SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v. Yukon*, 2019 YKSC 26 Date: 20190527
S.C. No. 16-A0120
Registry: Whitehorse

BETWEEN

ROSS RIVER DENA COUNCIL

PLAINTIFF

AND

GOVERNMENT OF YUKON

DEFENDANT

Before Chief Justice R.S. Veale

Appearances:

Stephen Walsh	Counsel for Ross River Dena Council
I.H. Fraser and Katie Mercier	Counsel for the Government of Yukon

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ross River Dena Council ("RRDC") applies, pursuant to Rule 31(6) of the *Rules of Court*, for the following order:

a) a declaration that the issuance of hunting licences and seals under the *Wildlife Act* and *Regulations* by the Government of Yukon might adversely affect the Aboriginal title of the Ross River Dena Council's members in and to the Ross River Area by permitting conduct in that Area inconsistent with Aboriginal title.

b) a declaration that the Government of Yukon has a duty to consult with and, where indicated, accommodate the Ross River Dena Council prior to issuing hunting licences and seals under the *Wildlife Act* and *Regulation* which allow the persons to whom the hunting licences and seals have been issued to enter the Ross River Area, and use and occupy the lands comprising that Area, in order to hunt big game animals in the Ross River Area

c) a declaration that, in respect of each of the 2016/2017, 2017/2018 and 2018/2019 hunting seasons, the Government of Yukon failed to consult with and, where indicated, accommodate the Ross River Dena Council prior to issuing hunting licences and seals under the *Wildlife Act* and *Regulation* which enabled the persons to whom the hunting licences have been issued to enter the Ross River Area, and use and occupy the lands comprising the Area, in order to hunt big game animals in that Area;

d) an order for the special costs of this action; and

e) such further or other relief as is considered just and fair in the circumstances.

[2] The Government of Yukon ("Yukon") opposes the application and relies upon *RRDC v. Yukon*, 2015 YKSC 45 (the "*RRDC* 2015 wildlife case"), where this Court refused to grant a declaration of a constitutional duty to consult on wildlife matters. This Court held that it was unnecessary to make this declaration when Yukon was ready, willing, and able to negotiate and consult on wildlife matters. There is no dispute about declaration a) that the issuance of licences and seals "might adversely affect" the

asserted Aboriginal claim to title. That matter was decided in the affirmative in the *RRDC* 2015 wildlife case, at para. 56.

[3] The issue that arises again is a dispute over the strength of the RRDC claim which drives the scope of the duty to consult. In the oral submissions, Yukon indicated a willingness to consult on wildlife matters on a deep consultation basis as set out in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida Nation"*), at paras. 44, 48 and 49.

[4] However, counsel for RRDC submits that the consultation must address the incidents of Aboriginal title outlined in *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 (*"Tsilhqot'in Nation*"), at para. 73.

[5] Counsel for RRDC frames the real issue as follows:

> At the heart of the dispute between the parties regarding whether the third element of the *Haida* test in engaged is a basic and fundamentally important disagreement as to whether the suite of ownership rights that are included as part of Aboriginal title are to be considered in the determination of whether the issuance of hunting licences and seals that permit hunting in the Ross River Area might adversely affect the plaintiff's claimed title. As noted above, the court confirmed in *Tsilhqot'in Nation* (at para. 73) that Aboriginal title includes the rights listed below:
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> - the right to decide how the land will be used;
> - the right of enjoyment and occupancy of the land;
> - the right to possess the land;
> - the right to the economic benefits of the land; and
> - the right to pro-actively use and manage the land.

[6] A collateral issue dividing the parties is the RRDC claim that the entire Ross River Area should be a permit hunt area rather than Yukon's view that permit hunting is more appropriate as a wildlife management tool in specified game management zones.

YUKON CASE LAW

[7] The context and content of Yukon's duty to consult RRDC in wildlife matters requires a consideration of the previous decisions of this Court and the Court of Appeal of Yukon.

[8] In *Ross River Dena Council v. Yukon*, 2012 YKCA 14 (the "*RRDC* 2012 mining case"), at para. 56, the Court of Appeal made the following order:

> a) the Government of Yukon has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands compromising [as written] the Ross River Area are to be made available to third parties under the provisions of the *Quartz Mining Act.*
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> b) the Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the Ross River Area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff.

[9] I note that in para. 45, Groberman J.A. declined to specify precisely how the Yukon mining regime might be brought into conformity with the requirements of *Haida Nation* as each case must be considered on its own merit.

[10] While it is clearly not in issue in the case at bar, it is my understanding that RRDC and Yukon have been negotiating the manner in which this court order is to be implemented for the last seven years without resolution. However, in response to the *RRDC* 2012 mining case Yukon made an order in council entitled Order Prohibiting Entry on Certain Lands in Yukon (Ross River Dena Council), recorded as O.I.C. 2013/60, which has effectively prohibited the registration of new placer and quartz mining claims in the Ross River Area since 2012.

[11] In the *RRDC* 2015 wildlife case, this Court set out the Yukon Wildlife Management regime and statistics specifically relating to the Ross River Area which is the claimed traditional territory of the RRDC. It encompasses 63,095 km^2 or about 13% of Yukon's land. It includes 83 of the 443-game management subzones in Yukon. The case also discusses the Finlayson Caribou Herd whose population has been declining from approximately 6,000 in 1990 to approximately 3,077 in 2007 (paras. 26 – 32). As stated in the *RRDC* 2015 wildlife case, there are seven mountain caribou herds that migrate within the Ross River Area during some portion of the year. The Finlayson Caribou Herd is the only one that remains entirely within the Ross River Area.

[12] I concluded in the *RRDC* 2015 wildlife case that the *Haida Nation* test for the duty to consult, as stated in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, at para. 31, had been met:

1. Yukon had actual knowledge of the RRDC asserted Aboriginal claim;
2. Yukon's contemplated Crown conduct in the annual issuing of hunting licences and seals had been met; and
3. Yukon's annual permission for licensed hunters to harvest wildlife in the Ross River Area has the potential to adversely affect Aboriginal title and the RRDC members' right to hunt.

[13] Having found that Yukon has a duty to consult and accommodate on wildlife matters, I made the following disposition and declined to grant a declaration of the duty to consult and accommodate RRDC on wildlife matters:

> [95] I have found that Environment Yukon has substantially consulted and accommodated RRDC in the Ross River Area in the past, and should continue to do so without the necessity of a Declaration from the Court.

> [96] In addition, the proposed mechanism of requiring that consultation precede the Yukon-wide issuance of licence and seals is far-reaching in its application unlike the declaration in *RRDC #1* [the *RRDC* 2012 mining case] which was limited geographically and therefore an effective trigger for the Ross River Area.
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> [97] This case is also distinguishable from *RRDC #1* [the *RRDC* 2012 mining case] as that case involved a denial of the duty to consult in addition to the timing issue. Here, the duty to consult is acknowledged and performed.
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> [98] For these reasons and the fact that declarations should be used sparingly, I exercise my discretion not to make a declaration that the duty to consult in the Ross River Area arises before the issuance of Yukon-wide licences and seals.
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> [99] Having so found though, I do want to observe that in my view there would be benefit to convening regular and predictable, i.e. annual, consultations with RRDC at the time that Yukon considers its annual hunting regulations. It strikes me that this would be an effective and reliable way of ensuring that RRDC's claims to title and hunting rights within the Ross River Area are recognized.

[14] This is the background to understand this application by RRDC for a declaration that Yukon has failed to consult, and, where indicated, to accommodate RRDC in wildlife matters for the 2016/2017, 2017/2018, and 2018/2019 hunting seasons.

[15] To make it abundantly clear, counsel for RRDC submits that Yukon:

a) refuses to accept that the RRDC claimed Aboriginal title to the Ross River Area includes the rights to the exclusive use and occupation of, and management and control over that Area, and

b) continues to deny that the issuance of hunting licences and seals might adversely affect the claimed Aboriginal title of the RRDC’s members in and to the Ross River Area.

DEEP CONSULTATION

[16] In *Haida Nation,* McLachlin C.J. described a spectrum to indicate what the honour of the Crown, i.e. the duty to consult, may require in cases of asserted but not established claims to Aboriginal title. The following principles are set out in *Haida Nation*:

1. At one end of the spectrum, where the claim to title is weak, the only duty may be to give notice, disclose information and discuss (para. 43);
2. At the other end of the spectrum, where the claim to title is strong, deep consultation is required which may include participation in the decision-making process, dispute resolution procedures and entitlement to written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on decisions. This list is neither exhaustive nor mandatory;
3. Between the extremes, the controlling question is (para. 44) what is required to maintain the honour of the Crown and to effect reconciliation with respect to the interests at stake (para. 45);
4. When consultation suggests taking steps to avoid irreparable harm or to minimize infringement, a duty to accommodate may arise (para. 47); and
5. This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim and is not a duty to agree (paras. 48 and 49).

[17] I find that there are a number of reasons that deep consultation is required by Yukon and I confirm that Yukon, at the hearing, did not dispute that deep consultation is required.

[18] Firstly, in *Ross River Dena Council v. Canada (Attorney General)*, 2019 YKCA 3 (the "1870 Order case"), the Court of Appeal of Yukon confirmed the constitutional obligation in the Rupert's Land and North-Western Territory Order (U.K.), reprinted in R.S.C. 1985, App. II, No. 9 (the "1870 Order"), which reads:

> [u]pon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

[19] I note that in the 1870 Order case, the proceeding concerned only a portion of the Ross River Area, namely Trapping Concessions Nos. 405 and 415.

[20] Savage J.A., in the Court of Appeal, put the 1870 Order in context for the case at bar, at paras. 50 and 57:

> [50] Whether it is appropriate to characterize such an obligation, at the time of enactment, as merely "moral" or "political", as opposed to "legal", seems, with respect, of no moment. Ultimately, RRDC argues that the proper interpretation of the Transfer Provision of the 1870 Order is to create a binding condition precedent that requires Kaska claims to be settled prior to opening their traditional lands for settlement. The submissions supporting that are founded on the interpretation issues raised in the appeal which I will now address.
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> …
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> [57] Despite finding that Parliament's original intent in 1870 was for the Transfer Provision to create a moral and not a legal obligation, the judge concluded, in conjunction with other established principles, that today the Transfer Provision imposes a legally binding constitutional obligation on Canada to consider and settle the claims of Indian tribes for compensation for their lands required for purposes of settlement (RFJ at paras. 167-169). The judge [Gower J.] therefore found the Transfer Provision legally enforceable today, as RRDC asserts.

[21] While the 1870 Order case is against Canada and not Yukon, it is important for the case at bar to recognize the historic and legal nature of the RRDC claim to title and its application to Yukon.

[22] Secondly, there have been significant impacts on the RRDC traditional territory, namely the Canol pipeline and Alaska Highway construction during World War II and the establishment of the Faro lead-zinc mine in the 1960s. In other words, the impact of specific developments involving Crown conduct has been ongoing for at least 50 years.

[23] Thirdly, Canada, Yukon and RRDC have been negotiating land claims off and on from 1973 to 2002. In my view, this supports the RRDC strength of claim as negotiations would only proceed on the understanding that there was an asserted but as yet undefined underlying claim to title.

[24] Fourthly, the RRDC strength of claim is enhanced by the lands set aside, on an interim basis, for settlement purposes.

[25] The fifth factor arises out of an agreement between representatives of the Kaska Nation, including RRDC, entitled Framework for a Government-to-Government Agreement in January 2016 (the “Framework Agreement”). The Framework Agreement was comprehensive in its proposed areas of negotiation and provided financial support for RRDC to participate. RRDC states that the Framework Agreement “… began substantive negotiations under the Framework Agreement and prioritized negotiations related to fish and wildlife matters in order to reach mutually agreeable arrangements regarding matters in this litigation and other related matters.” The Framework Agreement expired on March 31, 2017. Unfortunately, only two days of substantive negotiations took place under the Framework Agreement before it expired. However, the comprehensive nature of the Framework Agreement confirms that “deep

consultation" in wildlife matters is warranted. I note parenthetically that the case at bar was commenced on October 28, 2016. The case was subject to an Abeyance Agreement dated November 2017 that was formally terminated by RRDC by letter dated June 14, 2018.

[26] I conclude that given the longstanding constitutional recognition of the RRDC Aboriginal claim and the lengthy negotiations to settle the claim, Yukon has an obligation to have deep consultation with RRDC on wildlife matters. Although Yukon did not expressly acknowledge in its written Outline that deep consultation was appropriate, counsel for Yukon submitted on the record that Yukon consulted RRDC on the deepest level on wildlife management activity.

THE REAL ISSUE: ASSERTED TITLE V. ESTABLISHED ABORIGINAL TITLE

[27] The real issue in this case is whether RRDC, under its asserted claim for Aboriginal title, is entitled to the ownership rights set out in para. 73 of *Tsilhqot'in Nation*.

[28] The issue before me is whether the ownership rights of established Aboriginal title can be applied to the duty to consult in an asserted claim for Aboriginal title.

[29] At para. 73 of *Tsilhqot'in Nation*, the Supreme Court set out the incidents of established or confirmed Aboriginal title as follows:

> [73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

[30] It is these incidents of established Aboriginal title that RRDC submits apply to the duty to consult on its asserted claim for title.

[31] In *Tsilhqot'in Nation*, the Court then went on to summarize the procedure required by the Crown to develop the First Nation's land:

> [89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails [page299] to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.
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> [90] After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.
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> [91] The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong - for example, shortly before a court declaration of title - appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*. (my emphasis)

[32] In my view, RRDC is at the claim stage of asserting Aboriginal title. It is not at the final resolution or shortly before the establishment of Aboriginal title.

[33] The application of the *Haida Nation* and *Tsilhqot'in Nation* principles to the case at bar requires deep consultation and accommodation, if appropriate. However, RRDC does not have a right to veto any development or impose a duty to agree or require that RRDC consents to any developments in the Ross River Area. Yukon and RRDC must participate in a process of consultation along the *Haida Nation* principles, at the stage of an asserted RRDC claim for title. The ownership principles in para. 73 of *Tsilhqot'in Nation* are based on established title and there is no obligation to literally apply the *Tsilhqot'in Nation* incidents of established title in this "deep consultation" on wildlife matters. At the same time, Yukon must consult and accommodate where appropriate to avoid a ruling similar to *Tsilhqot'in Nation*. In *Tsilhqot'in Nation*, it was held that the province of British Columbia failed to consult and accommodate from the time the Tsilhqot'in Nation claim to title was filed in 1983 and the declaration of title in 2014. See para. 95 in *Tsilhqot'in Nation*.

HAS THERE BEEN A FAILURE OR BREACH OF THE DUTY TO CONSULT?

[34] In this case, Yukon acknowledges that its duty to consult with RRDC on wildlife matters requires "deep consultation" and, where appropriate accommodation.

[35] I find that Yukon has consulted extensively with RRDC representatives through sharing the harvest results, the population surveys, and discussing wildlife management issues.

[36] Yukon has provided RRDC with notification of planned wildlife initiatives which include:

(a) proposed Game Guardian program;

(b) outfitter quotas for the Finlayson caribou herd;

(c) Tay River caribou monitoring program;

(d) Grizzly Bear Conservation and Management Plan;

(e) survey of the Liard River moose herd; and

(f) Control Orders under the *Animal Health Act*, S.Y. 2013, c. 10, to protect wild sheep and goats.

[37] Yukon has shared specific wildlife data and information:

(a) Finlayson caribou herd population surveys;

(b) Tay River and Moose Lake caribou herd population surveys;

(c) comparative harvest data for moose, caribou, bear, and sheep for 1995 – 2017;

(d) updates to the guidelines for thin-horn sheep management; and

(e) programs such as Game Guardians and Community Ecological Monitoring.

[38] Yukon has also provided the following funding for:

(a) The Kaska, including RRDC, pursuant to the terms of the Framework Agreement;

(b) The RRDC to participate in discussions and negotiations with Yukon; and

(c) The RRDC to participate in game check and land steward programs.

[39] RRDC acknowledges that there has been a lot of correspondence as well as many meetings and discussions between representatives. For its part, RRDC has responded with many specific proposals. One of the proposals is the August 2018 RRDC request to Canada for an Indigenous Protected Area for 64% of the Ross River Area which would include the Ross River Trapping Concession, the Keele Peak –

Macmillan Area, the Ross River Lowlands, the Pelly River Corridor and the Pelly-Liard Watershed Divide. It includes a proposal for the Ross River Indigenous Guardian Program. These are appropriate matters for discussion and consultation. However, failure to agree does not necessarily result in a breach of the duty to consult, or, if appropriate, to accommodate. On the other hand, Yukon must always be alive to when appropriate accommodation is required.

[40] The ongoing disagreement in the Yukon-RRDC wildlife consultation is the RRDC proposal that the entire Ross River Area should be a permit hunt area. In other words, the former permit hunt in the Finlayson Caribou Herd for example would be extended for the entire Ross River Area. This was demanded by RRDC's Chief in a letter to the Premier dated March 3, 2016.

[41] Yukon sees this as a proposal to limit hunting access to the Ross River Area rather than a useful wildlife management tool for such an extensive area. Yukon firmly believes that there is no specific harm or potential harm to wildlife in the Ross River Area that is not being managed successfully under the existing wildlife management regimes, with the exception of the Finlayson Caribou Herd, which was already under a permit hunt. Nevertheless, Yukon is prepared to continue discussing the proposal but raises the challenge of amending the *Wildlife Regulations* and following the public involvement under the Fish and Wildlife Management Board, the primary instrument of fish and wildlife management, in Chapter 16 of the 11 First Nations Final Agreements.

[42] By letter dated June 14, 2018, the RRDC Chief informed the Premier and Minister of the Environment that there were growing concerns among its Elders and members about the effects of overhunting on the caribou and moose populations in the Ross River Area. As a result, RRDC published a NOTICE in the June 15, 2018 edition

of the Yukon News about its concern about overhunting and continuing this litigation. The NOTICE also required any non-Kaska hunters to obtain a permit to hunt moose or caribou in the Ross River Area. Approximately 59 hunters obtained RRDC permits.

[43] RRDC also imposed a moratorium on non-Kaska hunters hunting in Sheldon Lake, Dragon Lake, 41 Mountain, Mount Mye, Pelly Lakes, Finlayson Lake, Blind Lake, Pelly River and Ross River. It is unclear what impact this RRDC moratorium may have had on licences issued by Yukon and the annual wildlife harvest in the Ross River Area.

[44] The Elders' concerns are reflected in the 2017 Population Estimate for the Finlayson Caribou Herd at 2,712 caribou, which indicates a continuing decline from the 3,077 population estimate in the 2007 survey.

[45] The RRDC NOTICE of June 15, 2018, and the population decline, appears to have elicited a response from Yukon in July 2018, when Yukon closed the permit hunt for the Finlayson Caribou Herd and set the outfitter quota to zero for the 2019/2020 hunting season.

[46] This is significant accommodation and recognition that the Finlayson Caribou Herd is of critical importance to RRDC. However, Yukon does not consider that there is a depletion of wildlife resources generally in the Ross River Area or that the RRDC moratorium is necessary. These are obviously areas of disagreement that should always be on the table for further discussion.

[47] It is also important to note that in the June 14, 2018 letter, the RRDC terminated the Abeyance agreement regarding this litigation. It is encouraging that Yukon responded with respect to the Finlayson Caribou Herd and also that it continued consultations with RRDC. It resulted in the Minister of Environment and the Chief of RRDC, on or about July 18, 2018, signing off on a list of Long Term Vision and

Immediate Actions to address outstanding wildlife and harvest issues, as well as funding in a document described as a Government-to-Government commitment. The document did not result in a final agreement being reached by March 31, 2019.

[48] I conclude that both prior to and after the termination of the Abeyance agreement, there has been "deep consultation" with RRDC with respect to wildlife matters and no breach of the duty to consult, and where appropriate, to accommodate. Although Yukon's closing of the permit hunt for the Finlayson caribou herd came after the RRDC Notice on June 15, 2018, it is a significant accommodation.

CONCLUSION

[49] The application of RRDC is dismissed. There has been an extensive and "deep consultation" on wildlife matters resulting in significant accommodation between Yukon and RRDC.

[50] As indicated earlier, there is no dispute about declaration a) that the issuance of licences and seal "might adversely affect" the asserted Aboriginal claim of title. This matter was decided in the *RRDC* 2015 wildlife case, at para. 56.

[51] There is no requirement for Yukon to consult with respect to the incidents of Aboriginal title set out at para. 73 in *Tsilhqot'in Nation* on the basis of an established Aboriginal title. However, unlike the government in the *Tsilhqot'in Nation* case, Yukon acknowledges its obligation to consult and, where appropriate, to accommodate RRDC. That issue was decided in the *RRDC* 2015 wildlife case in 2015.

[52] The *RRDC* 2015 wildlife case did not address the scope of the duty to consult and this case confirms that it is a deep consultation.

[53] I decline to issue a declaration on deep consultation as Yukon acknowledges its obligation in that regard.

[54] As to the RRDC's claim for a declaration that Yukon's duty to consult must be prior to the issuance of hunting licences and seals, that matter was dismissed in 2015 and I decline to make such a declaration again. It is not practical nor appropriate to make every holder of a licence and seal in Yukon subject to a duty to consult RRDC prior to issuance.

[55] I also dismiss the RRDC claim for a declaration that Yukon has failed to consult and where appropriate accommodate. Both Yukon and RRDC have been engaged in consultation and will hopefully continue to do so as they both share a mutual interest in preserving wildlife populations.

[56] The RRDC claim is dismissed and counsel may speak to costs if necessary.

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VEALE C.J.