

Crown Consultation with Ghotelnene K'odtineh Dene

October 2021 Written Submissions

In the written submission to the Nunavut Planning Commission (the “Commission”), dated October 8, 2021, Ghotelnene K'odtineh Dene sought clarity on how the Crown's duty to consult merged with, not just the Commission's 2021 Draft Nunavut Land Use Planning process, but all of the Commission's processes (plan development, approval and implementation). Clarity is necessary if consultation is going to be meaningful and the Commission's processes are to be efficient and effective. The Commission's perceptions of its responsibilities related to the Crown's duty to consult will impact on how the Commission considers comments and recommendations on the 2021 DNLUP from Ghotelnene K'odtineh Dene and other Section 35 rightsholders and on how it conducts itself in other processes within the Commission's mandate.

Ghotelnene K'odtineh Dene recommended that the Commission, the Crown and Section 35 rightsholders engage in discussions to determine how the Crown's duty to consult will, or will not, be merged with all aspects of the Commission's processes (plan development, approval and implementation), authorities and responsibilities. Ghotelnene K'odtineh Dene also recommended that the Commission include the outcome of these discussions in the Nunavut land use plan.

In Canada's covering letter to its written submission to the Commission, dated October 8, 2021, Canada stated the following with regards to its duty to consult:

The Commission's process, as laid out in the Nunavut Agreement and the *Nunavut Planning and Project Assessment Act*, is used by the Crown to discharge its duty to consult with Indigenous people. The Government of Canada remains actively engaged throughout the Commission's process, listening to Indigenous concerns and issues and noting how they may be resolved. The Commission's final draft plan, submitted to the approving parties, along with the Government of Canada's identification of those concerns and potential solutions, provides federal decision-makers information that allows them to assess the adequacy of Crown consultation, and forms the basis of the

Minister's decision and subsequent consideration by Governor-in-Council. The Government of Canada therefore urges Indigenous peoples to focus their efforts on providing the Commission with all the information it will need to evaluate the draft plan and how it might affect their rights and interests, including Section 35 rights.

To the best of Ghotelnene K'odtineh Dene's knowledge, this statement was the first instance on the Commission's public record that Canada declared it was relying on the Commission's processes to discharge its duty to consult with Indigenous people.

Additional Submissions

Since October 2021, Ghotelnene K'odtineh Dene have engaged in further discussions with representatives from Crown-Indigenous Relations and Northern Affairs Canada to seek clarity on Canada's position on how it sees the Commission's processes discharging the Crown's duty to consult, and what other processes outside of the Commission's process will also be used to discharge the Crown's duty to consult. Although these discussions have been helpful in better understanding Canada's position, in Ghotelnene K'odtineh Dene's view, comprehensive discussions between the Crown, the Commission and section 35 rightsholders are required for there to be a clear and common understanding on this fundamental issue. The outcome of these discussions should be incorporated into the Draft 2021 Nunavut Land Use Plan and the Commission's other processes. This will provide for a transparent Crown consultation process and ensure that Indigenous people, the Crown, and the Commission are all aware of and in accord with the process of Crown consultation.

A critical component of these discussions is the Commission's view of its processes, authorities, and responsibilities, if any, in discharging the Crown's duty to consult. To date, Ghotelnene K'odtineh Dene is not aware whether the Commission has agreed to undertake the duty to consult or aspects of the duty to consult, on behalf of the Crown. If the Commission's processes are intended to discharge the Crown's duty to consult, it will be necessary to identify and discuss the mechanisms, resources, and expertise in place to ensure that comments and concerns related to Section 35 rights are appropriately sought, received, considered, and accommodated. Further consideration

will need to be given to whether the Commission's processes and its authorities and mandates under the Nunavut Land Claim Agreement and the *Nunavut Project Planning and Assessment Act* are consistent with the procedural and other requirements of the Crown's duty to consult.

A common understanding of the content and scope of the duty to consult will also be key to determining how the Crown's duty to consult may or may not be discharged through the Commission's processes. As discussed in Ghotelnene K'odtineh Dene's written submission, dated October 8, 2022, the Crown should advise how it intends to address its outstanding commitments to Indigenous peoples through the Nunavut land use planning process, including the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) generally and specifically the principle of free, prior and informed consent. Canada's commitment to implementing UNDRIP including the principle of free, prior and informed consent was reinforced by the recent Ministerial mandate letters, including the letter to the Minister of Northern Affairs, dated December 16, 2021, that directed the Minister "...to implement the United Nations Declaration on the Rights of Indigenous Peoples and to work in partnership with Indigenous Peoples to advance their rights."

Ghotelnene K'odtineh Dene are Section 35 rightsholders in Nunavut and it is critical that the Nunavut Land Use Plan acknowledge this. The Crown in right of Canada affirmed Ghotelnene K'odtineh Dene's Section 35 rights in Nunavut as recently as January 31, 2022, when the Minister of Northern Affairs, Dan Vandal, stated to the Nunavut Impact Review Board:

The responsible Ministers would like to confirm that Canada acknowledges the asserted and established Section 35 rights of Ghotelnene K'odtineh Dene in Nunavut. In addition, we highlight the Board's responsibility to consider the potential impacts of projects on these rights and interests. Ghotelnene K'odtineh Dene have used and lived on and continue to use and live on the lands and waters that are part of the Qamanirjuaq caribou herd's habitat, both inside and outside of Nunavut.¹ [Emphasis added]

¹ Letter from Minister Daniel Vandal to Kaviq Kaluraq, Nunavut Impact Review Board, dated January 31, 2022, Nunavut Impact Review Board File No. 11MN034.

In Ghotelnene K'odtineh Dene's written submission, dated October 8, 2022, Ghotelnene K'odtineh Dene included comments and recommendations related to their Section 35 rights, including the section titled "Dënesuḷiné Areas 4.2.2-1 (Map B2.5): Nature and Extent". At this time, it is uncertain whether the Commission would view Ghotelnene K'odtineh Dene's comments and recommendations through the lens of consultation and accommodation proposed by a Section 35 rightsholder or some other lens.

Finally, Ghotelnene K'odtineh Dene submit that the discussions related to the duty to consult, and the Nunavut land use planning process must not be limited to plan development and approval, but must also address the duty to consult during the implementation of the plan, including conformity determinations, variances, Ministerial exemptions and plan amendments. Ghotelnene K'odtineh Dene look forward to engaging in these discussions with Canada, the Commission, and other interested parties as the review of the 2021 Draft Nunavut Land Use Plan progresses.