.pstlaw.ca