# SUPREME COURT OF YUKON

Citation: *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)*, 2023 YKSC 5

Date: 20230131
S.C. No. 20-AP013
Registry: Whitehorse

BETWEEN:

FIRST NATION OF NA-CHO NYÄK DUN

PETITIONER

AND

GOVERNMENT OF YUKON AND METALLIC MINERALS CORP.

RESPONDENTS

Before Chief Justice S.M. Duncan

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| Counsel for the Petitioner | Nuri G. Frame by video conference |
| Counsel for the Respondent, Government of Yukon | Kimberly Sova and Julie DesBrisay |
| Counsel for the Respondent, Metallic Minerals Corp. | No one appearing |

**REASONS FOR DECISION**

**INTRODUCTION**

[1] This application for judicial review raises questions about the interpretation and implementation of processes used to resolve land use conflicts in the Yukon. The balancing of the various rights and interests connected to land use requires consideration of the rights and obligations in the modern treaties among self-governing

First Nations, the territorial government and the federal government, in the environmental assessment and mining legislation, and in the common law.

[2] The First Nation of Na-Cho Nyäk Dun ("FNNND") asks the Court to quash and set aside the decision of the Yukon government approving the proposed exploration project of Metallic Minerals Corp. ("Metallic Minerals") in the Tsé Tagé (Beaver River) watershed area of the traditional territory of the FNNND to proceed to the authorization stage. The Tsé Tagé watershed area is currently the subject of a land use planning process under an Intergovernmental Agreement entered into between the Yukon government and the FNNND as a result of a previously proposed project by ATAC Resources Ltd. ("ATAC"), a different proponent.

[3] In its decision, the Yukon government added several terms and conditions to the recommendation of the Yukon Environmental and Socio-economic Assessment Board ("YESAB") to allow Metallic Minerals to undertake its proposed exploration activities in the Tsé Tagé area every summer for 10 years. The decision is the final stage in the assessment process, before the project moves to the regulatory authorization stage.

[4] The FNNND says the decision was unlawful because it breached certain duties flowing from the honour of the Crown: the duty to consult and if necessary accommodate; the duty to diligently implement the promises of the Treaty, especially the promise to engage in regional land use planning for the FNNND traditional territory as provided in Chapter 11 of the Final Agreement (the modern treaty); and the duty to act in a way that accomplishes the intended purpose of the Treaty, including the duty to keep promises made in the Intergovernmental Agreement between the Yukon

government and the FNNND to develop a land use plan in the Tsé Tagé watershed area.

[5] The FNNND further says the decision was unreasonable because its internal reasoning was incoherent. The outcome was not justified because of its failure to comply with the factual and legal constraints. They also say the Yukon government's breach of the duty of good faith in the performance of the Intergovernmental Agreement rendered the decision unreasonable.

[6] The FNNND seeks declarations of the breaches of the duties flowing from the honour of the Crown and a declaration of the breach of the duty of good faith in the performance of the Intergovernmental Agreement.

[7] The Yukon government defends the decision as lawful. They say it complied with the requirements of the duty to consult. The Final Agreement and the Intergovernmental Agreement are not relevant or applicable to this decision, but if they are, there was no breach of any duties arising from those documents based on the honour of the Crown. The Yukon government defends its decision as reasonable because it is internally coherent as well as transparent, intelligible and justified. There was no breach of the duty of good faith in the performance of the Intergovernmental Agreement land use planning provisions.

[8] Metallic Minerals takes no position on this application and counsel did not appear at the hearing.

[9] Many arguments were raised in written and oral submissions by both parties. The essence of this dispute is whether the Yukon government can approve an exploration project in the Tsé Tagé region of FNNND traditional territory in the context of

the Final Agreement land use planning provisions and when a land use planning process between the Yukon government and the self-governing First Nation is occurring in the same area.

**BRIEF CONCLUSION**

[10] The decision of the Yukon government is quashed and set aside, on the basis that the Yukon government breached the honour of the Crown by failing to consult properly. In the alternative it is set aside because the Yukon government breached the honour of the Crown by failing to act in a way that accomplishes the intended purpose of the Final Agreement. In the further alternative, the decision was unreasonable because the Yukon government did not engage with the submissions and evidence provided by the FNNND and did not comply with the legal constraints on the decision. The failure to consider the ongoing land use planning process was a breach of the duty of good faith in the performance of the Intergovernmental Agreement. Declarations of the breaches of the two duties flowing from the honour of the Crown and of the breach of the duty of good faith are granted.

[11] There is no finding or declaration that the Yukon government failed to diligently implement the promises of the Treaty including the land use planning process set out in Chapter 11 of the Final Agreement.

**BACKGROUND**

***First Nation of Na-Cho Nyäk Dun and the modern treaty***

[12] The FNNND is a Northern Tutchone nation with a traditional territory of over 160,000km$^2$, 130,000 km$^2$ of which are within the boundaries of the Yukon. Within the Yukon, the territory extends from near Fort McPherson (Northwest Territories) in the

north to the Pelly River and South MacMillan River in the south, and from the Dempster Highway in the west to the border with Northwest Territories in the east. Na-Cho Nyäk Dun in Northern Tutchone means “the people that come from these ancestral waters.”

[13] The FNNND is a self-governing Yukon First Nation. It was one of the first four Yukon First Nations to sign a comprehensive land claims agreement, including a Final Agreement and a Self-Government Agreement, in 1993. This modern treaty meant that the *Indian Act*, R.S.C., 1985, c. I-5, no longer applied to the FNNND citizens. The FNNND obtained 4,739 km² of settlement land, similar in character to ownership of land in fee simple, and over which the First Nation can pass their own laws and have full administration and control. Settlement land is a relatively small percentage of the FNNND’s traditional territory. Their traditional territory is also Crown land. The Final Agreement contains chapters on heritage rights, water management rights, economic development measures, rights to harvest fish and wildlife, and rights to harvest forest resources that can be exercised in its traditional territory.

[14] The Final Agreement (also referred in this decision as the “Treaty”) includes several chapters addressing how the parties manage land in the traditional territory. One of them is Chapter 11, describing the land use planning process for the use of land, water and other renewable and non-renewable resources in the traditional territory (s. 11.5.1). The objectives of land use planning set out in Chapter 11 include:

> a. to minimize actual or potential land use conflicts both within settlement land and non-settlement land and between settlement land and non-settlement land (11.1.1.2);

b. to recognize and promote the cultural values of Yukon First Nations (11.1.1.3);

c. to utilize the knowledge and experience of Yukon First Nations in order to achieve effective land use planning (11.1.1.4); and,

d. to ensure that social, cultural, economic and environmental policies are applied to the management, protection and use of land, water and resources in an integrated and coordinated manner so as to ensure "Sustainable Development" (defined as "beneficial socio-economic change that does not undermine the ecological and social systems upon which communities and societies are dependent" in the Definitions section of Chapter 1 of the Final Agreement).

[15] The land use planning provisions in Chapter 11 have not yet been implemented for the FNNND. The parties gave different reasons for the delay. Nearly half of the FNNND traditional territory remains outside of any land use planning process.

[16] Staking of quartz mining claims in the FNNND traditional territory by industry continues. 73,807 claims are in good standing in the FNNND traditional territory, amounting to 43% of all quartz mining claims in the Yukon.

***The Intergovernmental Agreement***

[17] ATAC had a Class 3 mining land use approval of an operating plan to engage in an advanced mining exploration in the Tsé Tagé watershed. Classes of exploration programs reflect certain activities that meet defined criteria set out in the *Quartz Mining Land Use Regulation*, OIC 2003/064. They range from the least intrusive activities in Class 1 to the most intrusive activities in Class 4. The activities include building of

structures, length of time and numbers of people in camp, trenching, amount of fuel storage, removal of vegetative mat, establishment of trails, construction of corridors, use of off-road vehicles.

[18] In 2016, ATAC proposed the building of a 65 km all season road to facilitate access to the Tiger gold deposit. The ATAC road proposal was submitted for assessment under the environmental assessment legislation (*Yukon Environmental and Socio-economic Assessment Act,* S.C. 2003, c. 7, "*YESAA*") as an amendment to the approved Class 3 operating plan. The designated office of the YESAB in Mayo, Yukon recommended the road construction proceed, recognizing there were significant adverse effects that could be mitigated.

[19] As an accommodation measure, after community consultations with the FNNND, the Yukon government agreed to enter into an Intergovernmental Agreement with the FNNND to develop a small-scale land use plan for the Tsé Tagé watershed. Since the 1990s, the FNNND had been requesting land use planning in their entire traditional territory using the process set out in Chapter 11 of the Treaty. For various reasons, this did not occur. In 2017, as an alternative to land use planning in the entire traditional territory, the FNNND requested Chapter 11 land use planning for the Stewart River watershed, of which the Tsé Tagé watershed is a part. Protecting this wilderness area which their ancestors had called "a breadbasket for hard times" is of great importance to the Na-Cho Nyäk Dun. It has been described by a FNNND citizen as an area of "beautiful serene and basically untouched wilderness." The Yukon government agreed to the planning process for only the Tsé Tagé watershed area in the Intergovernmental

Agreement, not the whole Stewart River watershed. This initiative was outside of the process described in Chapter 11 of the Treaty.

[20] The Intergovernmental Agreement includes the following objectives for the development of the Tsé Tagé watershed land use plan, also referred to as the Beaver River Land Use Plan ("BRLUP"):

a. promoting collaboration with respect to the use and management of land, water and resources, including fish and wildlife and their habitat, within the Planning Area (the Tsé Tagé watershed area);

b. recommending measures to minimize actual and potential land use conflicts throughout the Planning Area;

c. using the traditional knowledge and experience of FNNND citizens, scientific information and local knowledge of other residents in FNNND's traditional territory;

d. taking into account traditional land use by FNNND citizens and their traditional land management practices;

e. promoting integrated management of land, water and resources including fish and wildlife and their habitats; and

f. promoting development that does not undermine the ecological and social systems upon which FNNND citizens and their culture are dependent.

[21] The Intergovernmental Agreement includes one order prohibiting entry in the area of the proposed road for the purpose of locating, prospecting or mining, until the BRLUP is approved by the parties. It also contains a prohibition on any regulatory action approving the construction of the proposed road until the completion of the BRLUP.

[22] The Intergovernmental Agreement further provides that the parties will exercise their lawful discretion to grant any interest in, or authorize the use of, land, water or other resources in conformity with the plan. However, if any part of the assessment board recommends the approval of a project that is inconsistent with the plan, the parties may agree that the project proceed subject to certain terms and conditions.

[23] The parties continue to negotiate the BRLUP pursuant to the Intergovernmental Agreement and it is anticipated that the plan will be complete sometime during 2023.

[24] In the meantime, on November 27, 2020, the Yukon government issued its decision rejecting the ATAC proposed road project. Its reasons included the ATAC road's adverse impact on the ability of the FNNND citizens to exercise their rights under s. 35 of the *Constitution Act, 1982* to hunt, fish and trap in that area. The mitigation plans proposed by ATAC were not sufficient to mitigate the significant adverse environmental and socio-economic effects created by the construction of the ATAC road and the significant adverse impacts identified by the FNNND on their Aboriginal and Treaty rights.

***Metallic Minerals Project***

[25] Metallic Minerals is a publicly traded mining exploration company incorporated under the laws of British Columbia. It is focused on the acquisition and development of high-grade silver and gold in the Yukon. On February 11, 2020, it applied for a Class 3/4 Quartz Mining Land-Use Approval for its LOTR Project (the "Project") under *YESAA*.

[26] The Project consists of 52 quartz mining claims over 1,086.8 hectares. It is located entirely within Na-Cho Nyäk Dun traditional territory and more specifically, entirely within the Tsé Tagé watershed area that is the subject of land use planning

under the Intergovernmental Agreement. The application seeks approval for activities including prospecting, geological mapping and rock sampling, soil sampling, ground and airborne geophysics, drone aerial photography, heli-portable excavation, trenching, drilling, bedrock interface sampling and bedrock sampling. In order to carry out these activities, Metallic Minerals wants to construct:

a. new temporary and permanent trails up to 5 km and 3 km long, and 5 m wide;

b. new roads up to 2 km long and 5 m wide;

c. new cut lines up to 5 km long and 1.5 m wide;

d. new corridors up to 2.5 km long and 1.5 m wide;

e. up to 50 new clearings up to 500 $m^2$;

f. a new 600 $m^2$ camp to house 20 seasonal workers;

g. a new 60 $m^2$ helipad;

h. up to 100 trenches 15 m long, 2.5 m wide and 2 m deep; and

i. up to 150 drill holes to a depth of 100 m.

Helicopter use is proposed for up to three hours each day.

[27] This Class 3/4 project application and the Class 4 ATAC amendment application are the only two projects submitted for assessment within the last three years above Class 1 in the Tsé Tagé watershed area.

***YESAB assessment process***

[28] *YESAA*, the socio-economic and environmental assessment legislation applicable to development projects proposed in the Yukon, was created as a result of Chapter 12 in the Final Agreements. The objectives of *YESAA* include to protect and

promote the well-being of Yukon First Nations and their societies and Yukon residents generally, as well as the interests of other Canadians; to recognize and, to the extent practicable, enhance the traditional economy of Yukon First Nations and their special relationship with the wilderness environment; and to guarantee opportunities for the participation of Yukon First Nations — and to make use of their knowledge and experience — in the assessment process.

[29] Evaluations of a project are conducted most often by a designated office but in certain circumstances may be done by the executive committee or a panel of the YESAB, the arms-length body responsible for carrying out the assessment under the *YESAA* and its regulations. In this case the Project evaluation was conducted by the designated office in Mayo.

[30] The *YESAA* assessment is designed as a planning tool. Once the designated office has concluded its evaluation of a project, it recommends one of the following:

- the project proceed if it determines no significant adverse environmental or socio-economic effects;
- the project proceed subject to terms and conditions if the project will or is likely to have significant adverse environmental or socio-economic effects that can be mitigated by terms and conditions;
- the project not be allowed to proceed if it determines the project will or is likely to have significant adverse environmental or socio-economic effects that cannot be mitigated;

- the project be referred to the executive committee if it cannot determine whether the project will or is likely to have significant adverse environmental or socio-economic effects (s. 56(1)).

[31] The YESAB provides their recommendation to a decision body under *YESAA*. A decision body is an entity that must issue a regulatory authorization in order for a project to proceed. A decision body may be a territorial minister or agency, a First Nation, or a federal minister or agency. A decision body must issue a decision document that accepts, rejects or varies the recommendation. The decision document is a form document designed to meet *YESAA* requirements that outlines the decision and the reasons for rejecting or varying any recommendation.

[32] A decision body considering a recommendation in respect of a project is required to give full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation (s. 74(1) of *YESAA*). There is a statutory obligation on a decision body to consult with a First Nation without a Final Agreement about significant socio-economic and environmental adverse effects of a proposed project in the First Nation's traditional territory (s. 74(2) of *YESAA*).

[33] The practice of the Yukon government when they are a decision body is to provide a separate letter to the First Nation in circumstances where they are consulted before the decision document is issued, in order to meet their legal consultation obligations. The Yukon government argues the decision document and the letter to FNNND, both dated February 19, 2021 constitute the decision to be reviewed in this case.

***Consultation process for the Project***

[34] The Yukon government is a decision body in the context of this Project. The consultation occurred on the basis of the constitutional obligation on the government to consult, as in this circumstance there are no applicable statutory consultation provisions under *YESAA,* other than the full and fair consideration requirement in s. 74(1).

[35] On March 24, 2020, the Yukon government initiated the consultation process for the assessment of the Project with the FNNND by letter to Chief Simon Mervyn from the Mining Lands Officer. In the letter, they asked about potential adverse effects of the application on the FNNND established treaty rights and encouraged the FNNND to participate in the *YESAA* process.

[36] On May 29, 2020, the FNNND Lands and Resources Department provided the Mining Lands Officer with a copy of FNNND's submissions to the designated office of YESAB. In those submissions, the FNNND expressed concerns about the environmental impacts of the Project. They stated the Yukon government's failure to that date to enter a land use planning process as promised by Chapter 11 of the Treaty was a breach of a key commitment in the Treaty and was inconsistent with the honour of the Crown. The FNNND wrote further that development could not continue unimpeded while the land use planning process under the Intergovernmental Agreement was ongoing. They wrote: "… Authorization of this development in the absence of a land use plan would only further undermine and infringe the section 35 protected treaty rights of FNNND."

[37] On July 24, 2020, YESAB issued its evaluation report and recommendation, after receiving submissions from other entities affected by the Project, including a local

outfitter with an overlapping concession, and Yukon Tourism. YESAB's evaluation report acknowledged that the Project is within the Tsé Tagé land use planning area. It noted that assessment is not a substitute for land use planning. The report concluded the proposed activities were "likely to have significant adverse effects on wildlife and wildlife habitat, environmental resources, and heritage resources". It recommended the Project be allowed to proceed, with seven terms and conditions considered sufficient to mitigate the adverse effects.

[38] By letter dated July 27, 2020, the Mining Lands Officer requested further comments from the FNNND before they issued their decision document.

[39] On August 18, 2020, the FNNND responded by letter to the Yukon government repeating their position that the Project could not be approved in the absence of a land use plan for the area. They said any approval that the project proceed would be against the wishes of the FNNND. They also described the proposed Project activities as undermining First Nation rights, Final Agreement obligations and the deliberations of the Beaver River Land Use Planning Committee. The FNNND in that letter identified proposed mitigations if the Project did proceed, relating to wildlife, particularly thin-horn sheep, wetlands, lakes, and other habitats.

[40] On August 19, 2020, the Yukon government Mining Lands Officer responded to the FNNND by letter clarifying certain specific points raised by the FNNND and advising they would add more terms and conditions to those set out in the YESAB recommendation, to address wildlife and habitat concerns based on the FNNND's proposed mitigations in their August 18, 2020 letter. The Yukon government in the August 19, 2020 letter set out its disagreement with the FNNND's position that no

development could occur in this area before land use planning was complete, stating "the Final Agreements do not contemplate the cessation of all development activities until land use plans are complete" and the Final Agreements provide a process for addressing concerns in the interim through the *YESAA* process. The letter also stated that a moratorium on all mineral permitting in the Northern Tutchone Land Use Planning Region and/or Dawson City Land Use Planning Region (Planning Regions created by the Yukon Land Use Planning Council under Chapter 11 in which FNNND has traditional territory) was not appropriate at this stage of the land use planning process as "YG has a responsibility to attempt to balance the interests of all Yukoners including both development and conservation interests." The Yukon government requested any additional information from the FNNND by August 26, 2020.

[41] On September 3, 2020, the Yukon government sent a letter to Chief Mervyn of FNNND, and another letter to the Environmental Assessment Officer at FNNND. Both letters enclosed a draft of the decision document that incorporated the changes to the terms and conditions explained in the letter of August 19, 2020, saying they were preparing to finalize the decision document. In the letter to Chief Mervyn, the Yukon government requested comments from the FNNND by September 10, 2020. In the letter to the Environmental Assessment Officer the Yukon government requested comments from FNNND before August 26, 2020. They repeated the same comments that were in the August 19, 2020 letter about no cessation of development activity pending a land use plan, and no moratorium on mineral activity because of the need to balance interests of all Yukoners.

[42] On September 4, 2020, the FNNND requested a teleconference with the Yukon government to discuss the Project. On September 24, 2020, the teleconference occurred, shortly after the FNNND community consultations about the ATAC road project proposal were concluded. The FNNND representatives requested similar direct consultations with the community be conducted for the Project, given the close proximity of the two projects in an undeveloped part of the Na-Cho Nyäk Dun traditional territory, that held great significance for the Na-Cho Nyäk Dun. They also repeated their position that the Treaty would be breached and honour of the Crown not upheld if the Yukon government were to approve the Project before the completion of land use planning. They advised that if this occurred, legal action may result. The Yukon government requested the FNNND put these concerns in writing for further consideration.

[43] The following day, September 25, 2020, the Yukon government asked the FNNND by email if it wanted to review the draft decision document, which was still being worked on. The FNNND stated by return email that it expected to review and comment on any revised versions of the decision document. It repeated its position stated during the conference call that if the Project were approved, it would be over their objections and in breach of the Crown's constitutional duties to FNNND, including the duty to consult, specifically with the community members.

[44] On September 29, 2020, the FNNND provided the Yukon government with the letter they had requested during the teleconference. Among other things, it stated: a) direct consultation with the citizens in the community was necessary to fulfill the duty to consult and accommodate; and b) the Yukon government approval of the Project before

land use planning was complete would be a breach of the Treaty and honour of the Crown.

[45] The FNNND suggested in their September 29, 2020 letter the following potential compromise: a) no decision on the final regulatory approval of the Project by the Yukon government until the BRLUP was completed; and b) any decision on the final regulatory approval of the Project shall be consistent with the final BRLUP and subject to all restrictions, terms, conditions and other requirements for development imposed by the BRLUP.

[46] By letter dated October 9, 2020, the Yukon government responded to the FNNND, repeating the same two points about no cessation of development pending a land use plan and the need to balance interests of all Yukoners, including development and conservation interests. The letter also stated that the Yukon government was preparing to issue the decision document, a final draft of which was attached, and was concluding consultation. The decision document included additional terms and conditions as well as clarifications as a result of the September 25 meeting. These terms and conditions related to timing of work to avoid lambing season, restriction of location and timing of drone activity to avoid lambing habitat, mineral licks and raptors nests, reporting of caribou sightings and following best management practices for flying in caribou country. The decision document approved the Project to proceed to the next stage.

[47] On October 16, 2020, Chief Mervyn wrote to then Minister of Energy, Mines and Resources, Ranj Pillai, to express disappointment about the conclusion of consultation on the Project, reiterating that the Yukon government was required to engage in deep

consultation, including directly and in-person with Na-Cho Nyäk Dun citizens. He repeated that the honour of the Crown and the Treaty would be breached if Project approval was granted before the completion of land use planning and indicated legal action may be forthcoming as a result.

[48] On November 17, 2020, Minister Pillai responded by letter, assuring Chief Mervyn that consultation was not concluded, and no decision document or authorization had been issued. In that letter, Minister Pillai also wrote "[t]he Government of Yukon understands the importance of the Tsé Tagé watershed to the First Nation of Na-Cho Nyäk Dun and we look forward to completion of the Beaver River Land Use Plan."

[49] On November 26, 2020, the Mining Lands Officer wrote to Chief Mervyn, outlining the changes made to the draft decision document in response to consultation, as set out in the letter sent on October 9, 2020. The November 26, 2020 letter confirmed the Yukon government wanted to re-engage with consultation on the Project with the FNNND. It repeated the Yukon government's position that the Final Agreements do not contemplate the cessation of all development activities until the completion of land use plans. The Yukon government rejected the FNNND request for community consultation, explaining that it was "not feasible" to conduct individual project consultation in this manner, and the honour of the Crown and duty to consult were fulfilled by engaging with FNNND government officials. Finally, they enclosed the same draft decision document that was attached to the October 9, 2020 letter. A deadline of December 4, 2020 was provided to the FNNND for response.

[50] On December 1, 2020, Chief Mervyn wrote again to Minister Pillai, observing that the Yukon government appeared not to be interested in further consultations based on

its November 26, 2020 letter. Chief Mervyn noted that s. 35 rights are collectively held and the duty to consult requires the Crown to consult with the rights-holders, who are the citizens of the community, as a collective.

[51] On December 29, 2020, Minister Pillai responded to Chief Mervyn by letter, acknowledging FNNND's concerns about consultation on the Project and recognizing their lack of support for the Project. The Minister wrote that the Yukon government had conducted consultation with the FNNND in good faith and in keeping with the honour of the Crown. He stated:

> It is clear that the [FNNND] opposes project exploration authorizations in this area until the government-to-government sub-regional land use planning is completed. However, the practice of land use planning does not preclude responsible resource management. Consultation on this exploration renewal application between our governments has focused on finding mitigations on impacts to rights. [Yukon] must balance the interest of all Yukoners, and remains committed to the consultation process to understand and mitigate the impacts of exploration projects to the rights of the [FNNND].

No further consultation about the Project occurred after this letter.

[52] On January 28, 2021, the FNNND wrote to the Yukon government to ask if the decision document would be signed or if the FNNND should be preparing for more consultation.

***The decision***

[53] On February 19, 2021, the Yukon government issued its decision document, varying the recommendation and terms and conditions of the YESAB evaluation report in the manner set out in the draft decision document sent to FNNND on October 9, 2020. Seven terms and conditions were added to those in the YESAB report and

recommendation, and one was removed from the original YESAB terms and conditions, for a total of 13 terms and conditions. They included ensuring the camps were located more than 3.5 km from mapped mineral licks; fitting water intake pipes with screens to prevent the entrapment of fish; notifying the FNNND Heritage Department upon discovery of a heritage resource; requiring Metallic Minerals to develop and implement an Ungulates Effects Monitoring and Adaptive Management Plan, to follow applicable best management practices set out in "Flying in Caribou Country", to report all caribou sightings to the FNNND Lands and Resources Department and the Regional Biologist, and not to conduct serial or ground-based work within 500 metres of the lambing areas and habitat; and restrictions on location and timing of drone operations to prevent disturbance of raptor nests and animals who use the mineral licks. None of these terms and conditions addressed the FNNND's proposed compromise about ensuring any regulatory approval was delayed until land use planning was completed and consistent with the terms and conditions of a BRLUP.

[54] The decision document stated:

> After giving full and fair consideration to the Evaluation Report and supporting information, including the scientific information, traditional knowledge and other information provided with the recommendation contained in the Evaluation Report, the Decision Body varies the recommendation and the terms and conditions of the Mayo Designated Office.

[55] Also on February 19, 2021, the Yukon government issued a letter directly to FNNND entitled Re: 2020-0028-Quartz Exploration-LOTR – YG Response to FNNND Letter Sent September 29, 2020. The Yukon government acknowledged FNNND's significant concerns about the proposed project activities affecting FNNND Treaty

Rights, and that it should not be allowed to proceed until after the BRLUP was completed. They acknowledged the socio-cultural value of the area to FNNND. They repeated the statement about the Final Agreement not contemplating the cessation of development activities pending the completion of a land use plan, and that the process for addressing concerns in the interim was the *YESAA* process. They also repeated the statement that the Yukon government has a responsibility to balance the interests of all Yukoners, including development and conservation interests. They highlighted the differences they saw between the ATAC proposed road project, the approval of which was rejected, and this Project. This Project had a comparatively small amount of access and no all season road, and was an exploration program involving drilling, trenching and clearing, all of which must be reclaimed. The Yukon government noted it had worked diligently to address the specific concerns identified by FNNND through the introduction of new terms and conditions. They advised the Aboriginal Relations branch would be responding to FNNND about their request for community consultation. The letter also outlined the changes and clarifications made to the YESAB recommendation as a result of consultation with FNNND.

[56] The decision document is not a regulatory authorization, licence or permit, but it is a necessary decision in order to allow the regulator(s) to consider authorizing the activities in the Project.

[57] On February 24, 2021, the Yukon government wrote to Chief Mervyn requesting comments within two weeks about adverse effects of the project on FNNND Treaty rights, given the conclusion of the assessment stage and the commencement of the regulatory process for permitting.

[58] On March 10, 2021, the FNNND responded by letter, stating their objections to the issuance of any regulatory permits. They summarized the concerns previously expressed:

> … The Tsé Tagé watershed, where the Project is proposed to occur, is a pristine area of our traditional territory and an area of significant ecological and cultural importance to FNNND….As we have repeatedly explained, authorising the [Project] will have dramatic and irreversible adverse effects on the ability of FNNND citizens to exercise our Aboriginal and treaty rights and on our Traditional Territory itself. Furthermore, approval of the [Project] irrevocably undermines the ability of the Tsé Tagé Land Use Plan to achieve its objectives, as set out in the.. Intergovernmental Agreement.

The FNNND also noted the consultation process was undermined and not fulfilled by the Yukon government's decision not to engage in direct in-person consultation with FNNND citizens to understand the full impact of the project on the Aboriginal and treaty rights of the citizens.

[59] This petition was commenced on March 15, 2021.

**ISSUES**

[60] What is the role of the court in judicial review and the appropriate standard of review for the questions related to the review of the decision to be answered?

[61] What is the role and effect of the Treaty in this case?

[62] Should certain paragraphs of the affidavits of Albert Peter and Josée Lemieux-Tremblay be struck or given little weight because they contain extrinsic evidence and fail to comply with the *Rules of Court* of the Supreme Court of Yukon, Rule 49(12) because they contain opinion, argument and information and belief without stating the source?

[63] Was the honour of the Crown and the duties flowing from it engaged by the decision in this case?

[64] Should the decision be set aside because it was unlawful on the basis that:

a. it breached the honour of the Crown and the duties flowing from it, specifically:

i) the duty to consult and if necessary accommodate;

ii) the duty to diligently implement the promises of the Treaty including the promise of land use planning in Chapter 11;

iii) the duty to act in a way that accomplishes the intended purpose of the Treaty, including the promise to engage in land use planning set out in Chapter 11;

iv) the duty to keep the promise made in the Intergovernmental Agreement to develop a land use plan for the Tsé Tagé watershed.

[65] Should the Court issue declarations of breaches, if found, of the above-noted duties?

[66] Should the decision be set aside because it was unreasonable on the basis that:

a. its reasoning was not internally coherent, and it was not transparent, intelligible and justified;

b. it cannot be justified in light of the relevant factual and legal constraints, specifically the evidence in the record and the submissions of the parties, and the common law requirements including a breach of the contractual duty of good faith arising from the Intergovernmental Agreement.

[67] In the following, I will first set out the role of the Court in judicial review. I will then comment on the role and effect of the Treaty in a review of this decision. I will set out my ruling on the motion to strike parts of the Albert Peter and the Josée Lemieux-Tremblay affidavits. Then I will explain how the honour of the Crown is engaged by the decision. I will explain why the duty to act diligently to implement the Treaty, especially Chapter 11 is not engaged by this decision. I will set out how the Crown's duty to consult and duty to act in a way that fulfills the purpose of the Treaty were breached by the decision. Next, I will assess whether the decision was reasonable. Finally, I will set out which declarations will be granted.

**Issue #1 – The role of the Court in judicial review and standard of review**

[68] Judicial review is an exercise of the court's supervisory function, to ensure that decision-makers act within the scope of their delegated authority. The Supreme Court of Canada summarized the role of the court aptly in *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para. 28:

> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. **The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.** [emphasis added]

[69] Although the Supreme Court of Canada revised the framework for determining the standard of review and the conduct of reasonableness review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"), that decision did not override the principles underlying judicial review articulated in *Dunsmuir* – broadly

stated, “that judicial review functions to maintain the rule of law while giving effect to legislative intent” (*Vavilov* at para. 2).

[70] The presumptive standard of review in a judicial review is reasonableness (*Vavilov* at paras. 23-32). The Supreme Court of Canada in *Vavilov* identified certain exceptions to the reasonableness standard: three types of legal questions to which the standard of correctness applies. The relevant one in this case is constitutional questions, including the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* (*Vavilov* at para. 53).

[71] Courts since *Vavilov* have held the correctness standard exception for constitutional questions also applies to matters of Crown-Indigenous treaty interpretation *(Makivik Corporation, The Grand Council of the Crees and Nunavik Marine Region Wildlife Board v The Attorney General of Canada and Nunavut Tunngavik Incorporated*, 2021 FCA 184, (“*Makivik*”*)* at para. 77), as well as to whether the Aboriginal duty to consult exists in any particular case *(Ermineskin Cree Nation v The Minister of Environment and Climate Change, The Attorney General of Canada and Coalspur Mines (Operations) Ltd.,* 2021 FC 758, (“*Ermineskin Cree*”*)* at para. 83). Treaties are protected by s. 35 of the *Constitution Act, 1982* and the duty to consult arises from the honour of the Crown, a constitutional principle that informs the purposive interpretation of s. 35. The existence, extent and content of the duty to consult have been legal questions reviewable on the standard of correctness since the 2004 decision of *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, (“*Haida*”) and *Vavilov* did not change this.

[72] The following questions in this case are reviewable on the standard of correctness:

a. whether the honour of the Crown and duties flowing from it were engaged by the decision under review in this case;

b. the existence, extent and content of the Yukon government's duty to consult about the decision; and

c. the Yukon government's interpretation of the FNNND's constitutionally protected treaty rights, assuming those are engaged.

[73] Whether or not the duty to consult was adequate is reviewable on a standard of reasonableness.

[74] The merits of the decision under review and whether or not there was a contractual duty of good faith created by the Intergovernmental Agreement are reviewable on a standard of reasonableness.

[75] Reasonableness requires that a reviewing court not substitute its decision for that of the administrative decision-maker, but instead ensure the reasoning process and the outcome are transparent, intelligible and justified (*Vavilov* at para. 15). However, any duties flowing from the honour of the Crown and any constitutionally protected treaty rights affected by the decision under review will inform the reasonableness review (*Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 ("*Redmond*") at para. 26; *Coldwater Indian Band et al v Attorney General of Canada et al.*, 2020 FCA 34, ("*Coldwate*r") at para. 27. As noted by the Supreme Court of Canada in *First Nation of Na-Cho Nyak Dun v Yukon*, 2017 SCC 58 ("*FNNND* 2017"):

> [33] … [T]he appropriate judicial role [in the application for judicial review] is informed by the fact that this dispute arises in the context of the implementation of modern treaties … It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship …
>
> [34] That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

**Issue #2 – Preliminary comments on the role and effect of the Treaty**

[76] A preliminary assessment of the role and effect of the modern Treaty in relation to the decision under review is useful because of the significance of the parties' disagreement on this issue. The FNNND argues that the government decision allowing a 10-year mining exploration Project in a pristine area of great value to the First Nation to proceed with conditions to the regulatory authorization stage, before the completion of a targeted land use planning process for that area, undermines and infringes their protected treaty rights. Much of the FNNND's challenge is based on the way in which the decision demonstrates the Yukon government's failure to implement the promise of land use planning set out in Chapter 11 of the Final Agreement. "Yukon's failure to co-develop a land use plan for the Traditional Territory, coupled with an onslaught of industrial development, has prevented the promise of Chapter 11 and the Treaty itself from being fulfilled."

[77] The Yukon government's position throughout is that Chapter 11 of the Final Agreement is not relevant to or engaged by the decision under review. They argue there is no legal requirement for the implementation of the land use planning process set out

in Chapter 11 because it sets out a voluntary and collaborative process the parties may choose to follow for land use planning. Once chosen, it must be followed, but it requires agreement of both the First Nation and government to enter into the process and to agree on the various steps within the process. There is no legal obligation in Chapter 11 or anywhere in the Final Agreement that economic development projects in the traditional territory cease until land use planning is completed. The Yukon government says that Chapter 11 does not create treaty rights.

[78] The Yukon government further notes that in this case the ongoing land use planning process is not occurring as a result of the Chapter 11 process, but outside of it, through the Intergovernmental Agreement. This Agreement did not require a suspension of development activities while the BRLUP was being completed, other than in the area of the proposed ATAC road, for which a limited prohibition order was issued.

[79] As a result, the Yukon government says the decision-maker was not required to take land use planning into account when making its decision. Chapter 11 of the Final Agreement is outside the scope of this judicial review. This position of the Yukon government informed their interlocutory application to strike pleadings, their application to strike certain paragraphs of the affidavits of Albert Peter and Josée Lemieux-Tremblay, and their arguments on the merits.

[80] The Supreme Court of Canada has described the modern treaties in the Yukon as models for reconciliation, intended to foster a positive and mutually respectful long-term relationship between the signatories (the First Nation government, the federal government and the Yukon government). “This framework establishes institutions for self-government and the management of lands and resources … [T]he Final

Agreements address past grievances, and yet are oriented towards the future." (*FNNND* 2017 at para. 10).

[81] The modern Treaties for each Yukon First Nation are based on the Umbrella Final Agreement ("UFA"). Each Treaty contains all the provisions set out in the UFA, as well as additional provisions negotiated by each individual Yukon First Nation and the federal and territorial governments.

[82] The monumental achievement of finalizing the Yukon Treaties after 30 years of negotiations was in no small part due to the Yukon First Nations surrendering their undefined Aboriginal rights, title and interests in their traditional territory of over 484,000 km² of land in the Yukon, in exchange for defined Treaty rights, including: title to 41,595 km² of settlement land (8.5% of Yukon land); financial compensation; rights to harvest fish, wildlife and forest resources; and rights of representation and involvement in land use planning and resource management in their traditional territories.

[83] The reconciliation objective of a positive and mutually respectful long-term relationship is in part fulfilled by Chapter 11 of the Final Agreements. Chapter 11 allows for the development of a common land use planning process for the use of land, water and other renewable and non-renewable resources in the traditional territories. This land use planning process was described by the Supreme Court of Canada as ensuring "the meaningful participation of First Nations in the management of public resources in settlement and non-settlement lands" (*FNNND* 2017 at para. 14). The Court noted further in *FNNND* 2017 at para. 46:

> The Chapter 11 process ensures that Yukon First Nations can meaningfully participate in land use planning for both settlement and non-settlement lands. It does so by setting out consultation rights and the authority of First Nations to

> approve, reject, and modify land use plans (ss. 11.6.1 to 11.6.5.2). In the Final Agreements, most traditional territory was designated as non-settlement land. **In exchange for comparatively smaller settlement areas, the First Nations acquired important rights in both settlement and non-settlement lands, particularly in their traditional territories** … Section 9.3.1 recognizes that "[t]he amount of Settlement Land to be allocated …has been determined in the context of the overall package of benefits in the Umbrella Final Agreement". Barry Stuart, the Chief Land Claims Negotiator for the Yukon Territorial Government, explains that it was more important to First Nations that they be able to meaningfully participate in land use management in all of their traditional territory than to acquire vast tracts of their traditional territory as settlement lands:
>
> > … it became abundantly clear that [the First Nations'] interests in resources were best served by creatively exploring opinions for shared responsibility in the management of water, wildlife, forestry, land, and culture. Effective and constitutionally protected First Nation management rights advanced their interests in resource use more effectively than simply acquiring vast tracts of land [as settlement lands] …
> >
> > The Yukon government's desire to decentralize decision making and create meaningful opportunities for public participation in managing resources complemented First Nation interests in resource management, and served their interests more effectively than increasing settlement land holdings.

[84] Contrary to the Yukon government's position at the hearing that Chapter 11 does not create treaty rights, Chief Justice Bauman in the Court of Appeal of Yukon decision of *The First Nation of Nacho Nyak Dun v Yukon*, 2015 YKCA 18 at para. 10 described Chapter 11 as setting out a "treaty right to participat[e] in the management of public resources." This echoes the description of Chapter 11 by the Supreme Court of Canada in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 (("*LSCFN*") at para. 36) as providing the "rights [of Yukon First Nations] to representation and involvement in

land use planning [Chapter 11]", rights gained in exchange for their surrendering of undefined Aboriginal rights, title and interests in their traditional territory.

[85] The decision under review directly engages the principles, values and purpose of the Treaty. It does so first because the Treaty, protected by s. 35 of the *Constitution Act, 1982*, is the framework for the new relationship among the federal, territorial and Yukon First Nations governments that has reconciliation between First Nation and non-First Nation people as its objective. It cannot be dismissed or ignored.

[86] Further, meaningful participation by Yukon First Nations in the management of public land and resources in their respective traditional territories is one of the purposes of the Treaty. It is a benefit obtained by Yukon First Nations as a result of the negotiated compromise.

[87] The Yukon government decision approving an exploration development project's progression to the regulatory stage in the traditional territory of the FNNND demands meaningful participation by the First Nation. This requirement for meaningful First Nation participation in decisions about land and resources in this area is heightened when the governments are negotiating a land use plan for the same area as the proposed development. Land use planning is one of the important tools to fulfill this purpose of meaningful participation. Even if the governments are negotiating this land use plan outside of the Chapter 11 process, the purposes and principles emanating from Chapter 11 and the Treaty as a whole must apply.

[88] The Yukon government's failure in this case to recognize the role of the Treaty in informing their decision gave rise to the breaches of the honour of the Crown described in more detail below and results in the setting aside of their decision.

**Issue #3 – Application to strike affidavits**

[89] The Yukon government has applied to strike parts of the affidavits of Albert Peter and Josée Lemieux-Tremblay, both affiants on behalf of FNNND.

[90] Albert Peter is an Elder and citizen of FNNND who has held many leadership roles within FNNND over the last 40 years, including advisor to the Chief, lead negotiator and Chief. Among other things, his affidavit describes the background of the negotiation of the Final and Self-Government Agreements, with an emphasis on land use planning. He also describes the attempts to develop land use planning for the FNNND traditional territory and the development of the BRLUP.

[91] Josée Lemieux-Tremblay is the manager of the FNNND Lands and Resource Department, a position she has held since 2019. She is responsible for overseeing the preservation, enhancement and administration of lands, fisheries and other land-based resources in the Na-Cho Nyäk Dun traditional territory in accordance with the Final and Self-Government Agreements, and for the development of appropriate land use management strategies for the Na-Cho Nyäk Dun traditional territory. She was directly involved in the consultations between the FNNND and the Yukon government about the ATAC road proposal and the Metallic Minerals Project. From 2008 to 2019 she was a Mining Reclamation Coordinator for FNNND for the closure of the Keno Hill mine. Josée Lemieux-Tremblay describes in her affidavit the consultation process for the ATAC proposed road project and the Metallic Minerals Project. More generally, she discusses the role of the FNNND Lands and Resources Department in consultation with the Yukon government and the impact of the absence of a land use plan on the Na-Cho Nyäk Dun traditional territory.

[92] The concerns of the Yukon government about these affidavits fall into two areas. First, they say the historical and other extrinsic evidence that was not before the original decision-maker does not fall within any of the recognized exceptions prohibiting its admissibility. Second, they say the affidavits includes impermissible opinion evidence and argument and contain statements of belief without identifying the source.

***Albert Peter affidavit***

*Positions of parties on extrinsic evidence*

[93] The Yukon government argues the early sections in the affidavit entitled pre-contact history, early colonial experiences, towards a FNNND treaty, early land claims movement, early negotiations and renewed negotiations, and the promise of the FNNND treaty should be struck in their entirety. They further seek to strike many of the paragraphs in the following sections – attempts at co-governance, Northern Tutchone Land Use Planning and Tsé Tagé (Beaver River) Land Use Planning, and the Path Forward.

[94] The Yukon government says the early sections are irrelevant and unnecessary to the decision under review. The historical circumstances leading up to and describing the negotiations of the land claim are not the subject of the judicial review and not necessary for the interpretation of the modern treaty. The Yukon government says this is not a breach of treaty case and this evidence of pre-Treaty and Treaty negotiations is unconnected to the decision under review.

[95] The FNNND says this evidence is admissible under certain exceptions to the prohibition against extrinsic evidence. Most of the impugned paragraphs are intended to assist the Court in determining its exercise of remedial discretion to grant the

declarations that the Yukon government breached its duties flowing from the honour of the Crown to diligently implement the Treaty's promises and to act in a way that accomplishes the intended purposes of the Treaty.

[96] The FNNND says the affidavit evidence is about the promises made by the Crown in the Treaty, the purpose of the promises, and the history and context related to the alleged breaches of the duties. The evidence is admissible on an analogous basis to the admissibility of evidence related to an allegation of a breach of the duty to consult, as a recognized exception to the prohibition on extrinsic evidence. It is necessary for an understanding of the context around the Crown's actions and the nature of the Aboriginal rights and interests at stake. Further, the FNNND disagrees with the Yukon government's position that Chapter 11 of the Treaty and the consideration of land use planning are not relevant to the decision under review and the declarations sought. In order to understand how Chapter 11 of the Treaty informs the issues in this judicial review, the FNNND says a review of its history and development is helpful and necessary.

*Analysis of extrinsic evidence*

[97] A principled approach is the preferred way to assess the appropriateness of affidavit evidence in a judicial review. As a general rule, the evidentiary record before a court on judicial review is restricted to the evidentiary record that was before the decision-maker. This is because "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal" (*Association of Universities and Colleges of Canada and The University of Manitoba v The Canadian Copyright*

*Licensing Agency, Operating as "Access Copyright"*, 2012 FCA 22 at para. 19). However, courts have consistently set out exceptions to this general rule, grounded in the rationale for the general rule and administrative law values. Understanding the context of each case is necessary in determining admissibility of extrinsic evidence. The categories of exceptions are not closed.

[98] Recognized categories of exceptions include:

- The provision of general background information, where it consists of orienting statements to assist the court in understanding the history and nature of the case before the administrative decision-maker (*Yukon Big Game Outfitters Ltd. v Yukon (Government of)*, 2021 YKSC 51 ("*Yukon Big Game*") at para. 15 and '*Namgis First Nation v Minister of Fisheries, Oceans and The Canadian Coast Guard and Mowi Canada West Ltd. (formerly Marine Harvest Inc.)*, 2019 FCA 149 ("*Namgis*") at para. 10);
- The provision of evidence that cannot be found in the record and is necessary for the court to carry out its role of review (*Namgis* at para. 10, *Yukon Big Game* at para. 15);
- The provision of evidence relevant to procedural fairness (*Yukon Big Game* at para. 15; *Namgis* at para. 10);
- The provision of evidence related to a claim that the Crown breached its duty to consult (*Chief Rene Chaboyer et al v Government of Saskatchewan, the Water Security Agency and Saskatchewan Power Corporation*, 2021 SKQB 200 at para. 36; and *Swan River First Nation v Alberta (Agriculture and Forestry)*, 2022 ABQB 194 at para. 20);

- The provision of evidence related to the reviewing court's remedial discretion, where evidence is not being used to supplement the record of the decision-maker; rather, it is assisting the reviewing court in formulating an appropriate remedy (*Namgis* at para. 10).

[99] The Yukon government's argument here suffers from the same flaw that permeates their view of and approach to this case. The Yukon government's separation of the decision under review from the Treaty has led to their submission that most of Albert Peter's affidavit is irrelevant and unnecessary. However, as described above, the purpose of the Treaty and how that purpose may be achieved is critical context in this case.

[100] As noted above, a central issue raised by the decision under review is whether or not the Yukon government's approval of the Project to proceed to the next stage in an area where land use planning is simultaneously occurring was lawful and appropriate.

[101] Albert Peter describes the traditional way of life of Na-Cho Nyäk Dun; how that was impacted by colonialism; the subsequent genesis of the land claims movement; the stages of negotiation of the Treaty; and the intentions behind the land use planning provisions and the expectations of FNNND from the Treaty. He describes the objectives of the Treaty from the FNNND perspective to include protecting the land, water, and wildlife so that they are able to carry on their traditional ways of life.

[102] Albert Peter's affidavit sets out the factual matrix surrounding the reason for the Treaty and the reasons why land use planning was included in its provisions and is important. It is a complex history over many years. Albert Peter's evidence focusses on showing the Treaty's goal of achieving reconciliation between the assertion of Crown

sovereignty and the First Nations' pre-existing sovereignty over the same land. His evidence is concrete support for the observations and conclusions made by Barry Stuart and quoted in *LSCFN* about the importance of FNNND participation in the management of land and resources in their traditional territory as above (see para. 83 above).

[103] The extrinsic evidence related to the background, purpose and promises of the Treaty is admissible under three of the recognized exceptions. First, it is necessary material for the Court to conduct the review properly. It is absent from the record of the judicial review because of the Yukon government's position that the decision under review is divorced from the Treaty context. Second, it is background information to assist the Court in understanding the nature of the effects of the Project before the decision-maker; a Project which despite its relatively small scope, has broad implications because of its intersection with an ongoing land use planning process which has its roots in the Treaty. Third, the remedy sought in this case is to set aside the decision because of its breach of constitutional duties to consult and act in a way that accomplishes the purposes of the Treaty. The FNNND also seeks declarations that these duties (and others) have been breached. The evidence in Albert Peter's affidavit assists the Court in determining whether or not these remedies should be granted.

*Position of the parties on opinion and argument*

[104] The second area of concern to the Yukon government is that the affidavit contains evidence that would not be admissible at trial. Further it does not comply with Rule 49(12) of the *Rules of Court* of the Supreme Court of Yukon, because it contains opinion, argument and information without stating its source. They say that Albert Peter

has not been qualified as an expert and as a result his opinions are not admissible.

Examples of these statements are:

> 51. NND wanted full control of our Traditional Territory through recognition of our self-government rights. I was part of NND's delegation presenting to the Penner Task Force in Whitehorse in 1983. NND was then called the Mayo Indian Band. Our submission to the Penner Task Force stated:
>
> > The final solution for effectively restoring family and community health and social well being of the Mayo Indian Band community, is dependent on parliamentary recognition of the right for self determination through Indian self government at the community level. [emphasis in original]
>
> 109. We expected that the land use plan would be used by the development assessment process to make recommendations to governments – both public government and the First Nation government – and that the land use plan would determine whether and where development could take place.
>
> 131. These requests have fallen on deaf ears.

[105] The Yukon government concedes that opinion evidence from lay witnesses is now considered acceptable. The British Columbia Court of Appeal in *Ganges Kangro Properties Ltd. v Shephard*, 2015 BCCA 522 referred to the criteria for receiving lay witness opinion set out in the *Law of Evidence in Canada*:

> [73] …
>
> Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately,

> adequately and with reasonable facility describe the facts she or he is testifying about.
>
> [74] …
>
> Couched in these terms, the modern opinion rule for lay witnesses should pose few exclusionary difficulties when based on the witness' perceptions. The real issue will be the assessment and weight to be given to such evidence after it is admitted.

However, they say that Albert Peter's evidence does not satisfy these criteria because he includes in his affidavit a number of events that occurred well before he was born and other matters that are hearsay. He should have been qualified as an expert and because he was not, the Court should exercise its discretion to exclude the evidence. They also object to many of the paragraphs they say are opinion or statement of belief because the source of the belief is not identified.

[106] The FNNND says the evidence here satisfies the criteria for admitting lay witness opinion. They also note that the evidence objected to is from Albert Peter's own experience, or his own knowledge obtained from other Elders, or inferences from that experience and knowledge.

[107] The Yukon government also objects to certain paragraphs because they are argumentative. Examples are:

> 63. In 1984, Canada put forward an AIP for CYI and First Nations to consider. Under the 1984 AIP, the initial amount of settlement lands proposed by Canada for First Nations in Yukon was one square mile for a family of four. That would have left NND with roughly 400 square miles. You could literally cover that land with a thumbtack on the map. That was unacceptable.
>
> 140. The Northern Tutchone region also partially overlapped with Ross River's Traditional Territory, and the Ross River community said they would not

> acknowledge the UFA [Umbrella Final Agreement]. So, how could we resolve overlaps there?

[108] The FNNND responds that affidavit evidence is inadmissible on the basis of argument if it is legal argument, not "statements of fact presented from the affiant's point of view." Albert Peter is not making legal argument but is stating facts based on his experience from his perspective. They further observe that the Yukon government appears to object to the tone of the evidence, rather than its substance.

*Analysis of opinion and argument*

[109] I agree with the response of FNNND to the Yukon government's objections. Most of the paragraphs characterized as opinion evidence by the Yukon government are facts within the personal knowledge of Albert Peters, an Elder who has occupied many roles within the FNNND, particularly related to negotiation and implementation of the Treaty and engagement with public government. With this depth and breadth of experience, he can draw inferences from facts gained from his personal knowledge. The source of his information and belief in paragraphs objected to by the Yukon government is his own knowledge and experience and inferences drawn from them.

[110] Other paragraphs objected to in the early sections contain information Albert Peters obtained from the many "stories from Elders about what they did, how they lived and where they traveled." This oral history passed from generation to generation in Indigenous communities is regularly found to be admissible in principle by courts, since the Supreme Court of Canada confirmed this approach in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para. 87:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be

> accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: [citations omitted]. To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis. …

[111] In this case, the information from oral history in the affidavit is, as noted above, background to assist the Court in the understanding of the purposes of the Treaty and the significance of the protections sought by the FNNND in their traditional territory. There is no valid legal reason to exclude those paragraphs in the affidavit.

[112] Some of the Yukon government's objections appear to be based on the manner in which Albert Peter speaks, or the tone he uses. While I agree that in some instances the information could have been more "clinically expressed" (*Tsleil-Waututh Nation et al v Attorney General of Canada et al*, 2017 FCA 116 at para.42) I do not find the prejudice to the Yukon government sufficient to justify striking the impugned paragraphs. I agree, however, that they should be given less weight.

[113] The Yukon government has not identified legal arguments made by Albert Peter in his affidavit. They do not object to statements that should more properly be in the memorandum of fact and law, called an "outline" in the Yukon (see *Coldwater* at para. 19). Instead, as stated by the Court in *Tsleil-Waututh Nation et al v Attorney General of Canada et al* (at para. 44) it appears that the Yukon government is more concerned that the statements they refer to as argument are wrong or incomplete. The remedy to

address this concern is through cross-examination, not an application to strike. A further remedy is to request that less weight be given to such evidence.

[114] I have reviewed the tables prepared by counsel setting out the basis of the objections to the specific paragraphs of the affidavit and the responses. I agree with the responses of the FNNND to all of the objections made by the Yukon government. No part of the affidavit of Albert Peter will be struck.

[115] To the extent that the tone of certain paragraphs is argumentative or unnecessarily opinionated, I will assign less weight to them.

***Josée Lemieux-Tremblay affidavit***

*Positions of parties on extrinsic evidence*

[116] Similar arguments are made by the Yukon government about Josée Lemieux-Tremblay's affidavit. The Yukon government objects to the paragraphs about the assessment of the ATAC proposed road project and the community consultation process in that case, on the basis that this was not before the decision maker and is irrelevant to the decision. They concede the Intergovernmental Agreement is relevant.

[117] The FNNND says this is relevant information as part of the factual matrix explaining the negotiation of the Intergovernmental Agreement as well as the context for explaining their proposed consultation process for the Project. The description of the development of the community consultation process and the content of the consultation sessions for the ATAC proposed road project are background to help place in context the request for community consultation sessions for the Project in this case. The FNNND also notes that the Yukon government refers to both subjects in two of their affidavits –Todd Powell #2 and John Bailey #1.

*Analysis of extrinsic evidence*

[118] I agree with the response of FNNND to the Yukon government objections. The background to the Intergovernmental Agreement provided by the description of the ATAC proposed road project is relevant to the allegation by the FNNND in this case of the Yukon government's failure to implement terms of the Intergovernmental Agreement in good faith as part of the challenge to the decision. The background and description of the community consultations in the ATAC proposed road project are relevant because similar community consultations were requested and refused by the decision maker in this decision, leading to a legal challenge of the fulfilment of the duty to consult.

[119] These paragraphs are not truly extrinsic evidence because the ATAC proposed road project is referred to in the record of the decision maker as a comparison, and in the affidavits of the Yukon government affiants. To the extent that specifics in the Josée Lemieux-Tremblay affidavit were not before the decision-maker, they fall under the exception of background information to assist in understanding the context of the decision and the Intergovernmental Agreement, and information that helps to explain the concerns raised about the duty to consult.

*Position of the parties on opinion and argument*

[120] The Yukon government objects to a number of paragraphs of this affidavit on the basis of opinion and argument. Examples are:

- "it is necessary for Yukon to hear directly from NND citizens, whose Section 35 Rights will be affected by the project" (para. 21)

- "While the proposed work set out in the Metallic Application is not as extensive as what was proposed for the construction of the ATAC Road, its impact on the NND

> Traditional Territory and the Section 35 Rights of NND citizens will still be very significant" (para. 56)
>
> - "… the impacts of the work on the Metallic Project proposed in the Metallic Application are not fully known because Yukon refused to engage in consultations with NND's citizens, where they would have been able to directly express how the Metallic Project would affect them and the exercise of their Section 35 Rights." (para. 59).

[121] FNNND says these statements and other similar ones the Yukon government objects to are statements of fact based on Josée Lemieux-Tremblay's experience. To the extent there is lay opinion, it is based on her knowledge and experience, and inferences arising from them. There is no legal argument included in the affidavit and, again, the Yukon government's objection appears to be to the tone, not the substance.

*Analysis of opinion and argument*

[122] I agree with the FNNND's position set out in the table prepared by counsel. The opinion expressed by the affiant arises from her position, knowledge and experience. There is no legal argument made; the paragraphs set out facts or permissible lay opinion evidence based on valid inferences that can be made by Josée Lemieux-Tremblay's experience.

[123] All of the affidavit of Josée Lemieux-Tremblay will remain in evidence.

[124] Where there are some statements or phrases that are more argumentative or unnecessarily opinionated in tone, I will accord them less weight.

**Issue #4 – Is the honour of the Crown engaged?**

[125] The honour of the Crown arises from s. 35(1) of the *Constitution Act, 1982*, and has been called a "constitutional principle". (*LSCFN* at para. 42; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 ("*Manitoba Metis*") at para.

69). The Supreme Court of Canada has described honour of the Crown in many decisions over the past twenty years.

[126] The honour of the Crown is a foundational principle of Aboriginal law and governs the relationship between the Crown and Aboriginal peoples. It arises from the Crown's assertion of sovereignty over Aboriginal peoples and *de facto* control of land and resources that were formerly in the control of Aboriginal peoples and extends from the *Royal Proclamation of 1763* (*Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 *(*"*Mikisew Cree*"*)* at para. 21; *Haida* at para. 32; *Manitoba Metis* at para. 66). It recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples (*Mikisew Cree* at para. 21).

[127] The underlying purpose of the honour of the Crown is to facilitate the reconciliation of Aboriginal peoples' pre-existing sovereignty and the Crown's assertion of sovereignty *(Mikisew Cree* at para. 22; *Manitoba Metis* at paras. 66-67).

[128] The honour of the Crown is "always at stake in [the Crown's] dealings with Aboriginal peoples" (*Haida* at para. 16). It applies when the Crown acts through legislation or executive conduct (*Mikisew Cree* at para. 23).

[129] "It is not a mere incantation, but rather a core precept that finds its application in concrete practices … In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (*Haida* at paras. 16-17).

[130] The honour of the Crown "refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign" (*Manitoba Metis* at para. 65).

[131] The honour of the Crown gives rise to different duties in different circumstances (*Haida* at para. 18). Not all interactions between the Crown and Aboriginal people engage the honour of the Crown. It has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty. When it is engaged, it imposes a heavy obligation on the Crown (*Manitoba Metis* at para. 68).

[132] It is not a cause of action itself but it gives rise to justiciable duties. It speaks to how obligations that attract it must be fulfilled (*Manitoba Metis* at para. 73).

[133] Three circumstances in which the Supreme Court of Canada has identified the honour of the Crown applies are relevant to this case:

a. the honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982* and gives rise to a duty to consult;
b. the honour of the Crown governs treaty-making and implementation, leading to requirements of honourable negotiation and the avoidance of the appearance of sharp dealing; and
c. the honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*Manitoba Metis* at para. 73).

[134] When the issue is the implementation of a constitutional obligation to Aboriginal people, the honour of the Crown requires that the Crown: 1) takes a broad purposive approach to the interpretation of the promise, and 2) acts diligently to fulfill it. In

interpreting the first requirement, “an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose” (*Manitoba Metis* at para. 77). A purposive approach gives meaning and substance to the promises made.

[135] In interpreting the second requirement, the Court notes that this duty on the Crown to act diligently to fulfill its obligations arises most commonly in the treaty context. This duty of diligent implementation is “narrow and circumscribed” (*Manitoba Metis* at para. 81). Implementation need not be perfect, but “a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown’s duty to act honourably in fulfilling its promise” (*Manitoba Metis* at para. 82). The honour of the Crown means the Crown must not only ensure its obligations under the treaty are fulfilled, but also that Crown servants “must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left ‘with an empty shell of a treaty promise’” (*Manitoba Metis* at paras. 79-80).

[136] The honour of the Crown is engaged in this case. First, the Yukon government does not dispute that the decision under review required consultation to determine the FNNND’s view of the effect of the decision on its s. 35 treaty rights. The honour of the Crown applies to the duty to consult in this context. The Yukon government notes correctly that the duty to consult exists independently and alongside of any modern treaty.

[137] Second, the decision under review affects land use planning processes, one of the Treaty provisions, and a mechanism to help fulfill one of the purposes of the Treaty: shared and meaningful participation by the First Nation in the management of public

land and resources. The honour of the Crown applies to the Yukon government decision in this case because it is Crown conduct that raises the question of whether they acted in a way that accomplishes the intended purposes of the Treaty.

[138] Third, the honour of the Crown applies to the promise made in the Intergovernmental Agreement to develop a land use plan for the Tsé Tagé watershed area. Although it is not being negotiated under the Chapter 11 process, the BRLUP is a way of fulfilling one of the purposes of the Treaty. The Intergovernmental Agreement and the BRLUP may not have been necessary if the Chapter 11 land use planning process was underway or completed for the FNNND traditional territory. The implementation of the Intergovernmental Agreement is Crown conduct that helps to fulfill the Treaty purpose of meaningful participation of management of land and resources in the traditional territory. The honour of the Crown applies to the Crown's actions in relation to the Intergovernmental Agreement.

**Issue #5 – Did the Yukon government breach their duty to consult?**

***Introduction***

[139] The parties agree that the Crown was obliged to consult with the FNNND before making the decision under review. The duty to consult is triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida* at para. 35). In this case, the decision under review is Crown conduct that may adversely affect actual Treaty rights, of which the Yukon government has knowledge. The duty to consult, and if necessary, accommodate, is justiciable and flows from the honour of the Crown.

[140] Given the parties' agreement that the duty to consult exists in this circumstance, I will first review the extent and content of the duty to consult on a standard of correctness, including with whom the Crown has a duty to consult in this case. I will then review the adequacy of the consultation on a reasonableness standard.

***Brief Conclusion***

[141] In sum, the duty to consult in this case is towards the higher end of the spectrum, including but not limited to the requirements to discuss consultation process and the need for community consultation, to meet in good faith with an open mind to discuss issues and concerns raised, to seriously consider the concerns raised, to make efforts to mitigate in an attempt to minimize adverse impacts, to advise of the course of action taken and why. The consultation in this case was inadequate and did not meet the duty owed as a result of the honour of the Crown.

***Extent and content of duty to consult***

[142] The parties disagree about the extent and content of the duty, which ranges across a spectrum from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Flexibility is necessary, as the depth of consultation required may change as the process advances and new information comes to light. (*Clyde River (Hamlet) v Petroleum Geo-Services Inc.,* 2017 SCC 40, ("*Clyde River*") at para. 20; *Haida* at para. 39; *Her Majesty the Queen v Long Plain*, 2015 FCA 177 ("*Long Plain*") at para. 102). As noted above, these matters are reviewable on the correctness standard.

[143] The extent and content of the duty to consult is also affected by the entire factual matrix of the case, and includes the concepts of honour, reconciliation, and fair dealing (*Long Plain* at paras. 104, 106).

*Position of the Parties*

[144] The Yukon government says the consultation requirement was moderate. They acknowledge the rights potentially affected – water, harvesting and heritage – are significant. But they say that the potential adverse impact on those rights of the decision is low to moderate because the project is a mining exploration program, not the construction and operation of a mine; it is seasonal – June to September for 10 years; it involves helicopter and drone access only and no road or trail access construction, (although roads and trails may be constructed within the claims); all soil and bedrock sampling, trenching, possibly diamond drilling will occur only in non-vegetative areas and any vegetative material required to be removed will be set aside for reclamation; and any disturbed sites will be reclaimed. Finally, they say the decision under review is the final stage of the *YESAA* process, described as a planning tool, for the use and management of land and is not the regulatory authorization allowing the project to proceed. There is opportunity for more consultation to occur at the regulatory authorization stage.

[145] The Yukon government further says there was no obligation to consult on the process used for consultation, and that it was appropriate to exercise their discretion to consult with the FNNND government representatives only and not the community members as requested by the FNNND.

[146] Finally, the Yukon government says there was no need to consult on the effect of the Chapter 11 land use planning process because, as they argued at the hearing, Chapter 11 does not create Treaty rights that can be impacted by the decision in question.

[147] The FNNND argues this decision required deep consultation because the rights potentially adversely affected are established Treaty rights to hunt, gather, fish, preserve and enjoy heritage resources and maintain water quality, as well as the right set out in Chapter 11 to involve the FNNND as a meaningful participant in decision making about land use in their traditional territory, including what types of development in what areas may be appropriate. The potential adverse effects of the decision on the Treaty rights are significant in this pristine area because as Josée Lemieux-Tremblay deposed "once an undeveloped portion of the NND traditional territory is industrialized, the impacts of that development project are irreversible; the area's environment will never truly return to how it was prior to development, even with the best mitigation and remediation measures."

[148] The FNNND maintains the duty to consult is owed to the Aboriginal community, and in particular to the Aboriginal group that holds the s. 35 rights, collective in nature. (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 ("*Behn*") at paras. 30 and 31). While it is always open to the FNNND community to authorize a representative for the purpose of consultation, if the rights-holders determine it is important that the government hear from them directly about the potential adverse effects of the decision on them, then the honour of the Crown in most cases will require that the government do this.

*Analysis of extent and content of duty to consult*

[149] I find in this case that consultation towards the higher end of the spectrum was required. It should have included discussion about the land use planning process, specifically the ongoing Intergovernmental Agreement land use planning process. The failure to do so created an adverse impact on the FNNND Treaty right to participate meaningfully in the land and resource management of their traditional territory. The consultation should also have included meaningful discussion about the consultation process, including community consultation. The failure of the Yukon government to consult as legally required was a breach of the honour of the Crown and rendered the decision unlawful.

[150] The rights potentially adversely affected by the Project are established Treaty rights, not asserted or claimed rights. As a result, there is no need to do a strength of claim analysis. Courts have accepted that the potential for treaty rights to be adversely affected generally gives rise to a higher level of consultation (*Clyde River* at para. 43; *Nunatsiavut Government v Attorney General of Canada (Department of Fisheries and Oceans) et al*, 2015 FC 492 ("*Nunatsiavut*") at para. 168).

[151] The Yukon government's conclusion that the Project's potential adverse impacts were not significant did not take into account the concern of the impact on the FNNND Treaty right to participate in the management of their land and resources. The Yukon government considered the Project in isolation, except to the extent that they compared it to the ATAC proposed 65 km access road project, observing this Project had far fewer impacts. By failing to situate the Project, as FNNND requested, in the context of development pressures not only in the Tsé Tagé area but within the entire FNNND

traditional territory, the Yukon government inappropriately minimized its potential impacts on Treaty rights. By failing to consider the ongoing land use planning process under the Intergovernmental Agreement in the area of the proposed Project, the Yukon government again minimized the impacts on the FNNND's ability to participate meaningfully in the management of land in their traditional territory. This resulted in a mischaracterization of the extent of the duty to consult.

[152] At the higher end of the consultation spectrum, the content can include: the requirement to give notice; to disclose information; to provide a reasonable opportunity to make submissions for consideration; to meet in good faith with an open mind to discuss issues and concerns raised; to answer questions; to seriously consider the concerns raised; to make efforts to mitigate in an attempt to minimize adverse impacts; to advise of the course of action taken and why, including the provision of written reasons to show the concerns raised were considered and the impact they had on the decision (*Haida* at para. 44; and *Nunatsiavut* at para. 177).

*Whom to consult*

[153] The decision of with whom to consult is part of the assessment of the extent of the consultation.

Position of the Parties

[154] The Yukon government argued they were not required to consult with community members because:

a. the Yukon government has the discretion to decide the consultation process, including with whom to consult (*Cold Lake First Nations v Alberta*

*(Tourism, Parks and Recreation)*, 2013 ABCA 443, ("*Cold Lake*") at para. 39);

b. the Yukon government has satisfied its consultation obligations by hearing the concerns expressed by the FNNND government officials and to do otherwise would be to state that elected representatives do not speak for those who elected them;

c. it was not feasible for the Yukon government to hear from the community for this project;

d. the community meetings attended by the Yukon government for the ATAC proposed road project did not provide it with information necessary to advance consultation because community members did not articulate how that project impacted their Treaty rights.

[155] The FNNND argued that community consultation was necessary in this case because of the impact of the proposed Project on their s. 35 Treaty rights to participate in co-management of the land through land use planning, among other things, and on exercising their harvesting and other traditional rights in this area. These rights are collective in nature (*Behn* at para. 30) and the FNNND determined the concerns about the impact on these rights of the project would be best communicated and understood by hearing from community citizens.

Analysis of whom to consult

*a. Does the Crown have discretion to choose with whom to consult?*

[156] The Yukon government relied on the Court of Appeal of Alberta decision in *Cold Lake*. In the context of discussing the standard of review of adequacy of consultation

the Court of Appeal of Alberta states that the Crown has discretion to structure the consultation process and there is significant flexibility in how the duty is met. The Court of Appeal did not specifically address the issue of who decides who will be consulted and how that decision is made. However, even if that test were applied in this case, the Yukon government's unilateral decision not to consult with citizens of the community without any explanation other than it was "not feasible" was not a legitimate exercise of discretion in the structuring of the consultation process. Instead, it showed a failure to acknowledge and take seriously the concerns of the FNNND.

[157] The decision in *Behn* confirms the collective nature of s. 35 rights. Part of consultation at the higher end of the spectrum involves the Crown understanding fully and considering seriously the First Nation concerns. If the First Nation requests the government hear from the rights-holders in the hope this will assist in explaining their concerns fully, then the government must consider this request seriously, in the spirit of reconciliation and fair dealing. If they refuse, the First Nation is owed a more meaningful explanation than this type of consultation is "not feasible."

*b. Crown entitled to rely on elected representatives to express concerns*

[158] The Supreme Court of Canada in *Behn* stated that an Aboriginal group can authorize an individual or organization to represent it for the purpose of asserting s. 35 rights. The Yukon government interprets the FNNND constitution to confirm the authorization by the FNNND of their elected representatives to assert their s. 35 rights. The FNNND disagrees. They acknowledge they have an elected Chief and Council as well as employees in the First Nation government departments to communicate with other government officials and politicians. Here, however, there was no indication that

the Chief and the government employees were the exclusive representatives of the community's assertion of their s. 35 rights. The Crown cannot rely on their own interpretation of the FNNND's constitution, as they argued at the hearing, especially without discussing it with the First Nation.

*c. Not feasible to consult with the community and d. no useful information received*

[159] The Yukon government did not elaborate in their decision on why they did not consider it feasible to consult with the community. It can be logically inferred, however that this conclusion stemmed from their view that no valuable information to assist with their decision would be obtained from community consultation and as a result it would not be worth the administrative effort and time to travel to the community to listen to the citizens. This assessment was based on the outcome of the Yukon government's earlier consultation with the community for the ATAC proposed road project. It was clear from the record and repeated in argument that the Yukon government did not consider the information provided by the community in the ATAC road consultation process to be helpful to their understanding of mitigations needed for the Project.

[160] This conclusion is in part a result of the Yukon government's restriction of the scope of the consultation to mitigations about specific impacts on s. 35 rights, such as the right to harvest, through terms and conditions. They were not open to hearing the concerns of the community about development pressures and the need for land use planning. Moreover, the Yukon government did not discuss with the FNNND the reasons for their conclusion. There was no discussion about potential compromises for the consultation process, such as whether the comments made during the community consultations for the ATAC proposed road project could be considered by the Yukon

government in their decision on this Project. The Yukon government's failure to discuss and consider community consultation was a failure to appreciate the extent of the obligation to consult in this case.

***Adequacy of Consultation***

[161] While it is arguable that a review of the adequacy of consultation is subject to a correctness standard based on the Supreme Court of Canada decision in *LSCFN*, the accepted view is that it is reviewable on a reasonableness standard. The assessment of the adequacy of consultation involves factual determinations, leading to greater deference even at the first level of review. However, where the initial decision maker is a representative of the Crown and a party to the dispute, less deference is warranted (*Cold Lake* at para. 38).

*Position of the Parties*

[162] The Yukon government relies on the principle that the adequacy of the duty to consult is not measured by a standard of perfection, referencing the Federal Court of Appeal in *Gitxaala Nation v Her Majesty the Queen*, 2016 FCA 187 at para. 182:

> … Sometimes in attempting to fulfill the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfill the duty, there will be difficult judgment calls on which reasonable minds will differ.

[163] The Yukon government argues their consultation was adequate because:

a. it was reasonable to have terminated the consultation once the FNNND was no longer proposing possible mitigations to the Project and only seeking to discuss land use planning and the process of consultation;

b. it was reasonable not to suspend approvals for all development activities until the completion of the land use plan because there was no legal

requirement to suspend for that reason, and it was not appropriate after considering the impacts of the suspension on the public and the need to balance Aboriginal rights with other societal interests; and

c. it was reasonable to reject the proposal to conduct community consultation because the FNNND government had already provided information on the potential adverse impacts of the Project on their rights and interests as well as mitigations, which led to changes to the terms and conditions in the *YESAA* evaluation report and recommendation.

[164] The Yukon government says that Indigenous people do not have a right of veto over projects, and consultation does not dictate any particular substantive outcome, nor does it require that all concerns of First Nations must be fully met.

[165] The FNNND argues consultation was inadequate because the Yukon government failed to engage meaningfully with the concerns expressed by FNNND, especially concerns about the decision's impact on their Treaty rights to participate meaningfully in the management of land and resources. Both the process of consultation, which appeared perfunctory, and the substance of the consultation which did not attempt to explore the seriousness of the impact on their rights, formed the basis for the inadequacy.

*Analysis of adequacy of consultation*

[166] I find that consultation in this case was inadequate on a reasonableness standard because:

a. the Yukon government's narrow interpretation of the scope of its duty to consult resulted in a failure to engage meaningfully with the FNNND to

understand and respond to their concerns about the Project, especially with respect to land use planning; and

b. the process suggested a pre-ordained conclusion.

*a. No meaningful engagement*

[167] From the outset, the FNNND expressed concerns that this Project undermined the land use planning process for the Tsé Tagé area, in the context of the promise of land use planning set out in Chapter 11 of the Final Agreement. Any approval of the Project to the next stage would detrimentally affect the FNNND Treaty rights to participate meaningfully in the management of lands and resources in their traditional territory and their Treaty rights to carry out traditional practices in this area. They situated this Project in the context of the ongoing significant development pressures in their traditional territory, risking the ever-increasing disappearance of pristine wilderness for the exercise of their s. 35 rights, especially in the absence of land use planning. These concerns were repeated in the many letters they wrote and in the teleconference meeting of September 24, 2020.

[168] In their submission to YESAB, the FNNND also detailed proposed mitigations of anticipated negative effects on their treaty rights to harvest fish and wildlife, to pursue other traditional activities, and to protect their heritage resources. Examples of the areas of the FNNND proposed mitigations are set out above in para. 39 above.

[169] The Yukon government responded reasonably to the proposed mitigations by the FNNND by adding and clarifying terms and conditions to the YESAB evaluation report and recommendation. The proponent Metallic Minerals had already committed to many of these terms and conditions in their submission to YESAB.

[170] However, the Yukon government did not address FNNND's concerns about the land use planning process and their ability to exercise their Treaty rights in their traditional territory in the face of development pressure. The Yukon government limited the consultation to the specific mitigations about the Project in isolation. They refused to explore or discuss the FNNND statements about the effect of any decision on the Project on the promise of land use planning under the Treaty and the ongoing land use planning process under the Intergovernmental Agreement.

[171] The Yukon government's repeated responses to these FNNND concerns were "the Final Agreements do not contemplate the cessation of all development activities until land use plans are complete" and the *YESAA* process was the mechanism to address concerns in the meantime; and a moratorium on development in the area was inappropriate because "Yukon has a responsibility to attempt to balance the interests of all Yukoners including both development and conservation interests."

[172] These responses demonstrated the Yukon government's failure to acknowledge meaningfully, understand, or address the FNNND concerns. They are generalized statements, without reference to the specific concerns raised by FNNND about the Project.

[173] While it is true that the Final Agreement does not contain a provision requiring the completion of land use planning before development is authorized to occur, the Yukon government's general statement does not attempt to resolve the perceptions and fears of the FNNND community in the context of the historical and ongoing pressures of development in their traditional territory. Consultation that included discussion about

whether and how a land use planning process and possible other interim protection mechanisms could address the FNNND concerns was lacking.

[174] Moreover, in this case there was an ongoing land use planning process for the small area of the Project, occurring in the context of development pressures and the absence of a comprehensive land planning process in the traditional territory as contemplated in the Final Agreement. The Yukon government did not acknowledge or discuss the effect of the decision under review on the ongoing BRLUP, in the context of the Chapter 11 land use planning process.

[175] The second statement about balancing interests repeated by the Yukon government in its correspondence also did not address the FNNND's concerns. The Yukon government's role in decision making is always to balance the interests of all Yukoners, including Yukon First Nations who have constitutionally protected rights. The difficult task of government is to determine how that balance is to be struck in each circumstance, and why. In this case, the Yukon government did not properly identify the interests to be balanced. Constitutionally protected Aboriginal treaty rights are not the same as "conservation interests" as stated in their letters. Nor did the Yukon government adequately explain in this case why the economic development interests of a small exploration Project outweighed its impacts on the FNNND Treaty rights.

[176] The record shows the Yukon government officials were "puzzled" by the FNNND's expressed concerns about this Project. Their view was that the FNNND had mischaracterized the nature of the Project. They noted it was only an exploration Project, and not a construction of a major road or a mine. They also wondered whether

the FNNND were “testing” the Yukon government because of their earlier decision not to authorize the ATAC proposed road amendment.

[177] The Yukon government’s confusion appears to have been genuine, due to their view that the Project would not have significant adverse effects on the rights of the FNNND. However, it would have been appropriate for the Yukon government to ask the FNNND why they viewed the adverse effects of the proposed Project more seriously than the Yukon government did. Significantly, the Yukon government did not inquire with anyone about the ongoing BRLUP process, and how it may be affected by the Project. The timing, status, and progress of the BRLUP process; any available information about how the land in the Project area was likely to be designated; and whether there were any significant disagreements between the parties in the BRLUP process, would all have been relevant and helpful questions for the Yukon government to ask to increase their understanding. Sharing such information could have resulted in potentially productive discussions with the FNNND and may have led to a compromised solution. The Yukon government neither acknowledged nor responded to the FNNND proposed mitigation measure that any decision by government about the Project be delayed until the completion of the BRLUP and be consistent with the BRLUP.

[178] The Yukon government’s disregard of the effect of the decision on land use planning in general and on the ongoing land use planning process in particular was a failure of the duty to consult.

*b. Process inadequate*

[179] The Yukon government’s approach to the process of consultation with FNNND did not meet the expected standard of consultation at the higher end of the spectrum.

The correspondence from the Yukon government shows the government gave short deadlines for the FNNND to respond, sent the same drafts of the decision document after receiving correspondence outlining concerns of the FNNND, and repeated the same responses about the Final Agreement not precluding development and the need to balance interests of all Yukoners.

[180] There was one meeting by teleconference, at the request of the FNNND. The meeting consisted mainly of a presentation by the FNNND and a request from the Yukon government to put their expressed concerns in writing. The Yukon government indicated their intention to conclude consultation in their letter of October 9, 2020 without answering the FNNND request for community consultation or addressing land use planning. Consultation was "re-opened" after Chief Mervyn complained to Minister Pillai, but no further substantive consultation occurred. The community consultation request was refused because it was "not feasible". The decision letter dated February 19, 2021 from the Yukon government indicated that their Aboriginal Relations branch would respond to the FNNND about this issue, but this did not happen.

*Reliance on YESAB*

[181] For the first time in its response to the petition, the Yukon government argued they relied on YESAB partially or wholly to fulfill their constitutional duty to consult. This had not been communicated to the FNNND in the past and was not part of the decision. I will address it here briefly because it is an important legal issue to clarify.

[182] The Supreme Court of Canada wrote in *Clyde River* (at para. 30) that:

> … [W]hile ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing

> so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60) …

[183] The Supreme Court of Canada also held in *Clyde River* at para. 23 that:

> … [W]here the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. …

This is to ensure the First Nation can effectively participate in the consultation.

[184] In this case, the Yukon government provided no evidence or analysis in their submissions about whether YESAB has the procedural powers necessary to implement consultation, and the remedial powers necessary to accommodate affected Aboriginal Treaty rights.

[185] YESAB wrote in their evaluation report that their process is limited in two respects. First, they noted the FNNND's deep concerns about the cumulative effect implications of potential mineral development activity in the Tsé Tagé area, and their statement that they could not support new development within its Traditional Territory until a land use plan is in effect. YESAB then stated in its report:

> … Land use planning is a tool that formalizes society's values or environmental, social and economic components, and provides guidance for how development can or should occur within a region or landscape. Land use plans often inherently incorporate a cumulative effects perspective into their plans. While the Designated Office [of YESAB] considers cumulative effects in the evaluation reports, **YESAB recognizes that the assessment process is not an appropriate substitute for land use planning** [emphasis added].

[186] The inability of the YESAB assessment process to consider cumulative effects the way a land use plan can restricts their ability to determine the potential impact of a

proposed project on the rights of a First Nation. In December 2020, YESAB released a bulletin explaining that the cumulative effects of a proposed project are considered as part of the assessment of a project. This consideration helps to define the existing conditions of valued components identified in the assessment and informing project effects significance determinations. However, the YESAB bulletin states the *YESAA* did not give them the power "to make cumulative effects *determinations*, or to make recommendations to decision bodies based on cumulative effects *determinations*."

[187] Secondly, YESAB does not directly assess or make findings about a project's impacts on asserted or established Aboriginal and Final Agreement rights, because YESAB makes factual and not legal determinations about the significance of a project's likely adverse effects. These rights help to inform the choice of valued environmental and socio-economic components (referred to as VESECs – such as wildlife habitat, heritage resources, environmental resources) used in an assessment, and may provide context relevant to determining the significance of likely adverse effects on those VESECs. However, YESAB's inability to make findings about or directly assess Aboriginal rights under a Final Agreement means that its ability to fulfill the duty to consult is limited.

[188] Further, the Yukon government gave no notice to the FNNND that they would be relying on the YESAB process to fulfill their duty to consult.

[189] The Yukon government cannot rely on YESAB to fulfill its consultation duty partially or wholly in this case. While it is appropriate for the Yukon government to obtain information from the YESAB process to inform their consultation process, the

*YESAA* and the policies of YESAB do not allow the Crown to delegate to YESAB its duty to consult the FNNND in this case.

*Conclusion on adequacy of consultation*

[190] The Yukon government summarized its approach to consultation in its own outline at para. 137:

> When FNNND was no longer prepared to consult on the mitigating terms and conditions for the Project, and was only discussing land use planning and the process of consultation, it was reasonable for Yukon to consider the mitigating terms and conditions as modified through the process of consultation to have sufficiently addressed FNNND's concerns about the impact of the Project itself and end the consultation.

[191] The refusal of the Yukon government to engage with FNNND on the issue of the effect of its decision on the ongoing land use planning for that area was unreasonable. Proper consultation required the Yukon government to consider, explore, discuss and assess with the FNNND the effect of the approval of the Project on the BRLUP process. The failure to do this was a critical omission, because of the connection of the BRLUP process to FNNND's exercise of its s. 35 Treaty rights, and it meant the duty to consult was not met.

[192] Further, the way in which the Yukon government conducted the consultation process appeared rushed. It reflected their assessment that the nature and size of the Project did not adversely affect the rights of the FNNND. The process showed the Yukon government's deliberate decision not to engage with the issues raised by the FNNND.

[193] As the collective rights-holders, the citizens of the FNNND deserved to have the request that they be heard directly considered seriously, in order to ensure the FNNND

concerns about the Project's impacts were clearly understood. The failure of the Yukon government to do so, without an adequate explanation, was unreasonable.

[194] The conclusion that the Yukon government's consultation was inadequate is not an imposition of the standard of perfection, nor is it giving the First Nation a veto over the project.

[195] A meaningful consultation process can be difficult, messy, and frustrating. But through difficult conversations, creative solutions may be found. Outcomes that resolve disputed issues may be achieved if open-minded, good faith, collaborative discussions occur. Meaningful consultation can be a useful tool for problem-solving and ensuring the various real interests are not only identified properly but also balanced and reconciled. In this case, the refusal of the Yukon government to understand the concerns of the First Nation and address the real issues prevented this from occurring.

[196] The value of meaningful consultation as an alternative to judicial review was emphasized by the Supreme Court of Canada in *Clyde River* (para. 24):

> … True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all,"[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani*, at para. 38, quoting D.G. Newman,*The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests" (para. 14). No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.

[197] The failure to fulfil the duty to consult is sufficient to set aside the decision under review. A declaration will issue that the Yukon government breached their duty to consult and if appropriate, accommodate.

**Issue #6 – Did the Yukon government breach their duty to diligently implement the promises of the Treaty including land use planning arising from Chapter 11?**

***Introduction***

[198] While the breach of the honour of the Crown in failing to meet the duty to consult is enough to set aside the decision, I will also address the other alleged breaches – that is, the duty to diligently implement the promise of the Treaty including land use planning; the duty to act in a way that accomplishes the intended purpose of the Treaty; and the duty to keep the promise in the Intergovernmental Agreement to develop a land use plan for the Tsé Tagé watershed – because the FNNND seeks declarations that the Yukon government has breached these duties. There will be some repetition in these sections because the breaches arise from the same failures noted above of the Yukon government in acknowledging and understanding the FNNND Treaty rights and the effect of the decision on those rights.

***Brief Conclusion***

[199] There is no finding that the Yukon government failed to diligently implement the promises of the Treaty including land use planning under Chapter 11 for the entire traditional territory. The decision under review and the evidentiary record before the Court do not support a finding of this kind.

***Position of the Parties***

[200] The FNNND in its written argument says that Chapter 11 embodies a constitutionally protected promise that the Yukon government will co-manage the

FNNND traditional territory with FNNND. It imposes an affirmative duty on the Yukon government to fulfill the promise of land use planning. For several decades, during the 1990s and 2000s the FNNND has tried to initiate the land use planning process under Chapter 11. The Yukon government refused until the overlaps among the First Nation traditional territories in the planning region were resolved. FNNND says these overlaps were settled in 2004, but there was no land use planning activity until 2020. FNNND requested land use planning from the Yukon government in 2011, prepared their own draft land use plan for FNNND traditional territory in 2012 and passed many resolutions at FNNND annual general assemblies in 2017-18. In 2020 the Yukon government indicated their willingness to recommence the process but the FNNND says three decades after signing the Treaty the process has not really begun.

[201] The FNNND says the duty to fulfill the promise of land use planning requires the Yukon government to make decisions with FNNND about its traditional territory to ensure that development is not authorized in a way that renders a land use planning process meaningless. The FNNND argues that the Yukon government's disregard of the obligation created by Chapter 11, viewing it as optional, is an ungenerous interpretation that misunderstands the nature and scope of the Chapter 11 Treaty right.

[202] In oral argument, counsel for the FNNND clarified that they are not arguing in this case that the absence of a land use plan under Chapter 11 is a breach of the honour of the Crown that should result in the setting aside of the decision or a declaration. The FNNND argue instead that the purpose, principles, and values emanating from Chapter 11 should have informed the government decision in this case.

[203] As noted above, the Yukon government's first position is that Chapter 11 is irrelevant and inapplicable in this case. In the alternative, if it is relevant, the Yukon government says it has not breached any of its terms.

[204] The Yukon government says the absence of a completed land use planning process under Chapter 11 for the Northern Tutchone Planning Region (where most of the FNNND traditional territory lies) has not been for lack of effort by any party, but due to external complexities, competing obligations and capacity issues. The Yukon government says it has fully participated in the Chapter 11 land use planning process and never refused to implement it.

[205] The Yukon government reviews the history of the parties' collaborative attempts to engage in the Chapter 11 land use planning process for the Northern Tutchone Planning Region, starting in 1998 and continuing to the present. It notes the role of arms-length entities created by Chapter 11, such as the Yukon Land Use Planning Council, which along with the FNNND and the Yukon spent significant efforts to implement Chapter 11 efficiently, especially between 1998 and 2003.

[206] The Yukon Land Use Planning Council, created under Chapter 11, and consisting of one First Nation nominee and two government nominees, made recommendations for eight planning regions in the Yukon, including the Northern Tutchone Planning Region. There are three Yukon First Nations whose traditional territories overlap in the Northern Tutchone Planning Region. They were unable to finalize an outside boundary for the planning region by 2003. No finalized outside boundaries meant that general terms of reference for the planning region could not be recommended. General terms of reference must be recommended by the Yukon Land

Use Planning Council and accepted by the parties in order to create the Northern Tutchone Planning Commission, necessary to start the land use planning process. The Yukon government says finalizing boundaries is important to avoid gaps between planning areas, which are intended to be comprehensive. Knowing which First Nation is included in the planning region is necessary because each First Nation with traditional territory in the planning region is entitled to representation on the Northern Tutchone Planning Commission.

[207] From 2004-2019, the parties were focussed on the Peel Watershed Regional Land Use Planning process. The Yukon Land Use Planning Council suspended its activities from January 2015 to December 2017.

[208] In 2020, the FNNND requested that Regional Land Use Planning for the Northern Tutchone Planning Region be recommenced. Since then, the Yukon government and the FNNND have been working on new draft general terms of reference. The Yukon government says the outside boundaries have not yet been finalized.

[209] The Yukon government says that the history shows their participation in the Chapter 11 land use planning process. The fact that it remains incomplete is not for lack of effort or refusal to participate by the Yukon government. It is a collaborative process and there are a number of reasons why it is not yet implemented. There is no legal obligation on the Yukon government to complete the process and they cannot do so unilaterally. Finally, the Yukon government says there is no connection between the Chapter 11 land use planning process and the decision in this case.

***Analysis of diligent implementation***

[210] The duty to diligently implement the promises in a treaty has received limited application as a basis for a judicial remedy in the treaty context. In recent cases such as *Restoule v Canada (Attorney General)*, 2021 ONCA 779 (application for leave to appeal granted [2002] SCCA No. 5) where this duty was upheld, the Crown was found to have a mandatory and reviewable obligation under the Robinson-Huron treaties of 1850 to increase annuity payments to the First Nations under the augmentation clause. It provided for an annuity increase if the resource-based revenue was profitable for the Crown. The Crown increased the annuities only once in 1875. For 168 years the First Nation were without this treaty benefit. The proceeding in that case was brought by way of an action.

[211] In *Yahey v British Columbia*, 2021 BCSC 1287, the Blueberry River First Nation argued successfully that the Province of British Columbia breached its obligations under the Treaty by failing to diligently implement the Treaty's promise to protect the First Nation's rights and way of life from the encroaching cumulative impacts of industrial development. This was also a treaty infringement action with much evidence heard over numerous days of trial. The court concluded in part that the lack of effective provincial regimes or processes for assessing, taking into account, and managing the cumulative effect of development on Blueberry River First Nation's exercise of its treaty rights breached the Province's obligations under the Treaty, including its honourable and fiduciary obligations to diligently implement the Crown's solemn promises. Those promises included the First Nations' right to hunt, fish and trap in their traditional territory.

[212] Unlike these two recent case examples, this case is not an action for treaty infringement. There is an insufficient evidentiary record here to explore the history of the Chapter 11 implementation process to date. Each party has different explanations for the delay. The affidavit evidence shows factual discrepancies between the parties about the attempts to implement the land use planning process under Chapter 11. For example, the FNNND says the boundary overlaps among the First Nations were resolved by 2004, while the Yukon government says they remain unresolved. The FNNND says the Yukon government ignored their many requests to start the land use planning process; the Yukon government refutes this, saying the boundary issue and the Peel Watershed Land Use Planning process, in which the FNNND participated, were valid explanations for the delay. A determination of the reasons for the delay in implementation of Chapter 11 is outside of the scope of this judicial review.

[213] The FNNND say they are not arguing that the Chapter 11 process should have been completed before the decision under review was made. However, the declaration they seek and the affidavit evidence they submitted suggests otherwise. They argue the Yukon government breached its obligation to implement land use planning under Chapter 11 by issuing this decision in its absence, thereby undermining the process. While the FNNND may have a legitimate concern resulting from the absence of a completed land use plan for their traditional territory, the failure to implement such a plan does not arise on the facts of this case.

[214] The decision cannot be set aside on this basis in the alternative, and the declaration requested cannot be made. The record does not include sufficient evidence for the Court to determine whether the Yukon government demonstrated “a persistent

pattern of errors and indifference that substantially frustrates the purposes of a solemn promise" (*Manitoba Metis* at para. 82) that is, the promise of land use planning under Chapter 11 for the whole traditional territory of FNNND.

**Issue #7 – Was there a breach of the duty to act in a way that accomplishes the intended purpose of the Treaty including land use planning in Chapter 11?**

**Issue #8 – Was there a breach of the duty to keep the promise in the Intergovernmental Agreement to develop a land use plan for the Tsé Tagé watershed?**

***Introduction***

[215] I will address these two issues together as I find that the breach of the Yukon government's duty to act in a way that accomplishes the intended purpose of the Treaty was caused by its failure to recognize Chapter 11 Treaty rights and the principles in that Chapter, and its failure to engage with FNNND in relation to the ongoing land use planning process provided for in the Intergovernmental Agreement.

[216] This breach is different from the alleged breach of a failure to diligently implement a promise in the Treaty, namely the land use planning process of Chapter 11. This breach requires an assessment of the underlying purpose of the Treaty and a determination of whether the Crown conduct advances that purpose. The purpose may be achieved in various ways, unlike an alleged breach of a duty to implement a specific process prescribed in Chapter 11. If the Crown conducts itself in a way that prevents the accomplishment of the intended purpose of the Treaty then the honour of the Crown is not met.

***Brief Conclusion***

[217] I find that the Yukon government breached its duty to act in a way that accomplishes the intended purpose of the Treaty through their decision in this case.

This is due to their failure to recognize the Treaty rights created by Chapter 11 (as argued at the hearing); their failure to recognize the relevance and applicability of the principles and values set out in Chapter 11 of the Treaty to the decision; and their failure to consider the effects of the decision on the Treaty purpose that the FNNND participate meaningfully in the management of land and resources in its traditional territory. Further, the Yukon government refused to consider the decision's effect on the land use planning initiative in the Intergovernmental Agreement. This contributed to the breach of the duty because the negotiation of the BRLUP in the Intergovernmental Agreement was a way of fulfilling the Treaty purpose of meaningful engagement in land and resource management in their traditional territory.

***Position of the Parties***

[218] The FNNND argues the objectives of the Intergovernmental Agreement cannot be met if the Tsé Tagé watershed is allowed to be developed before the BRLUP is negotiated and implemented. They say that the Yukon government's approval of the Project proceeding to the next stage has "crippled the BRLUP's development" and reduced the options for land use in the Planning Area (the Tsé Tagé watershed). This was a breach of the duty to act in a way that accomplishes the intended purpose of the Intergovernmental Agreement flowing from the honour of the Crown.

[219] As noted above in para. 20, the objectives of the Intergovernmental Agreement include:

a. promoting collaboration with respect to the use and management of land, water and resources, including fish and wildlife and their habitat, within the Planning Area;

b. recommending measures to minimize actual and potential land use conflicts throughout the Planning Area;

c. promoting integrated management of land, water and resources including fish and wildlife and their habitats; and

d. promoting development that does not undermine the ecological and social systems upon which Na-Cho Nyäk Dun citizens and their culture are dependent.

[220] These objectives are similar to those in Chapter 11 and they support meaningful participation by the FNNND in the management of this part of their traditional territory.

[221] The Yukon government argues first that Chapter 11 is not relevant or applicable and does not create Treaty rights. They also argue that the Intergovernmental Agreement should not be considered in this case because it was agreed to outside of the Chapter 11 process. Further, the Intergovernmental Agreement was entered into specifically to address the ATAC proposed road project and does not apply to the Metallic Minerals Project.

[222] The Yukon government argues that the Intergovernmental Agreement cannot now be interpreted to require all steps toward development in the BRLUP region be suspended until completion of the land use plan, as that would be an inappropriate re-negotiation of the Intergovernmental Agreement by the Court. It does not accord with the actual wording, the scope or the intent of the Intergovernmental Agreement. The Intergovernmental Agreement does not contain a prohibition of entry order or a moratorium on development order for the entire BRLUP area, only for the area where the ATAC road was proposed.

***Analysis of the duty to act to accomplish intended purpose of Treaty***

[223] As noted many times above, one of the purposes of the Treaty is to ensure meaningful participation by the First Nation in the management of land and resources in its traditional territory. This was an essential element of the compromise that resulted in the completion of the Treaty and its goal of achieving reconciliation between the Crown's assertion of sovereignty and the previous sovereignty of the First Nations over the same land and resources.

[224] Many chapters in the Final Agreement set out ways for the FNNND to participate in the management of lands and resources in their traditional territory: Chapter 11– land use planning process, Chapter 10 – the creation of special management areas, and Chapters 14, 16-18 – FNNND involvement in resource management. These Chapters and the Treaty as a whole provide a necessary backdrop and context for the decision under review.

[225] Courts have held that Chapter 11 does create Treaty rights (*FNNND* 2017), contrary to the Yukon government's interpretation. The Yukon government's position that Chapter 11 does not create Treaty rights and is not relevant or applicable to this decision, is an erroneous and ungenerous interpretation of the Treaty. The Supreme Court of Canada warned that this approach to interpretation could result in a failure to implement the treaty and thus fail to achieve reconciliation. A modern treaty will not accomplish its purpose of reconciliation "if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract." (*FNNND* 2017 at para. 37, and *LSCFN* at para. 10).

[226] The Yukon government's action in making the decision under review without considering the backdrop of the Chapter 11 Treaty rights or the Treaty purpose of meaningful participation of the FNNND was a breach of the honour of the Crown. The Yukon government did not consider in their decision the importance of the mechanism of land use planning to resolve or at least minimize land use conflict and to achieve the Treaty purpose of meaningful participation.

[227] The Yukon government's repeated statement in their correspondence to FNNND that there was no moratorium on development in this area and they needed to balance the interests of development and conservation failed to acknowledge the FNNND Treaty rights. Their argument at this hearing that Chapter 11 does not create Treaty rights, although not stated as part of the reasons for decision, confirms an approach that permeated their decision-making process.

[228] The negotiation of the BRLUP within the Intergovernmental Agreement was a way of fulfilling the intended purpose of meaningful engagement for FNNND in land and resource management in a small area of their traditional territory. If the Chapter 11 land use planning process had been substantively underway or completed, the Intergovernmental Agreement may not have been necessary. The stated objectives of the Intergovernmental Agreement are similar to the purposes set out in Chapter 11 of the Treaty (see para. 14 above). Its existence outside of the Chapter 11 process does not mean that the values, principles and purpose of Chapter 11 can be ignored.

[229] The BRLUP, while originally motivated by the ATAC proposed road project, applies to the entire Tsé Tagé area. Its application beyond the ATAC road proposal was

confirmed by the continuation of the negotiations after the November 2020 decision by the Yukon government not to approve the construction of the ATAC road.

[230] Even if the matter of land use planning had not been raised by FNNND during the consultation phase of the Project assessment, as a Treaty signatory and partner in reconciliation, the Yukon government still needed to consider the effect of their decision on the ongoing negotiation of the land use plan in the area of the Project.

[231] The Yukon government is correct that there was no explicit provision in the Intergovernmental Agreement that prevented the authorization of development during the negotiation of the BRLUP (except for the prohibition of entry around the ATAC proposed road). However, in this case, the Yukon government did not engage with the FNNND in any way to discuss the impact of the decision to approve the Project on the land use planning process. The Yukon government had no regard to the ongoing negotiations about that land, the intentions for its use and development, or the status of the process. The record shows that no attempt was made by the decision maker to find out anything about the ongoing land use planning process.

[232] A decision to approve a development project in an area where land use planning is occurring is a removal of that land from the land use planning process for at least the life of the Project. It undermines the land use planning process and the s. 35 Treaty rights it is intended to uphold. A land use plan becomes meaningless if development is allowed to continue without any consideration for the land use planning process, because it will result in a reduction of the amount of undeveloped land available by the time the plan is negotiated and implemented. This in turn affects the ability of the FNNND to exercise their s. 35 Treaty rights in the area.

[233] In making this decision without considering its effect on the land use plan being negotiated, or acknowledging the meaningful participation purpose of the Treaty, the Yukon government did not act in a way that accomplished one of the intended purposes of the Treaty. This is not to say that the honour of the Crown and the duty to act in a way that accomplishes the intended purpose of the Treaty prohibits the Yukon government from approving any development in the area before a land use plan is finalized. It would not be appropriate in this case for this Court to in effect impose a moratorium on development in the Tsé Tagé area. In the modern treaty context, the balancing of the interests of FNNND in exercising their Treaty rights, and of the interests of others in economic development is to be worked out by the parties in negotiation through the available mechanisms.

[234] As noted above in para. 75 by the Supreme Court of Canada in the *FNNND* 2017 decision:

> [33] … [T]he appropriate judicial role [in the application for judicial review] is informed by the fact that this dispute arises in the context of the implementation of modern treaties … **It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of the treaty relationship** … [emphasis added]
>
> [34] That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

[235] Here, the breach arises from the failure of the Yukon government to acknowledge the existence, the relevance and the applicability of the Chapter 11 Treaty rights and the Treaty purpose of meaningful participation by the FNNND in management

of land and resources in the traditional territory. Meaningful participation includes understanding the impacts of the decision on the FNNND's ability to exercise their Treaty rights. Further, the consequential actions of the Yukon government in refusing to acknowledge or discuss the impact of their decision on the BRLUP and the objectives of the Intergovernmental Agreement contributed to the breach.

[236] A declaration will issue that by refusing to consider or discuss the effect of the decision on the land use planning process contemplated in Chapter 11 and ongoing in the Intergovernmental Agreement, the Yukon government breached the duty to act in a way that accomplishes the intended purposes of the Treaty: that is, to ensure meaningful participation in the management of land and resources in the traditional territory.

[237] The decision is also subject to being set aside for failure to meet this duty, in the alternative.

**Issue #9 – Was the decision reasonable?**

***Introduction***

[238] As a result of my conclusion that the decision under review should be set aside on the basis of the breaches related to the duties arising from the honour of the Crown, it is not necessary to decide whether the decision was reasonable. However, for the sake of completeness, I will address whether this standard of review has been met.

[239] The Supreme Court of Canada in *Vavilov* identified two basic inquiries in a reasonableness review: 1) was the reasoning process undertaken rational, logical and internally coherent, so that the decision may be seen as justified, intelligible and transparent and 2) can the decision be justified in light of the relevant factual and legal

constraints. The relevant constraints in this case are the submission of the parties; the evidence before the decision maker; and the common law relevant to the decision.

***Brief Conclusion***

[240] The decision was unreasonable because it cannot be justified in light of the legal constraints upon it – in particular the constitutional duty to consult and to act in a way that accomplishes the intended purpose of the Treaty and the duty to act in good faith in the performance of the Intergovernmental Agreement.

***Position of the Parties***

[241] The following summarizes the Yukon government's position which was described above in the facts section of this decision.

[242] The Yukon government says the decision to vary the terms and conditions recommended by YESAB was transparent, intelligible and justified, with a reasonable outcome. It relies not only on the February 19, 2021 decision document for its reasons, but also on the letter sent to the FNNND on February 19, 2021. The reasons set out in the letter reflect the requirements of *YESAA*, the evidence before the decision maker, including the evaluation report of YESAB and the submissions of FNNND during consultation, which was reasonably conducted. The February 19, 2021 letter repeats the same two responses that were in the previous letters sent during the consultation process: the Final Agreements do not contemplate the cessation of all development activities until land use plans are complete, and no moratorium on development can be implemented because the Yukon government has a responsibility to attempt to balance the interests of all Yukoners including both development and conservation interests. The letter distinguishes this Project as having far fewer adverse effects than the ATAC

proposed road project. The Yukon government refers to the terms and conditions added as a result of the consultation with FNNND. It argues that Chapter 11 of the Final Agreement and the Intergovernmental Agreement did not create any legal constraints or obligations. It should not be considered because it did not include the Metallic Minerals Project, only prohibited entry in one part of the Tsé Tagé area and prohibited approval of one project, the proposed ATAC road, until completion of the land use plan. It did not contain a provision that development could not proceed in the area before the BRLUP was completed. To impose a contractual duty of good faith prohibiting development before the finalization of a BRLUP would extend the contract beyond what was negotiated by the parties and would confer a benefit on the FNNND not contemplated in the contract.

[243] The FNNND views the decision as the decision document only, not the additional letter of February 19, 2021. It argues that the decision lacks coherent reasoning because it provides no analysis or justification. The FNNND further argues the decision shows no engagement with the issues raised by FNNND in their submissions or with the evidence before the decision maker. It also fails to consider the constitutional duties flowing from the honour of the Crown or the duty of good faith arising from the Intergovernmental Agreement.

[244] The FNNND relies on the explanation of the duty of good faith in *Bhasin v Hrynew*, 2014 SCC 71 at para. 63: the notion that a contracting party in carrying out their own performance of the contract should have appropriate regard to the legitimate contractual interests of the contracting partner. One of the ways the duty of good faith shows itself is by preventing a party from seeking to evade its contractual duties by

acting in a way that is not prohibited by the agreement, but nonetheless serves to defeat its ultimate purpose and objectives (*Bhasin* at para. 47 and see other cases at footnote 183). Or put another way, as stated by the Court of Appeal for British Columbia in *Mannpar Enterprises v HMTQ*, 1999 BCCA 239 at para. 25, "a court will not willingly allow a party to act in a fashion to deny the benefits of a contract to the other contracting party."

[245] Here the FNNND says the relevant benefit to the FNNND of the Intergovernmental Agreement is the BRLUP. The decision approving the Project is a step towards removing the Project area from the land use planning process, thereby diminishing the benefits of the Agreement to FNNND.

***Analysis of reasonableness***

[246] I accept the Yukon government's explanation that the decision in this case consisted of the decision document as well as the letter to FNNND, both dated February 19, 2021. The prescribed decision document form under *YESAA* in this case is not sufficient on its own to explain the reasons for the decision to vary the terms and conditions of the recommendation from YESAB. It is to the credit of the Yukon government that they provided a separate letter to the FNNND to explain their reasons. The FNNND's argument that the decision was incoherent because it lacked analysis is dismissed.

[247] However, I find the Yukon government's decision was unreasonable on the ground of factual and legal constraints because: a) there was no engagement with the FNNND submissions or the evidence they provided about the adverse effects of the decision on their right to meaningful participation in the management of land and

resources set out in the Treaty and the commitment in the Intergovernmental Agreement to develop a BRLUP and b) it fails to consider the constitutional obligations flowing from the Treaty and the honour of the Crown, or the requirements of the Intergovernmental Agreement.

***Lack of engagement with FNNND objections***

[248] The Yukon government's lack of engagement with the submissions and evidence provided by the FNNND during the assessment process has been described in detail above. In sum, the Yukon government refused to discuss the effect of their decision on an incomplete land use planning process for the same area and refused to consider the community members' views of the impacts of an exploration development project in that area.

***Legal constraints***

[249] The legal constraints of the duties flowing from the honour of the Crown were also discussed above. The Yukon government failed to comply with the duty to consult, and the duty to act in a way that accomplishes the intended purpose of the Treaty. As noted above, any duties flowing from the honour of the Crown and any constitutionally protected treaty rights affected by the decision under review will inform the reasonableness review (*Redmond* at para. 26; *Coldwater* at para. 27). The failure to comply with these duties made the decision unreasonable.

[250] The issue of breaching the duty of good faith in contractual performance of the Intergovernmental Agreement is not the Yukon government's failure to impose a moratorium on development in the Tsé Tagé area in this case. It is instead their failure to consider whether the Intergovernmental Agreement created any obligations on the

Yukon government, such as discussing the effect of the decision on the BRLUP process with the FNNND, and considering potential alternatives to approval, before issuing their decision. By approving this Project to proceed to the next stage, the Yukon government made a decision that could defeat the ultimate objectives of the Intergovernmental Agreement. There was no discussion about whether this development undermined the ecological and social systems upon which Na-Cho Nyäk Dun citizens and their culture are dependent. By addressing this Project in isolation, the Yukon government was not promoting integrated management of land, water and resources in the area. Nor did their conduct leading up to this decision promote collaboration with FNNND on the use and management of the area. While the Intergovernmental Agreement did not prohibit approval of the Project, the Yukon government's conduct in doing so without any acknowledgement of or discussion about its effect on the BRLUP negotiation defeated the objectives of the Agreement. The benefit to the FNNND of the Intergovernmental Agreement of participating fully in the land use planning process in order to protect their exercise of s. 35 Treaty rights in the area was lost once the Yukon government decided to approve the Project, thereby taking a significant step towards removing it from the land use planning process. This was a breach of the duty of good faith in the performance of the Intergovernmental Agreement and was another reason why the decision was unreasonable.

## CONCLUSION

### *Declarations*

[251] The Supreme Court of Canada in *Ewert v Canada*, 2018 SCC 30 summarized the test for declaratory relief:

> [81] A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available ... A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought … [citations omitted.]

[252] Thus a declaration will only be granted if it will have practical utility – that is, it will settle a "live controversy" between the parties (*Daniels v Canada*, 2016 SCC 12 at para. 11. A declaration is a "judicial statement confirming or denying a legal right of the applicant": Lazar Sarna, *The Law of Declaratory Judgments* (Toronto: Thomson Reuters, 2016) at p. 1. "[I]t is a powerful tool in litigation involving governments, as it is assumed they will comply with the letter and the spirit of the declaration: K. Roach, *Constitutional Remedies in Canada* (2nd ed. (loose-leaf)), at pp. 15-63 to 15-64; *Assiniboine v Meeches*, 2013 FCA 114, 444 NR 285 at paras. 13-15." (*Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 ("*Uashaunnuat*") at para. 24). Courts can and do grant declarations to enable parties to know their rights and to avoid future disputes (*Yasin v Ontario*, 2018 ONCA 417 at para. 10).

[253] Declarations are appropriate discretionary remedies to be sought in an application for judicial review. Rule 54(1) of the *Rules of Court* of the Supreme Court of Yukon explicitly permits this.

[254] The Supreme Court of Canada has stated that granting broad declarations of unconstitutionality is appropriate in cases that engage s. 35 rights and the honour of the Crown as this may be the only way to give effect to the honour of the Crown (*Manitoba*

*Metis* at para. 143). Judicial declarations of existing Aboriginal rights have become the primary remedy for securing those rights (*Uashaunnuat* at paras. 247-250).

[255] The FNNND seeks declarations that the Yukon government breached its constitutional duties flowing from the honour of the Crown in making the decision under review. As all of these breaches are disputed by the Yukon government, there is a live controversy that would benefit from the clarity of certain declarations.

[256] I will grant the declaration that the Yukon government in its decision on the Project, failed to meet the duty to consult and if necessary, accommodate in relation to FNNND's Aboriginal and Treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.

[257] I will not grant the declaration that the Yukon government failed in its duty to diligently implement the promises in the Treaty, including the promise to engage in land use planning set out in Chapter 11 of the Treaty. The Chapter 11 land use process is underway, although progressing slowly. The decision to approve that this one Project proceed to the next stage in the absence of a completed land use plan is not sufficient to warrant a finding that the Yukon government breached this duty.

[258] I will grant a declaration that the Yukon government breached its duty to act in a way that accomplishes the intended purposes of the Treaty, that is, to ensure meaningful participation in the management of land and resources in the traditional territory by refusing to consider the effect of the proposed decision on the land use planning process contemplated in Chapter 11 and ongoing in the Intergovernmental Agreement.

[259] I will not grant a separate declaration that the Yukon government breached its duty to keep its promises made in the Intergovernmental Agreement to develop the BRLUP, in furtherance of Treaty promises. That land use planning process is ongoing and it would be inappropriate to grant this declaration.

[260] I will grant a declaration that the Yukon government breached its duty of good faith in the performance of the Intergovernmental Agreement, by failing to consider the effect of the decision on the ongoing land use planning process under the Intergovernmental Agreement.

***Decision***

[261] The decision under review is set aside for the reasons above. The matter will return to the stage of the provision to the decision bodies of the YESAB evaluation report and recommendation.

[262] Costs may be spoken to in case management, if necessary.

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DUNCAN C.J.