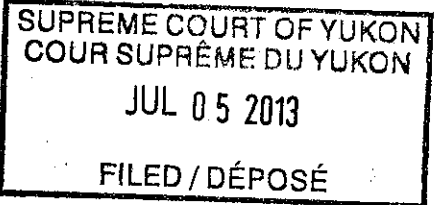


SUPREME COURT OF YUKON



Citation: *White River First Nation v. Yukon Government*,
2013 YKSC 66

Date: 20130705
S.C. No. 12-A0090
Registry: Whitehorse

Between:

CHIEF EIKLAND JR. on his own behalf and on behalf of all other members of
WHITE RIVER FIRST NATION and WHITE RIVER FIRST NATION

Petitioners

And

THE MINISTER OF ENERGY, MINES AND RESOURCES, and THE YUKON
GOVERNMENT, and ROBERT HOLMES, in his capacity as director of Mineral
Resources Branch, Ministry of Energy, Mines and Resources and
TARSIS RESOURCES LTD.

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Robert Janes, Karey Brooks and
Krista Robertson

Counsel for the Petitioner White River First
Nation

Laurie Henderson and Penelope Gawn
Thomas Isaac and Morgan Camley

Counsel for the Government of Yukon
Counsel for Tarsis Resources Ltd.

REASONS FOR JUDGMENT

INTRODUCTION

[1] On March 19, 2012, Tarsis Resources Ltd. ("Tarsis Resources") applied for a 5-year Class III Mining Land Use Approval permit for the White River – Quartz Exploration Project (the "White River Project").

[2] White River First Nation now applies to quash a decision (the "Decision Document") of the Director of Mineral Resources (the "Director"), dated September 5,

2012, that the White River Project be considered for regulatory approval. The Director rejected a Designated Office Evaluation Report (the "Evaluation Report"), dated July 30, 2012, recommending that the White River Project not be allowed to proceed because it will have significant adverse effects both on wildlife and wildlife habitat (specifically the Chisana Caribou Herd) and on traditional land use and culture of White River First Nation that cannot be mitigated.

[3] The Director consulted with representatives of the First Nation on August 21, 2012. In the Decision Document dated September 5, 2012, the Director rejected the recommendation of the Designated Office on the grounds that "any potential significant adverse effects associated with the project can be mitigated".

ISSUES

[4] The Court is not reviewing the Decision Document on its merits or substituting the decision of the Court for the decision of the Director, Mineral Resources. Rather, the Court will decide the following issues:

1. What is the standard of review to apply to the scope and extent of the duty to consult and the process of consultation?
2. What is the scope and extent of the duty to consult and accommodate with the White River First Nation regarding the Tarsis Resources White River Project?
3. Did the Director breach his duty to consult and accommodate White River First Nation?
4. If the Director has breached his duty to consult and accommodate White River First Nation, what is the remedy?

BACKGROUND AND CONTEXT

[5] Prior to the hearing, the Court granted Kluane First Nation party respondent status. Kluane First Nation signed a Final Agreement with Canada and Yukon in 2003. It shares a traditional territory with White River First Nation. Shortly before the hearing, counsel for Kluane First Nation advised the Court that it would not take a position with respect to the judicial review application of White River First Nation.

White River First Nation

[6] This application for judicial review is brought by Chief Eikland Jr. on behalf of all members of White River First Nation and the White River First Nation.

[7] White River First Nation is a small First Nation that has its administrative headquarters in the community of Beaver Creek, which is located in southwestern Yukon near the Alaska border. Beaver Creek is approximately 450 kilometres from Whitehorse and 480 kilometres from Fairbanks, Alaska, and approximately 35 kilometres from the Alaska border. Beaver Creek is now the primary residence for most White River First Nation members. Members of the White River First Nation are descendants of Northern Tutchone and Upper Tanana language speakers, which reflects the historical relationship with aboriginal people across the Alaska border and in central and northern Yukon. Beaver Creek is an historical First Nation campsite that became a Yukon Government settlement as well after the construction of the Alaska Highway in the early 1940's.

[8] Up until 1991, the White River First Nation was not recognized by Canada as a separate Band. As a result of a "wrongful amalgamation" without the consent of the White River First Nation, Canada included them as members of the Kluane First Nation,

whose headquarters is some 172 kilometres to the east on the Alaska Highway at Burwash Landing.

[9] The Council for Yukon Indians ratified the Umbrella Final Agreement on behalf of Yukon First Nations on May 29, 1993 with Canada and Yukon, signifying "their mutual intention to negotiate Yukon First Nation Final Agreements in accordance with the Umbrella Final Agreement". The Umbrella Final Agreement does not create or affect any legal rights. White River First Nation remains a Band under the *Indian Act*, R.S.C. 1985, c. I-5, as it has never entered into a Final Agreement as Kluane First Nation did. The Final Agreement negotiations between White River First Nation, Canada and the Yukon commenced in 1991, but concluded in 2005, when Canada terminated its mandate.

[10] The White River First Nation continues to assert Aboriginal rights and title to all land and waters within their traditional territory. The traditional territory claimed by the White River First Nation totals approximately 5,000 square miles and encompasses parts of Kluane National Park. This is apparently greater than the traditional territory that Canada and Yukon recognize.

[11] The traditional territory issue is complicated by the fact that Kluane First Nation Final Agreement has a traditional territory that is the same as the traditional territory that Canada and Yukon recognize for the White River First Nation. Nevertheless, there is no question that the White River Project is located in the White River First Nation traditional territory used by its members and recognized by Canada and Yukon.

[12] The rights and interests of First Nations without Final Agreements are safeguarded by the common law constitutional duty to consult arising out of the *Haida*

Nation judgment and s. 74(2) of the *Yukon Environmental and Socio-Economic Assessment Act*, S.C. 2003, c. 7 ("YESAA").

[13] Certain land claim selections, approximately 525 square kilometres identified by White River First Nation, have been protected from disposal and withdrawn from staking and other dispositions by Canada and Yukon. To give some perspective, the adjacent blocks of quartz claims comprised by the White River Property and the Wolf Property, represent approximately 420 square kilometres that were staked in the last several years.

[14] The White River First Nation has been fully engaged in the environmental and socio-economic assessment of the White River Project. The affidavit of Janet Vander Meer, the Lands Coordinator and a member of the White River First Nation through her mother's family line, consists of 50 exhibits and has formed the basis of the judicial review application. White River First Nation also attempted to negotiate an agreement with Tarsis Resources, the proponent of the White River Project. Tarsis Resources funded an initial review of the White River Project at a cost of \$1,984.50 by Calliou Group, who describe themselves as Aboriginal Consultation Specialists. That review, dated March 7, 2012, addressed a draft Tarsis Resources Application for Class 3/4 Quartz Mining Land Use proposal for the White River Project, which Tarsis Resources provided to the First Nation. The Calliou Group review recommended the initiation of project-specific baseline studies, including a Traditional Land and Resource Use Study. While Tarsis Resources incorporated some Calliou Group recommendations into its ultimate proposal submitted under YESAA, it refused to fund the proposed study. The First Nation and Tarsis Resources did not agree on how to proceed. White River First

Nation ultimately retained Calliou Group at its own expense to carry out limited traditional land use interviews and produced a report for the YESAA assessment that was conducted by the Haines Junction Designated Office.

Tarsis Resources

[15] Tarsis Resources describes itself as an early stage exploration company, which prospects for gold, copper, silver and base metal deposits. It options or sells the potential deposits to others. It does not develop or manage mines. It has no full time employees and it contracts work out to First Nations and others interested in and qualified to do the exploration work. It employed members of the White River First Nation and Kluane First Nation in 2010 and 2011. It also offered training opportunities, but no members of the White River First Nation participated.

[16] Tarsis Resources' White River Claims, as distinct from the White River Project, consist of 335 contiguous quartz claims in an area of approximately 6,700 hectares. The White River Claims were staked in late June 2010, during the recent staking rush. The White River Claims are adjacent to a much larger claim block owned by Teck Resources called the Wolf Property.

[17] In 2010 and 2011, Tarsis Resources conducted preliminary Class I exploration activities on 97 of the 335 claims covering approximately 20 square kilometres at a cost of \$500,000. Pursuant to an Option Agreement with Driven Capital Corp. a further \$800,000 has been spent on a drilling program on two of the claims.

[18] Tarsis Resources has no legal obligation to consult with the White River First Nation, but it has made significant efforts to inform the First Nation of its activities, including the Class I activities which, at the time they were undertaken required no

permit or approval from the Yukon Government and no duty to consult the White River First Nation by the Yukon Government. The relationship between Tarsis Resources and the White River First Nation could be described as cordial in 2010 and 2011.

[19] As stated, in 2012, Tarsis Resources provided White River First Nation with a draft Class III Application and funded the preliminary Calliou Group review. It was at that point that the relationship broke down, with Tarsis describing its White River Project as early stage exploration and rejecting the recommendation of the Calliou Group for extensive baseline studies as inappropriate in this context.

[20] This case is not about the relationship of the White River First Nation and Tarsis Resources, but rather about the duty of the Yukon Government to consult and accommodate the First Nation. I do not wish to demean the Tarsis Resources interest. I have briefly discussed their interaction and ultimate disagreement to indicate the gap in perception between an early stage exploration company and a First Nation whose interests were expressed by Janet Vander Meer:

... The Proposed Project is situated in a pristine wilderness area, which is rich with vegetation, water and animal life. I have learned from my elders that, since time immemorial, our people have extensively used the lands and waters in and around the Proposed Project area for resource harvesting and cultural practices. It is the home of the Chisana caribou herd, a herd that White River First Nation members have traditionally harvested, but have been unable to harvest, by a voluntary hunting ban, since 1994 due to a dramatic decline in the herd. The use of these lands provides us with more than subsistence. Our ongoing connection to the land, and the ability to go out on the land and pass on our knowledge to the younger generations is fundamental to the survival of our culture and our way of life as a people. ...

[21] Tarsis Resources, on the other hand, has incorporated various environmental monitoring and mitigation plans into its proposal but does not wish to enter into a Traditional Knowledge Protocol Agreement and fund further studies, which it considers to be more appropriate for an advanced mining project and disproportionate to early stage exploration activities. Tarsis Resources was prepared to negotiate a Memorandum of Understanding that was simply an expression of good will and evidence of their intention to work with the First Nation on a footing of mutual respect.

[22] The White River First Nation and Tarsis Resources fundamentally disagree on the purpose of this assessment. The First Nation says the assessment should include the adjacent mining activities and the build-out to a mine that may be contemplated; the exploration company wants to limit the assessment to its specific project.

The White River Project

[23] On March 19, 2012, Tarsis submitted its five-year Class III Mining Land Use Approval permit application. The proposed work area covers approximately 64 of the 335 quartz claims totalling approximately 1280 hectares (the "Class III Work Area"). The Class III Work Area is comprised of the Main Work Area and the East Work Area, both of which are at the higher elevations of the White River Project.

[24] The scope of activities that may be included under a Class III exploration program are extensive and include, among other things, structures with foundations, storage of more than 40,000 litres of fuel, trenching not exceeding 5,000 m³ per claim per year to a maximum of 10,000 m³ over the life of the exploration program, more than 8 clearings, helicopter pads and camps and construction of underground structures and

removal of 100,000 tons of rock per year and not more than 200,000 tons for the exploration program.

[25] However, the activities proposed for the White River Project are significantly less than the range of activities that can be applied for and conducted under a Class III permit. Tarsis Resources will not, according to this specific application, construct any camps, roads, structures with foundations or helicopter pads, clear any trees or use vehicles on the terrain other than two small excavators and diamond drill rigs.

[26] The proposed Class III activities are planned to take place annually between May and October each year for up to five years. The Project will be accessed by helicopter from an airstrip 15 kilometres southwest of the property at the White River Lodge on the Alaska Highway. The associated activities include:

- Use of heavy machinery including 2 excavators and 2 diamond drill rigs
- Developing new trails on claim (up to 10 km, 5 m wide)
- Helicopter access (maximum of 10 flights per day)
- Drilling (100 holes, 20,000 m total)
- Water use: up to 20,000 L/day
- Clearings: up to 10/claim, 25 m²
- Line cutting and IP surveying (1 m wide, 60,000 m total)
- Trenching by hand and mechanized equipment (up to 100 trenches, total of 10,000 m³)
- Fuel handling and storage (4,100 L diesel and 820 L Jet A in 205 L drums)
- On-going and final reclamation and decommissioning activities.

[27] The application includes a number of mitigation measures which have been augmented through the assessment process.

[28] Reclamation measures for the above activities include the following:

- (a) repairing any degradation to slopes;

- (b) monitoring slope stability;
- (c) re-contouring and re-vegetation during deactivation and final decommissioning;
- (d) native re-seeding on slopes to prevent erosion;
- (e) progressive backfilling of trenches once sampling and geological mapping is complete;
- (f) backfilling of drill pads and sump locations; and
- (g) adding organic materials to promote natural re-vegetation.

[29] Tarsis has taken additional steps including:

- (a) the measures described in Tarsis' Environmental Monitoring Protocol which was submitted to YESAB as part of the Final Class III Application;
- (b) commissioning of a water quality monitoring program;
- (c) commissioning of a Heritage Resource Overview Assessment following issuance of the Decision Document; and
- (d) seeking advice from a Yukon wildlife biologist (Richard Farnell) regarding potential impacts on local caribou and recommendations for mitigation measures, following issuance of the Decision Document.

[30] The Farnell Report dated December 11, 2012, was neither part of the assessment process nor the consultation process with White River First Nation.

Although Mr. Farnell does not appear to be a member of the Working Group in the Management Plan for the Chisana Caribou Herd 2010 – 2015, he was a senior biologist with the Yukon Department of the Environment until 2006. He was the project manager for the International Chisana Caribou Recovery Project (2003 – 2006) and has been retained by Tarsis Resources to make further recommendations for mitigation

measures. Mr. Farnell expressed the view that the exploration activities proposed by Tarsis do not present a threat to the herd.

The Chisana Caribou Herd

[31] Both the Assessment Report and the Decision Document focus on the impact that the White River Project will have on the Chisana Caribou Herd (the "CCH"). Some background on the herd is necessary. There is a Management Plan for the Chisana Caribou Herd 2010 – 2015 (the "Management Plan"), that was prepared by the Chisana Caribou Working Group in October 2012. The Management Plan contains a disclaimer that it does not create any commitments or obligations that are legally binding, but it is significant because it is approved by the Yukon Government, White River First Nation, Kluane First Nation, Alaska Department of Fish and Game, United States Fish and Wildlife Service and National Park Service. The Working Group was established in 2009 to develop a management plan for the Chisana Caribou Herd. It consists of 17 persons representing the various government bodies mentioned above, including former Chief David Johnny of the White River First Nation, Troy Hegel, a caribou biologist, Yukon Environment and Lorne Larocque, Kluane Fish and Wildlife Technician, Yukon Environment.

[32] The Executive Summary sets the stage:

The Chisana caribou herd (CCH) is a small international herd occurring in Yukon and Alaska on the Klutlan Plateau and near the headwaters of the White River. During the 1990s through 2003, the herd experienced a long and steady decline in population. Low recruitment, predation, climate, habitat, and harvest pressure likely all contributed to the decline. From 2003 to 2006, a recovery effort designed to increase recruitment and calf survival was conducted. Pregnant cows were captured and enclosed within a holding

pen during the last weeks of gestation and a few weeks following calving.

...

[33] The CCH range covers Alaska land within the Tetlin National Wildlife Range and the Wrangell – St Elias National Park and Preserve. In Yukon, the CCH ranges within the boundaries of the Kluane Wildlife Sanctuary and Asi Keyi Natural Environment Park (currently under management planning pursuant to the Kluane First Nation Final Agreement) and across the traditional territories of the White River First Nation and Kluane First Nation.

[34] The CCH suffered a dangerously steep decline in the 1990s. The estimated population in the late 1980s was approximately 1,900 caribou and it declined to approximately 315 by 2002. In 1994, the White River First Nation and the Kluane First Nation voluntarily stopped hunting the herd. At the request of the First Nations, the herd was designated as “Specially Protected” in 2002, prohibiting all licensed harvest of the herd and requiring a regulation change to initiate a harvest. It was also designated a species of “Special Concern” (Northern Mountain Caribou) under the *Species at Risk Act*, S.C. 2002, c. 29.

[35] Caribou biologists determined that weather and predation were the primary causes of the documented mortality. Between 2003 and 2006, the Yukon Department of Environment conducted a captive rearing program. As stated in the Management Plan at p. 6:

This program successfully increased the number of calves recruited into the population during 2003 – 2006. Based on census information from 2003 through 2010, the population appears to have been stable between 682 (2010) and 766 (2007) animals.

[36] From 2003 to 2006, pregnant cows were captured and transferred to a holding pen within their natural range for protection from predators. Radio-telemetry was used to monitor the survival of both caribou calves raised in the pen and in the wild. The Management Plan indicates that since 1987, both adult female and calf caribou have been radio-collared to maintain a sample of approximately 10 – 25 animals. In 2008, there were approximately 131 active radio telemetry collars and as of 2011, there were 90 active collars.

[37] The population trend which “appears to have been stable” is based upon fall composition counts which indicate bull-cow ratio and calf recruitment rates.

[38] With respect to population monitoring, the Management Plan states at p. 16:

Objective 1: Regularly monitor the CCH, track population trends, sex ratios and recruitment, and maintain a herd that is stable to increasing.

Considering recent recovery efforts, the international significance, and the importance of the herd to First Nations and residents of Yukon and Alaska, a cautious approach is being taken to manage the CCH which requires consistent and ongoing monitoring. It is therefore, important to support a stable or increasing population.

Strategy 11: Conduct regular monitoring of the herd

To best adhere to the population management goals and indicators, regular monitoring will be required. At least one census is recommended to occur within the life of this plan, and as early as possible to best complement the censuses conducted in 2005 and 2007. Annual fall composition surveys should be conducted in years when censuses do not occur, and annual to semi-annual telemetry flights should be conducted in coordination with other monitoring where possible, as described above.

[39] A footnote indicates that a census was conducted in 2010. The Management Plan recommends 1 – 2 telemetry flights per year which would report on the over 100 active radio-collars remaining on the herd.

[40] The Management Plan indicates that limiting factors for the CCH survival are habitat, climate, predation and human factors. As to the human factors, the Management Plan states at p. 12.

The CCH range is remote and there are few issues related to access. There are no roads into the range and all-terrain vehicles generally are not used in the area. Access to the area is easiest by snowmobile or aircraft, but occurs infrequently.

[41] The Management Plan also identified that “very little information exists with respect to habitat quality or habitat use and availability.” It also stated that although some work had been done in 2001 “further work could be done to engage knowledgeable community members in management of this herd”.

[42] The Management Plan sets out eight useful principles to guide the management of the CCH. While all the principles are important, I set out the following as particularly relevant to this case:

- Management of the herd and its habitat will depend on the ability of management authorities to develop and implement cost-effective and timely programs and approaches.
- Management must use the best available information and respect traditional, local, and scientific knowledge.
- Management of the herd relies on the health of all ecosystem components that support the herd.

- Consistent with the precautionary principle, required management strategies should not be delayed even if detailed information is limited or lacking. Caution must be exercised to avoid potential effects of human activities to the caribou herd and its habitat. (my emphasis)

[43] The Management Plan recommends a harvest of the CCH for the following reasons at p. 19:

Three censuses are required to estimate a population trend in a herd. Because of the intensive recovery program, and cessation of hunting since 1994, a cautious approach is being taken with respect to reestablishing a hunt on the CCH. The working group waited for the completion of the 2010 census to determine whether the herd was stable or increasing, and had a minimum sex ratio of 35 bulls to 100 cows. These indicators were met and so a harvest of the CCH was recommended to the management authorities.

The Evaluation Report

[44] The Evaluation Report is a comprehensive 79-page assessment prepared by the Haines Junction Designated Office. The Report is briefly summarized in the Executive Summary:

Five valued components were identified in the assessment: wildlife and wildlife habitat, environmental quality, First Nation traditional land use and culture, heritage resources and outfitting. The Designated Office has determined that the project will result in significant adverse effects on wildlife and wildlife habitat (specifically the Chisana caribou herd) and First Nation traditional land use and culture that cannot be mitigated.

[45] The Evaluation Report relies upon the Management Plan discussed above and, in addition, focusses upon the White River Project at p. 12:

A group of the Chisana caribou herd use the White River Property year round. In particular, collar data for cows and calves showed that the areas located within the Main and

East Work Areas were used for calving and post-calving over five consecutive years. Collar data from 2009 showed approximately 36 cows and 15 calves in the White River Property, primarily in the East Work Area; this represented 20% of all calves surveyed for the CCH that year over its range. WRFN also identified the mountain tops with which the Main and East Work Areas overlap as good caribou habitat, and identified a caribou migration route for the Chisana herd between Chisana, Alaska and Fort Selkirk as crossing through the property. As well, Mr. Dave Dickson of Dickson Outfitters [a member of the Kluane First Nation] noted that the small group of Chisana caribou are using the project area year-round, including use by bulls during the fall rut (late September – October). (my emphasis)

WRFN members have also identified caribou habitat in the region as follows:

- Migration route near Koidern to Miles Ridge;
- Migration route from Chisana (Shushana) Alaska to Wellesley Lake;
- Migration from White River to Beaver Creek to Alaska;
- Migration route across the Alaska Highway south of Koidern at Wolf Lake; and,
- A calving ground in the mountains south of Koidern near the Donjek River area. (footnotes omitted)

[46] I note that the reference to 20% of all calves surveyed for the CCH that year over its entire range was a personal communication from Lorne Larocque, Kluane Fish and Wildlife Technician, Yukon Government.

[47] With respect to the affected First Nations, the Assessment Report says at p. 15:

The White River property is located within the traditional territories of the White River First Nation (WRFN) and the Kluane First Nation (KFN). KFN ratified their Final Agreement, which delineates a KFN Core Area and a WRFN Core Area, as well as an area of overlap between the First

Nations. The proposed project is located entirely within the WRFN Core Area. However, it should be noted that WRFN did not ratify their Final Agreement, and may not agree with the delineated Core Areas or Core Area concept. Further, WRFN is in the process of updating a Traditional Territory boundary, which is currently not on record/recognized by Yukon Government. Nevertheless, this information is included as an *indicator*, among other indicators, of the potential importance/significance of the project area to each of KFN and WRFN, and their potential respective values in the region.

[48] The Evaluation Report also considered the traditional land use information contained in the White River First Nation Traditional Land Use Study for the Alaska Pipeline Project, a 94-page report prepared by the Calliou Group dated October 26, 2011. The proposed Alaska Pipeline corridor generally follows the Alaska Highway. That study, based upon interviews with 31 First Nation members, is limited to the use by the First Nation's members in the vicinity of the proposed pipeline but it also identified past and present hunting areas for moose, sheep and caribou in areas adjacent to or overlapping the White River Project. The White River First Nation, in a meeting with the Yukon Environmental and Socio-Economic Board ("YESAB") on June 22, 2012, indicated that the White River Project area was in a "red zone" as it was important to the First Nation. Further explanation was posted to the YESAB website on July 24, 2012, indicating the major waterways in the region and the quality of the associated wildlife habitat, giving the region both historical and contemporary significance.

[49] The Evaluation Report summarizes the views and information provided to the Designated Office and YESAB in a 3-page table that includes the request for a traditional land use study financed by Tarsis Resources Ltd. The First Nation also

identified, among many things, hunting areas for big and small game as well as important habitat and migrating routes for caribou, moose, sheep and bears.

[50] The significant adverse effects to the Chisana Caribou Herd that the Designated Office concludes cannot be mitigated are summarized as follows at pp. 46 – 48 of the Evaluation Report:

- There is a direct overlap of Project activities with the calving and post-calving areas year after year at the same time and at the same location as the proposed Project. The auditory and visual disturbances and loss of the calving ground will likely result in reproductive declines in the Chisana Caribou Herd;
- The Chisana Caribou Herd is an endangered herd and its precipitous 80% decline is poorly understood. Significant public investment has been made to recover the herd for 2003 to 2006;
- No census data has been taken since the boom in mineral staking and exploration and it is unclear if and how the caribou population has been affected;
- A healthy and sustainable caribou population is of value for First Nations, outfitters, hunters and tourism as indicated by “the costly, intrusive, and multi-jurisdictional captive-rearing program undertaken”;

[51] Having considered possible mitigations, the Designated Office concluded that “avoidance of activities that would cause a loss of this critical habitat is the only practical measure that would mitigate for this significant adverse effect”.

[52] As noted, according to the Evaluation Report (page 47), there has not been a survey of the Chisana Caribou Herd since the last count in 2009, which showed a decrease in the recruitment ratio of calves. Given the approximately 420 km² of staking in 2010 and 2011 (the White River Property and the Wolf Property) there may be declines (or increases) that could be greatly exacerbated by human activity. The Evaluation Report concludes:

... Therefore, new survey data may indicate a declining population since 2009 due to this exploration activity, which is likely to have already affected caribou use of this calving ground. Furthermore, should the population be in a phase in which it is declining, population declines will likely be greatly exacerbated by human-caused factors; conversely, if a population is undergoing a natural increase, this increase can be dampened by human activity (Farnell 2009).

[53] Finally, the Evaluation Report concludes that chronic helicopter disturbance, drilling, trenching and trail building for five years will result in significant adverse effects to Traditional Land Use and Culture that cannot be mitigated. The Evaluation Report listed the key mitigations the proponent has committed to undertake.

[54] It is not possible to do justice to this 79-page comprehensive Evaluation Report but the significance of the Chisana Caribou Herd to the members of the White River First Nation is described as follows:

... The assessment of wildlife determined that effects to caribou would be significant and adverse by jeopardizing the recovery and causing the continued decline of this endangered herd. The latter will have cascading effects to traditional land use and culture by perpetuating, what is already, a two-decade long ban on hunting of the CCH by WRFN. The continued inability of WRFN to hunt the Chisana Caribou widens the gap in the continuity of cultural practices, with implications for younger generations of WRFN members. WRFN members who do not have the opportunity to hunt CCH may not have the same opportunities to utilize

traditional ecological knowledge associated with the herd, and will be less likely to have the same personal connection of 'sense of place' attachment to the animals that often comes with use. Further, the continued demise of the herd may result in a multiple generations of WRFN members who do not "remember" the presence of CCH in areas of its range, or in its former numbers. Effects to the CCH will affect the future subsistence harvesting of these animals, as the project will result in effects that are likely to cause a decline in this endangered herd, with long-term implications for their recovery.

[55] There was some disagreement between counsel as to whether the Evaluation Report was, according to White River First Nation's counsel, an "exceptional" recommendation in that it rejected the White River Project. Of the hundreds of Evaluation Reports, counsel for the Yukon Government could recall only one other that rejected a quartz mining proposal. Counsel for the Yukon Government agreed that it was "not common".

The Consultation

[56] The Director of Mineral Resources had a tight timeline of 30 days from the date of Evaluation Report on July 30, 2012, plus an additional 7 days to meet the s. 74(2) consultation under YESAA and any common law constitutional consultation. The Director, a professional mining engineer, was assisted by the Chief of Mining Land Use, previously a Senior Policy Advisor with the Canadian Environmental Assessment Agency. The Director has the authority to issue the Decision Document dated September 5, 2012.

[57] The Mining Lands Officer initially sent a letter to the White River First Nation "mistakenly" stating that the Designated Office recommended that the White River Project proceed to regulatory approval. The error was corrected.

[58] In his affidavit, the Chief of Mining Land Use recognized the importance of the Chisana Caribou Herd, given its specially protected species designation and the Yukon initiated recovery program. Recognizing the importance of the Chisana Caribou Herd and Yukon's understanding of the concerns of White River First Nation about the herd, he contacted Troy Hegel by telephone on August 16, 2012, and the following is his summary record of that conversation:

- Caribou observed in the Tarsis-White River project area are members of the Chisana herd.
- Chisana herd, based on radio telemetry data, is considered stable at close to 700 animals since roughly 2005.
- There is little or no caribou presence at the Main Work area of the proposed Tarsis-White River quartz exploration project.
- Caribou are observed year-over-year at or close to the East Work Area. Cows and calves are present in spring, but there is some evidence of a post-calving presence near the East Work Area. Animals typically leave the area by mid-September. No data showing fall/winter presence.
- Generally, only a few animals are observed at the East Work Area, but the same animals appear to return year after year. Data for 2009 shows a larger congregation of animals near the East Work Area, including 15 calves.
- Potential effects on caribou can be mitigated or avoided by restricting work at the East Work Area to the period September 15 to October 31 and by

routing helicopter access along the White River corridor to the extent possible. (my emphasis)

[59] Troy Hegel, as indicated earlier, is a caribou biologist and a Working Group participant in the Management Plan for the Chisana Caribou Herd 2010 – 2015. This personal communication was not disclosed to White River First Nation until the Chief of Mining Land Use filed an affidavit in this proceeding on January 10, 2013.

[60] Tarsis Resources identified the same details about no caribou presence in the Main Work Area as opposed to high concentrations of calving and post calving telemetry data in the East Work Area in a letter to YESAB dated August 15, 2012, purportedly copied to Tim Smith. I refer to this letter at this point, not because the letter would be part of the consultation, but rather to indicate that the assertion that there is no caribou presence at the Main Work Area was a live issue.

[61] The consultation meeting between the Director and White River First Nation took place on August 21, 2012. I will refer to the extensive notes that the First Nation reproduced. I prefer to rely upon the 15 pages of notes provided by the First Nation rather than the one-page cryptic summary provided by the Chief of Mining Land Use. There is no substantial disagreement between the two versions.

[62] The Director stated that his staff did a lot of the “grunt work”, such as analysis and talking to departments, but that, at this point, he had formed no opinion and wanted to hear the First Nation views on the Evaluation Report.

[63] The Director stated again that he wanted to ensure that all the issues and concerns of the First Nation were considered. The Director’s legal counsel wanted to confirm that the First Nation’s views were accurately characterized by the assessor.

[64] Representatives of the First Nation stated that the Evaluation Report may have been too narrowly focussed on caribou and did not contain enough detail about other traditional hunting, trapping, fishing and gathering activities. In general, though, it was clear that the First Nation approved of the document's recommendation to reject the proposal and the reasoning behind this conclusion.

[65] The Director's legal counsel suggested that if the recommendation in the Evaluation Report was rejected further consultation may be required.

[66] The Chief of Mining Land Use also stated that if the Evaluation Report is found wanting or its conclusions are not based on sound or substantiated evidence, there is little choice but to reject the recommendations.

[67] There is no evidence that the consultation meeting addressed the views expressed by Troy Hegel on August 16, 2012, or any other reason for rejecting the recommendations of the Evaluation Report.

[68] On August 29, 2012, the Chief of Mining Land Use e-mailed Janet Vander Meer of White River First Nation that:

... while a final Decision Document has not yet been issued, we are concerned that the conclusions and recommendations contained in the YESAB Decision Document are not well founded and do not have a solid evidentiary basis. ...

[69] I assume that the reference to the YESAB Decision Document refers to the Evaluation Report. The Chief of Mining Land Use went on to say that when the proposed project is considered for regulatory approval there will be a further opportunity to explore residual impacts on traditional land use and culture. He also attached a

summary of "our analysis of the treatment of WRFN key concerns" in the Evaluation Report.

[70] The summary contained the following under the heading "Caribou Harvesting":

[According to the *Management Plan for the Chisana Caribou Herd 2010-2015*, the CCH now appears to be stable at approximately 700 animals. The Evaluation Report suggests a broader distribution of caribou within the White River claim block, including the Main Work Area. This conclusion is not borne out by telemetry data, which instead indicates that the presence of caribou is concentrated in the eastern portion of the property. The Evaluation report also suggests a post-calving presence through the summer and fall period, whereas telemetry data confirms no presence beyond mid-September, when animals migrate further south. This would suggest that project effects on the CCH can, in part, be mitigated by restricting project activities spatially and temporally.] (my emphasis)

[71] The same summary was faxed to Chief and Council of the White River First Nation on August 30, 2012. On August 31, 2012, by fax, counsel for White River First Nation expressed the shock and dismay of the First Nation in a strongly-worded 7-page letter with the following conclusion:

WRFN remains strongly of the view that the conclusions in the Evaluation Report regarding the Project's adverse impacts to caribou and impacts to WRFN's rights and culture, including the conclusion that these impacts cannot be adequately mitigated, are correct. We find the chart you provided to our clients to be troubling in terms of how YTG views the YESAB process and how YTG continues to approach consultation on the Project. We close by again asking you to take into consideration the full extent of the YESAB Report, the input of WRFN, and the larger issues at stake beyond the Tarsis Project: the integrity of the YESAB process, public confidence in that process, and the rights and interests of WRFN. To the extent that YTG is of the view that WRFN's rights and interests can be addressed in subsequent consultations if YTG rejects the YESAB Report, WRFN would have little to no confidence in such an engagement given that YTG has evidently ignored WRFN's

input in the YESAB assessment and the outcomes of that process.

[72] There was no response to this letter prior to the release of the Decision Document.

[73] The Decision Document rejecting the Evaluation Report recommendation was issued September 5, 2012. Further correspondence has been exchanged by the White River First Nation and the Chief of Mining Land Use regarding consultation with the First Nation before the regulatory approval is granted.

The Decision Document

[74] The Decision Body agrees with the Designated Office that the White River Project may have potential significant effects on the Chisana Caribou Herd but does not agree that the effects cannot be mitigated.

[75] Contrary to the conclusion of the Evaluation Report that the significant adverse effects to the Chisana Caribou Herd cannot be mitigated, the Decision Document states:

According to the Management Plan for the Chisana Caribou Herd 2010-2015, the CCH presently appears to be stable at approximately 700 animals. No technical expert put the CCH forward as a concern during the period for seeking views and information and First Nations and stakeholders made only limited reference to caribou. The Evaluation Report suggests a distribution of caribou within the White River claim block that includes the Main Work Area. This conclusion is not borne out by telemetry data, which instead indicates a presence of calving and post-calving caribou concentrated in the eastern portion of the property (YOR2012-0080-081-1), well away from the Main Work Area.

This would suggest that project effects on the CCH can be mitigated by restricting project activities spatially and temporally. It is on this basis that the Decision Body

disagrees with the determination made by the assessor with respect to wildlife and wildlife habitat. (my emphasis)

[76] As to First Nation Traditional Land Use and Culture, the Decision Document stated:

First Nation Traditional Land Use and Culture

The Designated Office determined that the proposed project will result in significant adverse effects on traditional land use and culture that cannot be mitigated. This determination was made specifically in relation to the assessor's determination of adverse effects on the CCH. The Evaluation Report does not conclude that potential effects on other values associated with traditional land use and culture including gathering, trapping, fishing and hunting (with the exception of caribou) cannot be mitigated.

...

Impacts on caribou, the CCH, have been addressed above. With respect to these other issues, the Evaluation Report concluded that any potential adverse impacts other than those related to caribou could be mitigated. The assessor also concluded in the Evaluation Report that any potential adverse impacts from helicopter activity could be mitigated. Bringing these conclusions together with the conclusion noted above regarding the CCH – namely that the Decision Body has determined that any potential adverse effects can be mitigated – the Decision Body has concluded that the determination of the assessor that the project will have significant adverse impacts on traditional land use and culture must be rejected. (my emphasis)

[77] The Decision Document concluded that any potential significant adverse effects associated with the White River Project can be mitigated and adopts some of the Evaluation Report recommendations.

THE LEGISLATIVE FRAMEWORK

[78] YESAA gives effect to the Umbrella Final Agreement, which was negotiated in 1993 by Yukon First Nations, Canada and the Yukon Government, and provides for an assessment process of environmental and socio-economic effects (s. 5).

[79] Assessment is defined by YESAA as an evaluation, in this case, by a designated office (s. 2(1)).

[80] The purposes of the YESAA are set out under s. 5(2)(a) to (j) as follows:

- (a) to provide a comprehensive, neutrally conducted assessment process applicable in Yukon;
- (b) to require that, before projects are undertaken, their environmental and socio-economic effects be considered;
- (c) to protect and maintain environmental quality and heritage resources;
- (d) to protect and promote the well-being of Yukon Indian persons and their societies and Yukon residents generally, as well as the interests of other Canadians;
- (e) to ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities and their residents, and societies in general, depend;
- (f) to recognize and, to the extent practicable, enhance the traditional economy of Yukon Indian persons and their special relationship with the wilderness environment;
- (g) to guarantee opportunities for the participation of Yukon Indian persons -- and to make use of their knowledge and experience -- in the assessment process;
- (h) to provide opportunities for public participation in the assessment process;

- (i) to ensure that the assessment process is conducted in a timely, efficient and effective manner that avoids duplication; and
- (j) to provide certainty to the extent practicable with respect to assessment procedures, including information requirements, time limits and costs to participants.

[81] YESAB is comprised of an Executive Committee of three members and four other Board members. Three Board members, including one Executive Committee member, are appointed on the nomination of the Council of Yukon First Nations and three, including one Executive Committee member, by the nomination and appointment of the federal and territorial governments. The Chairperson of the Board, who is also a member of the Executive Committee, is appointed by the federal minister, after consultation with the other two Executive Committee members.

The Designated Office

[82] Yukon is divided into six assessment districts with Designated Offices located in Dawson City, Mayo, Haines Junction, Teslin, Watson Lake and Whitehorse. The staff of each Designated Office is composed of employees of the Board assigned to that office.

[83] Project proposals subject to assessment under YESAA are submitted to a Designated Office or to the Executive Committee, depending on the activities proposed.

[84] Section 39 of YESAA sets out the general requirement that a Designated Office "shall give full and fair consideration to scientific information, traditional knowledge and other information provided to it or obtained by it under this Act."

[85] Pursuant to s. 42(1) of YESAA, a Designated Office "shall take the following matters into consideration":

- (a) the purpose of the project or existing project;

- (b) all stages of the project or existing project;
- (c) the significance of any environmental or socio-economic effects of the project or existing project that have occurred or might occur in or outside Yukon, including the effects of malfunctions or accidents;
- (d) the significance of any adverse cumulative environmental or socio-economic effects that have occurred or might occur in connection with the project or existing project in combination with the effects of
 - (i) other projects for which proposals have been submitted under subsection 50(1), or
 - (ii) other existing or proposed activities in or outside Yukon that are known to the designated office, executive committee or panel of the Board from information provided to it or obtained by it under this Act;
- (e) alternatives to the project or existing project, or alternative ways of undertaking or operating it, that would avoid or minimize any significant adverse environmental or socio-economic effects;
- (f) mitigative measures and measures to compensate for any significant adverse environmental or socio-economic effects;
- (g) the need to protect the rights of Yukon Indian persons under final agreements, the special relationship between Yukon Indian persons and the wilderness environment of Yukon, and the cultures, traditions, health and lifestyles of Yukon Indian persons and other residents of Yukon;
- (h) the interests of residents of Yukon and of Canadian residents outside Yukon;
- (i) any matter that a decision body has asked it to take into consideration; and
- (j) any matter specified by the regulations.

[86] To this point in YESAA, the statute has used the word "consideration" in both ss. 39. and 42 to describe the mandatory tasks of the Designated Office. In ss. 55 and 56, the words "evaluation" and "determination" are introduced:

Evaluation of Projects by Designated Offices

55.(1) Where a proposal for a project is submitted to a designated office under paragraph 50(1)(b), the designated office shall

- (a) consider whether the applicable rules have, in its opinion, been complied with and notify the proponent accordingly; and
- (b) determine whether the project will be located, or might have significant environmental or socio-economic effects, in the territory of a first nation.

(2) A designated office shall commence the evaluation of a project as soon as possible after it notifies the proponent affirmatively under paragraph (1)(a).

(3) A designated office may seek any information or views that it believes relevant to its evaluation.

(4) Before making a recommendation under any of paragraphs 56(1)(a) to (c), a designated office shall seek views about the project, and information that it believes relevant to the evaluation, from any first nation identified under paragraph (1)(b) and from any government agency, independent regulatory agency or first nation that has notified the designated office of its interest in the project or in projects of that kind.

56.(1) At the conclusion of its evaluation, a designated office shall

- (a) recommend to the decision bodies for the project that the project be allowed to proceed, if it determines that the project will not have significant adverse environmental or socio-economic effects in or outside Yukon;

(b) recommend to those decision bodies that the project be allowed to proceed, subject to specified terms and conditions, if it determines that the project will have significant adverse environmental or socio-economic effects in or outside Yukon that can be mitigated by those terms and conditions;

(c) recommend to those decision bodies that the project not be allowed to proceed, if it determines that the project will have significant adverse environmental or socio-economic effects in or outside Yukon that cannot be mitigated; or

(d) refer the project to the executive committee for a screening if, after taking into account any mitigative measures included in the project proposal, it cannot determine whether the project will have significant adverse environmental or socio-economic effects.

The Decision Body

[87] Section 74(1) of YESAA requires that a Decision Body "shall give full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation."

[88] Further, YESAA sets out in s. 74(2):

A decision body considering a recommendation in respect of a project shall consult a first nation for which no final agreement is in effect if the project is to be located wholly or partly, or might have significant adverse environmental or socio-economic effects, in the first nation's territory.

[89] Section 3 defines consultation:

Where, in relation to any matter, a reference is made in this Act to consultation, the duty to consult shall be exercised

(a) by providing, to the party to be consulted,

(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,

(ii) a reasonable period for the party to prepare its views, and

(iii) an opportunity to present its views to the party having the duty to consult; and

(b) by considering, fully and fairly, any views so presented.

[90] Section 75 requires a Decision Body to issue a Decision Document within the prescribed period, set as 37 days by SOR/2005-380.

[91] Section 83(2) requires the person or body undertaking the project to implement the Decision Document.

ANALYSIS

Issue # 1: What is the standard of review to apply to the scope and extent of the duty to consult of the Director and the process of consultation?

[92] The standard of review may be correctness if the issue relates to the legal and constitutional obligations of the Director, i.e., the existence and extent of the duty to consult and accommodate. On the other hand, the process of consultation, because it depends on the government's reasonable efforts to inform and consult, is reviewed on a reasonableness standard.

[93] Chief Justice McLachlin put it this way in *Haida Nation* at paras. 61, 62 and 63:

[61] On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will

depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[62] The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play... . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

[63] Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation. (my emphasis)

[94] In *Beckman v. Little Salmon/Carmacks First Nation*, Justice Binnie stated a similar standard of review at para. 48:

In exercising his discretion under the Yukon Lands Act and the Territorial Lands (Yukon) Act, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The

standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes? (my emphasis)

[95] In my view, correctness is the appropriate standard to assess the scope and extent of the Director's duty to consult. Whatever else one may take from its recommendations, it is clear that the Decision Body flagged the loss and/or decline of the Chisana caribou herd as having a significant and adverse impact on the Aboriginal rights and culture of the White River First Nation. Whether one considers the resulting recommendation that the Project not be allowed to proceed as 'exceptional' or 'not common', it clearly implicates important legal and constitutional considerations in the Director's obligation that transcend the factual assessment.

Issue # 2: What is the scope and extent of the duty to consult and accommodate with the White River First Nation regarding the Tarsis Resources White River Project?

[96] As stated in *Haida Nation* at para. 35, the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplate conduct that might adversely affect it. The duty to consult is based upon the "honour of the Crown" and as stated in *Taku River Tlingit*, at para. 24:

.... In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

[97] While acknowledging that different situations require different levels or processes for consultation, the Chief Justice stated at para. 42 of *Haida Nation*:

At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted. (my emphasis)

[98] The scope and extent of the duty to consult applicable in any given case falls on a spectrum that ranges from the giving of notice, to providing for submissions, to deep consultation that results in accommodation. It is determined by weighing the strength of the claim and the nature of the Aboriginal right against the significance and likelihood of adverse impacts from the proposed Crown conduct (*Haida Nation*, paras. 43 and 44).

[99] In describing meaningful consultation, the Chief Justice relied upon the insight provided by the New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to

amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ...

[100] As for the duty to accommodate that may arise after a good faith consultation, *Haida Nation* suggests at para. 49:

... The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them. (my emphasis)

[101] The context of the duty in *Haida Nation* was that the Haida had "a good *prima facie* case" that red cedar was integral to the Haida culture, and the potential impact of the tree farm licences was serious enough to require significant accommodation. In other words, the *Haida Nation* case fell at the more stringent end of the spectrum.

[102] Even at the low end of the spectrum, as in *Beckman v. Little Salmon Carmacks First Nation*, the consultation must be more than a "mere courtesy" (para. 57).

[103] I am satisfied that the Director of Mineral Resources has a duty to consult and accommodate the White River First Nation at the more stringent end of the spectrum requiring a deeper consultation for the following reasons.

[104] The Yukon Government is well aware of the claim of the White River First Nation to its traditional territory. The Council for Yukon First Nations entered into the Umbrella Final Agreement on behalf of White River First Nation, among others, to negotiate a Final Agreement. Canada, Yukon and White River First Nation negotiated for many years and although no Final Agreement was reached, it is disingenuous to suggest that the First Nation has a weak claim. It is a strong claim.

[105] The Designated Office has found that the proposed mining activity will have significant adverse effects on both wildlife and wildlife habitat and on traditional land use and culture that cannot be mitigated. It is significant that the Evaluation Report recommends that the White River Project not be allowed to proceed. It means that the independent body created to evaluate projects determined that these adverse environmental and socio-economic effects are so significant that they cannot be mitigated. Not surprisingly, the First Nation agrees with the Evaluation Report. But until a s. 74(2) consultation takes place with the Director of Mineral Resources, the First Nation has no way to determine what the view of the Director might be in response to the conclusion of the Evaluation Report that the White River Project should not proceed.

[106] The process of consultation that was implemented in the *Liard First Nation* case is worth considering in this context. I found that Liard First Nation, which also has no Final Agreement, was entitled to consultation that was 'significantly deeper' than the minimum and to accommodation where possible, and that this duty was met by the Crown. There, the Decision Body had accepted the recommendation of the Designated Office that the Selwyn Project proceed with some variations to the mitigation recommendations. In that case, and I do not suggest it is required in this case, the Decision Body presented Liard First Nation with drafts #1 and #2 of its Decision Document before the consultation meeting. This meant that there could be a meaningful exchange of views on the substantive environmental issues that arose.

[107] The consultation in *Liard First Nation* was held in Watson Lake. Nine Yukon Government employees, including the Director of Mineral Resources, two YG consultants, a Liard First Nation consultant and five representatives of the First Nation,

including the Chief, attended either in person or by teleconference. This meeting was set for the specific purpose of consulting the First Nation about the Evaluation Report and the second draft of the Decision Document. The second draft had been prepared to incorporate feedback about the first draft from the First Nation's consultant, and suggestions from this consultation meeting were also considered and added.

[108] As set out in *Haida Nation* and subsequent cases, the duty to consult and accommodate incorporates both procedural and substantive elements. Professor Sossin, in his article "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can. J. of Admin. Law and Practice 93, states at p. 106:

While many of the actual rights involved in the duty to consult look similar to the rights involved in procedural fairness in administrative law (for example, the provision of notice and disclosure, the opportunity to develop and present views by parties whose rights and interests are affected, the entitlement to reasons before an impartial decision-maker, etc.) two important differences deserve to be highlighted.

First, the duty to consult and accommodate involves not just a procedural guarantee, but also, importantly, a substantive constraint. Governments cannot discharge their duty to aboriginal communities simply by demonstrating that they provided a venue for those communities to be heard. It is also necessary to show that the governments' substantive position has been modified as a result. The duty, in other words, includes accommodation and not just consultation, and in this sense provides a far more significant constraint on the Crown than the duty of fairness at administrative law.

Second, the duty to consult may also include the requirement to provide aboriginal communities with the capacity to participate in the consultation process. In other words, the duty is a positive and proactive one, rather than simply a duty to allow for participation. Just how far this positive duty may reach remains unsettled.

So, if the duty to consult was both based upon and meant to operate beyond administrative law duties of fairness, the question is what exactly the duty was meant to look like in practice. As the Court made clear, guidance may be found in administrative law principles, but something "more" is also needed to discharge the particular duty, and the elaboration of that something "more" was largely left to later judicial comment. (my emphasis)

[109] This is not to suggest that the duty to consult and accommodate imposes any particular course of action or result. Crown action or inaction may be justified so long as the process of consultation has been meaningful. I would also note that, depending on where a case falls along the spectrum of the duty, accommodation is not always necessary.

[110] In my view, the duty to consult, which is statutorily imposed on the Decision Body in s. 74(2) with respect to a First Nation without a Final Agreement, has to be considered in the context that it is imposed. It must be assumed that the Designated Office has done an independent public consultation that includes a great deal of input from an affected First Nation. The Decision Body is entitled to rely upon the representations that have already been made, particularly in this case, where White River First Nation was fully engaged in that broad consultation.

[111] However, the Decision Body's duty to consult is not merely a check-in procedure to assess whether the First Nation is satisfied with the Evaluation Report. This is especially true here, where the Decision Body was considering a recommendation that the White River Project not be allowed to proceed.

[112] The Decision Body's duty to consult is not limited to an assessment about whether the Designated Office's evaluation has been satisfactory to the First Nation, although that is one component of the duty. In my view, a meaningful or genuine

consultation requires an exchange of views. While s. 74(2) is drafted somewhat narrowly in that respect, I rely on the *Haida Nation*, *Taku River Tlingit* and *Rio Tinto* cases to find that it nonetheless requires an exchange or dialogue that gives the First Nation some meaningful input into the decision-making process. If the Decision Body's duty to consult is fulfilled by merely asking the question "what do you think about the Evaluation Report?", in a context like this one, the consultation won't ever amount to more than "blowing off steam" because the First Nation would be hard pressed to disagree with a rejection of a project it opposes. There must be more.

[113] It has been submitted that the people of White River First Nation did not make specific reference to the Chisana Caribou Herd in their presentations to the Designated Office. While I would agree that the First Nation did not focus on the Chisana Caribou Herd to the extent that the Evaluation Report did, I do not accept the submission that this somehow suggests that the herd is not important to them. The fact is that they have voluntarily not hunted the Chisana Caribou Herd for over 20 years because of the dangerously low population estimates. The Yukon Government has now spent a significant amount of public funds on a novel recovery project to prevent the further decline of the herd. Although, there may be disagreement on the potential adverse impact of this White River Project, it is undeniable that there is at the very least potential for a significant adverse impact to a specially protected herd that has historically been important to the culture of the White River First Nation.

[114] I have concluded that the Director misconceived both the strength of the claim of the White River First Nation and the extent of the potential adverse impact of the White River Project on their right to harvest the Chisana Caribou Herd.

[115] As well, given the profound implications of the project for First Nations land use and culture that were identified by the Designated Office, the duty in this context does not end with a more meaningful consultation. There is as well a duty to accommodate the White River First Nation.

Issue # 3: Did the Director breach his duty to consult and accommodate White River First Nation?

[116] Counsel for the Yukon Government submits that the duty to consult and accommodate has been reasonable here for the following reasons:

1. The Decision Body routinely reviewed the online public registry during the evaluation by the Designated Office;
2. The Decision Body became aware of concerns expressed by White River First Nation throughout the review as well as the correspondence between Lorne Larocque and the Designated Office;
3. The Decision Body became aware of the term "red zone" by monitoring the public registry;
4. The First Nation was invited to a meeting with the Decision Body on August 21, 2012, where "a far-reaching discussion was held on the conclusion drawn and the recommendations made in the Evaluation Report";
5. The Decision Body for Yukon confirmed that the First Nation participated extensively in the evaluation and that the Evaluation Report was accurate if not complete on the First Nation concerns;

6. On August 29, 2012, Yukon provided the First Nation with what Yukon understood were the concerns of the First Nation and how they were addressed, including the issue that telemetry data did not support the distribution of the Chisana Caribou Herd as found by the Evaluation Report.

[117] I disagree with the characterization of the discussion with the White River First Nation on August 21 as “far-reaching”. Unlike the Liard First Nation consultation where conflicting substantive views on the need for baseline data were exchanged and considered by acknowledged experts on each side, the Decision Body in the case at bar did not reveal any basis at the consultation meeting on which it might reject the recommendation. The basis of its rejection of the Evaluation Report was disclosed on August 29, 2012, after the consultation meeting and only days before its September 5 Decision Document rejecting the recommendation of the Evaluation Report. In my view, the process amounted to “tell us what you think of the Evaluation Report but we will not give you any idea where we have problems with it”. At the date of the meeting, Yukon had consulted a caribou biologist and considered the telemetry data, and yet it did not disclose any concern.

[118] It is no answer that the telemetry data was available to the First Nation. What was not disclosed was the Yukon Government’s view of this data, including the opinion of Troy Hegel, which caused it to reach a substantially different conclusion than the Evaluation Report. That is neither a fair, nor a meaningful process of consultation. Yukon had the view of Mr. Hegel and it had the “stable population” data prior to the consultation meeting on August 21, 2012. These views should have been presented to

the First Nation to give them the opportunity to challenge and test the Director's information. A meeting where the determinative issue for one party is not identified makes the "consultation" an opportunity to blow off steam rather than meaningful exploration of the facts and discussion about appropriate accommodation.

[119] This is not to say that the Decision Body must disclose every communication it has had to the First Nation, but the First Nation must at least be given the opportunity to give an opinion on the data being relied on to reject a recommendation that the White River Project not proceed. This is not an issue about the relative merits of the Evaluation Report versus the Decision Document. This is about the Yukon giving the First Nation a say on the ultimate policy decision that the Yukon is entitled to make. Section 74(2) of YESAA states that "a decision body considering a recommendation in respect of a project shall give full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation."

[120] Yukon submits that it can, in effect, review the First Nation submission to the Designated Office, meet with the First Nation and ask broadly what they think of the recommendation without disclosing the basis upon which it is contemplating rejecting or varying the recommendation.

[121] The Decision Document states:

According to the *Management Plan for the Chisana Caribou Herd 2010-2015*, the CCH presently appears to be stable at approximately 700 animals. No technical expert put the CCH forward as a concern during the period for seeking views and information and First Nations and stakeholders made only limited reference to caribou. The Evaluation Report suggests a distribution of caribou within the White River claim block that includes the Main Work Area. This conclusion is not borne out by telemetry data, which instead indicates a presence of calving and post-calving caribou

concentrated in the eastern portion of the property
(YOR2012-0080-081-1), well away from the Main Work
Area. (my emphasis)

[122] I have no comment with this statement on the merits. After a "full and fair consideration to scientific information, traditional knowledge and other information", the Director is entitled to make this decision.

[123] However, here the consideration was not full and fair. The First Nation should have had the opportunity to put forward a technical expert, challenge the telemetry data, and present their traditional knowledge. Fairness and the honour of the Crown require that the First Nation be given an opportunity and time to put forward their view when the Decision Body, as here, is contemplating a decision completely at odds with the one that was rendered after an in-depth consultation process.

[124] Yukon and Tarsis also submit that the duty to consult and accommodate is an ongoing process and there will be other opportunities for input by the First Nation. All parties agree with this submission but it does not alleviate the duty to consult and accommodate under s. 74(2), which is explicitly imposed upon the Decision Body.

[125] Furthermore, s. 83(2) states that:

(2) To the extent of its authority under the Yukon Act, territorial laws or municipal by-laws, every territorial agency and every municipal government undertaking a project, requiring it to be undertaken or taking any action that enables it to be undertaken shall implement a decision document issued by the territorial minister in respect of the project.

[126] In s. 2(1) of YESAA:

"territorial agency" means a member of the Executive Council of Yukon or a person or body carrying out a function of government under the Yukon Act, but does not include an independent regulatory agency or a municipal government.

[127] I conclude that the Decision Document of a Decision Body is a significant step in the permitting process that must satisfy the duty to consult and accommodate.

Shortcomings in the consultation process at this stage cannot be addressed on the basis that there will be further consultation. The Decision Document is the basis for future decisions and not simply a recommendation.

[128] To summarize, I have concluded that the Director has breached his duty to consult and accommodate the White River First Nation by failing to provide a meaningful process to provide feedback on the government's basis for rejecting the recommendation that the White River Project not proceed. The consultation following a rejection recommendation must be deep and meaningful. While the First Nation has no power to require the Evaluation Report to be accepted, it should have an opportunity to address the government's basis for rejecting it.

Issue # 4: If the Director has breached his duty to consult and accommodate White River First Nation, what is the remedy?

[129] White River First Nation applies for, among other things, a declaration that Yukon breached its procedural and constitutional duty to consult with the First Nation thereby requiring an order quashing the Decision Document, or alternatively, suspending or staying the Decision Document until the deficiencies have been remedied and a court order to that effect has been made.

[130] Tarsis Resources, on the other hand, submits that the appropriate remedy is one that does not unfairly prejudice Tarsis and leaves the Decision Document in place.

Counsel for Tarsis submitted the following:

- (a) Tarsis carried out in depth consultation with WRFN in good faith since prior to staking the White River Claim. Tarsis has applied for a lawful use of the White River Claim, and has made diligent efforts to address and where appropriate, mitigate, the concerns that were raised by WRFN in respect of the Proposed Activities. Tarsis is committed to carrying out the Proposed Activities in accordance with applicable law and regulations and in a manner which mitigates potential impacts on WRFN's asserted rights and interests.
- (b) Tarsis received the Decision Document in September 2012, and has been awaiting issuance of the Class III Approval since then. In reliance on the Decision Document, Tarsis proceeded with commencement of various mitigation plans. As a result of the Petitioners' application, Tarsis has had to delay commencement of the Class III Activities.
- (c) Tarsis is an innocent third party that has complied with the regulatory framework in place and has relied on the Crown's process for its Class III Approval application, including consulting in good faith with WRFN at every stage of the process.

[131] Tarsis relies upon the concept that the Court should take into account the possibility of economic damage and prejudice to third parties who have acted lawfully and reasonably when considering the appropriate remedy for a lack of Crown consultation with a First Nation.

[132] While the potential impacts and delays in the case at bar are completely distinguishable from Beckman where the impact was significantly less and the delays longer, Binnie J. makes reference to third party interests as follows:

84 Somebody has to bring consultation to an end and to weigh up the respective interests, having in mind the Yukon public policy favouring agricultural development where the rigorous climate of the Yukon permits. The Director is the person with the delegated authority to make the decision whether to approve a grant of land already surrendered by the First Nation. The purpose of the consultation was to ensure that the Director's decision was properly informed.

[133] The case at bar involves a delay which is admittedly costly for Tarsis.

[134] However, although I am of the view that both White River First Nation and Tarsis Resources have been fully engaged in this process, the Tarsis submission fails to take into consideration the importance of YESAA. It is a statute that has its genesis in the Umbrella Final Agreement that was negotiated over a period of 20 years, followed by another 10 years to be legislated.

[135] There are multiple purposes to YESAA and I repeat the following from s. 5(2) that are particularly relevant here:

- (e) to ensure that projects are undertaken in accordance with principles that foster beneficial socio- economic change without undermining the ecological and social systems on which communities and their residents, and societies in general, depend;
- (f) to recognize and, to the extent practicable, enhance the traditional economy of Yukon Indian persons and their special relationship with the wilderness environment;

- (g) to guarantee opportunities for the participation of Yukon Indian persons - and to make use of their knowledge and experience - in the assessment process;

...

- (j) to provide certainty to the extent practicable with respect to assessment procedures, including information requirements, time limits and costs to participants.

[136] YESAA also clearly obligates the Designated Office to consider “the significance of any adverse cumulative environmental or socio-economic effects ...” which I interpret to mean that the Designated Office does not just assess the specific project before it. Those cumulative effects were not addressed in the Evaluation Report because it recommended rejection of the White River Project.

[137] While Tarsis is a responsible exploration company and its contribution is important, the participation and involvement of First Nations without a Final Agreement has both a statutory and a constitutional dimension that must be respected.


[138] This case is about the appropriate procedural solution which is best summarized by Professor Sossin, cited above, at p. 95:

Procedural solutions may be especially prudent in the aboriginal context for several reasons. First, process builds on both Canadian and aboriginal norms of dialogue and reasoned engagement by disputing parties, and enjoys significant acceptance by the public; second, even where not welcomed by the parties, process is difficult to challenge or oppose, as the meaningful exchange of views and perspectives had inherent value and appeal; third, process defers difficult decisions, and leaves open further opportunity for compromise, settlement, building of trust and improvement of relations – in this way, process results in the parties taking “ownership” over the substantive resolutions

which result from the process; fourth, a better process minimizes the risk of error in the substantive determination at issue; and fifth and finally, imposing a process is not viewed as "judicial activism" in the same way as imposing a substantive result. Process implies respect for the parties and their positions, which [is] particularly important in the context of aboriginal rights, where the role of judicial intervention has come under particular scrutiny.

CONCLUSION

[139] I conclude that the Decision Document should be quashed and the Director of Mineral Resources proceed to consult White River First Nation again pursuant to s. 74(2) with the same timeline of 37 days permitting the First Nation to have a further meeting with the Director, at Yukon's expense, to address the Decision Document dated September 5, 2012, in deep consultation. The Director may then issue his Decision Document in accordance with ss. 75 and 80 of YESAA.



VEALE J.