Cassels

The Need for Forthright Consultation: *First Nation of Nacho Nyak Dun*

Arend J.A. Hoekstra, Thomas Isaac

December 4, 2017

On December 1, 2017, the Supreme Court of Canada released its decision in *Nacho Nyak Dun*,[1] addressing the Yukon Government's decision to disregard the process set out in modern land settlement agreements and instead approve its own land use plan for non-settlement lands in the Peel Watershed. While the decision addresses specific elements of the Yukon Umbrella Final Agreement,[2] the Court also highlights the importance of clear and forthright communication of the Crown's interests and intentions during consultation.

Facts

In 1993, the Yukon Umbrella Final Agreement (the Agreement) was entered into between Canada, the Yukon Government, and Yukon First Nations, and established a collaborative regional land use planning process for Yukon Territory.[3] The Agreement was the product of decades of negotiations between well-resourced and sophisticated parties and was incorporated into modern Yukon treaties.[4]

Process for Developing Land Use Plans

The Agreement includes a process for developing land use plans. The Court noted that in signing onto the Agreement and accompanying treaties, First Nations accepted comparatively smaller settlement areas in exchange for important rights in both settlement and non-settlement lands, and particularly in their traditional territories.[5]

Under the Agreement, land use plans are developed by an independent Commission, with members nominated by the Yukon Government and the affected Yukon First Nations. Land use plans are intended to apply to settlement and non-settlement lands and to encourage a consistent approach to resource development.[6] The development of a land use plan under the Agreement includes a four-part process that applies to the Yukon Government:

1. The independent Commission prepares and provides a recommended regional land use plan to the Yukon Government and the affected First Nations.

2. **After consultation with First Nations**, the Yukon Government considers the recommended regional plan. If the Yukon Government rejects or proposes to amend the recommendations, the Yukon Government

must send written reasons, and proposed modifications if applicable, to the Commission.

3. The Commission considers the written reasons and proposed modifications, if any, and makes a final recommendation for the regional land use plan.

4. **After consultation with First Nations**, the Yukon Government may approve, reject, or modify the proposed land use plan for non-settlement lands.

Under the Agreement, the affected First Nations must follow a similar process before rejecting, modifying, or adopting a land use plan for settlement lands.

Agreed Approach

In 2004, by voluntary agreement, the Yukon Government and the affected First Nations agreed to establish a regional Commission to develop a regional land use plan for the Peel Watershed. In 2009, the Commission released its recommended plan,[7] and in 2010 and again in 2011, the Yukon Government and the affected First Nations entered into joint letters of understanding to establish a coordinated approach to consultation and to seek to achieve consensus on the plan.[8]

Divergence of Yukon Government

Following the initial consultation effort, the Yukon Government provided the Commission with two vague statements expressing its goal of increasing options for resource access and development, including a request that the Commission "re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan."[9] In July 2011, after determining that the Yukon Government's comments were simply expressions of general desires, and did not qualify as "proposed modifications," the Commission released its Final Recommended Plan,[10] which protected 80% of the region while opening 20% for mineral exploration.[11]

Following the release of the Final Recommended Plan, and despite the protests of affected First Nations, the Yukon Government proposed to substantially modify the land use plan, and engaged in an independent consultation initiative rather than follow the previously agreed upon collaborative approach.[12]

In 2014, the Yukon Government approved its land use plan for non-settlement land in the Peel Watershed.[13] The plan opened up 71% of the Peel Watershed to mineral exploration.[14]

Issues

The primary issue in *Nacho Nyak Dun* is whether the Yukon Government acted lawfully, and in accordance with the Agreement. More relevant for those outside of Yukon Territory however, is the Court's focus on

the importance of forthright communication during consultation efforts between the Crown and Indigenous peoples.

Issue 1: Interpreting Modern Treaties

Consistent with the Court's previous review of the Yukon Territory's modern treaties in *Beckman v. Little Salmon/Carmacks First Nation*,[15] the Court emphasizes that modern treaties have been meticulously negotiated by well-resourced parties, and that in reviewing actions under modern treaties, the reviewing court must pay close attention to their terms.[16]

The Court notes that the power to modify or reject a land use plan recommendation under the Agreement is subject to prior consultation,[17] and requires the earlier provision of written reasons to the Commission in order to enable them to review and potentially amend their recommendations.[18] The process must also meet the clear objective of ensuring that First Nations can meaningfully participate in land use management in their traditional territories.[19]

The Yukon Government's actions were inconsistent with the Agreement. First, the Yukon Government did not provide meaningful feedback to the Commission for their review and instead provided "bald expressions of preference" which were not sufficiently detailed to permit the Commission to respond in a meaningful way.[20] Not only did this breach the requirements of the Agreement, it removed the opportunity for the Commission to provide its expert response.[21] Second, by not clearly proposing specific modifications after the initial report of the Commission, affected First Nations missed an opportunity to provide meaningful feedback, early on, to the proposed modifications.[22] Third, while the Yukon Government was able to make modifications pursuant to the Agreement, those modifications could not be so significant as to effectively reject the recommendations, as was seen in this case. Finally, when seeking to depart from positions it has taken in the past, the Crown must act in good faith and in accordance with the honour of the Crown.[23] By failing to comply with the processes of the Agreement, failing to provide the Commission and First Nations with sufficient opportunity to provide feedback, and abandoning the approach to joint review and consultation that was previously agreed upon, the Court concluded that the conduct of the Yukon Government was not becoming of the honour of the Crown.[24]

Issue 2: The Importance of Forthright Communication

In conducting consultation, governments must be flexible **and** forthright in their approach. In *Mikisew Cree*[25] the Court noted that real consultation requires more than just an opportunity for Indigenous communities to "blow off steam before the Minister proceeds to do what she intended to do all along."[26] For some governments, this has led to overly general consultation efforts where everything is left 'on the table.' While the approach appears, at least superficially, to promote reconciliation, it can also undermine real consultation and constrain the Crown's later use of discretionary powers.

Nacho Nyak Dun highlights the risks and deficiencies of this approach. By not engaging in a forthright manner and fully expressing its preferences early on, while (it appears) hoping the process would resolve itself favourably without the Crown needing to display its bias towards a particular outcome, Yukon Government undermined the effectiveness of its consultation effort.The importance of clearly communicating the Crown's goals was highlighted by the Court when it concluded that "Yukon must bear the consequences of its **failure to diligently advance its interests and exercise its right** [Emphasis added]."[27] [28]

Yukon Government's breach of the Agreement was not necessary. Had it clearly stated its objections following receipt of the draft recommendations of the Commission, Yukon could have engaged in meaningful consultation, and could have exercised its discretionary authority under the Agreement in good faith while upholding the honour of the Crown. Instead, by vaguely suggesting its objectives, possibly with the hope of appearing open and flexible to the process and interests of the affected First Nations, the Yukon Government undermined effective consultation and forfeited a substantial portion of the discretionary authority provided under the Agreement.

Implications

Consultation does not require governments to start from a blank sheet. It does not require all options to be on the table, and it does not require governments to act as independent arbitrators, disassociated from any particular public interest. What consultation, particularly at the deepest levels, **does** require is an avenue for Indigenous groups to make submissions, be able to formally participate in the decision-making process, and for their concerns to be considered and addressed.[29] Without clearly stating **the goals and interests of the Crown**, Indigenous peoples are unable to fully and meaningfully understand the potential impact to their interests and effectively disclose their interests to the Crown.

Much effort has been made recently to encourage cooperation between Crown governments and Indigenous communities. The 10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, in particular, highlights the importance of including Indigenous self-governments in a system of cooperative federalism.[30] While encouraging an effective, respectful approach to Indigenous/Crown relationships is a worthwhile goal, the processes used to achieve the objective should be examined critically.

Whether in collaborative processes or in consultation generally, the Crown and Indigenous peoples do not come to the table as equals. While holding substantial resources and legislative powers, the Crown is materially constrained by the honour of the Crown. The honour of the Crown reflects the constrained powers of the Crown when dealing with Indigenous interests, while also reflecting the Crown's larger responsibility of balancing competing societal interests with Aboriginal and treaty rights.[31] In contrast, effective consultation **requires** Indigenous groups to set out and advance **their** interests.[32] There is no obligation for Indigenous groups to consider other parties or restrain the assertion or exercise of their rights.

For cooperative federalism to be effective, Crown governments **must diligently** communicate and advance the interests of those parties not represented at the table. Such interests include economic interest, fiscal interests, community interests, and the interests of non-participating Indigenous peoples. Pretending to come to the table unencumbered by interests and preferences undermines effective consultation, disadvantages the process, and undermines the honour of the Crown.

The honour of the Crown does not require self censorship. In processes set out in modern treaties, it requires the Crown to "diligently advance its interests."[33] In consultation efforts, it requires the Crown to listen to and consider the concerns of Indigenous peoples and, where warranted, to provide the form of accommodation which **it** deems appropriate, having consideration to the competing interests.[34] To be effective, cooperative federalism and reconciliation generally does not require parties to blindly agree or pay lip service. Rather, it requires all parties to diligently advance their interests within the context of Section 35 of the *Constitution Act, 1982*.[35]

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[1] *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 [*Nacho Nyak Dun*].
[2] Canada, *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Canada, Indigenous and Northern Affairs Canada, 1993) [Agreement].
[3] *Nacho Nyak Dun, supra* note 1 at para 2.
[4] *Nacho Nyak Dun, supra* note 1 at para 7.
[5] *Nacho Nyak Dun, supra* note 1 at para 46.
[6] Agreement, *supra* note 2 at paras 11.1.1.1 and 11.1.1.2.
[7] *Nacho Nyak Dun, supra* note 1 at para 17.
[8] *Nacho Nyak Dun, supra* note 1 at para 19.
[9] *Nacho Nyak Dun, supra* note 1 at para 21.
[10] *Nacho Nyak Dun, supra* note 1 at para 23.
[11] *Nacho Nyak Dun, supra* note 1 at para 53.
[12] *Nacho Nyak Dun, supra* note 1 at paras 23-24.
[13] *Nacho Nyak Dun, supra* note 1 at para 25.
[14] *Nacho Nyak Dun, supra* note 1 at para 53.
[15] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman v. Little Salmon/Carmacks First Nation*].
[16] *Nacho Nyak Dun, supra* note 1 at para 36.
[17] *Nacho Nyak Dun, supra* note 1 at para 40.
[18] *Nacho Nyak Dun, supra* note 1 at para 43.
[19] *Nacho Nyak Dun, supra* note 1 at para 47.
[20] *Nacho Nyak Dun, supra* note 1 at para 54.
[21] *Nacho Nyak Dun, supra* note 1 at para 55.
[22] *Ibid*.
[23] *Nacho Nyak Dun, supra* note 1 at para 52.
[24] *Nacho Nyak Dun, supra* note 1 at para 57.
[25] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew Cree*].
[26] *Mikisew Cree, supra* note 25 at para 54.
[27] *Nacho Nyak Dun, supra* note 1 at para 61.
[28] Throughout *Nacho Nyak Dun, supra* note 1, the Court stressed that it has a limited role when reviewing activities under a modern treaty. Rather than reviewing the overall conduct of the parties, the Court will limit its focus to whether a specific decision is legal, and otherwise generally leave space for the parties to govern together and work out their differences. There are two consequences of greater forbearance. First, governments are afforded greater deference in their overall conduct, so long as they are acting in accordance with the terms of the agreement and their actions are constitutionally compliant. The second consequence is that governments must take advantage of those rights provided under the treaties rather than rely on an overall process.
[29] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.,* 2017 SCC 41 [*Chippewas*] at paras 47 & 63.
[30] Canada, Department of Justice, *Principles Respecting the Government of Canada's relationship with Indigenous peoples*, (Canada, 2017).
[31] *Chippewas, supra* note 29 at para 59.
[32] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*] at para 79.
[33] *Ibid*.

[34] In *Ktunaxa Nation, supra* note 32 at para 79, the Court stresses that the Crown's ultimate obligation when consulting and contemplating accommodation is that it act honourably. "Section 35 guarantees a process, not a particular result."
[35] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].
