SUPREME COURT OF YUKON

Citation: *Yukon Big Game Outfitters Ltd. v Yukon (Government of)*, 2022 YKSC 31

Date: 20220704
S.C. No. 20-AP003
Registry: Whitehorse

BETWEEN:

YUKON BIG GAME OUTFITTERS LTD.

PETITIONER

AND

GOVERNMENT OF YUKON (MINISTER OF THE ENVIRONMENT)

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner — Vincent Larochelle

Counsel for the Respondent — Elaine Cairns

REASONS FOR DECISION

Introduction

[1] This is an application for judicial review by the petitioner, Yukon Big Game Outfitters ("YBGO") of two decisions of the respondent, Yukon government, imposing a condition of a zero quota for hunting Finlayson herd caribou for the 2019 and 2020 hunting years. YBGO seeks an order quashing both decisions, and an order that the Yukon government determine the appropriate compensation to be paid because of the quota imposition in both years.

[2] YBGO argues:

a. the failure of the Yukon government to hold quota or *ad hoc* meetings and to provide YBGO with full disclosure of necessary information was procedurally unfair;

b. the decisions were unreasonable because the Yukon government did not provide transparent, intelligible or justified reasons for the imposition of the quota of zero: they failed to explain their conclusions on the declining Finlayson caribou herd and effects of harvest on the herd, they failed to engage with evidence of herd stability and the criteria in their own Science-Based Guidelines, they failed to address submissions of YBGO, including the impact of the decision on them, and they incorrectly interpreted the effect of the Umbrella Final Agreement ("UFA"); and

c. the Yukon government improperly interpreted the *Wildlife Act*, RSY 2002, c 229 ("the *Act*") in failing to consider compensation for the zero quota imposition.

[3] The Yukon government disputes all grounds. They say:

a. the appropriate level of procedural fairness was met through an administrative hearing before the first decision and a meeting between the parties before the second decision, and YBGO knew the information on which the Yukon government based its decisions from previous meetings and correspondence;

b. the decisions were transparent, intelligible and justified based on the scientific data and principles for caribou management, including the

Science-Based Guidelines, as well as on the scope of discretion provided by the *Act* and its legal effect; and

c. the Yukon government's interpretation of the compensation provisions in the *Act* was reasonable.

Background

General

[4] Wildlife in the Yukon is a public resource. The Yukon government has the discretionary authority under the *Act* to manage, conserve and regulate the use of wildlife in the public interest. In fulfilling this role, the Yukon government must consider multiple interests and parties, including First Nations who have a constitutionally protected right to hunt, local resident hunters, outfitters who make their living from guided non-resident hunts, environmentalists, eco-tourism operators, wildlife viewers, and farmers.

[5] The Finlayson caribou herd is important for YBGO's financial position and reputation as an outfitter, because their remote location in the mountains during the summer and fall make YBGO guided hunts attractive. The Finlayson caribou herd is also important to the Ross River Dena Council ("RRDC"), a First Nation in whose traditional territory they range. RRDC depend on hunting the caribou for food and to enable them to carry out other cultural practices.

[6] In the early 1980s, the Finlayson caribou herd population was estimated at approximately 2,000. By 1990, after the seven-year implementation of a wolf control program, the estimated numbers increased to 5,950. The population then declined to 3,077 in 2007 and 2,712 in 2017, the last year a population estimate was done.

Outfitting

[7] The *Act* provides the legal framework for wildlife management and conservation in the Yukon.

[8] An outfitting business is issued a concession, a geographic area that reserves for the outfitter the exclusive opportunity to provide guides to persons for hunting big game animals in that concession, in accordance with the *Act*. Being guided by an outfitter is the only way in which non-residents of the Yukon can hunt big game. Big game is defined in Schedule A to the *Wildlife Regulation*, OIC 2012/84 to include muskox, polar bear, grizzly bear, black bear, wolf, coyote, wolverine, sheep, mountain goat, moose, mule deer, white-tailed deer, wood bison, elk, and caribou.

[9] An outfitting concession is subject to the imposition by the Minister of conditions prescribed by the regulations under the *Act*. Conditions include those imposed for the purpose of compliance with the *Act*; in the public interest to provide for the conservation of wildlife and effective wildlife management, or; to establish quotas to limit the number of wildlife of any species or type that may be hunted by the outfitter. An outfitter issued a concession must comply with the conditions of the concession (s. 50 of the *Act*).

[10] An outfitter must obtain an annual operating certificate from the Minister. An annual operating certificate can also contain conditions imposed by the Minister for the same purposes as those imposed on the concession (s. 54 of the *Act*).

YBGO

[11] YBGO is a corporation formed in 2012 to operate an outfitting business. There are three shareholders, one of whom is Shawn Raymond, also the operator.

[12] YBGO operates in Concession #20, the largest concession in the Yukon, located in south-central Yukon within the traditional territory of RRDC. Concession #20 is 14 million acres or 21,600 square miles. YBGO has quotas in Concession #20 to hunt grizzly bear and moose and is also permitted to hunt caribou from the Wolf Lake herd and Little Rancheria herd, without quotas.

[13] The Finlayson caribou herd, a northern mountain caribou herd, ranges in Concession #20. It is the only caribou herd whose range is entirely within the traditional territory of the RRDC.

Department of Environment – Yukon government

[14] The staff who work for the Department of Environment ("Environment Yukon") Fish and Wildlife Branch, Wildlife Harvest Program are responsible for wildlife harvest management decisions, harvest planning processes, harvest monitoring, evaluating harvest sustainability and sharing, establishing outfitter quotas, regulatory amendments and other related processes. Staff also collect wildlife inventory data to allow the evaluation of harvest sustainability.

First Nations

[15] RRDC is a Yukon First Nation with a traditional territory in the southeast Yukon. RRDC does not have a final agreement or self-government agreement with the federal and territorial governments and its members are governed under the *Indian Act*, R.S.C. 1985, c. I-5. Similarly, Liard First Nation ("LFN"), whose Yukon traditional territory is located south of RRDC, has no final or self-government agreement. RRDC and LFN, along with two other First Nations located in northern British Columbia, are referred to as the Kaska Nation, Kaska Nations, or Kaska First Nations.

[16] RRDC commenced a legal action against the Yukon government in 2014, seeking a declaration that the Yukon government had a duty to consult and if appropriate, accommodate RRDC before the annual issuance of hunting licences and seals under the *Act* allowing persons to hunt in the RRDC traditional territory. This Court declined to issue the declaration sought for reasons set out in a decision dated November 26, 2015. It held that the Yukon government had substantially consulted and accommodated RRDC in the Ross River area in wildlife management matters.

History of Finlayson caribou herd quotas imposed on YBGO

[17] The quota for hunting Finlayson caribou granted to YBGO in April 2012, the first year of their concession, was seven caribou per year for three years, until the 2014 hunting season. This included an overquota of 14, meaning the outfitter could exceed their annual quota up to 14 by offsetting it against future years, as long as the total number of caribou harvested over three years did not exceed 21.

[18] By letter dated April 23, 2015, the Yukon government confirmed to YBGO a one-year quota of seven caribou. No multi-year quota was granted because the Yukon government said a longer-term renewal was not consistent with their need to consult with RRDC. The letter further advised the Yukon government was working to engage with RRDC over 2015/16 to enable a new multi-year quota to be established.

[19] By letter dated March 21, 2016, the Yukon government advised YBGO their quota would be seven caribou for hunting season 2016, with an overquota of seven, for a total of 14 caribou; that the Yukon government was working within the Outfitter Quota Guidelines (the “Guidelines”) and Outfitter Quota Meeting Procedures (the “Meeting Procedures” – explained below) to set up a meeting with RRDC to establish a multi-year

quota for Finlayson caribou. The herd was considered to be in decline based on the most recent census numbers and the annual productivity survey. The licensed harvest would likely need to be reduced for the next multi-year quota. The letter specifically stated:

> … This letter also serves to provide you with the 1 year advance notification that your next Finlayson caribou quota is very likely to be lower than your current quota. This will be consistent with the distribution of opportunities, described in the Outfitter Quota Guidelines … attached for … reference.

The Environment Yukon official invited YBGO to contact them to review the population and survey information on the Finlayson caribou herd.

[20] On April 11, 2016 a meeting occurred among Shawn Raymond, two other outfitters, the Harvest Coordinator, and Liard Regional Biologist of the Fish and Wildlife Branch of Environment Yukon, to review the technical information about the Finlayson caribou and the implications for the quotas. The participants discussed the government role in recovery planning, the Finlayson caribou range use, caribou distribution and abundance, quota and herd decline and caribou harvest management. Information was exchanged. The Environment Yukon representatives advised they had attempted to engage with RRDC multiple times to discuss caribou quotas but to that date had no formal response from them on this topic. They noted the Finlayson caribou herd continued to be in decline, based on the 2007 population survey and the 2016 estimate from modelling; and as a result an annual allowable harvest of 1% had been identified. They noted there were risks to any harvesting from a declining herd and licensed harvest would have to be managed appropriately. The Finlayson caribou harvest by First Nations was discussed and estimated from historic collaborations between the

Yukon government and RRDC, current information from conservation officers, and information gained by Shawn Raymond working with RRDC trappers over the previous few years. The government representatives noted the actual numbers of RRDC subsistence harvest were not as relevant as the harvest distribution arrangements among First Nations, licensed resident hunters and outfitters.

[21] Environment Yukon emailed Shawn Raymond on April 27, 2016, confirming the one year quota term as an interim measure until a meeting with RRDC could be held to discuss quotas. The email reiterated that regardless of the First Nations harvest levels, the Yukon government were required to account for the First Nation share in their calculations. The email stated the government's information was that Kaska harvest of Finlayson caribou is higher than Shawn Raymond had suggested at the April 11 meeting. It also stated they had been trying to work with RRDC on a number of initiatives of mutual interest, such as a trapping program.

[22] By letter dated May 5, 2017 from the deputy minister of Environment, Yukon government advised YBGO their quota for the 2017/18 hunting season would again be seven caribou, that the process to establish multi-year quotas was postponed pending ongoing consultation with Kaska Nations, and that Environment Yukon officials were committed to working towards having a new, multi-year quota in place for the YBGO concession before the 2018 hunting season. The deputy minister noted the fieldwork necessary to update the population estimate for the Finlayson caribou herd was completed. The results of the population survey were published on June 9, 2017.

[23] By letter dated April 15, 2018, the director of the Fish and Wildlife Branch of Environment Yukon advised YBGO that it would again grant a quota of seven caribou

for the 2018/19 hunting season. The director stated the Yukon government had continued conversations with the Kaska Nation about fish and wildlife management priorities, including discussions with RRDC representatives about management issues of concern to their First Nation and they expected a quota meeting would be held in 2018/19. Staff were developing a comprehensive package of technical information on moose and caribou within the YBGO Concession which Yukon government would be sharing in anticipation of a quota meeting.

[24] YBGO states it did not receive this comprehensive package of information. Yukon government says technical information about the status of the Finlayson caribou herd and survey results was provided to YBGO in a December 4, 2018 meeting, and in answer to email requests in November 2019.

[25] The Minister met with the Chief of RRDC in July 2018. The RRDC expressed to the Minister their extreme concern about the health of the Finlayson caribou herd. They agreed that the discussion of outfitter quotas was a priority.

[26] By letter dated July 30, 2018, the deputy minister of Environment advised YBGO that its caribou quota for 2019/20 hunting season would initially be set to zero and would remain there until a quota meeting could be held with RRDC. The letter explained that successive census surveys since 1990 demonstrated declines in herd size and the current management approach had not been sufficient to stabilize the herd. The Yukon government noted its decision not to issue any Finlayson caribou herd permits for local Yukon resident hunters was the result of many discussions with RRDC and various stakeholders. The Yukon government identified a need to review fully harvest

distribution, herd status and the government management approach, before reinstating the Finlayson caribou harvest.

[27] In response to the July 30, 2018 letter, YBGO hand-delivered a letter dated March 25, 2019 on or about April 17, 2019 expressing the following concerns about the imposition of the zero quota:

a. the lack of notice or justification in unilaterally setting the quota to zero;

b. the lack of opportunity to respond;

c. the failure of the government to consider causes of herd decline other than harvesting, or to implement other recovery strategies;

d. the failure of the government to follow the Guidelines or the intent of the UFA, which both allow for harvest by harvesters other than the First Nation; and

e. the importance of the outfitting business for the Yukon community, including First Nations who are supplied with meat by the outfitters.

[28] In the meantime, the Minister wrote a letter to 113 Concerned Hunters and other hunting associations dated September 11, 2018, responding to their questions and concerns about RRDC limiting hunting in their territory. This letter was submitted on this judicial review by YBGO. The Minister in that letter referred to RRDC's lack of capacity and mechanisms for expressing their views to other governments, as a First Nation without a final or self-government agreement and consequently no Renewable Resource Council to work with. She confirmed RRDC's expression of extreme concern to her about the health of the Finlayson caribou herd in July 2018. She wrote the

decision to limit the permit hunt to zero was a temporary, interim measure to allow for better data collection and collaboration with RRDC.

Concession and Compensation Review Board process

[29] On April 18, 2019, YBGO signed the 2019/20 annual operating certificate with conditions but wrote on the certificate they did not agree with the caribou quota of zero.

[30] This was written notice of disagreement with the certificate conditions, as required by s. 127(2) of the *Act*, within the necessary ten-day period. YBGO wrote to the Yukon government on May 17, 2019 to request a hearing before the Concession and Compensation Review Board ("CCRB") of the Finlayson caribou quota for the 2019/20 hunting season. On June 11, 2019, the Minister referred the matter to the CCRB. The deputy minister confirmed the CCRB hearing by letter dated June 11, 2019 from the deputy minister, responding to YBGO's April 17 and May 17, 2019 letters. The letter also stated the conditions on the 2020/21 operating certificate would reflect the outcome of a quota meeting to be held before the 2020/21 hunting season.

[31] The CCRB is established under the *Act* for the purpose of reviewing conditions imposed on a concession or an annual operating certificate. At the end of the review, according to s. 127(11), the CCRB must produce a report with a summary of the evidence and its opinion on the merits of the conditions imposed, having regard to what is reasonably necessary for the conservation and management of wildlife; the effective administration of the *Act*; and ensuring compliance with the *Act*. The CCRB must also give reasons for its opinion.

[32] After considering the CCRB's report, the Minister may confirm, remove or amend the conditions imposed on the certificate or concession.

Decision #1 – 2019/20

[33] Initial notice of the imposition of a zero quota with reasons was provided by letter dated July 30, 2018. The certificate was signed by YBGO on April 18, 2019, expressing disagreement with the zero quota. The CCRB hearing to review the zero quota for 2019/20 occurred on December 3, 2019. Representations were made by YBGO and the Yukon government. No representations were made by RRDC and they were not present.

[34] The CCRB released its report and recommendation on January 24, 2020. They recommended that YBGO be granted a quota to hunt two-to-four Finlayson caribou annually for a two-year term. They made five other procedural recommendations. Relevant to this judicial review is the recommendation that the Yukon government should consider compensating outfitters when a sudden and drastic change to quotas is contemplated such as the one in this case and that the Minister should discuss the ability of the CCRB to recommend financial compensation at the outcome of a hearing.

[35] As required by s. 127(12) of the *Act*, the Minister reviewed the CCRB report and recommendation and issued her decision on March 24, 2020. She confirmed the quota of zero for 2019. She declined to accept the CCRB recommendations related to compensation on the basis it was not within their jurisdiction. This March 24, 2020 letter from the Minister is the first decision for which judicial review is being sought.

Decision #2 – 2020/21

[36] By letter dated July 31, 2019, the Yukon government initially advised YBGO their Finlayson caribou quota would remain at zero for hunting season 2020/21 and would be “in effect until further notice”. The letter stated the Yukon government continued to be

concerned about the declining status of the Finlayson caribou herd and saw the need to "review harvest management, herd status and the overall management approach prior to re-instating a licensed harvest on this herd." The Yukon government requested a meeting with YBGO before April 2020 to review information, to gain a better understanding of YBGO input and perspectives on the herd, and to ensure clarity for the 2020/21 licensing year. They were continuing to work to establish meetings with Kaska representatives to review herd status and potential for harvest opportunities on the herd. In closing the letter stated:

> Moving ahead in our planning for Finlayson caribou, we will be looking for input and support from the resident and non-resident hunting communities and other interested parties and to do so in partnership with Kaska First Nations.

[37] On April 27, 2020, the director of the Fish and Wildlife Branch, Environment Yukon wrote to YBGO to follow up on the July 31, 2019 letter. The Yukon government still had significant conservation concerns for the Finlayson caribou herd and believed any licensed hunting opportunities would be detrimental. Before finalizing the Finlayson herd quota on the YBGO annual operating certificate, however, the Yukon government sought YBGO's views before July 1, 2020 on the quota for 2020/21, in recognition of YBGO's commercial interest and their first-hand knowledge of the herd.

[38] At YBGO's suggestion, a ZOOM meeting was held with Environment Yukon representatives and YBGO on May 26, 2020, during which YBGO presented a power point. It included YBGO's view that the Finlayson herd was stable, and based on the 2016 Science-Based Guidelines, a 2% harvest (54 caribou) should be allowed. Of that, YBGO requested a quota of five bulls.

[39] The Environment Yukon representatives noted the YBGO presentation was similar to their December 2019 CCRB presentation and asked if they had any new information. Shawn Raymond advised the RRDC harvest was less than 20 caribou annually and between five and six, possibly up to 10. He thought this low harvest was due to aging hunters and inaccessibility of the herd, not conservation concerns. The government representative expressed the view this was a low estimate. Mr. Raymond then noted the caribou were accessible that year and that 50-60 families were hunting. The Environment Yukon representatives said they heard the subsistence harvest was higher than normal and was likely using the entire sustainable harvest. YBGO was invited to provide more information for Environment Yukon's consideration before July 1, 2020.

[40] Nothing further was received by Environment Yukon from YBGO by July 1, 2020. On July 10, 2020, the Yukon government advised YBGO by letter that the quota for 2020/21 would remain at zero. This is the second decision for which judicial review is sought.

[41] On August 19, 2020, YBGO signed the 2020/21 annual operating certificate, and indicated its objection to the Finlayson herd quota. Section 127(3) of the *Act* does not allow for a hearing under the CCRB process where the conditions imposed and objected to are the same as those for which a hearing had already been held.

The Outfitter Quota Guidelines, Outfitter Quota Meeting Procedures, Science-Based Guidelines, and the Umbrella Final Agreement

[42] The Guidelines are not part of the *Act* or regulations. They were developed after extensive consultation by the Yukon government with various stakeholders throughout the Yukon, including outfitters and First Nations. The Outfitter Quota Committee made

recommendations that were adopted as Guidelines and approved by the Yukon Cabinet on January 4, 1996. The purpose of the Guidelines was to set out a procedure for the consistent application of criteria for allocating and administering outfitter quotas.

[43] The Meeting Procedures was a document finalized in 2012, subject to review in 2013. It sets out procedures for determining outfitter quotas under the Guidelines, including establishing a local committee, also referred to as an *ad hoc* committee. This committee consists of two local citizens, one of whom must be a local First Nation representative, and Yukon government representatives, for the purpose of negotiating with the outfitter their quota allocation and term. If no local committee can be established, negotiations will be conducted between the outfitter and Yukon government representatives.

[44] The Science-Based Guidelines were published by the Yukon government in May 2016. They provide an overview of the "scientific information used by Environment Yukon … to make monitoring and harvest management decisions specific to Northern Mountain caribou …".

[45] The UFA was negotiated by the Council for Yukon First Nations, representing the 14 Yukon First Nations, the Yukon government and the Government of Canada and was finalized in 1990. It provides a framework agreement for the final agreements and self-government agreements negotiated individually by each First Nation. The UFA does not create or affect any legal rights (s. 2.1.2). The final agreements contain all of the UFA provisions, in addition to specific provisions for each First Nation. The final agreements are the legal documents implemented by territorial and federal legislation.

The final agreements include chapters on fish and wildlife management and land and are constitutionally protected under s. 35 of the *Constitution Act, 1982*.

[46] Three Yukon First Nations do not have final agreements – RRDC, LFN and White River First Nation.

[47] The *Act* specifies the circumstances in which compensation is payable to an outfitting concession holder.

Issues

[48] What is the appropriate standard of review?

[49] Was there procedural unfairness because of a failure to hold quota or *ad hoc* meetings and a failure to provide sufficient information about the case to be met?

[50] Were the zero quota decisions reasonable?

[51] Was the decision not to award compensation reasonable?

Brief Conclusion

[52] There is no standard of review for the procedural fairness issues – the question is whether the process was fair in all the circumstances.

[53] The standard of review for the merits of the decisions is reasonableness.

[54] While there were irregularities in the process of arriving at each decision, they did not amount to procedural unfairness.

[55] The quota decisions were reasonable.

[56] The decision not to award compensation was reasonable.

Analysis

Issue #1 - Standard of Review

Procedural Fairness

[57] Courts have held that the determination of procedural fairness does not require an assessment of the appropriate standard of judicial review. The leading case on procedural fairness remains *Baker v Canada* (*Minister of Citizenship & Immigration*), [1999] 2 SCR 817 ("*Baker*"), where the Supreme Court of Canada set out several non-exclusive factors to be considered in determining whether fairness had been achieved:

> A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court … asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed … strictly speaking, no standard of review is being applied. [*Canadian Pacific Railway Company v Attorney General of Canada et al*, 2018 FCA 69, para. 54]

[58] Put another way, many cases have described the standard of review for procedural fairness issues as correctness. However, the Federal Court of Appeal has said in the *Canadian Pacific Railway* case above, citing the Supreme Court of Canada in *Mission Institution v Khela*, 2014 SCC 24 at para. 79, "attempting to shoehorn procedural fairness into a standard of review analysis is an unprofitable exercise." The ultimate question is whether the applicant knew the case they had to meet and had a full and fair opportunity to respond.

Merits of decision

[59] The law applicable to substantive judicial reviews was revised and clarified by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v*

Vavilov, 2019 SCC 65 ("*Vavilov*"). The Supreme Court of Canada set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. The decision in *Vavilov* did not alter the principles for the review of procedural fairness issues (para. 77).

[60] Where there is no statutory appeal or legislated standard of review, then there is a presumption that reasonableness is the applicable standard of review of administrative decisions by a court. Where there is a constitutional question, a general question of law of central importance to the legal system as a whole, or a question related to the jurisdictional boundaries between two or more administrative bodies, then the reasonableness presumption is displaced, and the correctness standard applies.

Standard of review of merits of decision in this case

[61] Counsel for YBGO argues the interaction between the duty to consult Indigenous people and the duty of fairness owed to YBGO is a constitutional issue because it affects the scope of Aboriginal rights. He also argues it is a general question of law of central importance to the legal system as a whole because of the importance of the duty to consult and its wide-ranging and systemic implications.

[62] This argument relates to the fairness concern that YBGO did not know the case they had to meet because the Yukon government failed to disclose information from their consultation meetings with RRDC. The determination of this issue requires a procedural fairness analysis, applying the *Baker* factors. Thus, the exceptions to the reasonableness standard of review of the merits of an administrative decision set out in *Vavilov* do not apply.

[63] Counsel for YBGO further argues the Yukon government's interpretation of the interaction between the Guidelines, the *Act*, and the UFA is a constitutional issue. This argument relates to two aspects of the imposition of the zero quota decision. The first is the improper interpretation of the harvest sharing principles set out in the UFA and the Guidelines. The second aspect is the Yukon government's improper interpretation of the *Act* and the UFA in the context of the compensation issue.

[64] The UFA on its own has no legal force and effect and no constitutional status. The applicability and enforceability of the UFA provisions only occur once a final agreement has been entered into and implemented by legislation. As noted above, RRDC does not have a final agreement. The constitutional exception to the reasonableness standard of review does not apply here.

[65] The same conclusion about the effect of the UFA applies to the compensation concern.

[66] The presumptive reasonableness standard of review applies to the merits of the administrative decisions in this case.

Issue #2 – Procedural unfairness from failure to hold meetings or provide sufficient information?

Legal framework for procedural fairness

[67] The Supreme Court of Canada has described procedural fairness as:

> … a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges of interests of an individual." (*Dunsmuir* at para. 79, quoted in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 ("*Agraira*") at para. 93).

[68] The duty of procedural fairness is best described by its objective – to ensure a party is given a meaningful opportunity in a given context to present its case fully and fairly. The means by which this may be achieved will vary depending on the context which includes the particular statute and the rights affected (*Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KF*, 2006 FCA 398, as quoted in *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 ("*Taseko*").

[69] There are three questions to be asked in a procedural fairness analysis in a particular case. First, does the duty of procedural fairness arise? Second, what degree of procedural fairness is required? Third, was procedural fairness breached?

Application of procedural fairness legal framework in this case

[70] The first threshold question is straightforward. The Supreme Court of Canada in *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 held that any individual whose rights, interests or privileges are affected by a decision of a quasi-judicial or administrative decision maker is owed a duty of fairness in common law. The purpose of procedural fairness is to ensure that public administrative authorities act fairly when determining legal rights or interests.

[71] Here, a duty of procedural fairness is owed to YBGO by the Yukon government in determining the imposition of conditions related to the Finlayson caribou herd on its annual operating certificate. YBGO's commercial interests in harvesting caribou in its outfitting concession are affected by the Yukon government's administrative decisions. YBGO is entitled to procedural fairness in that process.

[72] The second question requires a determination of the scope of the duty of procedural fairness. The leading case to guide this determination is *Baker.* The court

stated there that "the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected" (p. 837). The court then listed the following non-exhaustive factors (pp. 838-840):

a. the nature of the decision being made and the process followed in making it;

b. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

c. the importance of the decision to the individual or individuals affected;

d. the legitimate expectations of the person challenging the decision; and

e. the choice of procedure made by the administrative decision-maker itself.

[73] The parties agree that the nature of the decisions being made and the process followed, (a in the list above) do not require a high degree of procedural protection. The decisions are clearly administrative, discretionary, and polycentric, with a public interest element.

[74] Similarly, YBGO concedes the choice of procedure made by the decision-maker in this case (e in the list above) does not give rise to heightened procedural protection. The statute here leaves the decision-maker the ability to choose its own procedures.

[75] The remaining factors to be considered are:

a. the nature of the statutory scheme;

b. the importance of the decision to YBGO; and

c. the legitimate expectations of YBGO about the process.

a) Nature of statutory scheme

[76] YBGO states the fact there is no statutory appeal once the Yukon government confirms its decision after receiving the CCRB report and recommendation requires a

high level of procedural protection. Further, the statutory limitation of one CCRB hearing if the same quota is imposed in different years means that a zero quota could continue to be imposed year after year, without legal recourse for YBGO.

[77] These two limitations on legal recourse do not preclude judicial reviews of the administrative decisions. They indicate the legislature's choice to require judicial deference to those decision-makers. The statutory scheme demands a medium level of procedural protection.

b) Importance of decision to YBGO

[78] The more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be mandated (*Baker*, pp. 838-39). This factor has been described as the balance to be struck between an individual's need for more procedural protections and society's need for efficient administration. It assumes greater procedural protections for an individual will slow the decision-making process and increase public costs. However, if the decision under review has significant impacts on an individual, then more procedural protections are justified. Significant impacts arise if, for example, an individual's physical liberty, ability to work, domicile, and safety are affected (*Taseko* at para. 38).

[79] YBGO says its financial loss resulting from these decisions – estimated to be over $100,000 per year – as well as the detrimental effect on its reputation from the inability to offer Finlayson caribou herd hunts are impacts warranting a high degree of procedural protection.

[80] The Yukon government notes YBGO is a corporation, not an individual. A corporation's economic interests do not equate to those involving an individual's

freedom, safety or livelihood (*Taseko* at para. 38). YBGO should not benefit from a high degree of procedural protection.

[81] The Federal Court of Appeal in *Taseko* was careful to say that decisions affecting economic rights are not inevitably less important than ones affecting individual rights. The economic interests affected in *Taseko* were the corporation's inability to continue its proposed mining project because the Minister of the Environment decided the project was likely to cause significant adverse unjustified environmental effects. The Federal Court of Appeal held in the circumstances of that case, the appellant corporation had not convinced them the Minister's decision should attract the same level of procedural fairness as, for example, the case of a woman with Canadian born children facing deportation or of a university faculty member facing suspension.

[82] In this case, while I do not diminish the effect of the decisions on the commercial interests of YBGO, and their reputation in the hunting community as an outfitter providing maximum opportunity for big game hunting, I cannot equate those interests with an individual's deportation or inability to work. The impugned decisions do not prevent YBGO from carrying on its business, as it has the ongoing ability to guide hunts for grizzly bear, moose and other caribou. This factor suggests a medium level of procedural protection.

c) Legitimate expectations

[83] This factor does not create substantive rights and affects only the procedure to be followed in coming to a decision. It is based on the principle that the promises or regular practices of administrative decision-makers be taken into account when determining the degree of procedural protection. Failure of an administrative decision-

maker to follow through on promises or representations about process will give rise to significant procedural rights (*Baker* p. 839-40). Similarly, if representations about a substantive result have been made to an individual, this will require more extensive procedural rights.

[84] As stated by the Court in *Agraira*, (para. 95) quoting from *Judicial Review of Administrative Action in Canada*:

> … a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. … Of course, the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified. [emphasis in original]

[85] *Agraira* was a case in which a Libyan citizen was found inadmissible to Canada on security grounds based on his membership in a terrorist organization. He appealed in part on the basis of his legitimate expectations that the procedure set out in the published Citizenship and Immigration Canada ("CIC") Inland Processing Manual (the "CIC Manual") would be followed. The Supreme Court of Canada held the CIC Manual created a clear, unambiguous and unqualified procedural framework for the handling of relief applications and consequently a legitimate expectation the framework would be followed. They were publicly available, used by employees of CIC in their duties, and constituted a relatively comprehensive procedural code.

[86] Here, the Yukon government conceded the Guidelines and Meeting Procedures created a legitimate expectation that the outfitter would participate in meetings to establish quotas and would be advised of First Nation concerns related to quotas.

[87] The Guidelines and Meeting Procedures are published documents. While they are not as comprehensive as the CIC Manual described in *Agraira*, references were made to them in the correspondence from the Yukon government to YBGO. In their letters received by YBGO dated April 23, 2015, March 21, 2016, May 5, 2017, April 15, 2018, and September 11, 2018, the Yukon government advised of their plan to hold a quota meeting to determine YBGO's caribou quotas, pending meeting with RRDC. The CCRB noted in its report and recommendation that the *ad hoc* committee was the common practice in the Yukon and failure to follow this practice was a breach of process.

[88] The existence of this legitimate expectation gives rise to a high level of procedural protection.

[89] To conclude on the second question of the scope of procedural fairness, it is necessary to weigh the five *Baker* factors in the context of all the circumstances. The nature of the decision and choice of procedure require low procedural protection, the affected economic interests and the statutory scheme militate towards medium level of protection, while the legitimate expectations suggest a higher level of procedural fairness. Weighing these together, the level of procedural fairness required in this case is medium on the spectrum.

[90] The third question is whether, given the objective of ensuring YBGO had a meaningful opportunity to present their case fully and fairly, the procedural fairness requirements in these circumstances were met. This question involves a discussion of what those procedural fairness requirements are as well as whether they were met. I will address each decision in turn.

Decision #1 – 2019/20 – Were procedural fairness requirements met?

[91] Counsel for YBGO argues the following constituted a breach of procedural fairness:

a. sudden change in quota from seven caribou to zero by letter of July 30, 2018, confirmed by the Minister's decision of March 24, 2020;

b. the failure to hold a quota or *ad hoc* meeting before the decision;

c. the failure of the Yukon government to disclose the information obtained from their consultation meetings with RRDC, and in particular from the Minister's July 2018 meeting with RRDC; and

d. the failure of the CCRB process to respect the timeliness of decision-making from YBGO's perspective and to provide necessary information to YBGO about RRDC's concerns, including information arising from their consultation meetings.

[92] As will be evident from the discussion below, there is overlap in the analysis of these alleged breaches.

[93] Counsel for Yukon government argues the CCRB process satisfied any concerns about procedural fairness of the 2019/2020 decision.

a) Sudden change in quota

[94] The concerns of the Yukon government about conservation of the herd, some harvest information, results of population and productivity surveys, and RRDC's concerns in general about conservation were communicated regularly in the correspondence from the Yukon government to YBGO (see paragraphs 19-28 – March 21, 2016 letter, April 11, 2016 meeting, April 27, 2016 email, May 5, 2017 letter, April

15, 2018 letter, July 30, 2018 letter, September 11, 2018 letter). YBGO was warned starting in March 2016 that their quota was likely to be reduced the following year. In fact, this reduction did not occur for another three years. The ongoing decline of the herd was made clear in 2016 and every year following. The Yukon government communicated to YBGO regularly the need to consider subsistence harvesting by RRDC, regardless of numbers. In other words, any management approach needed to assume constitutionally protected ongoing subsistence harvest as a priority.

[95] Despite the consistent communication of these concerns for several years by the Yukon government, it was not until 2018 that the government gave notice the quota would move the following year to zero from seven. The timing of this change in the same month as the Minister heard from RRDC their concerns about the herd's sustainability somewhat understandably aroused the suspicions of YBGO. I note that the July 30, 2018 letter provided notice for the 2019/20 season, almost one year in advance. At that time no licenses for resident hunters were being issued.

[96] The information shared with YBGO by the Yukon government before the initial one year advance notification in July 2018, and later through the CCRB process, providing YBGO with information and the ability to respond before the final decision was made, was sufficient procedural protection given the medium level required. All of this information, combined with the actual numbers showing ongoing decline of the herd despite management efforts, and the serious concerns expressed by RRDC in July 2018 to the Minister, was an instructive backdrop to the decision to change the quota.

b) Failure to hold a quota meeting or *ad hoc* meeting

[97] The circumstances in this case called for an *ad hoc* meeting, not a quota meeting, because RRDC does not have a final agreement. Where a RRDC member does not participate in an *ad hoc* meeting, the Meeting Procedures provide that the Yukon government can negotiate the quota directly with the outfitter. The information to be disclosed by the Yukon government according to the Meeting Procedures includes concerns about conservation; detailed analysis of licensed hunter animal harvest numbers and any other known harvest information; most current survey numbers of animals in the concession and other relevant information.

[98] Neither an *ad hoc* meeting with local representatives nor a direct quota negotiation meeting between the Yukon government and YBGO occurred. The Yukon government advised during the meeting with YBGO in April 2016 they were having difficulty meeting with RRDC to discuss quotas for caribou. This ongoing difficulty was also implicit from the subsequent letters referring to the Yukon government's postponement of any quota meeting until they had met with RRDC, and from statements of their hopes they would be meeting with RRDC before the following year.

[99] The Guidelines and Meeting Procedures were not followed before the quota of zero was imposed for the 2019/20 season. The representations each year from the Yukon government were that they expected and planned for a quota meeting before the following year, and this did not materialize. To this extent there was a procedural irregularity.

[100] The question is whether this irregularity was sufficient to be a breach of procedural fairness in the circumstances. Attempts were made by the Yukon

government to follow the Guidelines and Meeting Procedures, but they were repeatedly unsuccessful. The Yukon government's yearly statements to YBGO that a quota meeting would be held within the following year, pending a meeting with RRDC to discuss quotas, and the failure of those meetings to occur, contributed to an imperfect process.

[101] Yet despite not holding a meeting with YBGO in the absence of an *ad hoc* meeting with RRDC, the Yukon government made it clear in regular correspondence and meetings with YBGO from 2015 onwards the nature of the concerns that led to a zero quota. Further, a CCRB hearing occurred. The CCRB process helped to satisfy the procedural fairness concern of both the timing of the change and the absence of a meeting.

[102] YBGO was provided with notice of the CCRB hearing, disclosure of material relied on by Yukon government for the initial decision, written representations from the Yukon government and the opportunity to respond in writing before the hearing. YBGO was granted an extension of time from August 25, 2019 to October 15, 2019 to submit their written materials, which were not received until November 14, 2019, a public hearing with the opportunity to make oral representations, and written reasons from the CCRB and from the Minister after her receipt of the CCRB report and recommendation.

[103] The information regularly provided to YBGO up to and including 2018, the CCRB hearing and the Minister's response, satisfied the procedural fairness requirements for this decision in the absence of an *ad hoc* or quota negotiation meeting.

c) Failure to disclose information from meetings with RRDC

[104] The constitutional duty of the Yukon government to consult with RRDC about wildlife management issues has been twice affirmed by the Yukon courts (*Ross River Dena Council v Yukon (Government of)*, 2015 YKSC 45 and *Ross River Dena Council v Yukon*, 2020 YKCA 10). The Yukon government advised YBGO they had met with RRDC and other Kaska to discuss wildlife management issues in general, including their concerns about the Finlayson caribou herd. However, as noted above, they had not been successful in meeting with RRDC to discuss quotas.

[105] Although not all information shared at those consultation meetings was provided to YBGO, the Yukon government certainly advised YBGO of RRDC's ongoing concerns about harvest sustainability and the Yukon government's need to account for subsistence harvest in their management approach.

[106] The non-disclosure of all information from RRDC obtained through the government's legally mandated consultation meetings is consistent with the observations of the Federal Court of Appeal in *Taseko* (para. 43). The mining company in that case argued it should have the right to know and to respond to all adverse information provided during Crown consultations with Indigenous groups, except when it can be established that providing such information in a given case would violate the duty to consult. The Federal Court of Appeal wrote at para. 43:

> … I am inclined to think that Taseko's proposal would trivialize the duty to consult and empty it of its true content. It must be remembered that the duty to consult (and accommodate) is part of a process of reconciliation, which itself flows from rights guaranteed by section 35(1) of the *Constitution Act, 1982* … . It could hardly be said that the duty to consult supports and promotes reconciliation and re-affirms the nation-to-nation relationships with the First

> Nations if the Crown was equally to consult with the proponent and, for that matter, any other interested parties.

[107] In that case, the Court of Appeal did not need to decide the matter as it found there was no breach of Taseko's right to procedural fairness.

[108] The procedural fairness requirements for YBGO of disclosure of information from RRDC must be assessed in the context of the Yukon government's duty to consult obligations.

[109] As noted above, the Yukon government clearly advised YBGO before the CCRB hearing of the significant conservation concerns about the Finlayson caribou herd. This information included concerns expressed by RRDC about harvest sustainability. Environment Yukon officials were forthcoming about their lack of success in engaging with RRDC to discuss quotas, and the absence of actual caribou harvest numbers from RRDC. But they did share with YBGO the ongoing concerns expressed by RRDC about sustainability. They also noted several times the importance of accounting for the First Nation harvest share in their calculations, regardless of the actual numbers and their information was that the Kaska harvest is higher than YBGO have suggested.

[110] At the CCRB, the Yukon government's 2016 power point, discussed with YBGO during the April 11, 2016 meeting, referenced high First Nation harvest numbers between 1998 and 2004 including a high proportion of cows, and continued high harvest numbers along the Campbell Highway over the winter noted by conservation officers in 2015. The 2018 power point from the Yukon government to Yukon Outfitters Association noted the 2017 population estimate of 2,712, a 12% decline from 2007, and unsuccessful attempts to meet with RRDC since 2016 to discuss outfitter quotas.

[111] The information shared in correspondence and meetings from 2015-2018 and the CCRB process fulfilled the disclosure of information requirements of procedural fairness. This also addresses part of the concern expressed by YBGO in d) above – that is, that the CCRB process did not provide information about RRDC's concerns.

d) CCRB was not timely

[112] YBGO argues the CCRB process was not timely, but it must accept responsibility for the delay. It did not request a hearing until May 2019 and did not file their materials until November 15, 2019. I recognize the seasonal nature of their work made it difficult to do otherwise.

Conclusion on procedural fairness issues for decision #1

[113] To conclude, the information provided to YBGO through correspondence and meetings, as well as the CCRB process provided sufficient procedural protection for YBGO for the 2019/20 harvest year quota decision. While the quota change from seven to zero appeared sudden, it was not inconsistent with the approach and information provided by the Yukon government. No formal quota or *ad hoc* meeting as provided in the Guidelines and Meeting Procedures was held, but there was opportunity at the CCRB for YBGO to express concerns and ask questions to the Yukon government and to receive information from them about the quota decision. YBGO were aware of the difficulties the Yukon government had in meeting with RRDC to discuss quotas and to obtain subsistence harvesting information. YBGO had received most of the information presented at the CCRB hearing through previous meetings and correspondence with Yukon government between 2015 and 2018. They were aware of the Yukon government's conclusion the herd was in decline and the basis for that conclusion. They

were aware of the Yukon government concerns about harvest distribution and the apparent failure of the current management approach to prevent the decline. The notice provided in July 2018 was for the following year. The CCRB hearing did not occur until December 2019, but as noted above, the YBGO request was not made until May 2019 and the hearing delayed at YBGO's request to December. YBGO received the CCRB report and recommendation, and the Minister's reasons for maintaining the quota at zero.

[114] YBGO disagrees with the Minister's decision. Their disagreement with the outcome must be separated from the process of arriving at the decision.

[115] The procedural protections provided by the information shared with YBGO and the CCRB process satisfy the medium level of procedural fairness required in the circumstances of this case.

Decision #2 - 2020/21 – Were procedural requirements met?

[116] YBGO repeats its arguments challenging the process of the 2019/20 decision, adding that there was additional unfairness in the 2020/21 year because there was no CCRB hearing or Minister's decision with reasons.

[117] The Yukon government says the process satisfied the required procedural protection because after notice of the proposed decision was provided but before it was finalized, YBGO and Environment Yukon representatives participated in a ZOOM meeting where information was exchanged. Environment Yukon invited YBGO to provide further information after the meeting before their final decision was issued on July 10, 2020.

[118] The initial notification of the zero quota for the 2020/21 hunting season was provided to YBGO by letter from Environment Yukon on July 31, 2019. The letter referred again to the Yukon government's concerns about the declining status of the Finlayson caribou herd and the government view that they needed to review harvest distribution, herd status and overall herd management before reinstating licensed harvest. Environment Yukon advised YBGO of the zero quota and asked to meet with YBGO before the following spring so they could review information and obtain YBGO input and perspectives on the herd.

[119] By letter dated April 27, 2020, Environment Yukon again invited YBGO to provide input in writing (due to COVID-19 restrictions) about the quota for the 2020/21 season. The Yukon government officials advised that despite efforts they were unable to establish an *ad hoc* committee with RRDC.

[120] On May 22, 2020, YBGO signed its 2020/21 operating certificate which stated "[p]ending input from [YBGO], Finlayson caribou quota will be finalized after July 1, 2020." YBGO suggested a ZOOM meeting to provide input.

[121] At the ZOOM meeting held May 26, 2020, YBGO presented a power point similar to their CCRB presentation. No further information was provided by YBGO after the meeting.

[122] Environment Yukon officials advised YBGO on May 26, 2020 that conservation of the Finlayson caribou herd was a continuing significant concern because the herd was in decline and they believed the First Nation subsistence harvest was likely taking the entire sustainable harvest. They further advised that YBGO's information on the numbers hunted by RRDC was much lower than what they believed.

[123] The quota of zero was confirmed by letter dated July 10, 2020. Environment Yukon advised they had considered the information YBGO provided, the technical and local information, including the recent concerns expressed by the RRDC about caribou harvest. The letter confirmed they were still trying to meet with Kaska officials to review herd status and potential for harvesting opportunities but in the meantime, there was no licensed hunting, either resident or non-resident.

[124] The procedural fairness protections were met for this decision. Section 6 f) of the Meeting Procedures was followed because a meeting was held between the outfitter and the Yukon government after attempts to set up an *ad hoc* meeting failed. Information was provided by YBGO and responded to by the Yukon government at the May 26, 2020 meeting. The Yukon government set out their ongoing conservation concerns including their concerns about RRDC taking all of the sustainable harvest and their need to account for subsistence harvest in their management approach. YBGO was invited to meet and urged to provide additional information before a decision was made. The *Act* does not allow for a CCRB hearing to be held where a previous quota of the same amount had been the subject of a CCRB hearing. In the circumstances, YBGO had sufficient procedural protection and there was no breach of procedural fairness.

[125] In the end, the procedural fairness objections of YBGO relate in part to their frustration with the imposition of a quota condition they consider to be unfair, their inability to persuade the Yukon government to change its position, and their inability to have access to all of the information communicated by RRDC to the government during the constitutionally mandated consultation meetings about wildlife management. While

these may be legitimate reasons to be frustrated, they do not amount to a breach of procedural fairness in the context of this case.

Issue #3 – Were the decisions to impose a zero quota reasonable?

[126] In the following, I will summarize the law related to the reasonableness standard of judicial review of the merits of an administrative decision. I will then review the reasons for the decisions and address each of the arguments of YBGO about why the decisions were unreasonable.

Meaning of reasonableness standard of review

[127] As stated by the Supreme Court of Canada in *Vavilov*, the starting point of a reasonableness review is the principle of judicial restraint. Courts must respect the legislature's choice to delegate to the administrative decision-makers and recognize their authority and legitimacy within their proper spheres. Courts must intervene only when it is necessary to ensure the fairness, legality and rationality of the administrative decision-making process and its outcomes.

[128] At the same time, administrative decision-makers must develop:

> … a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

Reasonableness review must still be robust and not act to shelter decision-makers from accountability.

[129] A reasonableness review is distinguished from a correctness review because it focuses on the decision actually made by the administrative decision-maker – the

reasoning process, the outcome and the justification – and not on the decision the court believes should have been made or that it would have made. The court does not conduct a *de novo* analysis or seek to determine the correct solution to the problem. A reasonable decision has two distinct characteristics: it has internally coherent reasoning and it is justifiable in light of the legal and factual constraints on it (*Manitoba Government and General Employees' Union v Manitoba (Minister of Finance)*, 2021 MBCA 36 at para. 36).

[130] Internal rationality requires the decision be logical, without circular reasoning, false dilemmas, unfounded generalizations or an absurd premise (para. 104 *Vavilov*). It is not a 'line-by-line treasure hunt for error" (para. 102). However, there must be a rational chain of analysis, from which the conclusion may follow, and the reasons and the record must make it possible to understand the decision-maker's reasoning (paras. 102-3 *Vavilov*). Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at paras. 26-28, quoted in para. 96 *Vavilov*).

[131] In other words, both the outcome and its rationale or justification must meet a certain threshold. That threshold has been interpreted to be slightly higher for administrative decision-makers as a result of *Vavilov*. Decisions must be responsive to the arguments and evidence and demonstrate that the decision maker has applied their own expertise.

[132] The second characteristic – justifiable given the legal and factual constraints – reflects a recognition that the context of the decision may constrain the decision-maker.

The Supreme Court of Canada in *Vavilov* set out the following non-comprehensive legal and factual constraints on a decision-maker that may be relevant in determining reasonableness:

a. respect for the governing statutory scheme (paras. 108-10);

b. accord with other relevant statutes and common law principles (paras. 111-13);

c. be consistent with the modern approach to statutory interpretation – that is, consistent with the text, context and purpose of the relevant provisions, taking into account the decision-maker's insight into a statutory scheme (paras. 115-24);

d. reflect the evidentiary record and factual matrix (paras. 125-26);

e. meaningfully account for the key issues or central arguments raised (paras. 127-28);

f. justify any departure from past practices or decisions (paras. 129-32);

g. reflect the impact of the decision (paras. 133-35); and

h. the institutional context and history of the proceedings (paras. 91-94).

[133] To summarize, for a decision to be reasonable, the basis for it and its outcome must be transparent, intelligible and justified.

[134] The focus of the reasonableness analysis is on the reasons provided by the decision-maker, read in the context of the procedural history.

Decision #1 - 2019/20

[135] The Minister's decision of March 24, 2020 reviewed the CCRB's recommendation that YBGO be provided a quota of two-to-four Finlayson herd bulls

annually over a two-year term for a total allowable harvest of eight. This recommendation was based on three sources.

[136] First, the Science-Based Guidelines recommend 1% sustainable harvest for declining herds and a harvest rate of zero for herds in serious decline. The CCRB concluded the Finlayson caribou herd was a declining herd but not in serious decline.

[137] Second, the final agreements set out the sharing formula between licensed and subsistence harvesters – 25% and 75%. Although the CCRB acknowledged and appeared to agree that the UFA did not apply in this circumstance because RRDC does not have a final agreement, their harvest number recommendation was still calculated on the sharing formula in the final agreements.

[138] Third, the Guidelines recommend that non-residence harvest (i.e. the outfitters) be allocated 25-50% of the licenced harvest. Applying these three sources, 1% of approximately 2,700 caribou (the population estimate from 2017) is 27 bulls: 75% for subsistence harvest is 20, while 25% for licensed harvest is seven; and 25%-50% of the licensed harvest of seven for non-resident harvest amounts to two-to-four bulls.

[139] The Minister discounted the second source, the final agreements, because RRDC is not a signatory to a final agreement. The total allowable harvest formulas set out in those agreements is not applicable here.

[140] The Minister's primary rationale for the zero quota related to the need to account for the subsistence harvest by RRDC, the strong public interest in licensed resident hunting, and the interest of other concession holders in harvesting Finlayson caribou. The zero quota was described as a response to the consideration of what is reasonably

necessary for the conservation of a declining herd in the context of a significant subsistence harvest and the challenges of wildlife management in an area.

[141] The data available for subsistence harvest, primarily from information captured between 1999 and 2004 by RRDC game guardians, shows 50-80 caribou harvested for subsistence purposes and a high number of cows. The harvest of one cow is equal to the harvest of three bulls according to the Science-Based Guidelines. The Minister stated this was of particular concern.

[142] The Minister noted there was no licensed harvest of Finlayson caribou for Yukon resident hunters for 2018/19 or 2019/20. This implicitly addressed the third point raised by the CCRB that the Guidelines recommended the outfitters should obtain 25% of the licensed harvest. This amounts to zero.

[143] YBGO says the Minister's decision was not reasonable because:

a. she failed to interpret the Guidelines in a manner consistent with the principles in the UFA, including the harvest sharing formulas, even though RRDC has no final agreement;

b. there was no reasonable basis for her conclusion that the herd is declining;

c. there was no reasonable justification for the conclusion that a small bull harvest by YBGO would affect the herd stability;

d. there was no evidence on which to conclude the RRDC harvest may exceed sustainable harvest of the herd;

e. the Minister showed no awareness of the impact of the decision on YBGO; and

f. the Minister's failure to award compensation to YBGO was an unreasonable interpretation of the *Act*.

[144] In addressing each of these arguments, I will assess the intrinsic rationality and extrinsic rationality of the reasons for decision, including the relevant constraints on the Minister emerging from the context.

[145] **Harvest sharing formulas in UFA do not apply to Guidelines**: The Guidelines were drafted in the early 1990s and finalized in 1996. By 1996, the UFA had been finalized for several years, but not all Yukon First Nations had final agreements. Although many anticipated that all Yukon First Nations would eventually have final agreements, to this date, RRDC and LFN have not entered final agreements with the federal and territorial governments, despite years of negotiations. It was the intent of the Guidelines, in the context of the early anticipatory days of the final agreement negotiations, to apply consistently across the territory. However, where the Guidelines adopt provisions set out in the final agreements, originating from the UFA, this is not possible in areas where no final agreements exist.

[146] The Minister's conclusion that the harvest sharing formulas set out in the UFA and final agreements and referenced in the Guidelines cannot apply here is intrinsically rational. It is not logical to apply this formula in a context where the UFA has no application. Further, the legal constraint here is the absence of final agreements with legal force and effect. There is nothing in the Guidelines that addresses the situation where there is no final agreement in place. While discussions between the Yukon government and RRDC could result in the application of the harvest sharing formulas by agreement, there was no evidence this had occurred.

[147] **Herd is declining**: The 2017 population estimate of 2,712, decreased from 3,077 in 2007, and shared with YBGO in June 2017, showed a herd in decline. Highway access to the herd in winter and cow harvest by RRDC were discussed with YBGO. YBGO conceded the decline in their CCRB presentation. They argue the decelerated pace of the decline and the impact of the decline do not justify the Minister's decision. The CCRB agreed there was evidence of decline, but not serious decline.

[148] It is not the role of this Court to substitute its view on the degree of the decline and its implications. Instead, the question for the Court is whether the Minister's decision was reasonable in all of the circumstances, including the nature of the declining herd. On the evidence the ongoing decline of the herd is a rational conclusion.

[149] **Herd stability unaffected by small bull harvest**: YBGO argued, and the CCRB agreed, that the herd was stable because of the relatively healthy 45:100 bull-to-cow ratio and average calf-to-cow ratio of 21:100 noted in the annual productivity survey. YBGO and the CCRB say the Science-Based Guidelines support this indication of herd stability given these ratios and the Minister failed to follow the government's own guidelines.

[150] As noted above, the Minister's decision focussed on the overall continuing declining numbers and the need to account for subsistence harvest, the interest of other concession holders in the Finlayson caribou herd harvest, and the significant public interest in local resident hunting.

[151] Also as noted earlier at the outset of these reasons, the *Act* provides for the regulation and management of wildlife, a public resource, in the Yukon. The Minister of Environment, responsible for the administration and enforcement of the statute, must

act in the public interest, balancing the interests of many different parties. The public interest includes resident and non-resident hunters, outfitters, subsistence harvesters, tourists, environmentalists, and conservationists. Conservation of wildlife for the future is an overriding and crucial consideration of all these interest-holders. How conservation may be achieved may be a matter of debate amongst the interest-holders; ultimately, the Minister has the responsibility and discretionary authority to decide how it is done.

[152] As a result, although the yearly bull:cow and calf:cow ratios provide some indication of stability according to the Science-Based Guidelines, the surveys to estimate these ratios are not intended to provide an estimate of the herd's size and the ratios must be considered in the larger context. That context includes overall declining herd numbers, the multiple competing interests and management goals. The Science-Based Guidelines state they are only part of what is needed to make wildlife management decisions. They are a starting point for discussion and may be adjusted pending more specific, objective knowledge of a population. They complement other sources of information used to manage wildlife in the Yukon, including traditional and local knowledge, as well as wildlife management processes undertaken by the Yukon Fish and Wildlife Management Board, renewable resource councils and others. They are not meant to replace management planning but are a resource that will help promote science-based input and responses to management plans, programs and regulation proposals. In other words, they are one tool to assist, but do not claim to provide comprehensive prescriptive criteria.

[153] The management principles in the Science-Based Guidelines are:

1. Naturally self-sustaining wildlife populations are the principal management objective.

> 2. Wildlife populations will be, to the best extent possible, managed within their natural range of variation.
>
> 3. Management of human activity, including harvest, disturbance, and land use are the primary tools available for recovering or maintaining wildlife and wildlife habitat.
>
> 4. Management will be adaptive.
>
> 5. The interests of all consumptive and non-consumptive users will be recognized and considered in the management of wildlife populations.
>
> 6. Management will be guided by the precautionary principle [defined as a recognition that "the lack of complete scientific certainty should not be used as a basis to avoid or postpone measures to protect the environment, as there are inherent limits in being able to predict environmental harm" – *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575, para. 43.].
>
> 7. Management will, to the best extent possible, be ecosystem based.

[154] The Minister in her decision has followed these principles by focussing on managing the human activity, specifically harvest, and has considered the interests of all users, has been adaptive, and has been guided by the precautionary principle.

[155] The Minister's interpretation of the bull:cow/calf:cow ratios in the larger context, her understanding of the purpose of the Science-Based Guidelines, and their principles, was reasonable.

[156] **No evidence of RRDC exceeding sustainable harvest of herd**: Some of the evidence relied on by the Minister was the data collected 14 years earlier by the RRDC game guardians of a high number of harvested cows and 50-80 caribou annually. The Yukon government conceded they did not have actual recent harvest numbers from

RRDC but disclosed they had received expressed concerns from RRDC over their sustainable harvest opportunities. The importance of the Finlayson caribou herd to the Kaska people was and is well-known. Yukon Department of Environment, Fish and Wildlife Branch, *Finlayson Caribou Herd Late-Winter Population Survey, 2007*, 2010, "[t]he Finlayson caribou herd has been an important resource for the Kaska people, hunted and greatly valued, long before any surveys or studies by biologists."

[157] Legal constraints affect the Minister's decision in relation to this factor. The right to subsistence harvest of RRDC is protected by the *Constitution Act*, *1982* and the Minister has no authority to regulate that harvest. This s. 35 right also gives rise to the government's duty to consult RRDC on any government action, such as licensed hunts for residents, that may affect their right.

[158] Section 22 of the *Yukon Act,* S.C. 2002, c. 7, provides the legislature cannot make any laws restricting or prohibiting Yukon First Nations from hunting for food on unoccupied public real property unless the hunted species is in danger of extinction. This restriction is lifted once a Yukon First Nation signs a final agreement. Because RRDC has no final agreement, s. 22 still applies to them.

[159] The Minister therefore in its duty to manage wildlife under the Act, must take into account the subsistence harvesting of the Finlayson caribou by RRDC, without the ability to restrict, prohibit or regulate it. Discussions can and do occur, but in the end, the Minister lacks authority over the actions of RRDC in the exercise of their constitutional right to subsistence harvest. This is a significant legal constraint that affects the Minister's decision.

[160] It is for this reason that a focus of the Minister's decision is not on the specific numbers of subsistence harvest, but the fact that they must account for it and cannot regulate it. In the context of a declining herd, the Minister's decision was reasonable.

[161] **No awareness of impact of decision on YBGO**: The Minister recognized in her reasons the impact on the income of YBGO of the reduction in quota. Her ability to address it was constrained by an absence of legal authority. There was no ability in the condition review process set out in s. 127 of the *Act* to address the issue of compensation for a reduction in quota.

[162] YBGO were subject to quota changes over the years leading up to this condition imposition. For example their multi-year quota was changed to a single-year quota. Information explaining the change was provided to YBGO as noted above through correspondence and meetings. Warnings of further quota reductions were given by Yukon government to YBGO.

[163] Significantly, the Minister's discretionary authority to manage wildlife in the public interest means that some of the individual interests may be affected differently by her polycentric decision. This does not mean that her decision was unreasonable in all of the circumstances.

[164] **No compensation was unreasonable interpretation of the *Act***: The Minister in her decision referred to ss. 80, 82 and 84 of the *Act* which provide for compensation where all or part of an outfitting or trapping concession is cancelled, revoked, not issued, or suspended. The Minister further noted there is no provision in the statute for compensation for a reduction in quota on an operating certificate.

[165] Section 127 of the *Act* establishes the condition review process before the CCRB, and only allows for the Minister to receive and consider the report and recommendation of the CCRB, and to confirm, amend or remove the conditions. The factors the CCRB is to consider when providing its opinion on the merits of the conditions are: what is reasonably necessary for the conservation and management of wildlife; the effective administration of the *Act*; and ensuring compliance with the *Act*. There is no reference to compensation, as there is in the sections of the *Act* related to cancellation, revocation, non-issuance or suspension of an outfitting concession. YBGO notes there is nothing in the statute preventing the Minister from considering compensation for a reduction of quota for an operating certificate. However, the legislature's decision not to reference compensation for decisions on operating certificates means the Minister's interpretation is reasonable.

[166] YBGO notes a quota can be imposed as a condition attached to a concession or an annual operating certificate. It argues that the quota reduction in this case in effect applies to the concession rather than the operating certificate. A zero quota is equivalent to a revocation or suspension of the concession for the conservation of wildlife. On this argument, s. 80(2) of the *Act* would apply, allowing YBGO to obtain compensation.

[167] I agree with the Yukon government's response that the revocation or suspension of a concession is not the same thing as a quota reduction, even to zero, on the annual operating certificate. Entitlement to compensation is required in the first instance because the outfitter is being deprived of its ability to carry out its livelihood. By contrast, annual quotas are discretionary and take into account multiple interests. They can

change from year to year on the basis of all of the circumstances, as outlined above. YBGO has argued that the Minister's continuing imposition of an annual quota of zero would have the same effect as a revocation or suspension of a concession. This argument depends on the facts of each situation, including the justification for the annual quota, and the opportunities provided by big game in the rest of the concession. In this case, the Yukon government has indicated this annual quota of zero is a temporary measure, pending further discussion with RRDC and a review of herd management approaches and status. Further Concession #20 is the largest in the Yukon and there are no quotas on hunting other herds of caribou, and much larger quotas for hunting moose and grizzly bear.

[168] In any event, the argument raised by YBGO is not supported by the wording of the *Act*. The Minister's interpretation of the compensation provisions as they apply to operating certificates is reasonable.

Decision #2 -2020/21

[169] YBGO did not separate the decisions in its submissions and relies on the same arguments for the 2020/21 decision. The same analysis as set out above therefore applies to this decision, with the following additional factual considerations.

[170] The letter of July 10, 2020, the second decision under review, referenced the May 26, 2020 ZOOM call in which YBGO provided a power point similar to the one they had presented to the CCRB. In May 2020, however, instead of conceding the decline of the herd, they stated the herd was stable and requested an annual quota of five bulls. At the same time, YBGO indicated their belief that RRDC was harvesting only five-to-10 bulls annually, but then revised that statement after the Yukon government officials said

they had different information. YBGO then said 50-60 families were hunting and caribou were accessible, evidenced by carcasses off the highway. The Yukon government officials said the government's information, gathered mainly from conservation officers' observations, was that the RRDC harvest was much higher than 20 caribou. The Yukon government also relied on the same 2017 population estimate, showing the declining herd, the earlier correspondence and meetings with YBGO to exchange information, and the publicly available published notices by RRDC requiring hunters to obtain permits to hunt in RRDC traditional territory, and banning hunting at certain times and in certain areas. They noted there were still no licenses for resident hunters of Finlayson caribou.

[171] The same constraints described above for the first decision apply here.

[172] The additional submissions by YBGO about their donation of meat contributing to the subsistence harvest of RRDC are not sufficient to challenge successfully the reasonableness of the Yukon government's decision. There is no question that the donations were appreciated by RRDC and enhanced the relationship between YBGO and the community. However, as noted above the Yukon government is legally prevented from managing in any way the subsistence harvest by RRDC. In all of the circumstances, this 2020/21 decision was reasonable.

Conclusion on Reasonableness of Decisions

[173] In summary, when assessed in context, including the procedural history and the information provided by the Yukon government through correspondence and meetings, the impugned decisions were transparent, intelligible and justified, and therefore reasonable because of:

a. the discretion granted to the Minister under the *Act*,

b. the polycentric nature of the decisions to be made in the public interest,

c. the concern about the herd's ongoing decline despite management conservation efforts, communicated repeatedly to YBGO, including the importance of subsistence harvest, and expressed concerns by RRDC about the sustainability of the herd,

d. the constitutional right to hunt of RRDC that cannot be regulated by the Minister, and

e. the application of the precautionary principle set out in the Science-Based Guidelines in the absence of complete information and ongoing decline.

Compensation – Order for Mandamus

[174] YBGO did not plead this request for an order for mandamus requiring the Yukon government to compensate them, but argued it at the hearing and included it in their written submissions. As the Yukon government stated in their submissions, a mandamus order is discretionary and all of the following factors must be met for it to issue:

a. there must be a clear legal right to the performance of a public duty;

b. the duty must be specific and public;

c. there must be no discretion to act or not; and

d. all the conditions precedent to the performance of the duty have been satisfied (*Apotex Inc v Canada (Attorney General)*), [1994] 1 FC 742).

[175] Here, YBGO has no clear legal right to compensation under the *Act*, for the

reasons stated above.

[176] YBGO's application is dismissed with costs.

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DUNCAN C.J.