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Court Confirms that Good Faith Fulfilment of Modern Treaties is Essential to the Project of Reconciliation

By: Nigel Bankes

Case Commented On: *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 (CanLII)

In this unanimous decision authored by Justice Karakatsanis, the Supreme Court of Canada confirmed what seems like an obvious proposition, namely that good faith fulfilment of modern treaties is a necessary condition for the project of reconciliation. The Court concluded that the land use planning process established by the Yukon Final Agreements permitted Yukon to modify a Recommended Final Plan (in this case the Peel Watershed Regional Land Use Plan), but that the power to modify did not include the power to change a Plan "so significantly as to effectively reject it" (at para 39). More specifically, Yukon's power to modify was confined by the scope of the issues that it had raised during the planning process; it could not raise significant new issues although it could respond to changing circumstances. As a result, Yukon's purported approval of the Plan was invalid (at para 35).

The appropriate remedy in these circumstances was to turn back the clock to the stage in the decision-making process where Yukon was to "approve, respect or modify" the Plan in accordance with the above directions as to the scope of the power to modify (at para 58). The Court expressly rejected the remedy directed by the Yukon Court of Appeal which would have taken the process back further – thereby allowing Yukon the opportunity to introduce new issues into the planning process and thereby also enhancing the scope of its modification power. According to the Court (at para 61), "Yukon must bear the consequences of its failure to diligently advance its interests and exercise its right to propose access and development modifications to the Recommended Plan. It cannot use these proceedings to obtain another opportunity to exercise a right it chose not to exercise at the appropriate time."

All of this seems entirely appropriate.

In reaching her conclusion Justice Karakatsanis emphasises (at para 4) that "this proceeding is best characterized as a judicial review of Yukon's decision to approve its land use plan" (and see also para 32). That was perhaps not controversial in this particular case. Indeed, Justice Karakatsanis seems to use that frame of reference both to justify rejecting the Court of Appeal's analysis but also to suggest that the Court should play a restrained role in the implementation of modern treaties or land claim agreements. She puts it this way (at para 60):

> In my view, the Court of Appeal's approach is inconsistent with the appropriate role of courts in a judicial review involving a modern treaty dispute. The court's role is not to assess the adequacy of each party's compliance at each stage of a modern treaty process. Rather, it is to determine whether the challenged decision was legal, and to quash it if it is

> not. Close judicial management of the implementation of modern treaties may undermine the meaningful dialogue and long-term relationship that these treaties are designed to foster. Judicial restraint leaves space for the parties to work out their understanding of a process — quite literally, to reconcile — without the court's management of that process beyond what is necessary to resolve the specific dispute. By assessing the adequacy of Yukon's conduct at the s. 11.6.2 stage of the land use plan approval process, even though the First Nations did not seek to have the approval quashed on that basis, the Court of Appeal improperly inserted itself into the heart of the ongoing treaty relationship between Yukon and the First Nations.

But while this approach and framing seems to have favoured the First Nations in this particular case, I am not sure that a judicial review approach is consistent with the idea of building a consent-based relationship between Indigenous communities and the state. The purpose of judicial review is to ensure the proper exercise of statutory power rather than the good faith fulfilment of consent-based relationships. It is judicial supervision within the framework of the legal system of the settler state rather than judicial supervision of an inter-societal normative order that requires that treaties be performed by both parties in good faith (Vienna Convention on the Law of Treaties, Article 26). Justice Karakatsanis seems to recognize this alternative framing in the opening words of her judgment (at para 1) when she states that: "As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation" but then quickly moves to the judicial review framing. But how are these two framings connected? Or are they fundamentally disconnected?

I think that some of the (disconnecting) consequences of an over emphasis on a judicial review framing include the following:

- It downplays the significance of land claim agreements as contracts, treaties and constitutional accords.
- It invites the framing of judicial intervention in terms of standard of review and deference (to statutory decision-makers) rather than in terms of ensuring good faith implementation.
- It emphasises the statutory rules (including the Rules of Court) of the settler state rather the development of inter-societal norms to foster reconciliation.
- It invites parties to frame remedies in terms of quashing rather than in terms of (state) responsibility, or restitution, or fulfilling the terms of the bargain.

In this particular case a judicial review framing seems not to have made much difference and indeed seems to have allowed the Supreme Court to settle upon a remedy that perhaps best fulfilled the terms of the land claim agreement; but the Court could have used other language to achieve that result. For example, it might simply have said that the remedy sought by Yukon and endorsed by the Court of Appeal was inconsistent with the fundamental norm of good faith implementation of consent-based obligations (*pacta sunt servanda*); or it could have said that the remedy granted by the Court of Appeal was *ultra petita* (i.e. a remedy beyond that sought by the applicant) – a familiar concept in consent-based inter-state arbitration.

My point is not that judicial review is never an appropriate approach in the context of land claim agreement implementation: see for example: *Nunavut Tunngavik Inc. v Canada (Minister of*

Fisheries and Oceans), [1998] 4 FCR 405, 1998 CanLII 9080 (FCA). Rather my point is that land claim agreements are normatively complex instruments, part contract, part treaty, part statute, part constitutional instrument and that thus we should be open to considering a range of remedies that best fulfil the overall objective of the agreements – remedies that judicial review cannot always provide. An example of this broader approach is *Nunavut Tunngavik Incorporated v Canada (Attorney General)*, 2014 NUCA 2 (CanLII) (on the remedy of disgorgement; for ABlawg post see here). In that case the parties ultimately reached a $255 settlement agreement.

Thanks to my colleague Martin Olszynski for stimulating a discussion of the judicial review framing in the case.

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