



PST Case Summary

First Nation of Na-Cho Nyäk Dun v Yukon

Analysis and implications of the 2024 Court of Appeal decision*

Overview

On April 9, 2024, the Court of Appeal of Yukon issued its decision in a closely watched case between the First Nation of Na-Cho Nyäk Dun (FNNND) and the Government of Yukon. The decision represented a landmark victory for the First Nation following a decades-long effort to implement a core treaty promise by which FNNND would co-manage its traditional territory with public government.

The Court of Appeal held that the treaty in question, the First Nation of Na-Cho Nyäk Dun Final Agreement, requires – and that Yukon had failed to provide – “meaningful participation” by FNNND in the management of land and resources in its traditional territory. This clear direction from the court demands a dramatic change in how resource development decisions are made going forward.



Background

FNNND filed a lawsuit in 2021 challenging Yukon's decision to authorize a proposed mining exploration project by Metallic Minerals Corporation in the Tsé Tagé (Beaver River) watershed – a pristine and sensitive part of the First Nation's traditional territory. Importantly, the government had approved the project over FNNND's objections and while the First Nation and Yukon were in the midst of a land use planning process for Tsé Tagé, based on a 2018 Intergovernmental Agreement.

FNNND's lawsuit asserted that authorizing development before planning was complete would jeopardize the future land use plan. The suit also raised concerns regarding Yukon's failures in the consultation process and subsequent implementation of the treaty. In short, the lawsuit highlighted the persistent failure of Yukon to uphold the honour of the Crown – a constitutional principle that requires the government to act with integrity, good faith and fairness in dealing with Indigenous peoples, particularly in the context of treaties and rights agreements.

Initial Judgment

In January 2023, Chief Justice Suzanne Duncan of the Supreme Court of Yukon issued a decision setting aside Yukon's approval of the Metallic Minerals project and finding that:

- Yukon failed to meet the duty to consult and accommodate FNNND.
- Yukon breached its duty to act in a way that would accomplish 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 of the treaty, as well as ongoing planning for the Tsé Tagé watershed.
- Yukon breached its duty of good faith in the performance of the Intergovernmental Agreement, as it did not consider the effect of the proposed decision on land use planning for Tsé Tagé.

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



“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.”

– COURT OF APPEAL DECISION, PARA. 104

Court of Appeal Decision

The Court of Appeal unanimously affirmed the earlier decision of the Yukon Supreme Court on all substantive issues, finding that:

- Yukon acted unlawfully and dishonourably when it authorized the Metallic Minerals project.
- Yukon failed to fulfill its duty to consult FNNND.
- Yukon breached its duty to act in a way that would accomplish the treaty’s intended purpose by failing to recognize the relevance and applicability of FNNND’s Chapter 11 rights and by not engaging in the land use planning process for the Tsé Tagé watershed.

The Court of Appeal affirmed the decision of Chief Justice Duncan to set aside Yukon’s approval of the project. The only change to the earlier decision was that the Court of Appeal declined to grant two of the three declarations highlighted below, finding them no longer necessary when the decision itself provided all necessary guidance and remedy.

Key implications

1. FNNND has a right to co-manage its traditional territory.

The Court of Appeal agreed with FNNND that a core objective of the treaty is to ensure that the First Nation has a meaningful role in managing its traditional territory, including through land use planning. The Court held that FNNND has a treaty right to co-manage its land and resources with Yukon – a right that cannot be ignored (paras. 103, 145). The Court also noted (para. 101) that “the 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 ... [T]he ‘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.’”



Modern treaty interpretation principles require Yukon to adopt a generous approach to treaties, recognizing that they are a floor, not a ceiling. Yukon failed to do this.

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

Generalizing from this specific decision: Yukon cannot ignore core chapters and promises of treaties at its convenience. The government is reminded – once again – that it must take a generous and purposive approach to interpreting and implementing treaties. Yukon must work toward reconciliation by creating space for First Nations to co-manage the land and resources of their territories.

2. Yukon must work to achieve the purposes of the treaty.

The Court of Appeal recognized that one of the purposes of the treaty was to share governance over FNNND’s land and resources, and that Yukon had breached its duty to work to achieve this. The Court found that the honour of the Crown required Yukon to:

- pursue the purpose of Chapter 11 of the treaty – to ensure meaningful participation by FNNND in the management of land and resources in the traditional territory
- consider and discuss the effect of the project on a future potential Chapter 1 planning process, as well as the ongoing Tsé Tagé watershed planning process (para. 151).

Yukon failed on both counts.

From this decision, we can draw a broader conclusion: The spirit and intent of treaties matter, as do the objectives they are meant to achieve. Yukon has an obligation to work to achieve the purpose behind treaties – to share governance, lands and resources between Indigenous and non-Indigenous peoples. Yukon has been failing to live up to this constitutional obligation. The Court of Appeal made clear that this has to change.



3. Authorizing development risks jeopardizing future land use planning processes.

The Court of Appeal recognized that approving development in an area subject to a planning process may jeopardize that process and the subsequent land use plan. The Court also criticized Yukon for failing to consult FNNND regarding the impacts of the Metallic Minerals project on land use planning for the Tsé Tagé watershed.

Implicit in the decision is a more fundamental question: What's the point of a land use plan if all of the land has already been developed? As the decision noted (para. 159) in agreeing with FNNND's submission, "approval of a development project in an area where land use planning is occurring may undermine the land use planning process, and the...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."

Most of FNNND's traditional territory – and indeed most of the Yukon – has not undergone a land use planning process. To date, the Yukon Government has refused to implement interim protection to preserve the status quo until planning is undertaken. While the Court of Appeal did not go so far as to require an immediate moratorium on mineral claim 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 treaty 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 in the Yukon – decisions rooted in treaties and not in the short-term economic interests of development proponents.

“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....We hope this decision sparks a wholesale shift in Yukon Government's approach to treaty implementation.”

– CHIEF DAWNA HOPE, FIRST NATION OF NA-CHO NYĀK DUN

**This summary highlights key points of the decision of the Yukon Court of Appeal in [First Nation of Na-Cho NyāK Dun v Yukon \(Government of\)](#), 2024 YKCA 5. The summary was prepared by Pape Salter Teillet LLP, legal counsel to FNNND in this appeal, and reflects the opinions of the firm. It does not constitute legal advice.*