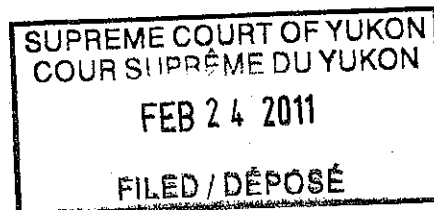


SUPREME COURT OF YUKON



Citation: *Western Copper Corporation v. Yukon Water Board*,
2011 YKSC 16

Date: 20110224
S.C. No. 10-A0048
Registry: Whitehorse

Between:

**WESTERN COPPER CORPORATION and CARMACKS
COPPER LTD.**

Petitioners

And

**YUKON WATER BOARD, YUKON GOVERNMENT,
LITTLE SALMON/CARMACKS FIRST NATION,
SELKIRK FIRST NATION and YUKON CONSERVATION SOCIETY**

Respondents

And

YUKON CHAMBER OF MINES

Intervener

Before: Mr. Justice R.S. Veale

Appearances:

Brad Armstrong, Q.C.

Counsel for Western Copper Corporation and
Carmacks Copper Ltd.

Murray Smith

Counsel for Yukon Water Board

Laurie Henderson

Counsel for Yukon Government

Arthur Pape and Jason Madden

Counsel for Little Salmon/Carmacks First Nation
and Selkirk First Nation

Zeb Brown

Counsel for Yukon Conservation Society

Richard Buchan

Counsel for Yukon Chambers of Mines

REASONS FOR JUDGMENT

INTRODUCTION

[1] A mine cannot operate without water and without releasing waste into a water system. It is the same for people, plants and animals. Yukon Government ("Yukon"), through its land claim settlement with First Nations has provided for a development

assessment process that, among other objectives, “protects and maintains environmental quality and ensures that Projects are undertaken consistent with the principles of Sustainable Development”. (UFA, s. 12.1.1.4)

[2] Western Copper Corporation (“Western Copper”) appeals the decision of the Yukon Water Board (the “Water Board”) denying its application for a type A water licence for a proposed copper heap leach mining project northwest of Carmacks, Yukon. Western Copper submits that the Water Board has breached its obligation to implement the decision document issued by the Yukon on September 12, 2008, contrary to s. 83(2) of the *Yukon Environmental and Socio-Economic Assessment Act*, S.C. 2003, c. 7 (“YESAA”). Western Copper also submits that the Water Board has exceeded its jurisdiction in four specific areas relating to the heap leach facility.

[3] YESAA gives effect to the provisions of the Umbrella Final Agreement (the “UFA”) dated May 29, 1993. The UFA forms the basis of eleven comprehensive land claims agreements between Canada, Yukon and First Nations. The specific chapters of the UFA engaged in this appeal are Chapter 12, Development Assessment, and Chapter 14, Water Management.

[4] In essence, the UFA and its statutory progeny, YESAA, provide a unique development assessment and water management process that guarantees the participation of Yukoners and Yukon First Nations. The UFA specifically “protects and promotes the well-being of Yukon Indian people and their communities and other Yukon residents and the interests of other Canadians.” (ss. 12.1.1.2 and 3)

[5] The stakes are high for everyone in this appeal. Western Copper says that when the mine is operational it will represent 5% of the Gross Domestic Product of Yukon. It

has worked on and invested in the Carmacks Copper Project ("the project") for many years.

[6] On the other hand, in its overview in the Closure and Reclamation section of the Screening Report and Recommendation, the executive committee of the Yukon Environmental and Socio-economic Assessment Board ("YESAB") noted past examples of inadequate closure and reclamation that resulted in serious environmental damage. Examples include the Faro mine, the United Keno Hill mine, the Clinton Creek mine and the Mount Nansen mine. These have resulted in Yukon and Canada incurring closure and reclamation costs years after the mines ceased to operate. However, since the Devolution Transfer Agreement dated October 29, 2001, the regulation of major mining projects and the financial burden of closure and reclamation has devolved from Canada to Yukon. Yukon has instituted the "Yukon Mine Site Reclamation and Closure Policy" to ensure that there is responsible and progressive mine closure and reclamation in Yukon.

[7] Yukon has invested time and money in the environmental assessment process and the water and mining regulatory process. Yukon will also no doubt receive additional revenue when the mine begins to operate.

[8] Western Copper, Yukon, the Little Salmon/Carmacks and Selkirk First Nations, and the Yukon Conservation Society all participated in the Water Board hearing that considered nine volumes of material and evidence from a number of witnesses, including experts during the seven day public hearing. The Water Board hearing appears to have had very active interventions from the First Nations and the Yukon

Conservation Society, who have been granted party respondent status in this appeal:

See *Western Copper Corporation v. Yukon Water Board*, 2010 YKSC 61.

[9] Western Copper submitted a Project Proposal for the Carmacks Copper Project in February 2006. The project was assessed in the Screening Report and Recommendation of the executive committee of YESAB on July 18, 2008. Yukon, in its decision document dated September 12, 2008, accepted the 148 recommendations of the executive committee, and recommended, pursuant to paragraph 58(1)(b) of YESAA, that the project proceed without a review, subject to the terms and conditions of mitigative measures, i.e. YESAB's 148 recommendations. A QML was issued on April 15, 2009. The Water Board denied Western Copper's application for a Water Licence on May 10, 2010.

[10] The Water Board denied the application as it was not satisfied that the waste from the mine would be treated and disposed of in a manner that is appropriate for the protection of the receiving environment in lower Williams Creek and the Yukon River. The Water Board concluded that the copper heap leach technology in the Western Copper application was unproven technology.

[11] Western Copper and the Yukon Chamber of Mines submit that the terms and conditions of the decision document, including mitigative measures, must be implemented by the Water Board under the *Waters Act* and the Chief of Mining Land Use under the *Quartz Mining Act*, S.Y. 2003, c. 14, ("QMA"). They submit that the Water Board has breached this direction under s. 83(2) of YESAA and, in addition, exceeded its jurisdiction by purporting to regulate the heap leach mining facilities within the jurisdiction of the QMA.

[12] Yukon, the Water Board, the First Nations and the Yukon Conservation Society submit that the environmental assessment process and consequent decision document indicate that a project is ready to proceed to the water licencing and mining regulatory phases, which are distinct from the assessment process. They submit that the Water Board retains the discretion to refuse an application for a water licence, and in that context, the recommendations of the decision document are not binding upon it.

[13] The narrow issue to be determined is whether the Water Board's decision to deny a water licence to Western Copper is an action that "enables [the mining project] to be undertaken", thereby requiring the Water Board to implement the terms and conditions of the decision document under s. 83(2) of YESAA. From a broader perspective, this case examines the assessment and regulatory process and the interaction of YESAA with the *Waters Act* and the *QMA*. Appendix A sets out the relevant sections of the *UFA*, *YESAA*, *QMA* and the *Waters Act*.

THE CARMACKS COPPER PROJECT

[14] The following is a somewhat oversimplified project description. The proposed mine would be located adjacent to Williams Creek, 8 km west of the Yukon River and 38 km northwest of the Village of Carmacks. The first copper claims were staked on Williams Creek in 1898, but it was not until the 1990s that Western Copper began to develop the property.

[15] The project was originally assessed under the Canadian *Environmental Assessment Act*, S.C. 1992, c. 37, but in February 2006, Western Copper submitted a project proposal under YESAA.

[16] The project is an open pit copper mine with a proposed mine life of eight years. A waste rock storage area covering approximately 70 hectares would be located north of the open pit.

[17] The proposed heap leach process would require an estimated use of 1.56 million cubic metres of water. In its design, the heap leach facility provides for the ore to be placed on a pad behind an embankment. The pad would cover an area of approximately 38 hectares. The project is described as using a "closed loop process" whereby sulphuric acid would be applied to leach out the copper from the ore to the maximum amount possible. The plan is to have the leaching solution proceed from the heap facility to the process plant. However, there would be times, for example, during high rainfall, when the solution would flow to what is called the 'events pond'. The events pond is separate from the heap leach pad drainage system.

[18] It is anticipated that rinsing and flushing of the heap will be required to neutralize or detoxify the heap. Once neutralized, a drainage channel will be built from the bottom of the heap to the events pond and the heap will be covered. The discharge will proceed to the sediments pond and then to Williams Creek.

[19] The heap leach pad treatment and closure is key in protecting surface water and ground water during the operation of the mine and after its closure.

THE APPROVAL PROCESS

The YESAB Executive Committee Screening Report and Recommendation

[20] The purpose of the Screening Report and Recommendation is to provide the decision bodies, in this case the Territorial Minister and Natural Resources Canada, with terms and conditions necessary to mitigate potentially significant adverse

environmental and/or socio-economic effects of a project. Under "Purpose of the Report", the executive committee states at p. 3:

YESAA requires that Decision Bodies consider the recommendation arising from a screening conducted under YESAA, and issue a decision document, prior to taking any action that would enable a project to be undertaken.

The purpose of this Screening Report is to provide the Decision Bodies with a recommendation arising out of the screening and the reasons for that recommendation.

[21] The Screening Report and Recommendation is a comprehensive document, consisting of 287 pages, and covering all aspects of the Project. However, chapter 9.0, "Closure and Reclamation" focusses on an important issue for this case under the heading "Effects Characterization" (p. 161):

The primary closure issue for this Project is long-term protection of local water resources. Potential long-term sources of contamination include effluent from the heap, effluent from the WRSA [Waste Rock Storage Area], exposure of groundwater to the open pit walls and the site runoff. If the effluent from the heap, WRSA and open pit do not meet water quality discharge standards, without treatment, then treatment costs represent an environmental liability to be borne by either the Proponent or the responsible government. Should the Project closure goals not be achieved and result in the long-term impairment of water quality, the Executive Committee would consider these adverse effects potentially significant.

[22] The relationship between water use and the heap is set out at p. 162 as follows:

The Project will result in the construction of a 13 million tonne heap of ore that will be processed or leached in place to remove copper. Once the recovery of copper is no longer economically feasible, the Proponent has proposed to rinse the heap with pulses of fresh and recycled, treated water, neutralize the acidity in the ore with an alkaline solution (sodium carbonate), and then rinse further with pulses of recycled, treated water. Once the heap has been successfully detoxified, the Proponent proposes to re-

contour and cover the heap with a soil cover. The design allows for the continuous infiltration of meteoric precipitation into the heap after the soil cover is in place. The rates of infiltration will depend on the slightly negative natural water balance that controls the amount of water available and the characteristics of the soil cover and the heap as well. It is expected that the drainage of water from the heap will mirror local precipitation patterns.

The water in the heap and natural infiltration will continue to move down to and flow along the liner beneath the heap. This water will be collected in ditches adjacent to the heap and will eventually be discharged to the environment if the concentrations of chemical constituents in the water are acceptable. The planned rinsing of the heap is intended to ensure that water quality is acceptable over the long-term after closure[.]

The ultimate goal of heap closure is that in the long-term, effluent from the heap will meet acceptable discharge criteria for metals, metalloids, and pH so that the heap effluent is not likely to contaminate local ground or surface water. Consistent with the YG 'Yukon Mine Site Reclamation and Closure Policy – Financial and Technical Guidelines', the Executive Committee is of the opinion that decommissioned heaps must be physically and chemically stable and that long-term water treatment is not an acceptable closure goal.
(my emphasis)

[23] At p. 167, the executive committee states that heap leaching is “a known and tried technology that has been applied at other mining operations for copper and gold projects.” However, at p. 178, “[t]he executive committee acknowledges that there is no example of a successfully detoxified heap elsewhere.” Nevertheless, at p. 179 “[t]he executive committee is satisfied that the proposed method of heap detoxification is viable and appropriate, especially with the additional knowledge to be gained through the application of field-scale leaching tests, as discussed in Section 9.2.1.” These statements are not inconsistent. Heap leaching is a known technology. However, as the report explains, for most sulphuric acid leach heaps, detoxification is not attempted. The

heap is located in dry areas where the risk of ground water contamination is low. In those cases, the heap is dried out and capped with liners rather than completely detoxified. Conditions in Yukon are different, and thus detoxifying the heap is necessary.

[24] At p. 160 in the Overview of the "Closure and Reclamation" section, the executive committee described "the walk-away" concept as follows:

The Proponent has indicated that the ideal goal at closure is to achieve the above objectives in a "walk-away" scenario; that is, one in which there is no further requirement for monitoring and maintenance. A period of post-closure "active care" will be required however, until it has been satisfactorily demonstrated from the results of site monitoring that reclamation measures have achieved the required outcomes and are self-sustaining – particularly with respect to the spent ore heap. An initial "active care" system is proposed to rinse and neutralize the heap until heap effluent quality is demonstrated (i.e., meets MMER standards), at which time a "passive care" system will be implemented. YG has stated that "Reliance on long-term active treatment is not considered acceptable for reclamation and closure planning" (YOR doc #2006-0050-093-1 and 'Yukon Mine Site and Reclamation Closure Policy – Financial and Technical Guidelines') (my emphasis)

[25] The executive committee stated at p. 179 under the heading "Closure Timing":

There remains uncertainty with respect to the amount of time required to detoxify the heap. Specifically, the Proponent has estimated it will require approximately 4.5 years to rinse and neutralize the heap, while the technical reviews commissioned by YG and the Executive Committee estimated nine to ten years.

[26] The project contemplates the use of cells for the heap leach process. The executive committee recommended that the first cell be used as a field-scale trial of the heap leach technology. However, it is understood that the project would proceed in any event and would not be conditional on the outcome of the field-scale testing. The

executive committee did not always come to definite conclusions in its report as indicated by the following statement at p. 173:

... The Executive Committee believes the likelihood of this passive treatment measure being effective is low. Consequently, it is imperative that the Proponent demonstrate that the heap effluent meets acceptable standards as set out in the water licence without the requirement for long-term passive treatment measures. It will be the responsibility of the regulator to ensure discharge standards are met in the long-term. If passive treatment is required to polish the effluent prior to discharge, an alternative option will have to be proposed by the Proponent and deemed appropriate by the regulator.

[27] The executive committee concluded at p. 180:

The results and review of the Proponent's analyses and tests indicate that successful detoxification of the heap is feasible. The Executive Committee is of the opinion that while useful, scaling-up these tests provides a much higher degree of certainty with respect to predicting the chemical stability of the heap. Furthermore, the proposed heap leach pad liner and cover – while proven technologies – may not function optimally, as predicted. Continued heap and rinse water treatment, testing and monitoring, and adaptive management, as proposed by the Proponent, are therefore critical to minimizing the potential for adverse effects to surface/ground water quality, soil quality/stability, aesthetics and/or land use. The Executive Committee is satisfied that these measures will effectively reduce the potential adverse effects. (my emphasis)

The Decision Document

[28] The decision document simply states that Yukon accepts the recommendation of the executive committee that the project "be allowed to proceed without a review, subject to the terms and conditions of the mitigative measures specified below, as the executive committee has determined that the project will have significant adverse

environmental and/or social-economic effects in Yukon that can be mitigated by the terms and conditions.”

[29] The decision document does not contain any further analysis of the project but it adopts the recommendations put forward by the executive committee. Of particular relevance to this case, the decision document accepts the following condition under the heading “Closure and Reclamation”:

To minimize the likelihood of incomplete leaching of the heap:

118. The Proponent shall design, build and manage the first cell of the heap as a field-scale trial of the heap leach process. This trial will be designed as an investigative approach to clearly show what ore is being leached and if there are zones that are not leached. If non-leached zones are identified, the Proponent shall make alterations or refinements to the leaching process to increase leaching efficiency and minimize the creation of non-leached zones in the heap. The Proponent shall provide the design and results of this leaching trial to regulators.

The Quartz Mining Licence

[30] The Minister of Energy, Mines and Resources (“MEMR”) issued a QML to Western Copper on April 15, 2009. It consists of 47 pages of directions. The QML requires that very specific details be submitted to the Chief of Mining Land Use as the project proceeds, including information about plans for construction and operation for the Heap Leach Facility.

[31] By way of example, s. 15.3.1.8 sets out the following:

An update of the Preliminary Reclamation and Closure Plan or the Revised Reclamation and Closure Plan, as the case may be, that includes details of reclamation optimization of heap rinsing and neutralization, including plans for laboratory and field scale trials of rinsing and neutralizing the heap

acidity, optimization of leaching, rinsing and neutralizing processes and adaptive management approaches, which includes a description of the following:

- 15.3.1.8.1 the scientific basis of the field scale trial, which would utilize at a minimum the first cell of the Heap Leach Facility, including the location of the trial, the operational variables that can be adjusted, and how they will be tested;
- 15.3.1.8.2 a description of the methods to be used to test leaching, neutralization, rinsing and covering aspects of the operation and decommissioning of the Heap Leach Facility;
- 15.3.1.8.3 any additional large column leach and rinsing and neutralization test work done concurrent with the field trial, such as work concerning primary and secondary mineral characterization, rinse time and volume, refined high density sludge treatment options, and post rinsing and neutralization water quality characterization;
- 15.3.1.8.4 identification of performance standards and criteria;
- 15.3.1.8.5 expected time required for good feedback information on which to make adjustments, and
- 15.3.1.8.6 adaptive management approaches;
- 15.3.1.8.9 any other information the Chief considers necessary

[32] The QML references other applicable legislation is as follows:

- 7.1 At all times, the Licensee must conform to all applicable laws, licenses, permits, approvals, or authorizations issued to the Licensee in relation to the Undertaking.

- 7.2 No term or condition of this License limits the application of any applicable laws.

[33] This means that the QML, although issued, cannot be acted on until the Water Board grants a water licence.

The Water Board Decision

[34] After the decision document was issued on September 12, 2008, Western Copper applied for a water licence. The Water Board held a public hearing based upon the plans and records of Western Copper and focussed on the following "key issues":

- Use of unproven technology
- Likelihood of successful leaching
- Likelihood of successful detoxification
- Adequacy of the proposed discharge management plan
- Adequacy of water quality standards for W12
- Adequacy of proposed effluent discharge standards
- Adequacy of heap facility preliminary design and liner system
- Adequacy of water quality model
- Adequacy of sludge management proposal

[35] The Water Board found, on the evidence presented before it, that the Western Copper application included the use of unproven technologies to leach, detoxify and manage discharges from the site.

[36] The Water Board recognized that the application had undergone assessment by YESAB under YESAA and had been the subject of a screening report and recommendations by the executive committee, followed by the issuance of a decision document that allowed the project to proceed to the licensing process.

[37] The Water Board stated that it may issue a licence under s. 12 of the *Waters Act* and that it is bound by s. 86 of YESAA. The Board stated its position on the relationship between the Board and a YESAA decision document at p. 4:

As Decision Document 2006 – 0050 has recommended the project to proceed, the Board has the authority to issue a licence. Regardless of the YESAA Decision Document determination, there is no legislative requirement within the Act or the YESAA that requires the Board to issue a licence for all water use applications and the discretion to approve or deny an application remains with the Board as defined in s. 12 of the *Waters Act*.

[38] It is important to note that Western Copper does not appeal the Water Board decision on the merits of its factual finding. Rather than relying upon the executive committee's conclusion that the detoxification of the copper heap is viable, the Water Board decided on the evidence it heard that there was no evidence of a successful application of the heap leach technology as proposed by Western Copper in a commercial operation. The Board applied Board Policy 2.1.10, which reads in part:

In the case of unproven technologies, the Board will take a cautious approach, expecting Applications to provide more detailed rationales and contingency plans than might be expected in the case of proven technologies. ...

[39] The Water Board also considered that Western Copper had conducted a heap leach pilot project with 200 tonnes of Williams Creek ore between September 1993 and July 1994. The Water Board found that this trial did not show successful leaching of the William Creek ore. Simply put, the Water Board found on the evidence that Western Copper could not prove that this heap leach project could be successfully achieved.

[40] I note at this point that Western Copper says it had a reasonable expectation that the Water Board would respect the findings of the executive committee. While this may

be a legal argument to be considered in the interpretation of ss. 83 and 86 of YESAA, it is my understanding that it was very clear in the Water Board hearing that the viability of the heap leach technology was the main issue. In other words, Western Copper did not have to rely on the executive committee finding but had every opportunity to present additional evidence establishing the viability of the heap leach technology to the Water Board.

[41] The Water Board noted that the project is within the traditional territories of First Nations involved.

YUKON ASSESSMENT AND REGULATORY FRAMEWORK

The First Nation Final Agreements

[42] Prior to the Umbrella Final Agreement of 1993 and the Devolution Transfer Agreement of 2001, there was no territorial environmental assessment process. The federal government controlled the resources of Yukon and assessed projects under the *Canadian Environmental Assessment Act*. For mining purposes, a water licence was the key regulatory hurdle. Any environmental and socio-economic terms and conditions for a mine were negotiated by the federal government directly with the mining company. First Nation input was through the Indian Affairs Branch rather than directly between the First Nation and the mining company. All this changed with the UFA in 1993.

[43] The UFA, signed May 29, 1993, is the basis for eleven Final Agreements which are land claim agreements within the meaning of s. 35 of the *Constitution Act*, 1982. Each First Nation Final Agreement incorporates the provisions of the UFA. Among the objectives of the UFA was a desire to enhance the ability of Yukon Indian people to participate fully in all aspects of the economy of Yukon as well as achieving certainty

with respect to the ownership and use of lands and other resources of Yukon. However, it is not a document that speaks only of the rights of Yukon First Nations but rather represents an historic agreement on how all Yukoners will participate in development assessment.

[44] Legislation is required to implement the terms of the Final Agreements. However, it was agreed that the terms of the Final Agreements would prevail in the event of an inconsistency or conflict with any federal, territorial or municipal law. (UFA s. 2.6.2.2)

[45] UFA Chapter 12, "Development Assessment", begins with the stated objectives of a development assessment process that:

...

- 12.1.1.2 provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process;

...

- 12.1.1.4 protects and maintains environmental quality and ensures that Projects are undertaken consistent with the principle of Sustainable Development;

...

- 12.1.1.6 provides for a comprehensive and timely review of the environmental and socio-economic effects of any Project before the approval of the Project;

- 12.1.1.7 avoids duplication in the review process for Projects and, to the greatest extent practicable, provides certainty to all affected parties and Project proponents with respect to procedures, information requirements, time requirements and costs; and

- 12.1.1.8 requires Project proponents to consider the environmental and socio-economic effects of Projects and Project alternatives and to incorporate appropriate mitigative measures in the design of Projects.

[46] Chapter 12 is the genesis of YESAA. It provides that:

- 12.3.1 Government shall implement a development assessment process consistent with this chapter by Legislation.
- 12.3.4 Government shall recommend to Parliament or the Legislative Assembly, as the case may be, the Development Assessment Legislation consistent with this chapter as soon as practicable and in any event no later than two years after the effective date of Settlement Legislation.

[47] Chapter 12 sets out the Yukon Development Assessment Board ("YDAB") and its executive committee, and the concept of a Decision Body and a decision document.

[48] As stated earlier, the interpretation of ss. 83(2) and 86(b) of YESAA are key to this appeal. These sections are partly a codification of s. 12.14.1.1., which states that Government shall:

- 12.14.1.1 ... exercise any discretion in granting an interest in, or authorizing the use of land, water, or other resources in conformity with the terms and conditions of a Decision Document issued by Government; and

[49] However, this section must be read with s. 12.14.2:

Nothing in 12.13.4.3 or 12.14.1.1. shall be construed to require Government to enact or amend Legislation to implement a Decision Document issued by Government or to require Government to grant an interest in or authorize the use of land, water or other resources.

[50] Section 12.14.2 appears to ensure that a decision document cannot bind Yukon to grant an interest or authorize the use of land, water or other resources. In other words, the Government is not bound to issue a water licence because of a decision document. Indeed, water licences are dealt with separately in Chapter 14 of the UFA. Nevertheless, it was the clear intention of the UFA that environmental and socio-economic effects be considered by project proponents and governments before the technical water licensing process proceeds.

[51] Chapter 14 of the UFA entitled "Water Management" provides for water rights for Yukon First Nations and other citizens. Section 14.1.1 states:

The objective of this chapter is to maintain the Water of the Yukon in a natural condition while providing for its sustainable use.

[52] Chapter 14 sets out the Government's management powers and the water rights of parties on settlement land.

[53] In s. 14.8.0, entitled "Protection of Quantity, Quality and Rate of Flow of Water", the water rights of Yukon First Nations are specified as follows:

14.8.1 Subject to the rights of Water users authorized in accordance with this chapter and Laws of General Application, a Yukon First Nation has the right to have Water which is on or flowing through or adjacent to its Settlement Land remain substantially unaltered as to quantity, quality and rate of flow, including seasonal rate of flow.

...

14.8.3 The Board shall not grant a Licence that interferes with the rights provided in favour of a Yukon First Nation in 14.8.1 unless:

14.8.3.1 notice, in a form prescribed by the Board, of receipt of an application has been given to the affected Yukon First Nation; and

14.8.3.2 the Board is satisfied that,

(a) there is no alternative which could reasonably satisfy the requirements of the application, and

(b) there are no reasonable measures whereby the applicant could avoid the interference. (my emphasis)

[54] Finally, paragraph 14.8.7 states:

14.8.7 In deciding whether to issue a Licence, and in setting the terms and conditions of any Licence issued, the decision of the Board shall not conflict with a Decision Document that a Decision Body is empowered to implement.

[55] Section 14.8.7 is codified in s. 86(b) of YESAA.

Yukon Environmental and Socio-economic Assessment Act

[56] Section 5(1) of YESAA clearly states that the *Act* is meant to give effect to the provisions of the UFA respecting assessment of environmental and socio-economic effects.

[57] The multiple purposes of YESAA are set out in s. 5(2):

(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. (my emphasis)

[58] Section 8 of YESAA establishes a Board, including 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 for Yukon First Nations and three, including one executive committee member, by 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 consulting the other two executive committee members.

[59] Part 2 of YESAA is entitled "Assessment Process and Decision Documents" and includes s. 42, which sets out the matters to be considered by the executive committee and includes, among others:

(1) In conducting an assessment of a project or existing project, a designated office, the executive committee or a panel of the Board 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.

(2) In addition to the matters referred to in subsection (1), the executive committee or a panel of the Board shall take the following matters into consideration:

(a) the need for effects monitoring; and

(b) the capacity of any renewable resources that are likely to be significantly affected by the project or existing project to meet present and future needs.

[60] Section 50 requires a proponent who submitted a proposal for a project to take into consideration the relevant matters set out in s. 42 and incorporate any mitigative measures that may be appropriate.

[61] Pursuant to s. 58 of YESAA, at the conclusion of the screening of a proposal, the executive committee recommends to the decision body whether the project should be allowed to proceed or not. The executive committee sets out mitigative terms and conditions for proceeding if it determines that the project will have significant adverse environmental or socio-economic effects.

[62] Section 74 of YESAA requires a decision body to give “full and fair consideration” to scientific information, traditional knowledge and other information provided with a recommendation. The decision body then has the option of “[issuing] a decision document accepting the recommendation” or referring it back to the executive committee.

[63] The following sections of YESAA are found under the heading “Implementation of Decision Documents”:

83. (1) Where the territorial minister is a decision body for a project, no territorial agency or municipal government shall undertake the project, require that it be undertaken or take

any action that would enable it to be undertaken until the territorial minister has issued a decision document under section 75, 76 or 77 allowing the project to be undertaken.

(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.

...

86. A body established by territorial law and having jurisdiction in relation to rights in respect of waters may not, under territorial law,

(a) grant or renew rights in respect of waters contrary to a decision document issued by a federal agency or a decision document that is to be implemented by a territorial agency, municipal government or first nation under subsection 83(2) or 84(2) or (3); or

(b) set terms of such rights that conflict with such a decision document, to the extent that the decision document is required to be implemented by a federal agency or a territorial agency, municipal government or first nation. (my emphasis)

[64] As noted, the interpretation of s. 83(2) and s. 86(b) is at the heart of this appeal by Western Copper.

[65] YESAA classifies regulatory bodies as any of a federal independent regulatory agency, an independent regulatory agency, a territorial agency or a territorial independent regulatory agency, defined as follows in s. 2 of YESAA:

"federal independent regulatory agency" means any body named in Part 1 of the schedule.

"independent regulatory agency" means any body named in the schedule.

"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

"territorial independent regulatory agency" means any body named in Part 2 of the schedule.

[66] The only federal independent regulatory agency listed in the schedule is the National Energy Board, and there is no territorial independent regulatory agency listed. The Water Board is a territorial agency.

[67] It should be noted that YESAA is unique to Yukon in the following aspects:

1. it provides "one window" for development assessment of projects under the jurisdiction of Canada, Yukon and First Nation governments;
2. YESAB is an arms length body from government with First Nation representation;
3. One or more of Canada, Yukon, or First Nation governments have the final say on whether a project should proceed.

The Quartz Mining Act

[68] The *QMA* includes provisions respecting the exploration, construction, development, operation and reclamation of mines.

[69] Part 2 of the *QMA*, entitled "Land Use and Reclamation," includes s. 129 through to s. 153. Section 130 states that the purpose of Part 2 of the *QMA* "is to ensure the development and viability of a sustainable, competitive and healthy quartz mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Yukon."

[70] Pursuant to s. 135(1) and (2), the MEMR may issue a licence permitting "development or production."

[71] Section 129 of the *QMA* defines these terms as follows:

"development" means the construction of a facility or work for the production of minerals, but excludes the construction of a facility or work for the sole or principal purpose of assessing land for its suitability for the production of minerals;

"production" means taking a mineral from the land, or treating a mineral that has been taken from the land, if done for commercial purposes, but excludes an exploration program;

[72] Under s. 83(1) of *YESAA*, the Minister may not issue a Quartz Mining Licence until a decision document has been issued.

[73] Once the decision document is issued, the Minister may proceed to issue a Quartz Mining Licence and implement the recommendations and terms and conditions of the decision document (s. 83(2) of *YESAA*).

The *Waters Act*

[74] The *Waters Act* is binding on Yukon which, generally speaking, has the administration and control of all water in Yukon.

[75] Section 7 prohibits the deposit of waste except in accordance with the conditions of a licence:

(a) in any waters in a water management area; or

(b) in any other place under conditions in which the waste, or any other waste that results from the deposit of that waste, may enter any waters in a water management area.

[76] As per s. 2, "Waste" means:

(a) any substance that, if added to water, would degrade or alter, or form part of a process of degradation or alteration of, the quality of the water to an extent that is detrimental to its use by people or by any animal, fish, or plant, or

(b) water that contains a substance in such a quantity or concentration, or that has been so treated, processed, or changed, by heat or other means, that it would, if added to any other water, degrade or alter, or form part of a process of degradation or alteration of, the quality of that water to the extent described in paragraph (a), and, without limiting the generality of the foregoing, includes

...

[77] Section 8 establishes the Water Board, consisting of four to nine members of whom one-third are nominated by the Council for Yukon First Nations.

[78] Section 12 provides for the issuance of licences as follows:

Subject to this section, the Board may issue type A licences and type B licences,

...

(4) Where an application for a licence is made, the Board shall not issue a licence unless the applicant satisfies the Board that

...

(c) any waste that would be produced by the appurtenant undertaking will be treated and disposed of in a manner that is appropriate for the maintenance of

(i) water quality standards prescribed by regulations made under paragraph 31(1)(h) or, in the absence of such regulations, such water quality standards as the Board considers acceptable, and

(ii) effluent standards prescribed by regulations made under paragraph 31(1)(i) or, in the absence of such regulations, such effluent standards as the Board considers acceptable; and

(d) the financial responsibility of the applicant, taking into account the applicant's past performance, is adequate for

- (i) the completion of the appurtenant undertaking,
- (ii) such mitigative measures as may be required, and
- (iii) the satisfactory maintenance and restoration of the site in the event of any future closing or abandonment of that undertaking. (my emphasis)

[79] The Water Board has the power to include conditions as follows:

13(1) Subject to this Act and the regulations, the Board may include in a licence any conditions that it considers appropriate, including, without limiting the generality of the foregoing,

(a) conditions relating to the manner of use of waters permitted to be used under the licence;

(b) conditions relating to the quantity, concentration, and types of waste that may be deposited in any waters by the licensee;

(c) conditions under which any such waste may be so deposited;

(d) conditions relating to studies to be undertaken, works to be constructed, plans to be submitted, and monitoring programs to be undertaken; and

(e) conditions relating to any future closing or abandonment of the appurtenant undertaking. (my emphasis)

[80] Section 4 states that nothing in the *Waters Act*, the regulations or a licence authorizes a person to contravene or fail to comply with any other Act, regulation or order.

THE POSITION OF THE PARTIES

Western Copper

[81] Western Copper submits that in Yukon, the assessment process, the decision making process, and the regulatory (licencing) process for mining projects is primarily addressed in:

- the Final Agreements between Canada, Yukon and First Nations;
- the *Yukon Environmental and Socio-economic Assessment Act*;
- the *Quartz Mining Act* and
- the *Waters Act*.

[82] Western Copper says that the Water Board is a statutory creation and cannot exceed the power granted to it. (*Atco Gas and Pipelines v. Alberta*, 2006 SCC 4, at para. 35.) Furthermore, the Water Board's jurisdiction must be considered in the context of the jurisdiction, roles and responsibilities of other government agencies. Thus, Western Copper submits that once the decision document was issued on September 12, 2008, the Water Board was authorized to proceed with the application for a water licence but specifically subject to ss. 83(2) and 86(b) of YESAA.

[83] Western Copper submits that the Water Board in its conclusion:

- Exceeds its jurisdiction by purporting to regulate the mining facilities;

- Is directly contrary to the conclusions reached by the executive committee of YESAB in the Screening Report and Recommendation and contradicts the Screening Report and Recommendation mitigation measure No. 118;
- Clearly fails to meet the s. 83(2) requirement to implement the decision document which accepts the Screening Report and Recommendation and authorizes the project to proceed subject to the terms and conditions specified;
- Purports to set terms of obtaining water rights which are in conflict with the decision document, contrary to s. 86(2) of YESAA; and
- Encroaches on the jurisdiction of the MEMR by contradicting the authorization for development and production of the mining facilities granted by the QML by purporting to set conditions to be met "prior to entering into production".

[84] More specifically, Western Copper further articulates its position as follows:

- (a) the Water Board erred in law in purporting to set terms and conditions for the design, construction and operation of the mining facilities contrary to the decision document, and contrary to the requirement in s. 83 of YESAA that , if a water licence is to be issued, the Board must "implement" the decision document. The Reasons for Decision of the Water Board make it clear that the Water Board would only issue a water licence in relation to the mining facilities, on terms and conditions which are not in conformity with the decision document and which therefore would not "implement" the decision document;

- (b) the Water Board exceeded its jurisdiction by purporting to regulate the mining facilities, and by contradicting the authorization for the design, construction, operation and ultimate decommissioning of the mining facilities, made by the MEMR, through issuance of the Quartz Mining Licence, and based on implementation of those provisions of the decision document which relate to the mining facilities.

[85] Nevertheless, Western Copper does not suggest that the Water Board has no discretion to deny a water licence. Rather, in its submission, the power or discretion to deny a licence must be exercised in conformity with the decision document. Western Copper submits that the discretion of the Water Board to deny a licence is limited to end of pipe water quality issues.

[86] Western Copper seeks the following relief:

- (a) a declaration that the Water Board is a territorial agency under s. 83(2) of YESAA that is required to implement the decision document issued on September 12, 2008;
- (b) in issuing a water licence, the Water Board, pursuant to s. 86(2) of YESAA, must not set terms and conditions that conflict with the decision document;
- (c) setting aside those parts of the Water Board decision that are contrary to or conflict with the decision document;
- (d) setting aside those parts of the Water Board decision that relate to the heap leach facility and operations, rinsing and neutralization of the heap

leach, the heap leach facility preliminary design and liner system, and the sludge management plans.

- (e) Directing the Water Board to implement the decision document including:
 - (i) accepting the findings and recommendations of the executive committee of YESAB as accepted by the Territorial Minister in the decision document;
 - (ii) accepting the decision of the Minister of Energy, Mines and Resources in implementing the decision document by authorizing the development and production of the project and its mining facilities and structures under the Quartz Mining Licence; and
 - (iii) setting terms and conditions in a water licence that are not contrary to or in conflict with the decision document.

Respondents

[87] The positions of the Respondents are very similar to one another.

[88] The Respondents submit that the correct interpretation of s. 83(2) of YESAA does not compel the Water Board to implement the decision document, but allows it the discretion to deny a water licence. The Respondents say that s. 83(2) means that the Water Board must implement a decision document only if the Water Board is taking an action that enables a project to be undertaken, i.e. issuing a licence.

[89] The Respondents submit that the Water Board must exercise its discretion within the powers granted to it in YESAA and the *Waters Act*. They say that the discretion of the Water Board is a regulatory matter that is separate and distinct from the YESAA

assessment mandate which must be completed before the regulatory processes of the QML and Water Board hearings begin.

[90] The Respondents submit that the regulatory licensing of the MEMR under the QMA proceeds separately from the hearing process under the *Waters Act*, but that their jurisdictions are overlapping rather than in conflict. In other words, the granting of the QML is appropriate under the jurisdiction of the QMA and the denial of a licence by the Water Board is valid under its jurisdiction under the *Waters Act*.

LEAVE TO APPEAL

[91] Counsel for the Water Board and the First Nations submit that leave to appeal should not be granted on the ground that Western Copper did not raise the issues in this appeal before the Water Board. It is agreed that the issues raised are of general importance.

[92] Section 26(1) of the *Waters Act* states:

An appeal lies from a decision or order of the Board to the Supreme Court on a question of law or a question of jurisdiction, on leave being obtained from that Court on application made within forty-five days after the making of that decision or order or within such further time as that Court, or a judge of it, under special circumstances allows.

[93] There is a general principle that legal issues should not be raised for the first time on appeal. See *D.O. v. British Columbia (Superintendent of Family and Child Services)* (1992), 69 B.C.L.R. (2d) 219 (C.A.), and *Household Finance Corp. of Canada v. Mores* (1997), 85 B.C.A.C. 318. The reasons for denying leave in these cases were based on the interests of justice not being well served without the opinion of the trial judge and the failure to make an argument in the court below. Essentially, these reflect variations of

the principle that where issues are not raised in the court below, they should not be permitted to be raised on appeal, except in unusual circumstances.

[94] One of the underlying reasons for refusing to grant leave to appeal on an issue not fully addressed in the court below is the concern that there may be evidentiary issues that should be addressed. That is not a concern in this appeal. The record from the Water Board is very thorough and no party has applied to bring new evidence or cross-examine a witness.

[95] I also find that the jurisdiction issue was specifically addressed by the Water Board in its decision (see para. 37 above). It is clearly not raised in the detailed fashion of this appeal but, in my view, the jurisdiction issue is one of considerable importance and no party is disadvantaged as the record below and the decision of the Water Board clearly set out the issue.

[96] Also, there is a valid issue of public importance to consider in this unique development assessment process and its relationship to the regulatory powers of the Water Board. This is not a private matter between the parties but one of exceptional public importance and no party is disadvantaged.

[97] Leave to appeal is granted. The standard of review is correctness.

PRINCIPLES OF STATUTORY INTERPRETATION

[98] The Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26, adopted Elmer Driedger's definitive formulation of the principles of statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the

scheme of the Act, the object of the Act, and the intention of Parliament.

[99] Both s. 12 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, and s. 10 of the Yukon *Interpretation Act*, R.S.Y. 2002, c. 125, provide that every enactment shall be “deemed remedial and shall be given [the] fair, large, and liberal interpretation as [that] best insures the attainment of its objects.”

[100] In para. 27 of *Bell ExpressVu*, the Supreme Court described “the preferred approach” as recognizing the important role that context plays when a court interprets a statute. Further, “where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive.” As stated in *R. v. Ulybel*, 2001 SCC 56, at para. 52, that means the application of “the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.”

[101] In cases of “genuine ambiguity” the words of the provision must be “reasonably capable of more than one meaning.” As stated in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14:

It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute that the courts need to resort to external interpretive aids.

Indeed, even the fact that two courts have differing conclusions on the interpretation of a provision does not create an ambiguity.

THE ISSUES

[102] The issues to be considered are the following:

1. Does the Water Board have the discretion to refuse an application for a water licence pursuant to s. 83(2) of YESAA, or is it obligated to implement the decision document in the Western Copper application for a water licence?
2. Has the Water Board's decision exceeded its powers under the *Waters Act* by purporting to regulate the mining facilities contrary to the authorization issued by the MEMR in the Quartz Mining Licence which incorporates the terms and conditions of the decision document?

ANALYSIS

Issue 1: Does the Water Board have the discretion to refuse an application for a water licence pursuant to s. 83(2) of YESAA, or is it obligated to implement the decision document in the Western Copper application for a water licence?

Grammatical and Ordinary Sense

[103] As Ruth Sullivan concludes in her text *Sullivan on the Construction of Statutes*, Fifth Edition (LexisNexis, Canada 2008), at p. 21:

Texts are not either plain or ambiguous; rather they are more or less plain and more or less ambiguous. The factors that justify outcomes in statutory interpretation are multiple, involving inferences about meaning and intention derived from the text, non-textual evidence of legislative intent, specialized knowledge, common sense and legal norms. These factors interact in complex ways. It is never enough to say the words made me do it.

[104] The ordinary meaning or the plain language of a section in a statute is a useful starting point. It is not necessarily the final meaning that will be given to the words to be interpreted.

[105] In this case, the key wording in s. 83(2) of YESAA can be reduced to the following:

... every territorial agency taking any action that enables [the project] to be undertaken shall implement a decision document issued by the territorial minister in respect of the project.

[106] The Water Board is a "territorial agency" and the first question is whether it has taken any action that enables the project to be undertaken. One could interpret "any action that enables it to be undertaken" to mean the issuance of a licence. The Water Board decision to deny a water licence to Western Copper could be characterized as a disabling rather than an enabling action.

[107] However, if one accepts that the decision document is a binding document, then it could be argued that the mere fact that the Water Board commenced hearing the application for a water licence is an enabling action in the sense of it being another step in the process to open the mine. But such an interpretation implies that the Water Board has no discretion to refuse a water licence when a decision document says a project should be allowed to proceed. In the case at bar, this would mean that the Water Board had to accept the finding of the executive committee of YESAB that successful detoxification of the heap is feasible so long as recommendation 118 is implemented to reduce the potential adverse effects.

[108] The submission of Western Copper is that the Water Board has the discretion to refuse to issue a water licence, but only in limited circumstances, such as when "the

application is insufficient to address matters such as discharge limits and water management plans to achieve downstream water quality." Western Copper submits that when the Water Board is presented with a decision document authorizing a mine to proceed, the Water Board must decide in conformity with the findings and recommendations of the decision document.

[109] These issues require a consideration of the development assessment process set out in the UFA and YESAA and the statutory regime consisting of YESAA, the *Waters Act* and the QMA.

The Statutory Regime

[110] In many respects, the UFA articulates the intention of Parliament and this is confirmed by s. 5 of YESAA which states that "the purpose of the *Act* is to give effect to the provisions of the Umbrella Final Agreement respecting assessment of environmental and socio-economic effects."

[111] It is also significant, but not necessarily determinative that Yukon and the First Nations, two of the three parties that negotiated the UFA, are in substantial agreement on how it should be interpreted. This is somewhat unique as it is often the original parties to an agreement that have contrary interpretations. The interpretation advanced by Yukon and the First Nations can be summarized as follows:

1. the development assessment process is a planning tool that precedes the regulatory process;
2. the decision document accepts the recommendations of the executive committee and permits the regulatory process to proceed;

3. the UFA, YESAA and the *Waters Act* confirm the discretion of the Water Board to deny a water licence;
4. the decision document is only binding on the Water Board when a water licence is issued.

[112] I am in agreement with this interpretation of the statutory regime. It is also important to understand the real issue at stake in this appeal: The Water Board has expressly disagreed with the finding of the executive committee of YESAB that certain aspects of the heap leach technology have been proven to be viable. There is no obligation, statutory or otherwise, for the Water Board to accept the scientific finding from the assessment process. To come to such a conclusion, which is Western Copper's interpretation of the Yukon development assessment and regulatory process, would completely eviscerate the licensing role of the Water Board. In my view, it was never intended that the assessment process' recommendations of socio-economic terms and conditions would trump the regulatory licensing process.

[113] It is crucial to differentiate between the development assessment process and the regulatory process. Development assessment is conceptually the same as environmental impact assessment. As stated in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at para. 95, environmental assessment is a planning tool that identifies and evaluates potential environmental consequences of a project:

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:

The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, *Environmental Approvals in Canada* (1989), at p. 1.2, (SS) 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.

[114] The YESAB executive committee conducts environmental assessments or screenings. It is not a regulatory body making the decision that a mine can operate. Thus, when a decision document accepts the recommendations of the executive committee, it is not a licensing or permitting decision that has the same status as a regulatory licence. This is the flaw in the Western Copper submission, which gives the decision document an authority or regulatory status greater than a more specialized licensing consideration.

[115] Section 12.8.1.2 of the UFA refers to the "screening" or "review" of a project followed by written recommendations to a decision body "concerning any significant adverse environmental or socio-economic effects of the project." The words "screening", "review" and "recommendation" do not indicate finality or final determinations.

[116] The wording in s. 41 of YESAA is similar as it directs the executive committee to "conduct assessments of projects". Section 42 of YESAA requires the executive

committee to take into consideration, among others things, “the significance of any environmental or socio-economic effects of the project.”

[117] In s. 50 of YESAA, a proponent submits a proposal to the executive committee for a project taking into consideration the matters set out in s. 42.

[118] Here, after the screening of Western Copper’s project by the executive committee, pursuant to s. 58(1)(b) of YESAA, the executive committee recommended to the decision bodies that the project be allowed to proceed without a review, subject to specified terms and conditions, as it had determined that the project had significant adverse environmental and socio-economic effects that could be mitigated by terms and conditions.

[119] I conclude that the development assessment process prescribed by YESAA is a planning tool that precedes the more technical regulatory licensing process under the *Waters Act* and the *QMA*. The development assessment process in YESAA is not for licensing or permitting projects but rather a process that ends with a decision document that accepts a recommendation and, in the wording of YESAA in s. 5(2), requires the consideration of environmental and socio-economic effects before projects are undertaken. The decision document is not a licence or permit for the project to be undertaken but a document allowing the project to proceed to the licensing application pursuant to YESAA.

[120] Nevertheless, the decision document issued by Yukon is not mere window dressing that can be ignored when the project is undertaken.

[121] The UFA expressly states in s. 12.14.1.1 that the government shall exercise any discretion in “authorizing the use of ... water ... in conformity with the terms and

conditions of a decision document.” In other words, the decision document only becomes binding on government when it authorizes the use of water in the ministerial approval required under s. 12(6)(a) of the *Waters Act*.

[122] To make it clear that the decision document is not a licensing document, s. 12.14.2 of the UFA states that “[n]othing in s. 12.13.4.3 or s. 12.14.1.1 shall be construed to require Government... to grant an interest in or authorize the use of land, water or other resources.”

[123] I interpret this to mean that the decision document, as contemplated in the UFA, is not a binding document committing the government to proceed with a project. It means that a project can proceed to the regulatory approval phase as set out in s. 83(1) of YESAA.

[124] I now turn to consider the decision-making powers of the Water Board. The *Waters Act* is Yukon legislation made under of s.18(n) of the *Yukon Act*, empowering the Legislature to make laws in relation to water, other than waters in a federal conservation area. Section 12(1) of the *Waters Act*, which was drafted before the UFA was signed, states that the Board “may issue type A licences” but in s. 12(4) “shall not issue a licence unless” the water use “would not adversely affect, in a significant way, the use of waters” without compensation to existing users. In the UFA, s. 14.8.3 states that the Board “shall not grant a licence ... unless ... the Board is satisfied that ...”. Thus, the Board has a wide discretion and can refuse to issue a licence.

[125] Section 83(2) of YESAA places a limitation on that discretion. It requires the Water Board to implement a decision document when it is “taking any action that enables [the project] to be undertaken.” In my view, “enabling” a project to be

undertaken in the context of the UFA and YESAA requires positive action to permit a project to be undertaken, i.e. the issuance of a water licence. The discretion of the Water Board is not limited by the decision document except when it issues a water licence. This interpretation is reinforced by s. 86(b) which states that the Water Board "may not set terms and conditions that conflict with such a decision document to the extent that the decision document is required to be implemented by the Water Board." Thus, s. 83(2) and s. 86(b) of YESAA are complementary. Implementation of a decision document is not required until the project is granted a water licence, and then the terms and conditions of that licence cannot conflict with the decision document. In the case at bar, the Water Board has not even addressed the terms and conditions of the decision document because it is not issuing a water licence until the technology is proven to its satisfaction.

[126] I conclude that the development assessment process of YESAA is a planning tool that reviews a proposal for a project with a consideration of its broad environmental and socio-economic consequences. This is a different mandate than that of the Water Board, which decides whether an application can be licensed. The discretion of the Water Board to not issue a licence exists even after the issuance of a positive decision document under YESAA. The decision document does not limit the discretion of the Water Board until it issues a water licence. The Water Board, in its decision-making power, is not fettered by a scientific finding of YESAB's executive committee that is not contained in the decision document.

Issue 2: Has the Water Board's decision exceeded its powers under the *Waters Act* by purporting to regulate the mining facilities contrary to the authorization

issued by the MEMR in the Quartz Mining Licence which incorporates the terms and conditions of the decision document?

[127] To paraphrase s. 1 of the *Waters Act*, waste is any substance that will degrade water to the extent that it will be detrimental to its use by people, animal, fish or plant. Waste also includes any substance added to water that degrades or alters it.

[128] The proposed Western Copper mining project requires the use of large amounts of water, treated or otherwise, to leach, rinse and detoxify spent heap and sludge material. This water, in some form, will end up being discharged into Williams Creek which flows into the Yukon River.

[129] Counsel for Western Copper submits that the Water Board has no jurisdiction over the heap leach process, which it characterizes as under the jurisdiction of the QMA and QML. While not requiring "bright lines" to be drawn between the Chief of Mining Land Use and the Water Board, Western Copper submits that the respective jurisdictions must be clarified and respected.

[130] In addition to the alleged error in the Water Board's interpretation of s. 83(2) of YESAA, Western Copper submits that there are four specific findings of the Water Board that are beyond its jurisdiction because they purport to regulate mining facilities already licensed under the QML issued on April 15, 2009 under the jurisdiction of the Chief of Mining Land Use. The findings are as follows:

1. Likelihood of Successful Leaching

[131] The Water Board accepted that testing of the leaching process "to the tall column level" had shown that commercially acceptable copper recovery is possible. However, this had not been demonstrated at the heap scale proposed by Western Copper, and

the Water Board identified several issues that could not be resolved by the column scale testing. The Water Board concluded that resolution of the uncertainty in relation to the leaching of the Carmacks ore should be required prior to full scale mining at the site.

2. Likelihood of Successful Detoxification

[132] Despite the finding of the YESAB executive committee that successful detoxification of the copper heap is feasible, the Water Board explicitly disagreed "that proof of leaching efficiency on a trial of an eight metre thick lift of Carmacks ore is proof of subsequent high efficiency for dispersal of rinsing fluids in the 70m thick heap" (p. 16). The Water Board noted that the only expert opinion based on the actual contents of the Western Copper application was that of Mr. Kuiper, who gave evidence and was cross-examined before the Water Board.

3. The Heap Leach Liner System

[133] The Water Board heard several arguments from interveners that the design of the heap leach facility is inappropriate. The Water Board found that the uncertainty of successful detoxification of the spent heap would require "an improved design that includes a continuous detection layer underneath the entire heap pad."

4. The Adequacy of Sludge Management

[134] The Water Board noted the plan of Western Copper to store up to 33,000 tonnes of sludge in a temporary holding cell adjacent to the heap. The sludge would be moved onto the heap benches prior to the heap being covered with a cover or cap. On the basis of the evidence provided, the Water Board found that it was not logistically feasible to place the sludge on the heap.

[135] Western Copper submits that with these four findings, the Water Board effectively rejected the decision document, failed to implement it and set terms and conditions that were contrary to it. Specifically, rather than allowing the first cell of the heap to be used as a field-scale trial, the Water Board set a condition requiring a separate field-scale test, prior to proceeding with the project.

[136] I find that the mandate or jurisdiction of the Water Board must be based upon the very broad definitions of waste and water in the *Waters Act*. The Water Board is concerned with the introduction of any substance to water that results in its degradation. The use of water and its potential degradation begins with the leaching of copper from the heap and continues through each stage of the process until mine closure.

[137] In my view, any attempt to set out separate jurisdictional spheres or areas would be fruitless and contrary to the harmonious operation of the statutory regime that has been created. There are undoubtedly many components of a project that have both a mining and a water quality aspect. For example, the heap leach process is fundamentally a part of the mining process. It is the process by which the copper is separated from the copper ore. From a mining perspective it must be commercially viable; from a water quality perspective it must not create unknown or unresolved water quality issues. In my view, it is within the jurisdiction of the Water Board to address the heap leach process to ensure that the mine reclamation and closure plan is feasible from a water quality perspective.

[138] The submission of Western Copper implies that there is an operational conflict between the Water Board's refusal to issue a water licence and the issuance of the QML. In my view, there is no operational conflict because the QML is explicitly subject

to all applicable laws and licences. The question of when a court should abandon curial deference to reconcile conflicting tribunal decisions was discussed in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 at para. 53 as follows:

This said, it is important to note that such an abandonment of curial deference is only appropriate in those few cases where there is true operational irreconcilability of administrative decisions. Conflicts should not be sought out or artificially created by the courts as a justification for judicial interference. Instead, judicial interference should only be contemplated where it is impossible to comply with two administrative decisions in that they are in direct operational conflict.

[139] In my view, the regulatory regime is working and there are valid reasons for the Water Board's refusal to issue a licence based on its concerns about the proposed use of water by Western Copper. Western Copper does not find itself in a position where it is impossible to fulfill its legal obligations.

[140] The Water Board's jurisdiction to regulate the use of water and discharge of waste into water must be respected. This cannot be limited to monitoring the end of the pipe before waste is discharged into Williams Creek. That monitoring can only occur late in the development of the mine. The Water Board's jurisdiction must begin where the use of water or treatment of water begins, and in this case that is with the heap leach process. The suggestion that the Water Board leave the heap leach process exclusively to the Chief of Mining Land Use would be an abdication of the Water Board's duty to exercise its jurisdiction over water where the process of degradation or alteration begins. The Water Board has a crucial role to play in ensuring that water effluent from the heap will meet acceptable discharge criteria and that Western Copper,

not Yukon or Yukon citizens, bears the environmental and financial liability for the water used in the heap leach process.

[141] In specific response to Western Copper's submission, the Water Board has jurisdiction over the water used in the heap leach process and it is appropriate for the Water Board to make findings in this area, as water is a key ingredient in this process. The viability of the heap leach process is not simply a question of commercial viability. It goes to the very fundamental question of whether the mine can leach the copper without creating water toxification issues that cannot be managed. Similarly, it is appropriate for the Water Board to opine on the likelihood of successful detoxification of the heap, as that too will have a major impact on the quality of water emanating from the mine site after closure. The design of the heap leach liner system, while certainly a shared jurisdiction with the Chief of Mining Land Use, is fundamental to the integrity of the surface water and groundwater quality.

[142] Finally, the adequacy of sludge detoxification is critical to water quality. In my view, the *Waters Act* must not be so narrowly interpreted that the Water Board cannot do its job to protect Yukon water resources at any stage of a process involving its use.

CONCLUSION

[143] I conclude that the Water Board has acted within its statutory jurisdiction under both the *Waters Act* and s. 83(2) and s. 86(b) of YESAA.

[144] The appeal of Western Copper is dismissed with costs to the respondents that have applied for costs. I note that Western Copper did not claim costs as it considered this to be a test case. Nevertheless, the respondents have incurred significant expense

and should be permitted to recover them. If there are any costs issues that remain to be determined, counsel may refer the issue to case management.



VEALE J.

APPENDIX A

Umbrella Final Agreement (UFA)

CHAPTER 2 – General Provisions

2.6.0 Interpretation of Settlement Agreements and Application of Law

2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;

CHAPTER 12 – Development Assessment

12.14.0 Implementation of Decision Document

12.14.1 Government shall:

12.14.1.1 subject to 12.14.8, exercise any discretion in granting an interest in, or authorizing the use of land, water, or other resources in conformity with the terms and conditions of a Decision Document issued by Government;

12.14.2 Nothing in 12.13.4.3 or 12.14.1.1 shall be construed to require Government to enact or amend Legislation to implement a Decision Document issued by Government or to require Government to grant an interest in or authorize the use of land, water or other resources.

CHAPTER 14 – Water Management

14.1.0 Objective

14.1.1 The objective of this chapter is to maintain the Water of the Yukon in a natural condition while providing for its sustainable use.

14.8.0 Protection of Quantity, Quality and Rate of Flow of Water

14.8.1 Subject to the rights of Water users authorized in accordance with this chapter and Laws of General Application, a Yukon First Nation has the right to have Water which is on or flowing through or adjacent to its Settlement Land remain substantially unaltered as to quantity, quality and rate of flow, including seasonal rate of flow.

14.8.3 The Board shall not grant a Licence that interferes with the rights provided in favour of a Yukon First Nation in 14.8.1 unless:

14.8.3.1 notice, in a form prescribed by the Board, of receipt of an application has been given to the affected Yukon First Nation; and

14.8.3.2 the Board is satisfied that,

- (a) there is no alternative which could reasonably satisfy the requirements of the applicant, and
- (b) there are no reasonable measures whereby the applicant could avoid the interference.

...

14.8.7 In deciding whether to issue a Licence, and in setting the terms and conditions of any Licence issued, the decision of the Board shall not conflict with a Decision Document that a Decision Body is empowered to implement.

Yukon Environmental and Socio-economic Assessment Act, S.C.
2003, c. 7 ("YESAA")

An Act to establish a process for assessing the environmental and socio-economic effects of certain activities in Yukon

...

GENERAL

Effect of Act

5. (1) This Act gives effect to provisions of the Umbrella Final Agreement respecting assessment of environmental and socio-economic effects.

...

PART 2 ASSESSMENT PROCESS AND DECISION DOCUMENTS

...

Screening of Projects by Executive Committee

...

Conclusion of screening

58. (1) Subject to subsection (2), at the conclusion of its screening the executive committee shall

- (a) recommend to the decision bodies for the project that the project be allowed to proceed without a review, 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 without a review, 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;

...

Consideration of Recommendations and Issuance of Decision Documents

...

Decision on recommendation from executive committee or panel of the Board

76. (1) Subject to subsection 59(1), where the executive committee or a panel of the Board makes a recommendation to a decision body, the decision body shall, within the period prescribed by the regulations,

- (a) issue a decision document accepting the recommendation; or
- (b) refer the recommendation back to the executive committee or the panel for reconsideration by it, unless that recommendation was made in response to a previous referral under this paragraph.

...

Implementation of Decision Documents

...

Territorial agencies and municipal governments

83. (1) Where the territorial minister is a decision body for a project, no territorial agency or municipal government shall undertake the project, require that it be undertaken or take any action that would enable it to be undertaken until the territorial minister has issued a decision document under section 75, 76 or 77 allowing the project to be undertaken.

Implementing decision document

(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.

...

Water licences

86. A body established by territorial law and having jurisdiction in relation to rights in respect of waters may not, under territorial law,

- (a) grant or renew rights in respect of waters contrary to a decision document issued by a federal agency or a decision document that is to be implemented by a territorial agency, municipal government or first nation under subsection 83(2) or 84(2) or (3); or
- (b) set terms of such rights that conflict with such a decision document, to the extent that the decision document is required to be implemented by a federal agency or a territorial agency, municipal government or first nation.

Waters Act, S.Y. 2003, c. 19

Issue of licences

12(1) Subject to this section, the Board may issue type A licences and type B licences, in accordance with the criteria set out in the regulations made under paragraph 31(1)(c), for a term not exceeding twenty-five years, permitting the applicant for the licence, on payment of the fees prescribed by regulations made under paragraph 31(1)(k)

- (a) at the times and in the manner prescribed by any applicable regulations made under paragraph 31(1)(l), or
- (b) in the absence of such regulations, at the times and in the manner set out in the licence, to use waters or deposit waste, or both, in connection with the operation of the appurtenant undertaking and in accordance with the conditions specified in the licence.

(2) The Board shall not issue a licence in respect of a use of waters referred to in subsection 6(2).

(3) The Board shall not refuse to issue a licence merely because the use of waters or deposit of waste in respect of which the application for the licence is made is already authorized by regulations made under paragraph 31(1)(m) or (n).

(4) Where an application for a licence is made, the Board shall not issue a licence unless the applicant satisfies the Board that

(a) either

- (i) the use of waters or the deposit of waste proposed by the applicant would not adversely affect, in a significant way, the use of waters, whether in or outside the water management area to which the application relates,
 - (A) by any existing licensee, or
 - (B) by any other applicant whose proposed use of waters would take precedence over the applicant's proposed use by virtue of section 27, or
- (ii) every licensee and applicant to whom subparagraph (i) applies has entered into a compensation agreement with the applicant;

...

(c) any waste that would be produced by the appurtenant undertaking will be treated and disposed of in a manner that is appropriate for the maintenance of

- (i) water quality standards prescribed by regulations made under paragraph 31(1)(h) or, in the absence of such regulations, such water quality standards as the Board considers acceptable, and
- (ii) effluent standards prescribed by regulations made under paragraph 31(1)(i) or, in the absence of such regulations, such effluent standards as the Board considers acceptable; and

...

(6) The Board may issue a licence only with the approval

- (a) in the case of a type A licence, of the Minister; or
- (b) in the case of a type B licence,

- (i) of the chairperson of the Board, where no public hearing is held by the Board in connection with the application for the licence, or
- (ii) of the Minister, where a public hearing is held by the Board in connection with the application for the licence.

Conditions of licence

13(1) Subject to this Act and the regulations, the Board may include in a licence any conditions that it considers appropriate, including, without limiting the generality of the foregoing,

- (a) conditions relating to the manner of use of waters permitted to be used under the licence;
- (b) conditions relating to the quantity, concentration, and types of waste that may be deposited in any waters by the licensee;
- (c) conditions under which any such waste may be so deposited;
- (d) conditions relating to studies to be undertaken, works to be constructed, plans to be submitted, and monitoring programs to be undertaken; and
- (e) conditions relating to any future closing or abandonment of the appurtenant undertaking.

(2) In fixing the conditions of a licence, the Board shall make all reasonable efforts to minimize adverse effects of the issuance of the licence on

- (a) licensees,
- (b) domestic users,
- (c) instream users,
- (d) authorized users,
- (e) authorized waste depositors,
- (f) owners of property,
- (g) occupiers of property, and
- (h) holders of outfitting concessions, registered trapline holders, and holders of other rights of a similar nature who already are such licensees, users, depositors, owners, occupiers or holders, whether in or outside the water management area to which the application relates, at the time when the Board is considering the fixing of those conditions, who would be adversely affected by the use of waters or deposit of waste proposed by the applicant, and who have notified the Board in response to the notice of the application given pursuant to subsection 21(1) and within the time period stipulated in that notice for making representations to the Board.

...

(6) If any regulations made under paragraph 31(1)(j) are in force, a licence shall include conditions that are at least as stringent as any applicable standards prescribed by those regulations.

...

Quartz Mining Act, S.Y. 2003, c. 14

PART 2 LAND USE AND RECLAMATION

Purpose of Part

130. The purpose of this Part is to ensure the development and viability of a sustainable, competitive and healthy quartz mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Yukon.