

SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v Yukon (Government of)*,
2024 YKSC 1

Date: 20240102
S.C. No. 22-AP008
Registry: Whitehorse

BETWEEN:

ROSS RIVER DENA COUNCIL, ON ITS OWN BEHALF, AND ON BEHALF OF ALL
MEMBERS OF THE KASKA NATION AND THE KASKA NATION

PETITIONER

AND

GOVERNMENT OF YUKON (DEPUTY MINISTER, EXECUTIVE COUNCIL OFFICE),
THE ATTORNEY GENERAL OF CANADA AND BMC MINERALS LTD.

RESPONDENTS

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

Mark Youden, Nicholas Tollefson,
and Maya Stano

Counsel for the Respondent,
Government of Yukon (Deputy Minister, Executive
Council Office)

I.H. Fraser and
Amy Porteous

Counsel for the Respondent,
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William Lu

Counsel for the Respondent,
BMC Minerals Ltd.

Roy W. Millen, Ariel Solose, and
Kevin O'Callaghan

REASONS FOR DECISION

OVERVIEW

[1] A decision that allows the construction, operation, and closure of a copper, lead, and zinc mine project (the "Project") within Kaska traditional territory to proceed to the

regulatory permitting stage was jointly made by the Yukon government and two federal government departments on June 15, 2022.

[2] Ross River Dena Council (“RRDC”), on behalf of the Kaska Nation (“Kaska”), asks the Court to set aside this decision because the government departments, called “Decision Bodies” under the applicable project assessment legislation, failed to consult with and accommodate reasonably Kaska before issuing their decision, thereby not meeting the honour of the Crown. In addition, RRDC says the decision was unreasonable and flawed because it was made in a procedurally unfair manner. RRDC asks the Court to refer the decision for redetermination by the Decision Bodies or for further recommendation by the Yukon Environmental and Socio-economic Assessment Board (“YESAB”) after a panel hearing. The petitioner also requests an order requiring the Decision Bodies to complete deep consultation before a new decision is issued, including giving full and fair consideration to the June 14, 2022 submission of Kaska, and consulting about the application of Kaska-Centric Indigenous assessment processes.

[3] The Decision Bodies, represented by the Yukon government and the Attorney General of Canada, oppose this petition. They say they met their duty of deep consultation through relying in part on the assessment process under the *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7 (“YESAA”), and by engaging directly with Kaska. They also say their issuance of the decision on June 15, 2022, was not a breach of procedural fairness.

[4] The company who proposed the Project is BMC Minerals Ltd. (“BMC”), also called the proponent. BMC submitted the Project proposal to YESAB in March 2017,

responded to multiple requests for information from YESAB over the following four years, and engaged with Kaska before and during the assessment process. BMC argues that the Decision Bodies fulfilled their duty to consult and accommodate, as evidenced in part by the modified and new terms and conditions from those recommended by YESAB, in response to concerns of Kaska. BMC also says the process was procedurally fair and asks the Court to dismiss the petition.

[5] This case requires a determination of whether the Crown has met its duty to consult and accommodate Kaska in the context of the YESAA process. The standard to be applied by the Court in this assessment is reasonableness. The Court is not to substitute its decision for the decision under review.

[6] The Crown in this case demonstrated patience and persistence in its ongoing engagement attempts with Kaska. There was no failure of the Crown in its consultation and accommodation obligations owing to Kaska except in one respect.

[7] The Crown failed in its duty to consult and accommodate in its treatment of the June 14, 2022 submission of Kaska. The failure of the Decision Bodies to respond directly to Kaska about this document before issuing the Decision Document was not reasonable in all of the circumstances. The remedy is to refer the decision to the Decision Bodies for consultation on the June 14, 2022 submission.

BACKGROUND

The Project

[8] The proposed open pit and underground copper, lead, and zinc mine is proposed to be located on lands within Kaska traditional territory, approximately 260 kilometres

northwest of Watson Lake, Yukon, 115 kilometres southeast of Ross River, and 24 kilometres south of Finlayson Lake, within the Pelly Mountain Range.

[9] BMC proposes to mine approximately 5,500 tonnes of ore per day, for an approximate production of 180,000 tonnes of zinc, 60,000 tonnes of copper, and 35,000 tonnes of lead concentrates each year for 10 years. The time between construction and conclusion of closure monitoring is expected to be approximately 38 years.

[10] BMC has named the Project Kudz Ze Kayah, meaning caribou country in Na'hani' Dena language. This is the same name that Kaska call the land where the Project is proposed to be located.

Kudz Ze Kayah Lands

[11] The Kudz Ze Kayah Lands (“KZK Lands”) are a core area of Kaska traditional territory. While the KZK Lands do not have specific boundaries, they lie within the range of the Finlayson Caribou Herd (“FCH”), and specifically at the confluence of the FCH post-calving, rutting, and winter ranges. The FCH belongs to the Northern Mountain population of woodland caribou, listed as a species of special concern in Schedule 1 of the *Species at Risk Act*, SC 2002, c 29 (“SARA”). The KZK Lands are significant to Kaska not only because of harvesting FCH, but also because of harvesting other large game, fishing, trapping, gathering, and trading. There are several sacred burial sites in and around KZK Lands, and it contains trails of importance. The KZK Lands are close to three abandoned mine projects – Wolverine, Ketzka River, and Faro. The KZK Lands are also surrounded by a large number of active and historical mineral claims and tenures.

The Parties

[12] The petitioner, RRDC, is a “band” within the meaning of the *Indian Act*, RSC 1985, c I-5, and an “Aboriginal people” within the meaning of s. 35(1) of the *Constitution Act, 1982*.

[13] RRDC brings this petition on behalf of all citizens of the Kaska Nation and the Kaska Nation itself. The Kaska Nation includes RRDC, Liard First Nation (“LFN”) including Daylu Dena Council, Dease River First Nation, and Kwadacha Nation. These First Nations are located in both the Yukon and British Columbia. Kaska traditional territory is in southeastern Yukon and extends into northern British Columbia and the western Northwest Territories. RRDC, whose main community is Ross River, and LFN, whose main community is near Watson Lake, are the two First Nations who are geographically the closest to the proposed mine.

[14] The Kaska includes members called Pelly Banks – they originate from the Kaska region that includes the headwaters of the Pelly, Hoole, Nahanni, Campbell, Black, and Hyland Rivers watershed areas. Pelly Banks is not a separate First Nation but are members of the Kaska Nation.

[15] None of the members of the Kaska in the Yukon is a signatory to the Umbrella Final Agreement (“UFA”) in the Yukon. The Kaska specifically rejected a treaty-based land claim agreement based on the UFA. The Kaska claim Aboriginal rights and title within their traditional territory.

[16] The Government of Yukon represents the Deputy Minister, Executive Council Office for the Yukon, the delegate of the member of the Executive Council of Yukon designated as the territorial minister for the purposes of the YESAA, and one of the

Decision Bodies. It is a Decision Body because various departments of the Government of Yukon will be required to issue regulatory authorizations or permits for the Project.

[17] The Attorney General of Canada represents the two federal Decision Bodies, Natural Resources Canada (“NRCan”) and Fisheries and Oceans Canada (“DFO”). NRCan is required to consider the authorization of a licence under the *Explosives Act*, RSC 1985, c E-17, and Regulations because the Project includes the manufacturing and storage of explosives, including the construction and operation of a bulk explosives plant by the Project’s explosives supplier. DFO is required to consider the issuance of an authorization under the *Fisheries Act*, RSC 1985, c F-14, in order to allow a proposed work, undertaking, or activity that would otherwise contravene the prohibition against the harmful alteration, disruption, or destruction of fish habitat under the *Fisheries Act*.

[18] The federal Decision Bodies were supported in meeting their consultation obligations by the Canadian Northern Economic Development Agency (“CanNor”), specifically its Northern Project Management Office (“NPMO”). The Attorney General of Canada also represents CanNor. In its role as Crown Consultation Coordinator it:

- identifies the Indigenous groups that are potentially adversely affected by the Project proposal and assesses the scope of the Crown’s duty to consult based on project location, extent of adverse impacts, and Crown knowledge of asserted or established Aboriginal rights in that area;
- facilitates early and meaningful participation of the Indigenous groups in the YESAA process;
- corresponds with Indigenous groups throughout the assessment process to explain the federal approach to consultation and to encourage Indigenous groups to provide comments about impacts on their rights in the assessment process; and

- maintains the consultation record, which is a compilation of all documents including correspondence and meeting notes of Crown consultation, and which assists in tracking the issues, comments, and concerns raised by Indigenous groups as well as provides a basis for analysis by CanNor and the Decision Bodies of the adequacy.

[19] BMC and BMC's parent company, BMC (UK) Limited – a private United Kingdom-based company – are engaged in the assessment, acquisition, and development of base metals projects. BMC purchased the Project from Teck Resources Limited on January 14, 2015. As a single-project entity, BMC's only asset is the Project.

The YESAA Process

[20] YESAA, the environmental and socio-economic assessment legislation applicable to development projects proposed in the Yukon, was created as a result of the commitment in Chapter 12 in the UFA. The purposes of YESAA are set out in s. 5(2) of the statute as follows:

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

- (g) to guarantee opportunities for the participation of Yukon Indian persons - and to make use of their knowledge and experience - in the assessment process;
- (h) to provide opportunities for public participation in the assessment process;
- (i) to ensure that the assessment process is conducted in a timely, efficient and effective manner that avoids duplication; and
- (j) to provide certainty to the extent practicable with respect to assessment procedures, including information requirements, time limits and costs to participants.

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

[22] 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 Executive Committee because the regulations required it.

[23] The YESAA assessment is designed as a planning tool. Once the Executive Committee has concluded its evaluation of a project, it recommends one of the following:

- the project proceed without a review if it determines no significant adverse environmental or socio-economic effects;
- the project proceed without a review 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 and not be subject to a review if it determines the project will have or is likely to have significant adverse environmental or socio-economic effects that cannot be mitigated;
- the project be referred to a review by a panel of the Board if after taking into account any mitigative measure in the project proposal, it cannot determine whether the project will have or is likely to have significant adverse environmental or socio-economic effects (s. 58(1)).

[24] 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. It may be a territorial minister or agency, a First Nation, or a federal minister or agency, and it must issue a decision document that accepts, rejects, or varies the YESAB recommendation. The decision document is a form document designed to meet *YESAA* requirements. It outlines the decision and the reasons for rejecting or varying any recommendation, including recommended terms and conditions (s. 75 of *YESAA*).

[25] 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 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 (such as RRDC and LFN) about significant socio-economic and environmental adverse effects of a proposed project in the First Nation's traditional territory (s. 74(2) of *YESAA*). Thus in this case, the Decision Bodies were under a

statutory obligation to consult with the Kaska under YESAA, in addition to the constitutional obligation to consult them at common law.

[26] Section 3 of YESAA defines consultation:

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

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

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

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

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

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

[27] Section 75 requires a decision body to issue a decision document within the prescribed period, set as 30 days with the possibility of a seven-day extension.

[28] A chart attached as Appendix A prepared by and publicly available from YESAB sets out the time stages and time frames for Executive Committee review and recommendation.

[29] In this case, 1,916 days passed between the date BMC submitted its Project proposal to YESAB and the issuance of the Decision Document in June 2022.

Extensions to the various participants at various stages in the process were granted as follows:

- BMC – from January 16, 2020, to January 30, 2020;
- BMC – from January 30, 2020, to February 12, 2020;
- LFN – from February 14, 2020, to May 31, 2020;

- Decision Bodies to facilitate Kaska consultation at RRDC's request – from December 11, 2020, to January 22, 2021;
- Decision Bodies to facilitate Kaska consultation – from 37 days after March 29, 2021, to June 15, 2022.

Crown Consultation Approach

[30] Both governments wrote to LFN and RRDC in the early days of the Project proposal to advise them they would be relying, to the extent possible, on the assessment process under *YESAA* to assist in their duty to consult. The Yukon government requested comments or feedback from the First Nations to be provided to them or *YESAB* about this approach and received none.

[31] There were three reasons for relying on the *YESAA* process to assist in the Crown consultation obligations:

- a) the *YESAA* process is designed to consider the potential adverse environmental and socio-economic effects of a project in addition to the interests, perspectives, and views of First Nations. While *YESAB* does not directly assess or make findings about a project's impacts on asserted or established Aboriginal or Final Agreement rights, those rights help to inform or guide the choice of Valued Environmental and Socio-economic Components ("VESECs") used in a *YESAB* assessment. The rights also provide relevant context to determining the significance of likely adverse effects on identified VESECs;
- b) the direct participation of Indigenous people in the *YESAA* process is a significant component of the assessment, especially given the stated purposes of the statute to protect and promote the well-being of Yukon Indian persons, to guarantee opportunities for their participation, and to make use of their knowledge and experience in the assessment process; and
- c) the assessment process includes the submission of a detailed project proposal, supplementary information requests, public comment periods, exchange of information among all parties, and opportunities for First Nations to raise concerns directly to the Executive Committee during the stages of adequacy and screening.

[32] In addition to relying on the procedural aspects of the YESAA process, particularly to obtain information – technical and otherwise – about the Project and its potential adverse effects, both governments advised Kaska they would consult directly with them. This consultation included ensuring the Decision Bodies understood First Nation concerns about the Project adversely affecting their asserted rights and title and the possibility of mitigating those concerns, as well as addressing concerns or questions about the assessment process, including the legislative framework, and the consultation process.

[33] The information provided to YESAB for this Project assessment occurred over a five-year period and consisted of almost 20,000 pages of documents. All documents were posted publicly and available for comment. These included 49 technical reports related to wildlife, water, and closure of the proposed mine. There were also many other letters and submissions from RRDC, LFN, Liard Aboriginal Women’s Society, Health Canada, Environment and Climate Change Canada (“ECCC”), Yukon, Natural Resources Canada, CanNor, and BMC. BMC also responded to six information requests from the Executive Committee. Some of those responses were over 800 pages long. Comments on the BMC responses were provided by various groups.

[34] The federal Decision Bodies and CanNor’s consultation and engagement with Kaska during this time was summarized in the Crown Consultation Assessment Report (“CCAR”), prepared by CanNor in collaboration with the Decision Bodies. Generally, a CCAR is an internal document prepared to assist federal decision-makers in their decision-making in relation to a specific project, and in the North is not shared outside of the federal Crown: such reports are treated as confidential. It contained a summary of

the First Nations participation in the assessment process; a summary of Canada's consultation and engagement with the First Nations; the record showing the consultation and engagement; a document tracking the issues raised by the First Nations called Indigenous Issues Tracker; and a summary of BMC's engagement with the First Nations. The Issues Tracker was shared with Kaska on a regular basis during the assessment and consultation process.

Funding to Kaska

[35] RRDC and LFN received or were offered funding from several sources to assist in their participation in the Project assessment and consultation in general. The following is a summary:

[36] Federal Funding:

- \$260,000 annually to each of RRDC and LFN to assist in any Project assessments under YESAA, to be allocated at the discretion of the First Nation;
- \$150,000 to LFN from the Northern Participant Funding Program for Project assessment 2019-20; RRDC did not submit a funding application for this funding although they were offered assistance with application process; and
- \$108,154.45 to Liard Aboriginal Women's Society from the Northern Participant Funding Program for Project assessment 2019-20.

[37] Yukon Funding:

- \$150,000 to be used by LFN for logistical and administrative support during assessment and regulatory stages of Project – \$10,000 provided in September 2019 and the remaining \$140,000 to be paid in accordance with workplan and budget to be provided by LFN; after three extensions, the agreement to fund expired without a request from LFN for the remaining \$140,000; and
- \$270,000 offered to RRDC to cover expenses in 2021-22 fiscal year including consultation and engagement on major projects – \$232,624.22 provided to RRDC with the remainder available but unused.

[38] BMC Funding:

- BMC committed over \$880,000 but not all was used;
- \$387,750 for three services agreements with Dena Cho Environmental and Remediation Inc. (“Dena Cho”), a 100% owned RRDC environmental consulting company to review the Project and provide input to BMC on management plans;
- \$41,000 to fund a work plan designed by RRDC to gather and prepare traditional knowledge for BMC;
- \$413,425 committed to LFN to conduct a Kaska-Centric review of the Project - \$206,000 paid in August 2019 and LFN confirmed it had adequate funds for this purpose in January 2020; and
- Up to \$210,000 offered to RRDC and LFN on March 24, 2021, to develop a caribou management plan and/or for negotiations to amend or modernize the Socio-Economic Participation Agreement; no response to this offer received from Kaska.

Procedural History

[39] The decision being judicially reviewed was jointly made by the three Decision Bodies - Yukon government, NRCan, and DFO - on June 15, 2022, as required by YESAA after the Executive Committee issued their Screening Report. The decision allowed the Project to proceed to the regulatory processing stage. It contained 38 terms and conditions and two monitoring measures directed primarily to BMC and to the Yukon government. The general process by which this decision was arrived at is as follows.

[40] The Project proposal was submitted by BMC to the Executive Committee of YESAB in March 2017. Before this date, and beginning in 2014, BMC spent time engaging with Kaska to explain the Project proposal and address their concerns, as required by YESAA. The assessment process in this case had five stages:

- **Adequacy – March 17, 2017 – January 9, 2018** – The Executive Committee determined whether applicable rules under YESAA were complied with by the proponent in its submission of the Project proposal.
- **Screening – January 9, 2018 – October 21, 2020** – Draft and Final Screening Reports prepared by the Executive Committee after review and evaluation of all information and views submitted. On October 21, 2020, the Executive Committee set out their recommendation in a Screening Report that the Project proceed subject to specified terms and conditions for the purpose of mitigating potential adverse effects.
- **First Decision – October 21, 2020 – January 30, 2021** – Decision required from the Decision Bodies either accepting the recommendation of the Executive Committee in a decision document, or referring it for reconsideration to the Executive Committee, or to a panel of YESAB for review. On January 22, 2021, federal Decision Bodies referred the recommendation to the Executive Committee for reconsideration because:
 - i) there was insufficient explanation of the supporting analysis as to why the recommended mitigation measures would sufficiently eliminate, control, or mitigate the associated significant adverse effects; and
 - ii) there was insufficient explanation of how First Nation interests, including from a rights perspective, were considered within the analysis in the recommendation.
- **Reconsideration – February 1, 2021 – March 29, 2021** – The Executive Committee reconsidered its recommendation and requested, received, and reviewed new information provided during that period, including nine documents recording engagement by or communications with Kaska in the areas of potential impacts of the Project on Kaska rights and the FCH on the basis of traditional knowledge. There were also multiple communications from the community. On March 29, 2021, the Executive Committee concluded it could not issue a new recommendation within the time period prescribed by YESAA, because the four members were deadlocked 2-2. Three Executive Committee members had initially conducted an evaluation of the Project and issued a Screening Report. A fourth Executive Committee member was appointed and added to the group who issued the Referral Conclusion. The four-member Executive Committee was unanimous that the proposed Project would result in significant adverse effects, but did not agree on whether those effects could be adequately mitigated by the application of terms and conditions such that they would no longer be likely adverse and significant. As a result, under s. 77(2) of YESAA, the Executive Committee was deemed to

have made the same recommendation as set out in the Screening Report of October 21, 2020, before the reconsideration request had been made.

- **Second Decision – March 29, 2021 – June 15, 2022** – Decision Bodies were required (s. 77(3) of YESAA) to issue a decision document accepting, rejecting, or varying the recommendation. The YESAA regulations/rules prescribed a time period of 30 days plus a possible extension of seven days for a decision. On June 15, 2022, more than 14 months after the Executive Committee Referral Conclusion, the Decision Bodies issued the Decision Document, the subject of this judicial review. This was done after RRDC and LFN submitted a 26-page letter with 22 pages of appendices on June 14, 2022.

[41] Throughout this five-year time period there was a large amount of information exchanged and provided to the Executive Committee. Many meetings were held amongst the various stakeholders, including First Nations. There were multiple emails and other correspondence exchanged amongst the stakeholders and provided to the Executive Committee in order to complete the required assessments, recommendations, and decisions at each stage. The sheer volume of that information and correspondence is evidenced from the 33-page chronology prepared by the Attorney General of Canada of the key events and communications, based on all of the source documents produced in this proceeding.

[42] For the purpose of this decision, I will include in the analysis portion factual summaries relevant to the issues raised by the petitioner including reference as necessary to documents and meetings. I have read and considered each party's description of the procedural history in their affidavits and outlines in coming to my decision.

Role of BMC

[43] The petitioner objects to the Court's consideration of BMC's involvement with Kaska. The petitioner says BMC's submissions about their engagement with Kaska and

any documents in support cannot be relied on in any assessment of the duty to consult and accommodate because the Crown did not delegate any consultation responsibilities to BMC.

[44] I agree with BMC's response to this objection that information about BMC's engagement with Kaska is relevant context to be considered by this Court in assessing adequacy of consultation. Early engagement by BMC with Kaska about the Project provided the First Nations with valuable and necessary information that facilitated the Crown consultation process. BMC also provided significant funding to Kaska enabling them to submit Kaska-Centric Independent Peer Reviews ("KCIPR") during the assessment process; allowing Dena Cho to review the Project; and allowing Kaska participation, including Liard Aboriginal Women's Society, in the Project assessment.

[45] The engagement of BMC with First Nations is also required by statute. *YESAA* mandates the proponent to consult with First Nations in whose traditional territory the project will be located; and for *YESAB* to be satisfied that this has been done. *YESAB* must also be satisfied that the proponent has taken into account the significance of environmental or socio-economic effects of the Project. *YESAA* further requires that the proponent take into consideration alternatives or mitigations that may avoid, minimize or compensate for significant adverse environmental or socio-economic effects; in addition to considering the need to protect the rights of Yukon First Nations under Final Agreements (not relevant here), the special relationship between Yukon First Nations and the wilderness environment of the Yukon, and the cultures, traditions, health and lifestyles of Yukon First Nations and other Yukon residents (ss. 50(2), (3), and 42 of *YESAA*).

[46] As part of the assessment process, the engagement of BMC with Kaska was known to the Decision Bodies because of their reliance on the assessment process for some of the procedural aspects of consultation.

[47] Documents submitted by BMC on this judicial review that were not part of the YESAB registry, are still admissible as part of the background and context to this petition (*Delios v Canada*, 2015 FCA 117 at para. 44). Understanding the scope and type of engagement between BMC and Kaska is relevant to the Crown consultation process because it shows some of the information and assistance available to Kaska for the purposes of consultation.

Summary of Decision Under Review

[48] The Decision Document issued jointly on June 15, 2022, stated the Decision Bodies agreed with the Executive Committee's recommendation that the Project be allowed to continue to the regulatory processing stage without a review. However, they made changes and additions to the terms and conditions recommended by the Executive Committee. The Decision Document was 46 pages with a seven-page appendix. It summarized Crown consultation with Kaska and referenced issues raised in the June 14, 2022 Kaska submission 10 times.

[49] The Decision Document proposed 38 conditions: 25 of which were recommended in the Screening Report and accepted by the Decision Bodies; five of which were varied by the Decision Bodies from those set out in the Screening Report; and eight of which were new conditions added by the Decision Bodies. The Decision Document addressed the key substantive issues by listing them, summarizing the potential effects, and setting out the mitigation measures to address the potential

effects. Those issues were: FCH; water resources and aquatic life; air quality; traditional land use; economic feasibility of the Project; cumulative effects; and personal safety and well-being.

[50] The new and modified terms and conditions related to water quality, air quality, caribou effects monitoring and effluent standards, and included extensive mitigation measures for the FCH (see Appendix B).

ISSUES

[51] The first issue is whether Yukon and Canada failed to consult Kaska reasonably and accommodate them by not engaging in a meaningful two-way dialogue in the following ways:

- i) failed to consult on all possible decision outcomes on the Project and instead consulted only on varying the terms and conditions;
- ii) improperly narrowed the scope of consultation by: a) focussing disproportionately on impacts to the FCH to the exclusion of other Kaska concerns; b) did not adequately consider the impact of the Project on cumulative effects; c) failed to consider Kaska-led parallel assessment processes, that would fill in the gaps of the YESAA assessment process; d) failed to consult meaningfully on Kaska jurisdiction and legal orders; and e) failed to consider the input of Kaska Elders and in particular the conditions developed for the Project by Elders in 2017;
- iii) failed to consider and meaningfully grapple with the June 14, 2022 submission by RRDC and LFN; and
- iv) improperly deferred consultation to the regulatory phase of the Project, after YESAA approval.

[52] The second issue is whether Yukon and Canada breached the duty of procedural fairness owed to Kaska by:

- i) imposing an arbitrary decision date of June 15, 2022;
- ii) failing to take adequate time to fully and fairly consider the June 14 submission; and

iii) subjecting the June 14 submission to a rushed and unfair review process.

[53] The Decision Document was issued jointly and for the most part all three Decision Bodies were engaged in the consultation processes at the relevant times. Although the record shows some differences in the numbers and types of meetings and other correspondence between Kaska and each of Canada and Yukon, the petitioner has not differentiated between them. I will not do so either.

LEGAL PRINCIPLES

Nature of Judicial Review and Standard of Review

[54] 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]

[55] 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).

[56] The presumptive standard of review in a judicial review is reasonableness (*Vavilov* at paras. 23-32). The parties in this case agree that the standard of review here is reasonableness. The Supreme Court of Canada in *Vavilov* identified certain exceptions to the reasonableness standard, none of which applies here. The issues on judicial review involve an assessment of the adequacy of consultation and accommodation as well as whether there was procedural fairness. The correctness standard applies to a review of the legal questions of the existence, extent, and content of the duty to consult. These are not a matter of dispute in this case. All parties agree that Yukon and Canada have an obligation to consult Kaska about their conduct in issuing authorizations for the Project and that deep consultation is required.

[57] Reasonableness requires that a reviewing court not substitute its decision for that of the administrative decision-maker, but instead ensures the reasoning process and the outcome are transparent, intelligible, and justified (*Vavilov* at para. 15). As stated by the Supreme Court of Canada in *Vavilov* at para. 83:

It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. ... Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable. [emphasis in original]

[58] In the assessment of reasonableness, context is important and may constrain whether a decision is reasonable. Reasonableness “takes its colour from the context” and “must be assessed in the context of the particular type of decision making involved and all relevant factors” (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para. 59; *Catalyst Paper Corp. v North Cowichan (District)*, 2012 SCC 2 (“*Catalyst*”) at para. 18). In other words, the circumstances, considerations, and factors in particular cases influence how courts go about assessing the acceptability and defensibility of administrative decisions (*Catalyst* at para. 18; *Doré v Barreau du Québec*, 2012 SCC 12 at para. 54; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para. 44). An example of relevant context that informs a reasonableness review is the existence of a duty flowing from the honour of the Crown (*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 (“*Coldwater*”) at para. 27).

[59] In *Vavilov*, the Supreme Court emphasized that a reasonableness review is to be conducted by appreciating the decision, the reasons for it, and the context in which it was made. This requires the reviewing court to consider the reasons offered in justification of the decision in light of the evidentiary record (*Coldwater* at para. 31).

Duty to Consult

[60] In this case, an assessment of the reasonableness of the decision requires an understanding of the duty to consult, as this is a significant part of the context of the decision at issue. Before a decision of this kind can be made, the Decision Bodies had to fulfill their common law duty to consult Kaska emanating from the honour of the Crown, as well as their statutory duty to consult Kaska under YESAA.

[61] The common law 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 Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (“*Haida Nation*”) at para. 35). In this case, the decision under review is Crown conduct that may adversely affect actual Kaska rights, of which the Decision Bodies have knowledge.

[62] The duty to consult with Aboriginal peoples and if necessary, accommodate their interests, is justiciable and grounded in the honour of the Crown. The achievement of reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown requires the Crown to act honourably in all its dealings with Aboriginal peoples (*Haida Nation* at paras. 16-17). The duty to consult, in turn, seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43).

[63] Here, the parties are agreed that the level of consultation owed by the Crown to Kaska is deep. Deep consultation is required because of the Kaska asserted rights and territory, the proximity of the Project to Kaska communities and the scope of the Project. The duty of deep consultation includes the requirements to discuss the consultation process, including whether there is a 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; and to advise of the course of action taken and why. Deep consultation requires written explanations capable of showing that the Indigenous group’s concerns were duly considered and sufficient to reveal the impact they had on the decision (*Haida Nation* at

para. 44). It is not the quantity but the quality of consultation that determines the substance of the depth of consultation (*Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68 at paras. 66-70).

[64] The Court in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 (“*Tsleil-Waututh Nation*”), stated at para. 499:

Meaningful consultation is not intended simply to allow Indigenous peoples “to blow off steam” before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, paragraph 54).

[65] The Court went on to state at para 501:

... [M]eaningful consultation is not just a process of exchanging information. Meaningful consultation “entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback.” Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation. This serious consideration may be demonstrated in the Crown’s consultation-related duty to provide written reasons for the Crown’s decision.

[66] The consultation process does not require agreement or a particular outcome.

The Crown is required to act in good faith to provide meaningful consultation, not a specified result (*Haida Nation* at para. 42; *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para. 37).

[67] Good faith is required by both Crown and Indigenous participants in the consultation process. Indigenous claimants must not frustrate the Crown’s reasonable good faith consultation attempts, nor should they take unreasonable positions to thwart government from making decisions where agreement is not reached despite meaningful

consultation (*Haida Nation* at para. 42). The duty to consult and, if appropriate, accommodate an Aboriginal right or interest is a two-way street (*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (“*Ktunaxa Nation*”) at para. 80).

[68] Part of the two-way street requires that all participants in a consultation process act diligently to advance their respective interests in a timely way as issues arise (*Coldwater* at para. 55).

[69] The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. Accommodation plays a role when an Indigenous group asserts a project should not proceed. However, it does not give Indigenous groups a veto over the proposed activity. Consent is required only for proven claims, and even then only in certain cases. What is required is a balancing of interests, a process of give and take (*Redmond* at paras. 45 and 48-50). The Supreme Court of Canada in *Ktunaxa Nation*, stated at para 83:

The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. ... While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.

[70] The court in *Redmond* described the balancing required where an Indigenous group does not want a project to proceed at para. 48:

Ultimately, the duty to consult is a process of “give and take.” Depending on the factual matrix before an administrative decision maker, sometimes this “process of balancing” inherent in the consultation process leads to the approval of

a project over a First Nation's outstanding concerns regarding its impacts on their spiritual practices: ... However, sometimes, as is the case here, it will be reasonable for a decision maker to take a different path: *Haida*, para. 48. Ultimately, "[r]easonable accommodation can include consideration of whether the project should proceed at all given its adverse impacts on Aboriginal rights." ... [citations omitted]

[71] As noted above in the quote from *Ktunaxa Nation*, consultation and accommodation do not guarantee a particular outcome. The Court in *Coldwater* at para. 58 expanded on this concept:

Like consultation, accommodation does not guarantee outcomes. It is an ongoing "give and take" process. One way to accommodate is to impose conditions on a project proponent, such as ongoing participation of Indigenous groups. ... Canada must act in good faith, but at the same time accommodation cannot be dictated by Indigenous groups. ... [citations omitted]

[72] Put another way, accommodation that does not meet the concerns of Indigenous groups does not necessarily mean that consultation was inadequate. The Court in *Coldwater* stated at para. 51:

The process of meaningful consultation can result in various forms of accommodation. But the failure to accommodate in any particular way, including by way of abandoning the Project, does not necessarily mean that there has been no meaningful consultation.

[73] Where adequate consultation has occurred, the concerns of the Indigenous group can be balanced against "competing societal interests" (*Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 ("*Chippewas of the Thames*") at paras. 59–60; *Haida Nation* at para. 50; *Tsleil-Waututh Nation* at para. 495).

[74] The Supreme Court of Canada in *Haida Nation* explained the standard for assessing whether the governments' duty to consultation and accommodate was met:

[62] ... Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": [R. v. Gladstone, [1996] 2 S.C.R. 723, at paragraph 170]. What is required is not perfection, but reasonableness. As stated in [R. v. Nikal, [1996] 1 S.C.R. 1013, at paragraph 110], "in [the aspects of] information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." ...

ISSUE #1: i) Failure to consult meaningfully on all decision outcomes

Introduction

[75] The petitioner argues that the Decision Bodies focussed on the option of varying the recommendations in the Screening Report through adding and modifying terms and conditions to the exclusion of other outcomes, and in particular, the outcome of rejection of the Project proposal. This focus of the consultation on approval of the Project to the next stage without considering the possibility that the Project could not proceed showed a failure to grapple fully with Kaska concerns.

[76] The Decision Bodies say all options remained open for consideration throughout the consultation period, including rejection of the recommendations in the Screening Report, and this was communicated repeatedly to the petitioner. Their preference to vary the terms and conditions was also openly stated. They unsuccessfully sought feedback on those modified terms and conditions from Kaska for many months. The responses and input of Kaska were expected to help the Decision Bodies assess whether the proposed mitigations were sufficient to address Kaska concerns. The Decision Bodies wanted that feedback first, in order to assess the usefulness of the

proposed mitigations, before considering the rejection option. They did not receive specific feedback on the mitigations until the submission of June 14, 2022.

Brief Conclusion

[77] The Decision Bodies did not fail to consider all outcomes. Rejection of the Project proposal remained a possibility throughout the consultation process, up to the June 14, 2022 submission. The explanations to Kaska of the consequences of rejection and why feedback from them on the modified terms and conditions was requested before rejection was considered were reasonable.

Facts

[78] Before the request for reconsideration by the federal Decision Bodies and the Referral Conclusion indicating a deadlocked Executive Committee, LFN requested on January 15, 2021, that the Decision Bodies reject the Project as proposed or refer it to a panel review because of its potential impacts to the FCH and Aboriginal rights. After further consultation with LFN and RRDC, the federal Decision Bodies referred the Screening Report recommendation to the Executive Committee for reconsideration on January 22, 2021.

[79] The Executive Committee Referral Conclusion, issued on March 29, 2021, stated that two of the four Executive Committee members were of the view that mitigations through terms and conditions could not sufficiently address the potential significant adverse effects of the Project, given the importance of the KZK Lands to Kaska and their asserted rights. They would not have recommended approval of the Project. The other two Executive Committee members also found the Project would have potential significant adverse effects, but they could be adequately mitigated through terms and

conditions. They would have recommended approval of the Project. They wrote in the Referral Conclusion: “The primary point of divergence between members was whether information received during the referral period was compelling and novel or largely reiterates and overlaps with previously submitted information”. The failure of the Executive Committee to agree on a recommendation meant that none was issued during the prescribed time period and the original recommendation in the Screening Report was deemed to have been made (s. 77(2) of YESAA).

[80] RRDC and LFN again raised the option of rejection of the Project as proposed after this Referral Conclusion, in writing and in meetings. During a meeting on April 9, 2021, LFN said it wanted to talk about all potential decision options, including a public panel review if appropriate. The federal Decision Bodies responded that a panel would add time to the review process and they had not discussed this possibility in any detail.

[81] On April 28, 2021, the Chiefs requested the Decision Bodies reject the recommendations in the Screening Report for reasons related to “the assessment process, the location of the Project, the sensitive nature of the Finlayson Caribou Herd (FCH), the significant cumulative effects, and the obvious deficiencies in the mitigation measures, which we view as insurmountable”. In that letter, the Chiefs also stated that a panel was no longer a viable option because it would revisit a project “already been revealed to be fundamentally flawed”. They also assumed that a rejection would result in the submission by the company of a new, redesigned project, which would allow proper consultation and accommodation to occur.

[82] In response, the Decision Bodies, by letter of July 5, 2021, requested a meeting with the Chiefs to discuss how variations to the recommended terms and conditions

they had been considering could adequately address Kaska concerns. A follow up letter was sent on July 16, 2021, after no response was received to the July 5 letter.

[83] By letter dated August 3, 2021, LFN agreed to meet to discuss proposals for varying the recommendations and options, but stated it was inappropriate for the Chiefs to meet with technical representatives of Decision Bodies. LFN advised they would assemble an appropriate team of technical experts for the meeting. They requested the Decision Bodies provide LFN with an outline and draft language of the proposed varying terms and conditions sufficiently in advance of the meeting for LFN to do its internal review.

[84] As requested, the draft of the modified terms and conditions was sent by the Decision Bodies to LFN by letter dated September 21, 2021, and to RRDC by letter dated October 5, 2021. Between October 5, 2021, and December 17, 2021, approximately 13 emails and letters were exchanged between the Decision Bodies and LFN and RRDC in unsuccessful attempts to set up a meeting to discuss the modifications.

[85] Finally, they met on January 13, 2022. They discussed capacity issues of the First Nations, the Chiefs' April 28, 2021 letter, cumulative effects in general terms, and the next steps in the process. The meeting was intended to discuss the modified terms and conditions but the time allotted was insufficient. The First Nations repeatedly asked at the meeting for a response to the Chiefs' letter proposing rejection of the Project, whether the process they suggested for the next steps after rejection would be followed and its effect.

[86] The Decision Bodies and CanNor explained at the meeting that if the Project were rejected, it would not proceed to the regulators, so no permits or licences would be issued for the Project. It would then be BMC's decision whether to proceed in a different way, such as by submitting a new project proposal for assessment. If a new proposal were prepared and submitted to YESAB, the assessor would consider whether it was a new project, that is, whether there was a material change from the rejected Project proposal, as YESAB cannot re-assess the same project.

[87] The Decision Bodies and CanNor further explained that the modified terms and conditions they developed were an effort to address the concerns raised about the Project and the FCH by Kaska. They stated:

- [The] modified terms were to hopefully improve what was put on the table to enable a broad consideration of all options before the regulators.
- Further discussions are important for Canada to make a decision, including whether there is sufficient information to continue moving forward.
- If the ultimate answer is that they are still unable to proceed given that mitigation measures are not sufficient to enable Kaska to provide consent - that puts them on a decision path for rejection/varying/approving.

[88] The Decision Bodies asked several times at the January 13 meeting for initial feedback on those terms and conditions. No feedback was forthcoming, even though technical experts consulting to the First Nations were present at the meeting. Instead, the focus of the First Nations continued to be on the failure of the Decision Bodies to respond to the Chiefs' letter proposing rejection and the process to follow. The Decision Bodies stated at that meeting their preferred approach at that time was to vary the

recommendation, but that all options were still available, pending the receipt of Kaska comments on the modified terms and conditions.

[89] On January 24, 2022, the Decision Bodies wrote to LFN and RRDC confirming they had not yet decided whether rejecting or varying would be the final decision. They confirmed that if rejection were chosen, it could not be assumed that BMC would choose to redesign and submit a new proposal. They repeated they preferred the proposed modifications as a way to address Kaska concerns related to the Project, specifically the FCH, cumulative effects and water quality. They requested a series of focussed meetings in January and February to determine whether further modifications could address concerns and stated they hoped to move forward with a decision in late February 2022. They concluded:

Ultimately, Decision Bodies are seeking to understand if LFN and RRDC continue to have concerns and the nature of those concerns, including whether Kaska Chiefs continue to recommend that the Project be rejected.

[90] LFN and RRDC responded by letter dated January 28, 2022, with a number of questions about reconciliation, the meaning of deep consultation, cumulative effects, and mine feasibility. They referenced again the “path forward” provided by the Chiefs in their April 28, 2021 letter, that is, rejection of the current Project and discussion about a newly designed project. In response, the Decision Bodies by letter on February 16, 2022, repeated much of what had been written in the January 24, 2022 letter. They again requested consultation meetings to discuss the draft modified terms and conditions and associated information package that provided explanations, implementation information, caribou data and science information. LFN responded that

the proposed meeting dates did not work for LFN and RRDC and they would propose a new date.

[91] On February 24, 2022, the Decision Bodies wrote to acknowledge the competing priorities and other capacity issues of the First Nations. They confirmed they would not make a decision at the end of February as they had hoped but would work towards a decision in March. They further stated they looked forward to discussion of the decision phase consultation and responses to Kaska questions about reconciliation and other matters; presentation and discussion of Kaska views on the draft terms and conditions; and discussion of additional consultation meetings.

[92] After one cancellation of a scheduled meeting on March 10, 2022, because of an RRDC election, the meeting was held on March 30, 2022. At that meeting, the Decision Bodies repeated the vary decision was their preferred option, that rejection was still available, and no decision had been made. This was stated several times. Tracey Sandgathe of DFO said that “any discussion about a reject of the Project must be focused on the question of whether or not the Project will have significant effects, and whether or not [Decision Bodies] agree or disagree that those effects can be mitigated”. Rinaldo Jeanty of NRCan responded to the repeated comments by LFN and RRDC that the terms and conditions had been developed unfairly behind closed doors saying:

... The intent was to take information provided by Kaska on the record since the beginning of the assessment process. It has never been absent of considering the views we’ve heard on the record throughout this entire process. What we’re trying to do now ... is to seek feedback directly related to the [terms and conditions] to make a determination together on whether what we’re proposing is responsive enough to what we have heard. The characterization of closed-door decisions without the input of Kaska is not reflective of the reality that transpired. The [terms and conditions] were

developed with the views heard on the record and we did the best we could to reflect these in the modified [terms and conditions]. Now through consultation we're trying to make sure we continue to listen and ask if there is room to improve or if there is misinterpretation of how we've tried to respond to the concerns on the record.

[93] The Decision Bodies confirmed at the March 30, 2022 meeting they had two preferred options. They wanted confirmation that the Kaska preferred option was reject. They suggested that modified terms and conditions be used as a starting point for the variation of the recommendation and "if we are considering the option for reject, that decision would need to be informed by why there are not mitigations available that would mitigate significant adverse effects and what we would need to consider ...". They asked again for Kaska's views and reactions on the modified terms and conditions as that would help them understand they could not proceed with them and perhaps the panel would be the best option. They also asked questions to Kaska about a panel review.

[94] The First Nations responded at one point "Kaska are not here to discuss the terms and conditions. They are here to discuss what is the information missing and what is the path forward, given that missing information". They repeated several times there was missing information.

[95] On April 27, 2022, the Decision Bodies sent another letter with attachments related to the FCH, mine economics and the regulatory process. They invited RRDC and LFN to another meeting to discuss the draft new and modified terms and conditions, as well as the information in the letter and attachments. They repeated that the Decision Bodies were considering the option to vary, although a final decision had not been made and they wanted to consult with LFN and RRDC about a Project

decision, inclusive of terms and conditions and supporting rationale. The Decision Bodies invited RRDC and LFN to two half-day meetings between May 17 and 19, 2022, to discuss the proposed draft terms and conditions, mine economics and the regulatory process, and the effects on the FCH and whether those could be mitigated through terms and conditions. No response was received until LFN sent emails dated May 10 and 20, 2022, asking for dates in June or July for a meeting.

[96] On May 25, 2022, the Decision Bodies sent another letter to Kaska indicating their intention to make a decision by June 15, 2022. The letter also stated they intended for the Project to proceed subject to the modified terms and conditions, but they still wanted to meet with Kaska, get their views and receive any information they wished to send. The letter contained information on further changes to the terms and conditions to incorporate advice they had received from ECCC, as well as commitments to continue consultation throughout the regulatory phase and life of the Project, including implementation of the terms and conditions.

[97] A meeting occurred on June 8, 2022, attended by the Decision Bodies, representatives from ECCC, the Chief of RRDC, officials from RRDC and LFN, legal counsel, and technical expert advisers to LFN. The First Nations had questions about the information from ECCC on the risk characterization of the FCH and all parties wanted to discuss next steps. One of the LFN technical consultants said they had questions on the modified terms and conditions and there was some discussion around those terms generally. The Decision Bodies stated several times that they intended to issue a decision on June 15, 2022, that the Project proceed to the regulatory stage, but they would take into account any new information supplied by the First Nations and it

would inform their decision. Any information from the First Nations received after June 15 would help inform further consultations throughout the regulatory stage.

Analysis

[98] The petitioner argues that the Decision Bodies failed to grapple with Kaska concerns and consider potential outcomes other than approval to proceed on varied terms and conditions. Specifically, the petitioner says they did not consider whether the Project should not proceed at all, given its adverse impacts on Kaska rights. The petitioner argues, based on *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (“*West Moberly*”) at para. 144, that reasonable consultation requires that not only had the Kaska position on rejection “been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable...”.

[99] The Decision Bodies were clear from July 2021 onwards that their preferred path was approval with varied terms and conditions. However, this position was not categorical, even up to May 25, 2022, when they announced their intention to make a decision on June 15, 2022. Until that date, the Decision Bodies stated repeatedly in letters and at meetings that all options except “accept” remained open. They addressed the First Nations’ position that the proposed Project be rejected by explaining the consequences: it would not proceed to the regulatory stage and there was no guarantee that BMC would make another proposal or even if it did that YESAB would accept it as a new project. The Decision Bodies also explained several times they wanted to hear views from Kaska on the modified terms and conditions first, as that would inform them

about whether mitigation of the adverse effects was possible. If not, then rejection would have to be considered.

[100] The multiple attempts of the Decision Bodies to obtain substantive responses from the First Nations to the modified terms and conditions was a reasonable approach to consultation. That information would assist them in determining a path forward – whether that involved acceptance of the proposed mitigations, further modifications, or the possibility of rejection of the Project.

[101] This case is not analogous to *West Moberly*. In that case, the decision-maker approved a coal mining project that would impact adversely the Burnt Pine caribou herd, the population of which was 11, and which the West Moberly First Nation had refrained from harvesting for the previous 40 years because of its precarious state. The decision-maker based its decision on the company’s “caribou mitigation and monitoring plan” in the face of the First Nations’ expressed concerns, which were supported by the government’s expert biologist. No explanation was provided to the First Nation of the rationale for the decision to approve, or why rejection of the project was unnecessary, impractical or otherwise unreasonable.

[102] Here, the modified terms and conditions with explanations, rationale, and supporting documents were provided to the First Nations in September and October 2021. The First Nations’ complaint that the modified terms and conditions had been developed unilaterally and “behind closed doors” was unreasonable. The Decision Bodies invited the Chiefs to discuss the development of the modifications in their letter of July 5, 2021. This invitation was rejected because of the inappropriateness of Chiefs meeting with technical representatives. The First Nations did not, however, suggest a

meeting between the technical representatives. Instead, they requested the Decision Bodies send the draft modified terms and conditions to them so they could confer with experts and respond at a meeting between technical representatives. Those modified terms and conditions were sent to the First Nations as requested at the end of September and early October 2021. They were developed on the basis of the concerns expressed by Kaska during the assessment and decision-making process and provided to them after they rejected a meeting to discuss them and asked for the draft to be sent to them.

[103] Consultation meetings were attempted by CanNor and the Decision Bodies for many months to discuss the modified terms and conditions. It was difficult to get Kaska to meet. Meetings eventually held on January 13, March 30, and June 8, 2022, were unsuccessful in obtaining any substantive responses from the First Nations about the modified terms and conditions. Nor were any Kaska responses forthcoming in writing, until the June 14, 2022 submission. Meanwhile, the Decision Bodies explained the consequences of Project rejection, and the need for Kaska feedback on the modified terms and conditions before rejection would be considered was clarified.

[104] From January 2021 to mid 2022, the Chiefs consistently requested the Decision Bodies reject the proposed Project. They were unwilling for many months to discuss in more than general terms any other possibility, despite receiving an explanation of how consultation on the proposed modified terms and conditions could lead to outcomes other than approval – i.e. rejection or a panel hearing – depending on the discussions. Those discussions could not occur because Kaska did not respond substantively on the modifications. The Decision Document refers to the Chiefs' position that the Project

should be rejected as designed and that modifications were considered to address their concerns.

[105] The duty to consult and accommodate imposes obligations on the Crown and the Aboriginal group. This was described in *Ktunaxa Nation*, where the court summarized *Haida Nation*:

[80] ...

- The duty to consult and, if appropriate, accommodate pending the resolution of claims is grounded in the honour of the Crown, and must be understood generously to achieve reconciliation (paras. 16-17).

...

- The duty to consult and, if appropriate, accommodate the Aboriginal interest is a two-way street. The obligations on the Crown are to provide notice and information on the project, and to consult with the Aboriginal group about its concerns. The obligations on the Aboriginal group include: defining the elements of the claim with clarity (para. 36) not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached (para. 42).

[106] The Court in *Coldwater* elaborated on the role of the Indigenous peoples being consulted:

[55] ... the case law is clear that although Indigenous peoples can assert their uncompromising opposition to a project, they cannot tactically use the consultation process as a means to try to veto it Tactical behaviour aimed at ensuring that discussions fail within the time available for consultation is not consistent with reconciliation and would, if tolerated, allow for the effective use of a veto right. [citations omitted]

[107] Here, the failure of Kaska to respond substantively to the modified terms and conditions provided by the Decision Bodies in the fall of 2021 was unreasonable. It frustrated the Decision Bodies' good faith attempts to mitigate the concerns expressed by Kaska. It was reasonable for the Decision Bodies to want to hear the substantive response of the Kaska to the modified terms and conditions before discussing rejection fully and considering it as an option. The Decision Bodies maintained an open mind including the possibility of rejection as an option.

ISSUE #1: ii) Improper narrowing of consultation

Introduction

[108] The petitioner argues the Decision Bodies narrowed consultation in the following ways: a) failed to consider and consult on the full spectrum of Kaska concerns and instead focused disproportionately on the FCH; b) did not adequately consider the impact of the Project on cumulative effects; c) failed to consult on a Kaska-led Indigenous assessment process; d) did not meaningfully consult on Kaska jurisdiction and legal orders; and e) did not facilitate or consider the input of Elders or the Elders' Conditions.

Brief Conclusion

[109] The Decision Bodies did not narrow consultation as alleged by the petitioner. They were open to and did hear all concerns raised by Kaska on all issues. They attempted to address the concerns in various ways – such as by referring the YESAB Screening Report for reconsideration, and developing modifications to the terms and conditions.

a) *Failed to consider and consult on all concerns of Kaska and focussed disproportionately on FCH*

Facts

[110] The petitioner acknowledged that the adverse impacts on FCH were a key concern for them but noted that the right to hunt caribou is only “one strand in a complex web of Kaska rights, including other hunting, stewardship, and governance rights”. More specifically, those rights are: harvesting of large game such as moose; fishing; trapping; harvesting and the use of animal pelts; harvesting of berries and plants; use of trails for seasonal travel throughout Kaska territory; protection of sacred burial sites in and around KZK Lands; trade and other commercial/economic right exercised on Project lands; the exercise of cultural and spiritual rights related to carrying out cultural activities on Project lands; and transmitting cultural knowledge specific to the Project area to maintain the continuity of Kaska culture. The petitioner says further their concerns about the economic and financial feasibility of the mine and the impacts of the Project on the health and safety of women and girls were not substantively addressed.

[111] At a consultation meeting held on April 1, 2021, just after the Referral Reconsideration was received, LFN stated “[t]he caribou issue is so important to Kaska, it is the crux of the issue with this mine as it’s proposed”.

[112] The Decision Bodies heard and understood the concerns raised by Kaska about the FCH and the other issues. This is clear from the Decision Document and the record. The issue is whether the further requirement of deep consultation was met. Was there meaningful dialogue on those issues and did the Decision Bodies consider altering the proposal in order to address the Kaska concerns?

[113] The Decision Document describes the key substantive issues of the Kaska under the following headings: FCH, water resources and aquatic life, air quality, traditional land use, economic feasibility of the project, personal safety and community well-being. The Decision Document states each of these substantive issues was considered in the decision-making process. During the consultation phase, the Yukon government on behalf of the Decision Bodies summarized the following activities as impacted by the Project: hunting; wildlife impacts; fishing; trapping; gathering plants for food and medicinal purposes; water (including quality, management, treatment and effects of toxic water on wildlife); air quality; travel and access (including to places where rights are exercised and ancient trails); traditional and current land use (including how changes could affect how rights are exercised); and cultural and spiritual concerns (including grave sites) community well-being and human health. These were replicated in the Decision Document, which also noted many of these issues were considered by the Executive Committee and discussion continued into the decision phase of the project.

[114] The Screening Report contained 30 terms and conditions. The Decision Document contained 38 modified terms and conditions – 25 of the Screening Report conditions were accepted; five were modified; and eight new ones were added. The following addresses the modifications for each of the subject areas.

Water Quality

[115] The Decision Document states that the Decision Bodies modified and added new terms and conditions to provide greater clarity around the analysis, monitoring, and mitigation measures to be implemented to ensure the long-term efficacy of water

treatment plans. The Decision Document noted the *Fisheries Act* authorization will require the development of a detailed offsetting plan to counterbalance any residual effects to fish and fish habitat not addressed through mitigation, including a long-term monitoring plan and the provision of a bond for the full cost of implementing and monitoring the offsets.

Air Quality

[116] The Decision Document set out a new term to address uncertainties in the characterization of air-quality-related health risks, confirm modelling predictions, and ensure that air quality monitoring and associated management plan requirements will be consistent with the appropriate federal and Yukon standards at the time of the Project operation.

Traditional Land Use

[117] The Decision Document refers to four terms and conditions (#12-15) that ensure First Nations involvement and participation in management plans; closure objectives; monitoring programs; environmental, cultural and heritage management programs; BMC-sponsored on the land cultural activities that promote sharing of Traditional knowledge and practices during the construction and operation of the mine; and up to 14 days unpaid leave to all Yukon First Nation employees to allow them to exercise Aboriginal rights on the land and to attend culturally important events.

[118] The Decision Bodies considered the LFN KCIPR memos and Interim Report that were not reviewed by the Executive Committee before it released the Screening Report. The LFN documents informed the variations and additions to the terms and conditions related to caribou, water quality, and air quality. “The variations to the terms and

conditions were made to further enable the collection, consideration and integration of Kaska traditional knowledge and traditional land use information into future regulatory processes, caribou range management and Project operations”.

Health and Safety of Women and Girls

[119] The Decision Document accepted without variation nine terms and conditions recommended by the Executive Committee related to safety of women and girls. They included:

- mandatory regular harassment prevention training for all BMC’s employees, contractors and consultants at the mine site;
- provide training to human resources staff to assist in supporting workplace harassment reports and provide information to new employees on how to record and provide evidence of harassment and bullying as well as protection from reprisals;
- mentor program for First Nation employees to assist with voicing concerns and addressing negative experiences especially related to a male-dominated work environment, with LFN and RRDC involvement in program development;
- development with experts and LFN and RRDC of gender appropriate and gender and sexuality specific policies and processes to promote a safe, respectful and inclusive environment for women and gender minorities;
- development with an expert of an anti-harassment and anti-bullying policy;
- mental health training for short term or crisis support at the mine site for the on-site First Aid or Emergency Medical technicians;
- ensure employees can use the employment assistance program services available and they know their dependents have access;
- provide resources, supports, and safety plans for employees who are victims of domestic abuse;
- development of standards for behaviour at work and codes of conduct to prevent sexual harassment, gender-based violence at the site and in the broader community, including distribution of education and awareness materials on gender-based violence.

[120] The Decision Bodies also considered concerns brought forward by the Liard Aboriginal Women's Society during their submissions to the Executive Committee and the public comments period of the reconsideration of the Screening Report.

Economic Feasibility of Mine

[121] This was an issue for the First Nations for two articulated reasons: concern arose when BMC refused, for financial reasons, to accede to the Elders' condition of road closure for two months during caribou migration; and the spectre of another abandoned mine in Kaska traditional territory remained real, given the track record of failed mines and the Kaska belief that governments exercised insufficient due diligence in authorizing them. The First Nations sought to have the financial viability and security assessment done during the YESAA stage, rather than waiting for the regulatory stage.

[122] LFN had sought independent assurance of the financial viability of the Project by commissioning its own report (the "Golder Report") that reviewed BMC's June 19 technical report. Legal counsel for LFN had characterized its conclusion as the apparent existence of a "narrow bandwidth for this to be a profitable mine and be cleaned up". BMC released an updated feasibility study in December 2020.

[123] This issue was discussed at meetings on April 1, 2021, and March 30, 2022, among the federal Decision Bodies, LFN, and RRDC, and in the April 27, 2022 letter from the Decision Bodies.

[124] It was made clear to Kaska that the YESAA process is limited to a socio-economic and environmental assessment, and it does not include economic feasibility. However, the Executive Committee can and did in this case make recommendations in the terms and conditions about security to be provided by BMC. They were: i) BMC

maintain in trust a transition fund with sufficient funds for affected employees from Watson Lake and Ross River if there were an unscheduled closure; and ii) requirements that BMC take into account potential care and maintenance costs necessary to maintain environmental protection in the event of temporary or permanent closure. These terms and conditions were accepted and not varied by the Decision Bodies in the Decision Document. The Decision Bodies stated that if mitigations were necessary they would be applied, regardless of cost or viability.

[125] The Yukon government explained to the First Nations at the March 30, 2022 meeting that security reviews to ensure sufficient monies for mine reclamation and closure were part of the licensing process. The detailed, lengthy regulatory reviews for a mining licence and a water licence would include consultation with First Nations and require rigorous feasibility studies for ore deposit evaluation, final mine planning, and project financing investment.

Analysis

[126] Consultation, especially deep consultation, requires more than an identification and understanding of the issues of concern. Deep consultation requires a demonstration that the concerns were considered in the decision-making process. A review of the record shows that concerns related to water, air, traditional land use, community well-being, and health and safety of women and girls, were addressed in the Executive Committee recommended terms and conditions or added to them in the Decision Document.

[127] On the issue of economic feasibility, discussion occurred, positions were exchanged, and an explanation provided by the Decision Bodies for the constraints on

their ability to consider this factor at this stage; that is, the YESAA assessment process does not include an economic viability assessment. However, the regulatory stage sets out rigorous processes and requirements for provision of security. Changes from YESAA to another kind of assessment process would require a much broader discussion at many levels of government. These were reasonably and legitimately beyond the scope of this Project assessment.

[128] While not every issue was discussed as fully as the concerns about the FCH, there was a reasonable level of deep consultation on these issues. This is demonstrated by the thoroughness of the information exchanged and provided to the Executive Committee; the additional information provided, reviewed and considered during the reconsideration and decision stage; the discussions and letter exchanges that occurred throughout the assessment process and especially between January 2021 and June 2022 on specific issues; and perhaps most significantly, the terms and conditions and the additions and modifications to them by the Decision Bodies. There is no requirement for decision makers to address every argument or every issue (*Ktunaxa Nation* at para. 139; *Bigstone Cree Nation v Nova Gas Transmission Ltd*, 2018 FCA 89 (“*Bigstone Cree Nation*”) at para. 65) in order for consultation to be reasonable.

b) Failed to adequately consider cumulative effects

Introduction

[129] The petitioner says throughout the consultation period, Kaska raised concerns about the cumulative effects of the intensification of industrial development in and around the KZK Lands and throughout Kaska’s traditional territory, including on the FCH

and on other aspects of Kaska rights. The cumulative effects result from abandoned mine projects and historical quartz claims and tenures in the same area.

[130] The petitioner agrees that the Decision Document and letter of June 24, 2022, demonstrated the Decision Bodies' acknowledgement and understanding of the cumulative effect concerns. The petitioner says the Decision Bodies correctly concluded there were information gaps and uncertainties and broader study was required. The complaint of the First Nations is that the Decision Bodies failed to grapple with the problem of cumulative effects at the critical stage of assessment and were not prepared to amend their preferred course of action. They should have attempted to identify the existing level of cumulative effects on the FCH, what the threshold is for the maximum level of industrial development in Kaska territory to enable them to exercise their rights, and whether that threshold may be reached with this Project.

[131] The petitioner says this failure contravenes legal authority described in the case of *Yahey v British Columbia*, 2021 BCSC 1287 ("*Yahey*"), where the government decision-maker was found to have infringed the Aboriginal rights set out in the historic Treaty 8 that governs the relationship between the government and the Blueberry River First Nation. The court found that part of the reason for the infringement was the government's failure to establish a firm threshold or limit on industrial development to reduce cumulative effects and to plan about what would occur if the threshold were reached. In this case, the petitioner says the Decision Bodies similarly failed to identify thresholds for the cumulative level of industrial development and impacts to FCH in Kaska territory.

Analysis

[132] The objective of the new and modified terms and conditions was to address and respond directly to the First Nations' concerns about cumulative effects. The Decision Bodies proposed new and modified terms and conditions related to water quality and management, air quality, traditional land use in addition to the FCH conditions. They are interconnected and together are anticipated to be a means to address cumulative effects.

[133] In particular, the modified terms and conditions related to FCH clarified data collection, review and sharing among the FCH Oversight Committee ("FCHOC") regulators, and wildlife managers. The purpose was to enable more responsive mitigations by the Project and governments if required, to address adverse changes created by environmental conditions or effects of development. This was a strengthening of the adaptive management approach, helping to minimize the Project's potential contribution to cumulative effects. The requirement for the Yukon government to develop the FCH management plan with Kaska input, including identification of offsetting measures, was a way to address uncertainties related to cumulative effects of other activities and the Project on the FCH.

[134] The Decision Bodies also had the benefit while considering this issue of the comprehensive scoping and assessment of cumulative effects including analysis, mitigation and significance determination done by BMC. This was part of the Project proposal and was also submitted as an updated document in answer to the following Information Request from YESAB: "Provide information on the past and current environmental and socio-economic effects of previous mine closures (planned or

unplanned closures) on the Liard First Nation, Ross River Dena Council, and the residents of Ross River and Watson Lake to the extent that effects are unique to the community”.

[135] The principles and conclusions set out in *Yahey* are not directly applicable because of contextual and factual differences: *Yahey* was a treaty infringement trial; and the degree of industrial development in the First Nations territory was much higher than in this case. Here, there is no treaty, and the evidentiary record and legal analysis in a duty to consult case without a treaty are different. There is no obligation to make a determination of a breach of fiduciary duty or promises made in a legal and constitutional document.

[136] This distinction does not diminish the real potential for cumulative adverse effects in Kaska traditional territory. There are asserted Kaska Aboriginal rights that may be impacted by cumulative effects, and it is one of the issues raised and to be grappled with in the context of this Project. This was recognized by the Decision Bodies, and in their view addressed by the modified and new terms and conditions. The adaptive management approach proposed through the modified terms and conditions allows for adjustments to be made as more information about the areas of impact is gained. The Decision Document recognized that broader study of this issue was required and committed to doing so.

[137] RRDC referred to the land use planning process they had proposed in 2014 as an approach to addressing cumulative effects. This proposal is addressed in the following section.

[138] The Decision Bodies did not ignore or fail to grapple with the issue of cumulative effects. By seeking to impose terms and conditions that promoted, facilitated, and allowed for adaptive management approaches, as well as committing to further study and consultation, the Decision Bodies put reasonable safeguards in place, in response to Kaska concerns.

c) *Refusal to consult on Kaska-led Indigenous assessment process or Kaska-led assessments*

Introduction

[139] The petitioner argues that the Decision Bodies did not consult on Kaska assessment processes. Specifically, the petitioner says RRDC recommended that the Yukon government apply Tu-Lidlini, a process grounded in Kaska Indigenous laws and customs, as a parallel process to the YESAA process, to address its shortcomings. The petitioner says the Decision Bodies never responded to this request and did not mention Tu-Lidlini in the Decision Document. The petitioner says meaningful consultation meant the Decision Bodies should have discussed with Kaska whether it was possible to implement Tu-Lidlini for this purpose and this did not occur.

[140] The petitioner says another failure was the lack of discussion about Gu Cho Ka-ka Dee, a comprehensive land use plan for RRDC traditional territory. At the meeting with federal Decision Bodies on March 29, 2021, RRDC explained how Gu Cho Ka-ka Dee could address concerns about cumulative effects. By selecting certain lands for development and protecting others, the risks of adverse impacts from development may be reduced. RRDC raised Gu Cho Ka-ka Dee again at a meeting on April 13, 2021.

[141] The petitioner says the Decision Bodies provided no reasons as to why implementation of these processes was impractical, unnecessary, or otherwise unreasonable.

[142] The federal Decision Bodies said they looked forward to discussing these processes further after receiving additional information while noting they would raise with the Yukon government how they could support the discussion.

Analysis

[143] Contrary to the petitioner's characterization of what occurred, the Decision Bodies did engage with RRDC in discussions about both Tu-Lidlini and Gu Cho Ka-ka Dee. Further information was requested from and promised by RRDC and the Decision Bodies were open to continuing discussions. However, no further information about either process was forthcoming from RRDC.

[144] On March 29, 2021, RRDC explained to the federal Decision Bodies Gu Cho Ka-ka Dee was a land use plan created by the community and guided by Elders, including traditional knowledge of how to protect and maintain water, wildlife, and presented to the Yukon government in 2014. The federal Decision Bodies asked questions including whether there were mitigations for governments or proponents in the plan; whether the plan was specific to RRDC or all Kaska; whether its implementation would address concerns related to this Project; whether the plan was public; whether RRDC had considered implementation of the plan or aspects of it; and whether the plan considered monitoring the areas of importance or the use of game guardians. RRDC answered the questions. RRDC said no part of the land use plan had been implemented.

[145] RRDC mentioned the land use plan again briefly at the April 13, 2021 meeting. RRDC noted the significance of the KZK Lands was reflected in the plan and suggested as a result it should be implemented “to avoid future projects being proposed in the wrong place”. RRDC did not mention this land use plan again.

[146] Most of the April 13, 2021 meeting between RRDC and the federal Decision Bodies was spent discussing the Tu-Lidlini process. RRDC explained they were currently designing the process; it was not finalized. As an intended parallel process to YESAA, its purpose was to address the adverse impacts to Aboriginal rights and title. Recommendations from the Tu-Lidlini process would go to Chief and Council, not to YESAB, and to the Decision Bodies, outside of YESAA. The Tu-Lidlini process would be able to take into account RRDC’s concerns and interests more adequately and would have more credibility within the community than the YESAA process. RRDC said that they needed Canada’s help to implement the process and all projects should be suspended, including the Project, until Tu-Lidlini was implemented. The Decision Bodies asked for more information from RRDC about the support they were requesting for the Tu-Lidlini process, the timelines for its development, what they were aiming to achieve, and how it could fit within the decision pathways for the Project. RRDC responded they would follow up in writing with more information about Tu-Lidlini, a budget, and plan for community engagement. The Decision Bodies never received anything further from RRDC.

[147] The Decision Bodies adequately consulted on these two initiatives. They listened, asked questions to increase their understanding, requested additional information, and said they were prepared to discuss it further. However, the information

promised did not materialize and the First Nations did not refer to these processes again until this litigation.

[148] Further, both land use planning and the development of a parallel project-specific assessment process to determine effects of proposed projects on claimed Aboriginal rights and title are significant initiatives. Tu-Lidlini was still in development. Gu Cho Ka-ka Dee had not been implemented. Their development and implementation could take significant time and would necessarily involve many other government representatives than those who were consulting on this Project. They were beyond the scope of this Project. It is not reasonable for the First Nations to expect the Project to be suspended for an unspecified period to allow the development and implementation of the processes.

[149] This conclusion does not diminish the value or significance of Kaska processes or suggest they should not be pursued or funded. The conclusion here is based on a review of the record and an assessment of the reasonableness of the decision of the Decision Bodies on the basis of that record.

[150] The YESAA process has been approved by this Court as sufficient to assist in satisfying the Crown's obligation to consult. RRDC and LFN have the benefit of the assessment process negotiated by other Yukon First Nations, although as non-signatories to a final agreement, they may not consider the process to be adequate and instead prefer their own processes. However, as the Chief Justice of Canada wrote in *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 ("*Taku River*"), the province did not have to develop special consultation measures to address the First Nation's concerns "outside of the process provided for by

the [BC] *Environmental Assessment Act* [RSBC 1996, c 119], which specifically set out a scheme that required consultation with affected Aboriginal peoples” (at para. 40). Subsequently, in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 39, a case that originated in the Yukon in the context of the YESAA process, the Supreme Court interpreted *Taku River* as saying that participation in a forum created for other purposes (such as the YESAA process) may satisfy the duty to consult “if *in substance* an appropriate level of consultation is provided” [emphasis in original].

[151] As a matter of law, the Crown has discretion as to how it structures the consultation process and how the duty to consult is met (*Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443 at para. 39). What is required is a reasonable process, not perfect consultation: *Haida Nation* at para. 62. The YESAA process, supplemented by direct engagement by the Decision Bodies with the First Nations, is a reasonable process. It has been accepted by this Court as such.

[152] The petitioner also argues that the Decision Bodies’ reliance on the reviews completed by Dena Cho and through the KCIPR process are not a substitute for a reliance on the Indigenous led processes described above. The Dena Cho reviews were focussed on technical deficiencies, and the KCIPR processes were used to educate LFN Council, citizens and Elders, the Executive Committee, and the Decision Bodies about the Project impacts on Kaska rights. These purposes were not a replacement for consulting on the basis of a parallel assessment process or land use plan developed through Kaska legal orders and jurisdiction. Further, the petitioner says neither the Executive Committee nor the Decision Bodies engaged with the Dena Cho or KCIPR findings.

[153] The Decision Bodies did not argue that these Dena Cho reviews and KCIPR memos replaced consultation on Tu-Lidlini or Gu Cho Ka-ka Dee. They referenced the Dena Cho review in their detailed Indigenous issues tracker and noted the 72 commitments made by BMC to RRDC based on Dena Cho's technical assessment of the Project. The Decision Document states the Decision Bodies considered the Interim Report, along with the other KCIPR memos. They wrote at page 25:

... Decision Bodies did consider the information in LFN's KCIPR memos and Interim Report to inform variations and additions to terms and conditions specific to caribou, water quality, and air quality. The variations to the terms and conditions were made to further enable the collection, consideration and integration of Kaska traditional knowledge and traditional land use information into future regulatory processes, caribou range management and Project operations. Terms were also varied to require the collection of an additional two years of FCH baseline information.

[154] The petitioner's argument that these Kaska led reviews and memos were not consulted on is not well-founded. As evidenced from the record, this information was reviewed, considered, and served to alter the Project proposal through BMC commitments to mitigation measures as well as to varying the terms and conditions.

d) Failed to meaningfully consult on Kaska jurisdiction and legal orders

[155] The petitioner says the proposed Project is in an area where the Kaska hold unextinguished rights, including Aboriginal title, meaning they have an exclusive right to decide how the land will be used, to enjoy and occupy the land, to possess the land, to the economic benefits of the land and the right to pro-actively use and manage the land (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras. 75 and 88). The petitioner says the Decision Bodies did not properly recognize asserted Kaska laws, part of

Canadian common law, and failed to consult Kaska on the impacts of the Project on Kaska laws and legal orders.

[156] As noted in *Ross River Dena Council v Yukon*, 2020 YKCA 10 (“*Ross River Dena Council*”), there is a distinction between Aboriginal title that is established and that which is asserted. Established Aboriginal title confers ownership rights similar to those associated with fee simple (para. 7). In the case of *Ross River Dena Council*, the Court of Appeal of Yukon noted:

[9] RRDC’s title is not yet established. It has only a claimed title, albeit a strong one. Aboriginal title that is claimed, but not established, does not confer ownership rights.

...

[22] ... Without an established claim, RRDC does not have an exclusive right to control the use and occupation of the land at present, nor does it have a right to veto government action. That being the case, the legal framework set out in *Haida Nation* and *Rio Tinto* applies. [emphasis in original]

[157] The duty to consult of course arises where there is asserted Aboriginal title. This was the finding in *Haida Nation*, referenced by the Court of Appeal of Yukon as follows:

[10] Where title is not established, the duty to consult arises when the Crown has real or constructive knowledge of the potential existence of an Aboriginal right or title and contemplates action which might adversely affect that right or title: *Haida Nation* at para. 35. The purpose of the duty to consult is not to provide claimants immediately with what they could be entitled to upon proving or settling their claims. Rather, it is intended as a mechanism to preserve Aboriginal interests while land and resource claims are ongoing, or where the proposed action may interfere with a claimed right or title: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 33; *Ka’A’Gee Tu First Nation v. Canada (Attorney General)*, 2012 FC 297 at para. 123.

...

[12] The content of the duty to consult in any particular case will vary, depending on the strength of the claim and proposed government action. In *Haida Nation* at paras. 43–46, it was described as falling along a spectrum. At one end, where the claim is weak, the Aboriginal right is limited and the potential harm is minor, the duty may be discharged by giving notice, disclosing information and discussing. At the other end, where the claim is strong, the right is significant to the claimant and the risk of harm is high, deep consultation may be required. Deep consultation may include an opportunity for the claimant to make formal submissions and formal participation in the decision-making process. The requirements will vary from case to case, depending on the circumstances: see also *Tsilhqot'in Nation* at paras. 89–91.

[158] In this case, the Crown's assessment of its obligation to conduct deep consultation with Kaska is based in part on its acceptance of the strong claim of Kaska to title. The Crown also recognized the importance of the KZK Lands to the exercise of Kaska rights. Their approach to consultation reflected their recognition of asserted Kaska rights and title and was not a failure to consult.

[159] The petitioner did not elaborate in its submissions on how the Crown failed to give proper recognition to asserted Kaska laws, other than its alleged failure to apply Kaska-led Indigenous assessment processes to the Project assessment. This is addressed in the previous section.

e) *Refusal to facilitate or consider input of Kaska Elders or consider Elders' Conditions*

Introduction

[160] The petitioner makes two arguments: first, the Elders were prevented from participating in and commenting fully on the assessment of the Project because the original project proposal documents were not translated into Kaska; and second, the Elders' Conditions, developed by RRDC/Pelly Banks Elders and provided to BMC in

2017, to the Executive Committee in May 2020, and to the Decision Bodies on January 19, 2021, as well as referenced at a meeting on March 29, 2021, and in another letter dated March 1, 2022, were not responded to or discussed by the Decision Bodies.

Analysis

[161] The failure to translate all Project documents into Kaska was not a failure to consult properly as the Elders were able to provide their views about the Project as evidenced by the Elders' Conditions. The Decision Bodies were aware of BMC's response to the Elders' Conditions, and continued to consult on the one condition that was repeatedly raised – that is the seasonal road closure.

No translation

[162] Before the Project proposal was submitted to the Executive Committee and in the early days of the assessment, BMC engaged with the Elders in the following ways:

- provided funding to RRDC to gather traditional knowledge for the Project area;
- attended and provided funding for a June 1, 2016 Elders Oversight committee meeting to answer questions about Project plans;
- concluded a traditional knowledge protocol with RRDC to facilitate gathering, recording, and reporting traditional knowledge in relation to the Project;
- held multiple tours of the Project site for RRDC Elders, including an overview of BMC, a description of the Project, a tour of the core facility, vehicle tour of the exploration Project and helicopter tour of the Project site;
- participated in meetings at community and individual level, including with Kaska Elders, with someone from community translating into Kaska at community meetings; attended and funded Elders' meetings to answer questions about the Project;

- paid Testloa Smith, Elder from Pelly Banks to translate at a YESAB meeting in Ross River; and
- funded LFN KCIPR which allowed LFN and its citizens and Elders to become informed about the Project.

[163] The failure of BMC or the Decision Bodies, who have the legal obligation to consult, to translate the Project documents into Kaska did not contribute to a failure to consult properly. The multiple meetings, tours, and funding for traditional knowledge gathering and use for Project assessment by BMC constituted reasonable efforts to familiarize the Elders with the Project to enable the Elders to comment. Translation into Kaska at some meetings was provided. The preparation and submission of the Elders' Conditions in 2017 showed they were not deterred from participating in the consultation.

Elders' Conditions were not consulted on

[164] The Elders submitted 24 conditions to BMC in 2017, advising the company that fulfillment of all 24 was necessary in order for BMC to receive support from RRDC Elders for the Project. The conditions were developed pursuant to a traditional knowledge protocol and work plan between BMC and RRDC.

[165] BMC met with the RRDC Elders to discuss their conditions in April 2019. BMC agreed to 17 of the 24 conditions. They stated two were outside of BMC authority and internal to RRDC. They partially agreed to two: first, while BMC did not agree to full closure of the access road for two months during spring and fall migration, they committed to wildlife protection plans and traffic management plans that would dictate how the access road would be managed during migration periods, including the cessation of traffic in the presence of caribou near the access road; and second, they did not object in principle to the establishment of a protected area south of the Project

but needed more details before they could fully agree. They rejected three conditions completely: first, they refused to narrow the haul road for safety reasons due to truck use; second, they refused to refrain from using liquid natural gas because they needed to transport and use it on site for power generation, but they committed to try to source other renewable energy options to reduce reliance on compressed gas; and third, they did not agree not to proceed with the Project unless consent of the RRDC Elders was obtained, because BMC had provided positive responses to as many conditions as possible, however, there were some that could not be met.

[166] Those conditions and BMC's responses are set out in Appendix C to this decision. Some of the conditions to which BMC agreed included paying for an RRDC water engineer to meet with BMC and YESAB engineers to reach consensus on tails management; co-management with Kaska of fish and wildlife area; fund Kaska Caribou Research Centre from mine profits; fund Kaska land guardians to monitor and enforce Dena laws throughout the life of the mine; and establish Ross River oversight board consisting of land stewards for the areas.

[167] The Decision Bodies were aware of the Elders' Conditions and knew that BMC had agreed to most of them. One of the conditions to which BMC did not agree fully - the complete road closure during spring and fall caribou migration - was explained by BMC as financially unfeasible. This was the only Elders' Condition referenced at the March 29, 2021 meeting by RRDC and in their March 1, 2022 letter. BMC's response of which the Decision Bodies were aware led to several discussions (referred to above) about mine feasibility during the consultation sessions, including the rationale for BMC's position on the requested road closure, and their reference to the wildlife protection and

traffic management plan that would address road management during migration periods.

[168] The June 24, 2022 letter written by the Decision Bodies after the Decision Document was released referenced the road closure and the protected area conditions, suggesting further consultation meetings during the regulatory stage to discuss. This letter also referenced the FCHOC reviewing and monitoring the mitigation and management strategies, including the operation of the access road during migration, as well as the expected development and implementation of offsetting measures terms and conditions to help address the Elders' Conditions. Although this letter was written after the Decision Document was made, it shows how the Elders' Conditions were understood and considered in the development of the terms and conditions and final decision.

[169] The June 24, 2022 letter explained how the conditions were considered during the process leading up to the Decision and in the modified terms and conditions. The propriety and effect of the June 24 letter will be addressed in the next section.

ISSUE #1: iii) Failure to consult on the June 14, 2022 submission

Introduction

[170] The petitioner says the June 14, 2022 submission by Kaska was prepared on short notice in response to the request for final views and comments by Decision Bodies after they imposed a June 15, 2022 decision date by letter dated May 25, 2022. The petitioner says the Decision Bodies carried out a surface level review of the submission and engaged in no further dialogue with the Kaska before issuing their decision on June 15, 2022. Acknowledgement of the submission was made in the body of the

Decision Document through passing references, not real engagement. After inviting the First Nations to comment and promising to consider their views before issuing the Decision, their failure to engage meaningfully on their response was a failure to consult.

Brief Conclusion

[171] The Decision Bodies failed to respond meaningfully to the June 14, 2022 submission by Kaska and instead ended consultation on June 15, 2022, with the issuance of the Decision Document. This failure was a breach of the duty to consult. Whether or not Kaska raised new issues in the submission, it was unreasonable for the Decision Bodies not to respond directly to Kaska about their letter. Deep consultation requires more than identifying and understanding the issues raised. It requires dialogue, including discussions of whether the concerns change elements of the proposed decision, and if not, explanations of why not. This did not occur. The letter of June 24, 2022, was a significant step towards a meaningful dialogue, but was insufficient because it was a written document, not a discussion, and was issued after the Decision was made.

Facts

[172] To understand the context of the June 14, 2022 submission, it is helpful to review the interactions during the previous months. In the meeting of March 30, 2022, Kaska raised several questions: whether the federal Decision Bodies' questions about how Aboriginal rights and traditional knowledge were considered by the Executive Committee in determining significance and mitigation measures were answered; how the 10 Principles developed by Canada to guide its relationship with Indigenous Peoples would be applied to decisions about the Project; whether the Yukon

government could effectively apply reconciliation principles without a reconciliation policy in place; what was the Decision Bodies' response to the LFN expert analysis (Golder Report) on the economic feasibility of the mine; and how the federal Decision Bodies planned to deal with cumulative effects concerns.

[173] As noted above, the April 27, 2022 40-page letter of the Decision Bodies to RRDC and LFN had four appendices: answers to Kaska questions from the March 30, 2022 meeting; response to questions about the economic viability of the mine; setting out Decision Bodies' understanding of LFN's and RRDC's concerns about the FCH and other information relevant to a proposed caribou-specific meeting; and provision of the draft risk characterization from ECCC of the FCH in relation to the Project.

[174] At the time of consultation, the FCH were part of the woodland caribou designated as species of special concern under *SARA*. Decision Bodies are required, under s. 79 of *SARA*, to ensure that if a project is implemented, measures are taken to reduce or prevent adverse effects of the project on the species at risk and to monitor the effects. ECCC assists Decision Bodies to fulfill their obligations under *SARA* by providing advice in the form of a draft risk characterization, provided for the first time to Kaska on April 27, 2022. ECCC concluded that the Project posed a medium risk of unmitigated, adverse effects to the FCH, that if left unmitigated would not align with species management objectives under *SARA*. To reduce uncertainty and address residual impacts, ECCC wrote that offset-focused discussions were required. Offsetting in this context means providing more habitat or being required to restore other habitat in place of habitat that has been disturbed.

[175] In the April 27, 2022 letter, the Decision Bodies confirmed they were considering the option to vary the recommendation but a final decision had not yet been made. There was no mention in that letter of any deadline for a decision from the Decision Bodies. They suggested another meeting with Kaska to confirm their understanding of Kaska concerns about the FCH; to discuss whether the draft terms and conditions sufficiently addressed Kaska concerns; to hear LFN and RRDC views about additional proposed mitigation measures about any valued component, including changes to terms and conditions; and to discuss the ECCC draft risk characterization.

[176] On May 10, 2022, LFN representative Travis Stewart replied to say he had COVID and needed more time to prepare a response to the April 27, 2022 letter. On May 20, 2022, LFN emailed the Decision Bodies to request copies of studies referred to by ECCC and to advise them that Kaska's review had begun.

[177] Also on May 20, 2022, BMC sent a letter to the Decision Bodies advising that unless a decision document were issued immediately, BMC would cancel a \$30 million drill program planned for 2022 and would take legal action against the Decision Bodies to recoup losses incurred over the last year and to compel the Decision Bodies to fulfill their legislated duties. They noted under *YESAA* the time for the Decision Bodies' decision after receiving the Referral Conclusion was 37 days, (inclusive of a 7-day extension) and by this time almost 14 months had passed.

[178] On May 26, 2022, the Decision Bodies wrote to LFN and RRDC to say that on careful consideration of the whole record, they believed they had sufficient information to proceed with the issuance of a decision document on June 15, 2022, approving the Project subject to the modified terms and conditions, now including additions about

offsetting measures from the ECCC advice. The letter acknowledged the important implementation work to be done and committed to continuing consultation with Kaska and providing opportunities for their input throughout the regulatory phase and the life of the Project. The letter concluded by saying the Decision Bodies were open to receiving any final comments from LFN and RRDC on the modified terms and conditions and the proposed decision direction and invited Kaska to propose a meeting date to discuss the May 26, 2022 letter, the April 27, 2022 letter, or to provide input for consideration in the decision by June 10, 2022.

[179] On June 1, 2022, LFN and RRDC proposed a meeting on June 8, 2022. That day representatives of the Decision Bodies, ECCC, LFN, including technical experts, the RRDC Chief and one other RRDC representative, and legal counsel for all parties met to discuss two agenda items at the First Nations request: i) clarification for Kaska; and ii) discussion about next steps.

[180] The ECCC representative and Kaska discussed the FCH risk characterization, still in draft. ECCC clarified they were open to receiving further comments.

[181] In the discussion about next steps, both RRDC and LFN noted they had a long list of questions and issues to be discussed. The Decision Bodies confirmed their intention to issue a decision by June 15, 2022, and if there were additional information between now and then, they could continue meeting or receive the information in writing. If information was received after June 15, 2022, the Decision Bodies said it would help with continued consultation throughout the regulatory stage. Travis Stewart, the LFN representative, said they did not know how they would meet the June 15, 2022 deadline, given the new information recently received, as well as the flooding in their

community, COVID, and consultation requirements on other projects. He repeated this in a June 9, 2022 email, in which he also said LFN would provide written comments before June 15, 2022, without prejudice to their position that the behaviour of the Decision Bodies constituted a breach of the honour of the Crown.

[182] On June 14, 2022, RRDC and LFN sent their submission to the Decision Bodies. The letter confirmed Kaska's opposition to the issuance of a decision on June 15, 2022, that the Project should proceed subject to modified terms and conditions. The submission contained seven parts: A. Introduction; B. Summary – outstanding consultation and accommodation fails to advance reconciliation; C. Detailed description of outstanding consultation and accommodation; D. Conclusion; E. Schedule A – Kaska comments on modified terms and conditions; F. Schedule B – Summary of Ross River Elders' 2017 Project Preconditions; G. Schedule C – Kaska technical review of 2022 ECCC report. The letter was 26 pages with 22 pages of schedules.

[183] The petitioner says Part B of the letter listed the serious unresolved concerns: premature decision to approve; failure to consult on impacts to Kaska jurisdiction and legal orders; improper narrowing of consultation to impacts on caribou; failure of modified terms and conditions to address issues repeatedly raised by Kaska; failure of the appendices to the April 27, 2022 letter to address outstanding issues; outstanding information on Project impacts; and lack of capacity funding. The letter also stated the setting of the June 15, 2022 date to render the Decision Document was arbitrary and unnecessary.

[184] The petitioner says the submission included the following new information: i) detailed comments on the modified terms and conditions; ii) Kaska views on the ECCC

risk characterization produced on April 27, 2022, both at a high level summary and in a technical memo; iii) identification of information gaps in the letters of April 27 and May 25, 2022, and of failures to address Kaska concerns about: Kaska rights and traditional knowledge; the economic feasibility of the Project and its relationship to the regulatory process; the adequacy of the Decision Bodies' understanding of Kaska concerns regarding the FCH; and cumulative effects; and iv) identification of specific foundational principles of Kaska law and legal orders relevant to the project assessment.

[185] The Decision Bodies described their process of review on receipt of this letter. Both Yukon and federal Decision Bodies officials stated in affidavits and on cross-examination that they reviewed the submission carefully and thoroughly, comparing it to other discussions and documents provided. Specifically, Stephen Mills and Keith Maguire of the Yukon government spent several hours reviewing the submission and discussed its contents with one another and other Yukon officials, concluding it raised no new concerns or factual issues. Keith Maguire worked late into the night of June 14/15 and had at least one conversation with CanNor during that time. Other Yukon officials also reviewed the submission carefully. Rinaldo Jeanty of NRCan, who was in Norway on government business at the time, spent approximately four hours reviewing the submission, comparing it to other documents and meeting notes he had with him electronically. Two other members of his team independently reviewed the submission. David Carter of DFO reviewed the letter three times: first quickly on the evening of June 14, 2022, then a more detailed and thorough review later that evening, and a third quick review the following morning. The morning of June 15, 2022, the federal Decision Bodies and CanNor met to discuss the submission, including how the

modified terms and conditions addressed the contents of the letter. The result of the meeting was that “every single person at that table concluded the same thing” that is, there was “no substantively new information or issues raised”.

[186] After this meeting, on June 15, 2022, the federal Decision Bodies met with representatives of Yukon government and again reviewed the June 14, 2022 submission. All agreed it contained no new concerns or information. They then amended the draft Decision Document to include references to the June 14, 2022 submission where appropriate. The Decision Bodies representatives said under affirmation that if they had found something new in the letter, they would have delayed the issuance of the Decision Document in order to address the new information.

[187] Finally, on June 24, 2022, the Decision Bodies sent a follow up letter to RRDC and LFN, acknowledging the June 14, 2022 submission and replying specifically to some of the Elders’ Conditions requiring further consultation, including the impacts of cumulative effects. The letter also stated that ongoing consultation would occur during the regulatory processes and throughout the life of the project.

Rule in Browne and Dunn

[188] The federal Decision Bodies say the petitioner’s itemization of new information in argument was a breach of the rule in *Browne and Dunn*. They say their witnesses should have been cross-examined by the petitioner about the information the First Nations say is new. Their failure to do so means I should disregard the argument asserting new information in the June 14, 2022 submission.

[189] I disagree that the rule in *Browne and Dunn* applies here. The rule is a flexible one and was developed to ensure a fair trial and fairness to witnesses, and to eliminate

the effects of unfair surprise. It provides that a party who intends to contradict an opponent's witness must direct the witness' attention to that fact by asking appropriate questions during cross-examination. If the cross-examiner fails to do so, the consequence depends upon the circumstances of each case and is in the discretion of the trial judge. The witness may be recalled at trial; the weight of the contradictory evidence or submission may be reduced; or the evidence may be rejected in favour of the opposing witnesses' testimony. The application of the principle requires judges to consider two questions:

- i) Is a party leading evidence in chief that would contradict or impeach the evidence of the opposing party's witness on a significant matter without having first cross-examined the opponent's witness on the same matter?
- ii) If yes, what can be done about it to ensure the fairness of the trial?

[190] Here, there is no element of unfair surprise as is contemplated by the rule, such as new facts of which the Crown witnesses would be unaware. All participants had the same information – that is the submission of June 14, 2022, and all of the documents in the consultation record showing what had been discussed previously. Whether or not certain information in the June 14, 2022 submission is new, is a matter of interpretation or argument. Decision Bodies can choose to explain their position that there was no new information by merely asserting it, as they did, or they can choose to explain it by showing where the issues raised by Kaska in the June 14, 2022 submission had been previously addressed, as BMC did in its written submissions. All the information necessary to answer the argument or interpretation of Kaska that they provided new information was equally available to the Decision Bodies. The rule in *Browne and Dunn* is not engaged.

Analysis

[191] The Decision Bodies say they had been engaging or attempting to engage with Kaska around this Project for many years. Since September/October 2021, they had been trying to obtain comments from Kaska about the modified terms and conditions they hoped would mitigate their concerns. They were statutorily obligated by YESAA to make a decision after the Executive Committee's Referral Conclusion, a decision that had been outstanding for approximately 13 months past the statutory deadline. The June 14, 2022 submission did not convey new information on existing issues or new issues to the Decision Bodies, as agreed by all officials who reviewed it between the end of the business day on June 14, 2022, and the issuance of the Decision Document the afternoon of June 15, 2022. The Decision Bodies say this was sufficient time for them to conduct a careful review of the submission, hold several meetings about it internally, with all the Decision Bodies, including Yukon, that day, as well as incorporate it into the Decision Document. They argue that consultation has an end point, as set out in the case of *Pimicikamak v Manitoba*, 2016 MBQB 128 ("*Pimicikamak*"):

[46] Despite the constitutional nature of the obligation, consultation is a finite process which of necessity must at some point end. In this connection, contextual information need be considered to determine whether the ending of a consultation process was premature given the information before the decision maker. See *Beckman*, supra, at para 81 and *Pimicikamak*, supra, at para 75. A court's decision as to whether the termination of a consultation process was or was not reasonable may be assisted where the record supports the Crown contention that there were no new concerns raised. See *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013, ABCA 443 at paras 55-56, 88 Alta. L.R. (5th) 179.

[192] There are three reasons why the Decision Bodies' position on the June 14, 2022 submission showed a failure to consult and accommodate: i) it was linked to the relatively sudden setting of a hard deadline to issue the decision to approve the Project on June 15, 2022, which in the context of the previous 13 months did not demonstrate good faith; ii) there was information provided by Kaska in the June 14, 2022 submission, including specific commentary and questions about the modified terms and conditions, that required a dialogue; and iii) the setting of the June 15, 2022 deadline may have been improperly influenced by external timing pressures.

[193] First, the May 26, 2022 setting of a hard deadline of June 15, 2022 for decision, was a break from the pattern of soft deadlines and easy and regular extensions established over the previous 13 months. The Decision Bodies extended the deadline by which they were to provide their Decision Document regularly and often to facilitate consultation with Kaska. While they had referenced to Kaska proposed deadlines for making a decision, such as end of February 2022 and some time in March 2022, none was as definitive, uncompromising, or precise as the June 15, 2022 deadline. The Decision Bodies provided only three weeks advance notice of this deadline to the First Nations.

[194] The record shows that the Decision Bodies treated this date as a hard deadline for the issuance of their decision. Not only did they repeat several times to the First Nations their intent to issue the decision that day, but the officials also testified they worked late into the evening of June 14 and during the early morning and day of June 15 to review the June 14 submission and incorporate it into the decision. This is inconsistent with a flexible deadline. Further, there was no particular reason why June

15 had to be the deadline, as confirmed by the Decision Bodies affiants on cross-examination.

[195] There is no question that the Decision Bodies were statutorily required to issue a decision that was long overdue. There is also no question that attempts to engage with Kaska throughout the previous five years were often extremely challenging and frustrating. The Decision Bodies regularly had difficulty in setting up meetings with Kaska: either LFN or RRDC or both would cancel or delay meetings, or in some cases refuse to meet at any of the many suggested times. The Decision Bodies displayed a high degree of patience, flexibility and politeness, appreciating the capacity issues of the Kaska caused by COVID, multiple consultation requests, and internal issues such as flooding in the community. During the meetings, the substance of the discussions veered into matters that were not part of the agenda and not directly related to the Project. As a result, there was often insufficient time at the meetings to address the agenda items.

[196] This hard decision deadline of June 15, 2022, also contradicted the tone and substance of the April 27, 2022 letter, which invited further dialogue with Kaska about that letter and its attachments, and contained a large amount of information that suggested significant discussion was still required. It did not set a deadline for decision. The letter was consistent with the position stated by the Decision Bodies for months which was that they needed and wanted feedback from Kaska on the modified terms and conditions. The Decision Bodies requested specific feedback from the First Nations on various topics, including, yet again, the modified terms and conditions (see para. 175 above). By May 26, 2022, none of that information requested had been provided,

although the First Nations had advised on May 20, 2022, they were working on a response.

[197] The Decision Bodies had granted themselves an unlimited extension to issue the Decision Document under s. 46.1 of YESAA and had continued to engage with Kaska either without establishing a clear endpoint or establishing multiple successive endpoints. The pattern they established, reinforced by the letter of April 27, 2022, made it more important for them not to end the consultation without proper notice and ensuring the opportunity for Kaska to express all concerns and leaving sufficient time for their serious consideration and where possible, demonstrable integration into the proposed plan of action. Although the Decision Bodies attempted to do this in their June 15 Decision Document, the references to the June 14, 2022 submission were incomplete and were not a substitute for meaningful dialogue. Their insistence on the June 15, 2022 deadline meant that consultation on the June 14, 2022 submission could not occur.

[198] Second, there was information provided in the June 14, 2022 submission that required dialogue. For the first time, the First Nations responded specifically to the modified terms and conditions related to water quality and the FCH, explaining why they were unsatisfied with each one and asking questions in some of them. Those questions included: how will a desktop review report of the FCH approved by Yukon reach a common understanding on the two worldviews and approaches – i.e. western scientific and traditional knowledge; how would the adequacy of the baseline data for FCH be assessed; how much power can affected First Nations expect in the development by Yukon of the FCH management plan. Kaska also responded in more detail than in the

June 8, 2022 meeting to the draft risk characterization from ECCC, setting out the nature of their disagreement with the ECCC process and conclusions and including a technical KCIPR memorandum that addressed information gaps in the ECCC characterization. The memorandum noted that further discussion and information were needed to understand specifically where Kaska knowledge had been integrated into the framework and how the integration of Kaska knowledge would change the risk characterization. Further, the submission identified information gaps in the letters of April 27 and May 25, 2022, and noted those letters had not addressed Kaska concerns that had been previously articulated.

[199] As noted above in *Pimicikamak*, contextual information must be considered in the determination of whether ending consultation was premature. Here the context included the facts that the First Nations were responding to new information recently provided to them in the April 27, 2022 letter, and as well they were providing the responses to the terms and conditions that had been requested of them for months. Even if the Decision Bodies believed they had received no substantively new information, deep consultation required them to explain to Kaska why the information in the June 14 submission did or would not change their decision. To do otherwise ignores the requirement of deep consultation to engage in dialogue and explain why or why not the concerns are addressed in modifications to the project, or why other modifications are not needed.

[200] The content of the June 24, 2022 letter, issued after the Decision, demonstrates how consultation could have occurred on the June 14, 2022 submission. That letter confirms that further consultation on the issues raised will be carried out at the regulatory stage of the Project, and it commits to that consultation. It explains how some

of the modified terms and conditions will be implemented. It sets out how some of the Elders' Conditions will be addressed. In addition, it would have been reasonable to address the questions raised by Kaska in their responses to the modified terms and conditions.

[201] The June 15, 2022 Decision Document and the modifications and additions to the terms and conditions are dependent on future information gathering processes, future monitoring and evaluation processes, and future consultation processes through the regulatory authorization process and beyond. Many of these processes are to be developed and negotiated, so are necessarily described in the terms and conditions in broad terms. The First Nations expressed their discomfort in proceeding with the Project without all the information they believed necessary in order to determine the extent of adverse effects or cumulative effects, and to determine how the anticipated processes will assist in mitigations. The question of how the Project would be affected if the new information acquired through these processes showed significant ongoing harm difficult or impossible to mitigate is one that was asked repeatedly by Kaska and not answered directly. While a direct answer may not be possible given future variables, discussions about processes to address this question may be possible and reasonable.

[202] Other cases where courts have held the Crown was justified in ending consultation, over the objection of the First Nations are distinguishable. In *Interlake Reserves Tribal Council Inc v Manitoba*, 2022 MBQB 131, the Crown had requested but never received the input of First Nations on "Community Tables" which set out their understanding of the comments and concerns of the First Nations on the proposed activity at issue. The First Nations declined to respond so there was nothing for the

Crown to consider before ending consultation. Similarly, in *Bigstone Cree Nation*, the First Nations' input on the CCAR [Crown Consultation and Accommodation Report] was requested and two extensions of time were granted. Still, the First Nations did not respond by the deadline given for the decision, approximately three months after the CCAR was provided to them. Unlike the case at bar, consultation ended without any further input from the First Nation to be considered.

[203] In *Liard First Nation v Yukon Government and Selwyn Chihong Mining Ltd*, 2011 YKSC 55 ("*Liard First Nation*"), the First Nations did respond with their concerns immediately before the deadline for decision. The difference in this case from the case at bar was that once the LFN expert consultant report commenting on draft #2 of the decision document was received, eleven government officials met with six representatives of LFN. The officials met for the better part of a day to discuss the expert report. LFN's views were heard and understood. Changes were made as a result of the meeting. The Court noted that although the time frame was very tight (the 37-day time limit set out in *YESAA*), there had been sufficient substantive exchange of views, consideration and accommodation achieved to meet the duty to consult. Here, there was no such meeting, dialogue, or changes made to the Decision Document as a result of the June 14 submission.

[204] As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation. As explained above (at para. 63) meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to

make changes to its proposed actions based on information and insight obtained through consultation. Here that dialogue after the June 14, 2022 submission did not occur, affecting the reasonableness of the consultation. Although there were references to the June 14, 2022 submission in the Decision Document, they were selective examples from the submission that showed a repetition of certain issues raised previously by Kaska. These types of references were inadequate to constitute meaningful consultation.

[205] Third, the Decision Bodies representatives all testified in cross-examination that the May 25, 2022 letter from BMC did not influence their position on setting the June 15, 2022 deadline. They testified that if there had been new information or new issues they would have delayed the decision in order to consult. While I accept this evidence provided by the officials under oath or affirmation, I cannot ignore the fact that the BMC letter formed part of the context leading up to the June 15, 2022 decision. The decision was statutorily required to be issued but had already been outstanding for many months, and the Decision Bodies were continuing to engage with Kaska without imposing a strict end date. It was only after receiving the BMC letter that they insisted on a fixed deadline for the issuance of the Decision Document.

[206] In the case of *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991, consultation was found to have been improperly limited because of an election. The court wrote:

[214] The Crown may not conclude a consultation process in consideration of external timing pressures when there are outstanding issues to be discussed: *Dene Tha' First Nation v Canada (Minister of Environment)* at para. 116; *Blaney et al v British Columbia (The Minister of Agriculture Food and Fisheries) et al*, 2005 BCSC 283 at para. 108. As Jack

Woodward says in *Native Law* (looseleaf 2014 - release 1), (Toronto: Carswell, 1994), at 5.2040:

The Crown must give the Aboriginal group a reasonable amount of time to respond to a referral and to engage in consultation. The Crown must be prepared to let consultation run its course; it cannot abort the consultation process because of other time pressures where the Aboriginal group is actively engaged in the consultation process, there remain outstanding issues, and there is value to further discussions.

[Emphasis in original, footnotes omitted in original]

[207] Here, the June 14, 2022 submission required further dialogue. The decision was already overdue by many months. The ending of the consultation process a day after receiving this submission was an inappropriate succumbing to external timing pressures, rather than allowing the consultation process run its course.

[208] The Decision Bodies were not justified in proceeding to issue the Decision Document on June 15, 2022, without engaging in a dialogue with Kaska about their June 14, 2022 submission. Although there is no doubt that many officials from the Decision Bodies reviewed the submission carefully and referenced aspects of it in the Decision Document, they failed to engage with Kaska on the matters raised, contrary to the duty to consult. The absence of this engagement process was unreasonable – it lacked transparency and intelligibility.

ISSUE #1: iv) Deferral of consultation to regulatory process

[209] The petitioner says the Decision Bodies acted unreasonably by deferring consultation to the regulatory phase of the Project. They were obligated to address all issues in the assessment approval stage, before the decision to approve the Project. Following this Court in *White River First Nation v Yukon Government*, 2013 YKSC 66

(“*White River*”), the petitioner says shortcomings of the consultation process in the first stage cannot be resolved during the permitting stage. That stage will not necessarily address the same issues, nor can it implement the same kind of accommodations, because a decision to approve has occurred. The petitioner says the knowledge and information gaps and the outstanding unaddressed concerns of Kaska meant that consultation was inappropriately and prematurely ended. The Decision Bodies’ promise to continue consultation as set out in their letter of June 24, 2022, was further indication of incomplete and inadequate consultation, according to the petitioner.

Brief Conclusion

[210] It was not a breach of the duty to consult and accommodate to provide that consultation would continue during the regulatory process and beyond. However, it was unreasonable to defer consultation on the June 14, 2022 submission to a time period after the Decision Document was issued.

Analysis

[211] It is helpful here to review in general the process by which a project is assessed and approved in the Yukon and the principles that apply to that process. The development assessment process undertaken by YESAB has been described in

Western Copper Corporation v Yukon Water Board, 2011 YKSC 16 (“*Western Copper*”):

[119] ... as a planning tool that precedes the more technical regulatory licensing process under the *Waters Act* and the [*Quartz Mining Act*] ... The decision document is not a licence or permit for the project to be undertaken but a document allowing the project to proceed to the licensing application... .

[212] In other words, YESAB reviews and assesses a project on the basis of socio-economic and environmental impacts, determines if identified adverse effects can be

mitigated, and if so, then makes a recommendation to the Decision Bodies that the project be approved with whatever terms and conditions they consider appropriate. Alternatively, YESAB can decide (as two members of the Executive Committee did in this case) that the adverse effects cannot be mitigated and recommend that the project not be approved.

[213] This Court in *Western Copper* after determining that the YESAA process is in essence an environmental impact assess process, adopted the quote from *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para. 95:

[113] ...

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

[214] In *Taku River*, the Supreme Court of Canada recognized that project approval is “simply one stage in the process by which the development moves forward” (at para. 45). Thus, outstanding First Nation concerns could be more effectively considered at later stages of the development process. It was expected that throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown would continue to fulfil its duty to consult, and if required, accommodate.

[215] As noted above, once YESAB issues a recommendation, the Decision Bodies then can accept, vary, or reject it. If their decision allows the project to proceed, it does

not mean the project is approved for construction. It still must proceed through the regulatory licensing process.

[216] At that stage, the regulatory authorities apply their statutory mandates and criteria to determine whether to issue a licence. In *Western Copper*, this Court analysed the regulatory authority of the Water Board under the *Waters Act*, SY 2003, c 19, in the context of receiving a decision document for a project. The Court concluded: i) the decision document does not limit the discretion of the Water Board until it issues a water licence; ii) there is no obligation, statutory or otherwise, for the Water Board to accept the scientific finding from the assessment process; and iii) it was never intended that the assessment process' recommendations of socio-economic terms and conditions would trump the regulatory licensing process.

[217] While the *Western Copper* decision addresses the regulatory authority of the Water Board, its analysis of the nature and character of YESAB in comparison to a regulator has broader implications. The Court stated at para. 119:

... The development assessment process in YESAA is not for licensing or permitting projects but rather a process that ends with a decision document that accepts a recommendation and, in the wording of YESAA in s. 5(2), requires the consideration of environmental and socio-economic effects before projects are undertaken. The decision document is not a licence or permit for the project to be undertaken but a document allowing the project to proceed to the licensing application pursuant to YESAA.

[218] This Court also examined the interaction between the YESAA process and the regulatory processes, as well as the prescribed limitations of the YESAA process in *Liard First Nation*. In that case, LFN argued there was insufficient information or background data provided by the company and as a result the Designated Office

making the recommendation had an insufficient evidentiary basis on which to do so. In that case, the Designated Office of YESAB recommended and the decision document approved the mining underground exploration project (the “Selwyn Project”) to proceed to the regulatory stage, with terms and conditions. The primary concern of LFN was the environmental impact of the Selwyn Project on Yukon’s water and aquatic resources and the proposed treatment of water in the traditional territory of LFN. LFN provided two expert reports on the main issue of the environmental impact of the project on water. This second expert report outlined how the Evaluation Report from the Designated Office had not addressed or assessed the concerns raised in the first LFN expert report. It disagreed with the conclusions of the Evaluation Report that the identified uncertainties could be addressed during the operation of the project, finding instead that they arose from a lack of sufficient data and research and could not readily be resolved. Further, because of these uncertainties, there was no basis to determine how the proposed mitigation measures could perform. The Yukon government officials agreed that certain issues needed to be addressed by the company but advised that some matters could be addressed by the Yukon Water Board after the decision document was issued. Over the objections of LFN that the issuance of a decision document before these issues were addressed was premature, the Yukon government issued the decision document the following day. The Court held that “the Evaluation Report did not have to provide finality and resolve all uncertainty prior to the regulatory procedure” (para. 105). It concluded at para. 107:

... Based upon its consideration, the Designated Office determined that the project will have significant adverse environmental effects that can be mitigated by terms and conditions. **However, the Designated Office did not**

determine that its terms and conditions would address every potential uncertainty and unquantified risk as proposed by Mr. Slater [LFN expert]. The word “mitigate” does not require elimination but can also include reduce and control, which is the approach taken by the Designated Office. It is possible that Mr. Slater and the Designated Office would never agree that sufficient research had been completed to ensure that the terms and conditions would meet all potential uncertainties. This is not the standard that this court should impose on the Designated Office. The standard of review is whether the terms and conditions are within the range of acceptable and rational solutions. In my view, they meet that standard and properly moved forward for consideration by the Decision Body. [emphasis added]

[219] The Court found that terms and conditions varied by the decision document to defer to the roles and responsibilities of the Water Board were appropriate.

[220] This concept of the appropriateness of continuing consultation and accommodation of First Nations concerns by the Crown at the regulatory stage, including information gathering, has been approved by courts in other cases. In *Taku River*, the Supreme Court of Canada noted that the permitting process that occurred after the environmental assessment stage would require further information and analysis of the company and consultation with the First Nation may continue to require accommodation. As an example, the Supreme Court noted at para. 46: “more detailed baseline information will be required of Redfern [the company] at the permit stage, which may lead to adjustments in the road’s course”.

[221] In *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189, the Federal Court of Appeal wrote that the consultation process between the Crown and the Aboriginal people continued up to the issuance of licences by Transport

Canada and DFO. The Court confirmed that the Crown consultation process was not yet completed and would remain ongoing.

[222] In *Coldwater*, the Federal Court of Appeal noted, at para. 60, that post-approval consultation was “both relevant and important”.

[223] Thus, in general, there is nothing inappropriate or unreasonable about continuing consultation throughout the regulatory stage of the process. The extensive requirements of the authorization process, the ongoing consultation requirements and commitments, and the possibility that through those independent statutory processes, mitigation measures will continue to occur, and licences may be refused, are all factors that make post-approval consultation appropriate.

[224] As the nature of the proposed modified terms and conditions in this case involve future information gathering, adaptive management and other future processes, post-approval consultation will, of necessity, occur. Adaptive management is used in situations where information is missing or in the process of being gathered, where the existence and extent of potential adverse effects are uncertain based on existing knowledge (*Tsleil-Waututh* at para. 330). The techniques used in adaptive management and the mitigation measures are designed to identify and deal with unforeseen effects (*Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 at para. 24). Adaptive management necessarily means that consultation is continuing and ongoing, as new information is received, assessed, and integrated into plans of action. It is not unreasonable for consultation to continue in the next phases of the Project.

[225] However, as the petitioner correctly notes, deferring consultation to a regulatory process where consultation was inadequate or has serious shortcomings in the first assessment stage is improper. This is a different analysis from the determination of whether post-approval consultation is appropriate.

[226] For example, in the case of *White River*, the Court found there was a breach of the duty to consult at the assessment stage, because there was no exchange of views. The Designated Office had recommended that the project not be approved because of significant adverse effects that could not be mitigated. Decision Bodies met with the First Nation and asked for their views on the report. The First Nation agreed with the recommendation. The Decision Body listened but did not provide their views at the meeting about why they did not agree with the recommendation. After the meeting, they rejected the recommendation, but at that point there was no ability for the First Nation to give meaningful feedback. This constituted a failure to consult and accommodate. The Court went on to address the argument of the Yukon government (the Decision Body) and the proponent that consultation was ongoing and there would be other opportunities to consult with the First Nation in future at para. 127:

...the Decision Document of a Decision Body is a significant step in the permitting process that must satisfy the duty to consult and accommodate. **Shortcomings in the consultation process at this stage cannot be addressed on the basis there will be further consultation.** The Decision Document is the basis for future decisions and is not simply a recommendation [emphasis added].

[227] Here, I have found a failure to consult on the June 14, 2022 submission. It follows that it was unreasonable for the Decision Bodies to defer consultation on that submission. The Decision Bodies' letter of June 24, 2022, sets out responses to some

of the issues raised in the June 14 submission. Those responses include explanations of Decision Bodies' positions on issues raised and confirmations of their future commitments to consult with Kaska. The June 24, 2022 letter contains content that could have formed part of a consultation dialogue with Kaska on the June 14, 2022 submission. See for example the following excerpts from the June 24 letter:

RRDC Elder Preconditions for Consideration of Project Support

During consultation in the decision stage, **and further confirmed in your June 14 letter**, Decision Bodies heard concerns related to the RRDC Elders' Preconditions for consideration of Project support. In particular, Decision Bodies heard that RRDC Elders requested the Project's access road be closed seasonally (from April 15 to May 15, and October 15 to November 15) to avoid further displacement of caribou during periods of migration. The Decision Bodies understand this is still an outstanding concern for RRDC and LFN.

Decision Bodies expect the issue of access road management, inclusive of any necessary period of closure, will be revisited during the regulatory review of the Project and by the FCH Oversight Committee. The FCH Oversight Committee, with the envisioned participation of LFN and RRDC, is required to regularly review and consider the effectiveness of the Project's mitigation and management strategies — this includes the operation of the access road on a seasonal duration or shorter basis. Decision Bodies are of the view that the RRDC Elders' Precondition regarding operation of the access road, on a seasonal duration or shorter basis, will be further discussed and evaluated by the FCH Oversight Committee, informed by updated baseline information and on-going monitoring. One of the roles of the FCH Oversight Committee will include evaluating effectiveness of mitigations and adaptive management and recommending new mitigations to YG, where necessary.

Decision Bodies also heard that, as a Precondition, RRDC Elders requested the establishment of a protected area around the Kudz Ze Kayah area, including the removal of existing mineral claims. Decision Bodies anticipate that the

collaborative development of an FCH management plan, and the consideration and expected development and implementation of offsetting measures, may support the RRDC Elders' Precondition.

However, Decision Bodies also recognize that this Precondition is broader than the FCH management plan and possible offsetting measures, and needs to include further discussion about regional cumulative effects. Canada and YG commit to further dialogue with RRDC and LFN about broader regional cumulative effects. Canada and YG are open to determining the most appropriate forum and participants for this dialogue with LFN and RRDC as part of our ongoing consultation during the regulatory stage.

Next steps regarding implementation of Modified Terms and Conditions Specific to the Finlayson Caribou Herd

Decision Bodies expect that Kaska perspectives, traditional knowledge and traditional land use information will be further integrated into the Project design and operations through the envisioned participation of LFN and RRDC on the FCH Oversight Committee (Term #10), as well as in the collaborative development of the FCH desktop status report (Term #11a) and FCH management plan (Term #11d). LFN and RRDC representatives will be involved in, for example, the review of the Proponent's Wildlife Protection Plan, the review of Project monitoring data, and the adaptive management and implementation of caribou mitigations. The collaborative development of the FCH desktop status report is expected to bring together both western scientific and Kaska traditional knowledge to work towards a shared understanding of the FCH dynamics and status, and determine appropriate action items, such as project-specific and range-wide monitoring. The development of an FCH management plan (Term #11d) is further expected to integrate Kaska perspectives and traditional knowledge to identify and focus management priorities for the herd and its range.

In the immediate term, YG will work to establish the FCH Oversight Committee with representatives from LFN and RRDC and will ensure appropriate funding is available for RRDC and LFN in developing the terms of reference. YG has also committed to preparing a desktop status report on the FCH in collaboration with Kaska to identify gaps in

information. Decision Bodies recognize identification of information gaps will inform monitoring, and that there is a time-sensitive aspect to completing the desktop status report. YG would like to begin work on these commitments as soon as possible now that the Decision Document for the Project is issued.

Canada would also like to confirm that Environment and Climate Change Canada is open to participating in future discussions with LFN, RRDC and YG regarding offsetting measures. These discussions are expected to begin as part of consultation during the Quartz Mining Licence regulatory stage. [emphasis added]

[228] Some of this content repeats what was earlier stated by Decision Bodies, while other material is more directly responsive to questions and issues raised in the June 14 submission: for example, the description of the way in which Kaska perspectives, traditional knowledge and land use information will be integrated into the Project design and development, and further details about the role of the FCHOC in addressing Elders Conditions.

[229] In general, post-approval consultation that is to occur during the regulatory process and throughout the life of the Project is not unreasonable. However, for the reasons noted above, it was unreasonable to defer consultation on the June 14, 2022 submission to the time period after the Decision Document was issued.

ISSUE #2: Breach of Procedural Fairness

[230] Given my conclusion on the failure of the Decision Bodies to consult on the June 14, 2022 submission, it is not necessary to consider the procedural fairness argument, which addresses only that document.

CONCLUSION

[231] The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome (*Haida Nation* at paras. 42 and 49). While the goal of the process is reconciliation of the Aboriginal and state interests, in some cases this may not be possible.

[232] Reconciliation as relationship can only be advanced through consultation when the respective parties commit to the process, avoid counterproductive tactics, get to the substance of the issues of concern and exercise good faith — Indigenous peoples by communicating their concerns in the clearest possible way and the Crown by listening to, understanding and considering the Indigenous peoples' points with genuine concern and an open mind throughout. Only then can the process lead to accommodations that respond to the concerns of Indigenous peoples.

[233] In this case, the stakes are high. The Project is large with the potential for significant commercial investment and return, as well as the potential to create significant adverse effects in Kaska traditional territory. Deep consultation with the First Nation is necessary. Accommodation requires a balancing of the competing societal interests – in this case the economic benefits of an operating mine – with Aboriginal and treaty rights. The purpose of consultation and accommodation done reasonably is to achieve compromises of conflicting interests that move the parties further along the path of reconciliation.

[234] Here, the Crown through the Decision Bodies and CanNor worked hard to engage the First Nations in the consultation process. They listened carefully and demonstrated a good understanding of the issues and concerns raised by the First

Nations. They maintained an open mind throughout and responded to concerns expressed by the First Nations through actions such as referring the Screening Report for reconsideration because of concerns about inadequate consideration of Aboriginal rights and interests; and modifying the terms and conditions of approval of the Project. They exhibited significant patience, flexibility and persistence in their many good-faith but unsuccessful attempts to meet with the First Nations to obtain their feedback, especially on the modified terms and conditions. They extended the deadline for the issuance of their decision many times in order to accommodate consultation with Kaska.

[235] The Crown is not to be held to a standard of perfection in fulfilling its duty to consult and accommodate. What is required is reasonableness. In this case, I have found the Crown acted reasonably in all respects but one.

[236] The First Nations in this case did not always fulfill their reciprocal duty to participate in the consultation process in a way that requires them to clearly state their concerns, avoid unreasonable positions and not frustrate the process (*Pimicikamak* at para. 115). Even acknowledging their very real capacity issues, they were not diligent in responding substantively to the modified terms and conditions, nor were they agreeable to meet in timely ways. For many months, they maintained their position that the Project should not proceed and were not willing to discuss seriously other options. All of these actions served to frustrate and unjustifiably prolong the consultation process.

[237] However, the Kaska June 14, 2022 submission contained a comprehensive statement of their position, including a specific and detailed response to the modified terms and conditions related to water quality and the FCH. Despite the late timing of this submission, it deserved a more substantive response through a dialogue, rather than

through references in the Decision Document to issues that had been raised previously. An assessment of the consultation record and surrounding context shows the Decision Bodies' failure to consult on this submission did not meet the standard of reasonableness. The basis for issuing the Decision Document the day after the receipt of the June 14, 2022 submission was not transparent, intelligible, or justified. It did not meet the honour of the Crown.

[238] To that end the Decision is set aside for the limited purpose of consulting on the June 14, 2022 submission. The terms of that consultation are set out below in the section on Remedy. It is important to note that the duty to consult and accommodate is not intended to immobilize the Crown from making a decision that may have a potentially adverse effect. The duty to consult does not require a duty to agree. Kaska do not have a veto over the proposed Crown decision-making. However, reconciliation requires the Crown to act honourably, in good faith, and to engage in a meaningful two-way dialogue in addressing concerns raised by Kaska.

REMEDY

[239] As I have found that the Crown failed in its duty to consult only with respect to the June 14, 2022 submission, the remedy will be restricted to address it.

[240] The Decision Document is set aside to allow a consultation meeting on the June 14, 2022 submission to occur. No further submissions or documents shall be exchanged except for an agenda for the meeting that shall be prepared and agreed to in advance of the meeting. The consultation meeting shall be held within 60 days of this decision. The meeting shall be scheduled for one full day, with the possibility for a second day if required and agreed to by all parties.

[241] Particular attention should be provided to the comments and questions in the submission on the modified terms and conditions. Where Decision Bodies are of the view they have answered concerns raised by Kaska elsewhere, they should so advise.

[242] The date of the issuance of the Decision Document shall be within 30 days of the final day of the consultation meeting. There will be no extensions of this deadline.

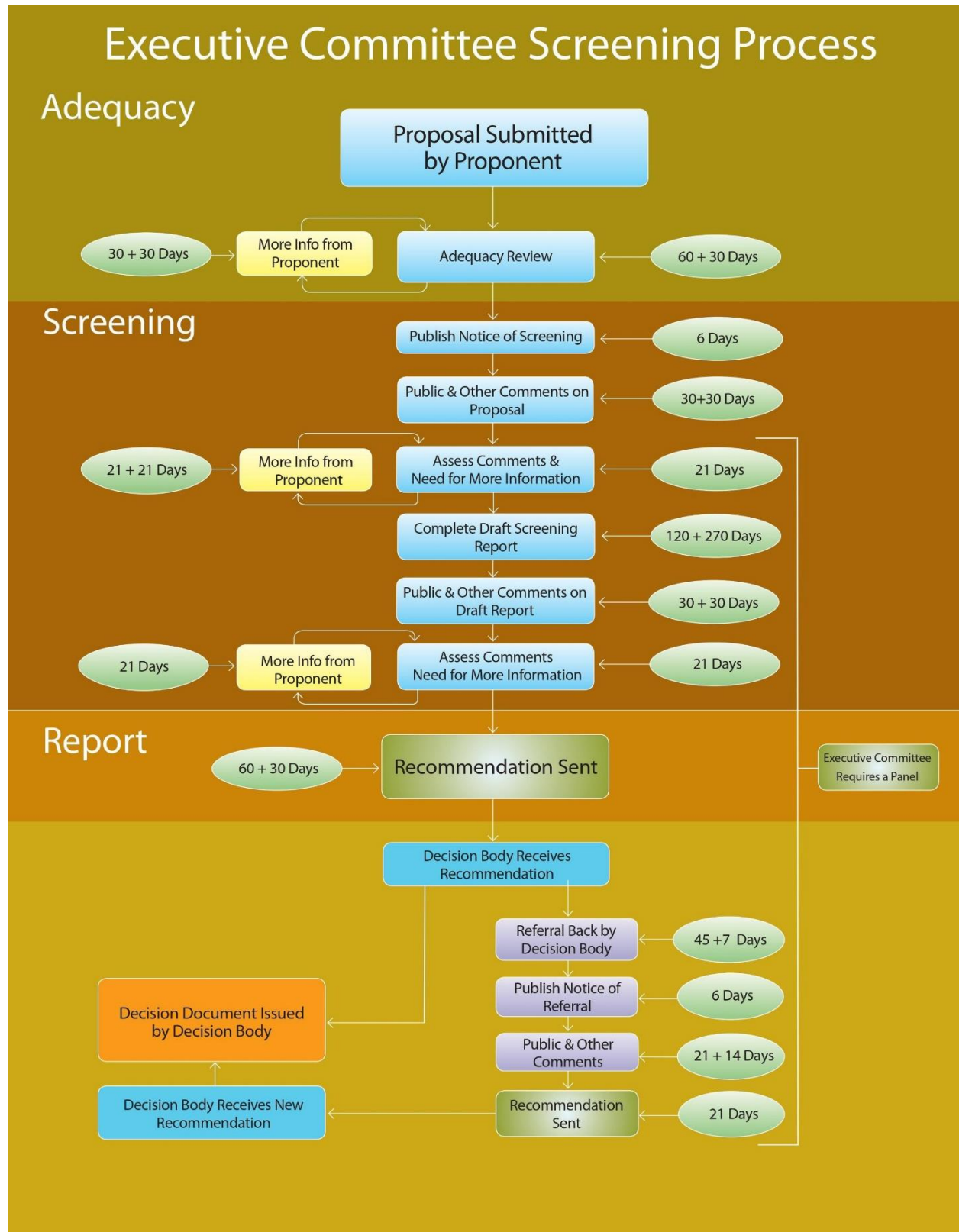
[243] It may be helpful to select a neutral third party to act as the chair of the consultation meeting, to ensure the participants stay on track and all the agenda items are discussed.

[244] Costs may be spoken to in Case Management if necessary.

[245] My thanks to all counsel for their cooperation and their excellent organization of a vast amount of written material.

DUNCAN C.J.

Appendix A



Appendix B

Term No.	Term & Condition	Variation	Status	Rationale
1	YESAB: The proponent shall update the geochemical modelling during operations to inform detailed design of the cover systems, with the aim of reducing acid production and COPI loadings from storage facilities.	The proponent shall update the geochemical modelling during operations to inform detailed design of the cover systems and update the Waste Rock Management Plan, with the aim of reducing acid production and COPI loadings from storage facilities.	Varied	Term has been revised for clarity and to ensure the results of geochemical modelling are incorporated in to any revisions to the Waste rock Management Plan.
2	YESAB: The proponent shall advance development of the WTP design and confirm expected performance for all relevant COPIs during licensing to optimize design and ensure timely implementation.	N/A	Accept	
3	YESAB: The Proponent shall conduct pilot studies for in-situ pit treatment and the CWTS during operations to confirm their expected performance for all relevant COPI's, optimize their respective designs and ensure timely implementation.	N/A	Accept	
4	YESAB: The Proponent shall implement additional treatment options if the proposed CWTS cannot be demonstrated to reduce COPI concentrations to background levels consistently.	The Proponent shall implement additional treatment options if the proposed CWTS cannot be demonstrated to reduce COPI concentrations to levels that are consistently below the defined regulatory thresholds.	Varied	Term has been modified to better reflect the Proponent's proposed approach to developing water quality objectives and linkages to regulatory processes for the setting of thresholds.
5	YESAB: The Proponent shall revise WQOs as necessary to ensure they are based on the most recent toxicological	N/A	Accept	

Term No.	Term & Condition	Variation	Status	Rationale
	information and guidance from CCME and BCMOE.			
6	YESAB: The Proponent shall establish effluent quality standards for the Project based on achieving WQOs in the receiving environment in Geona Creek (KZ-37) and in Finlayson Creek (KZ-15).	N/A	Accept	
7	YESAB: The Proponent shall conduct ongoing investigations into WRSA liners and cover systems to ensure that the performance objectives used in the water quality model are achieved during all Project phases.	The Proponent shall conduct ongoing investigations into WRSA liners and cover systems to ensure that the expected liner and cover performance is achieved during all Project phases.	Varied	Term has been modified for clarification, recognizing that further design refinements will occur through regulatory licensing.
8	YESAB: The Proponent shall commit to ongoing geochemical studies for WRSA A and B, and studies to optimize the performance of the proposed CWTS to address the potential for acidic conditions to develop in the future.	N/A	Accept	
9	YESAB: The Proponent shall ensure the WTP remains operational until it has been demonstrated that surface water from the site meets WQOs for the receiving environment in Geona Creek (KZ-37) and in Finlayson Creek (KZ-15).	N/A	Accept	
10	YESAB: Government of Yukon shall oversee the establishment and maintenance of an oversight body, financed by the Proponent, comprised of participants representing the Proponent, Government of Yukon, LFN, and RRDC.	Within six months of issuance of a Decision Document the Government of Yukon (YG) shall establish an independent KZK-FCH Oversight Committee (FCHOC) comprised of participants representing the YG, Liard	Varied	The term is varied to create stronger linkages between all of the FCH related terms leading to a more effective mitigation approach within YG's regulatory framework. In addition to the

Term No.	Term & Condition	Variation	Status	Rationale
	<p>The proponent will be required to include in the wildlife management plan (a component of the QML), any outputs and actions agreed to by the oversight body. These components of the plan will be updated as required based on the seasonal nature of the outputs or actions.</p> <p>The oversight body shall require the implementation of mitigations, and monitoring of their effectiveness, considering the following mitigation and management strategies:</p> <p>a. In general:</p> <p>i. When and how to apply mitigation measures pertaining to caribou referred to in Appendix A (Proponent commitments).</p> <p>ii. The prioritization of methods for reducing sensory disturbance.</p> <p>iii. The establishment of objectives, methods and prioritization for effectiveness monitoring.</p> <p>iv. The identification of triggers and corrective actions within the adaptive management plan.</p> <p>v. The identification of additional mitigations that may be necessary to reduce adverse</p>	<p>First Nation (LFN), and Ross River Dena Council (RRDC).</p> <p>Establishment of the FCHOC will include the development of a Terms of Reference that describes:</p> <ul style="list-style-type: none"> • Establishment of roles, responsibilities, and participants. The role of the Proponent as a member of the FCHOC. • Participant funding (RRDC and LFN). • Process for review of information (western scientific and traditional knowledge). • Process for decision-making. • A mechanism for conflict resolution. • Other matters as agreed to by the parties. • Communication protocols between the FCHOC (chaired by YG), the regulator, and the Proponent. <p>Review throughout the Life of the Project:</p> <p>The FCHOC will be engaged during the life of the KZK Project to annually review monitoring and the effectiveness of the project's mitigation measures. The FCHOC will consider, at a minimum, the following mitigation and management strategies, and their implementation, as necessary:</p>		<p>variance of terms 10 and 11, an additional term was added (New Term 38) to support the development of a caribou effects monitoring, mitigation and adaptive management program.</p> <p>Variance of term 10 includes a timeline for establishment and development of a TOR for the FCHOC, connection to data collection and monitoring inputs from term 11 and plan reviews in connection with the QML process and subsequent amendments as required in relation to adaptive management.</p> <p>Established mechanisms exist for affected First Nations to provide input to the QML process via the regulatory plan review and approval processes through governments duty to consult; however, the FCHOC will provide an additional instrument to allow for periodic discussion, recommendations and updates to existing plans associated with the QML.</p> <p>FCHOC will interact with project specific data collection, effects monitoring, mitigation and adaptive management as well</p>

Term No.	Term & Condition	Variation	Status	Rationale
	<p>effects based on new knowledge.</p> <p>vi. Educational and outreach activities regarding caribou in relation to the project.</p> <p>b. On a seasonal or shorter duration basis:</p> <p>i. The implementation of daily timing windows for or temporary suspensions of blasting and crushing</p> <p>ii. The implementation of daily timing windows for or temporary suspensions of truck transportation</p> <p>iii. The limiting of speeds on the access road</p> <p>iv. Restrictions on flights based on daily timing windows</p> <p>v. Modification of flight paths</p> <p>vi. Suspension of helicopter use</p> <p>vii. The use of convoys for transportation</p> <p>viii. The intervals between and location of breaks in snow berms on the access road.</p>	<p>a. Annually:</p> <p>i. When and how to apply the Proponent's mitigation measures pertaining to caribou referred to in Appendix A (Proponent commitments).</p> <p>ii. The prioritization of methods for reducing sensory disturbance.</p> <p>iii. The establishment of objectives, methods and prioritization for effectiveness monitoring.</p> <p>iv. The identification of triggers and corrective actions within the adaptive management plan.</p> <p>v. The identification of additional mitigations such as offset measures that may be necessary to reduce adverse effects based on traditional knowledge or new information from project-specific or range-wide monitoring.</p> <p>vi. Educational and outreach activities regarding caribou in relation to the project.</p> <p>b. On a seasonal or shorter duration basis:</p> <p>i. The implementation of daily timing windows for temporary suspensions of</p>		<p>as provide input and receive recommendations related to the range wide management of the FCH.</p>

Term No.	Term & Condition	Variation	Status	Rationale
		<ul style="list-style-type: none"> i. blasting and crushing. ii. The implementation of daily timing windows for temporary suspensions of truck transportation. iii. The limiting of speeds on the access road. iv. Restrictions on flights based on daily timing windows. v. Modification of flight paths. vi. Suspension of helicopter use. vii. The use of convoys for transportation. viii. The intervals between and location of breaks in snow berms on the access road. <p>The FCHOC will review the initial Quartz Mine Licence (QML) application and any subsequent amendments to the Wildlife Protection Plan (inclusive of the Caribou Effects Monitoring and Mitigation Program), AMP and any other applicable plans. The FCHOC will be provided all available information to support their reviews, including the results of data collection and monitoring on the FCH.</p> <p>The FCHOC shall submit recommendations related to addressing potential impacts on the FCH from the Project to YG regulators. YG shall give full and fair consideration to recommendations from the</p>		

Term No.	Term & Condition	Variation	Status	Rationale
		<p>FCHOC, and to the extent of its authority under applicable legislation, YG shall incorporate the recommendations into project authorization requirements. Any other outputs of the FCHOC related to the status of the FCH across its range shall be provided to the appropriate YG officials.</p> <p>Upon decision, the YG regulator(s) shall submit to the FCHOC an explanation of how the Committee’s recommendations were taken into consideration.</p>		
11	<p>YESAB: Government of Yukon shall, in collaboration with affected First Nations and communities, develop a comprehensive long-term range management plan for the FCH based on the following principles:</p> <ul style="list-style-type: none"> ● Be informed by best available scientific and traditional knowledge ● Acknowledge and be guided by people’s relationship with caribou ● Help to promote the social, economic, and cultural well-being of people in the Yukon ● Promote transparency in decisions made during the range planning process ● Respect the need for a collaborative process for co-management of resources with affected First Nations. 	<p>11(a) The Government of Yukon (YG), in collaboration with affected First Nations, shall prepare a desktop review report of the FCH (FCH), based on all available western scientific and traditional knowledge. The results of the desktop review will inform the following:</p> <ol style="list-style-type: none"> i. The need for and collection of additional data and project effects monitoring information, and identification of offset measures as required for unmitigated effects. ii. Range wide herd population dynamics, distribution, health, and habitat surveys. iii. Examination of cumulative effects and risks to the herd based on existing land use information. 	Varied	<p>The term is varied to address and expand upon project specific and range wide concerns raised during the assessment process. The revised term is divided into four key components, which together with term 10 and New Term 38 provide a robust path forward to create certainty around effective mitigation and monitoring of the FCH at the project and range levels. The revised components provide clarity and alignment with existing government processes and include key deliverables, opportunities for First Nation input, and builds a foundation for effective monitoring, mitigation and adaptive management actions</p>

Term No.	Term & Condition	Variation	Status	Rationale
	<ul style="list-style-type: none"> ● Recognize the potential for and encourage local community engagement and involvement in implementing the range plan <p>The plan should include the following sections in relation to the FCH:</p> <ul style="list-style-type: none"> a. Management principles and goal: Identification of the principles underlying the planning process and the management goal. b. Current conditions: Best available information will be used to identify the health, trend and condition of the population and its habitat. c. Limiting factors: Best available information will be used to identify the factors limiting the population including: habitat, predation, climate, and human activities (harvest and land-use). d. Future conditions: Identify scenarios and projections of likely sources and locations of future impacts from development, wildfire, and climate, and their implications for the population and its habitat, including consideration of predation. e. Management objectives and thresholds: Identify specific management objectives related to population and habitat, 	<p>The results of the desktop review will be made available to the FCHOC. The FCHOC will review and provide recommended actions, as appropriate, such as offsetting measures, to the YG regulator(s) for any additional mitigations or monitoring.</p> <p>11(b) The Proponent shall undertake additional baseline data collection (habitat, distribution and movement) for a period of 2 years prior to initiation of construction, to inform the development and approval of a Caribou Effects Monitoring and Mitigation Program (Term No. 38⁽¹⁾), AMP and the WPP.</p> <p>The design and methodology for this baseline data collection will be developed in cooperation with YG. The baseline data collection shall commence once YG approves the Proponent's study design and methodology, following the issuance of this Decision Document.</p> <p>11(c) YG will undertake additional range wide data collection and monitoring based on the results of the desktop review. The results of this monitoring will be shared with the FCHOC.</p> <p>11(d) YG, in collaboration with affected First Nations, will develop a management plan for the FCH. The parties will determine</p>		<p>for the FCH over the long-term.</p> <p>The path forward in the varied term is to collaborate with affected First Nations to get a common understanding of all available western scientific data and traditional knowledge which will be used to identify information gaps related to the FCH (11a). The desktop review report will be made available to the FCHOC to inform additional project specific and range wide mitigation, monitoring and management.</p> <p>To address concerns raised in the referral back period, an additional 2 years of baseline data will be collected by the Proponent prior to construction (11b). This baseline program will build off existing information where possible and address key concerns raised during the assessment (i.e., movement corridors, winter and summer habitat) related to project effects.</p> <p>Yukon government will commit to additional range wide data collection to support a stronger understanding of all pressures on the</p>

Term No.	Term & Condition	Variation	Status	Rationale
	<p>and thresholds of change in population and habitat related to achieving these objectives.</p> <p>f. Management tools and actions: Identify specific population and habitat management tools and actions (voluntary and non-voluntary) required to achieve objectives, and the relationship of these tools and actions to community-based, regulatory and land-use planning processes.</p> <p>g. Implementation: Describe how the plan will be implemented in a collaborative and timely manner.</p> <p>h. Monitoring: Identify ongoing monitoring needs including outstanding questions and uncertainties faced in developing and implementing the range plan, and develop time-bound learning plans to address key uncertainties.</p> <p>i. Adaptive management and review: Identify how monitoring results and new knowledge will be incorporated into revisions to the plan.</p> <p>j. Communication: Establish methods of ongoing communication to ensure that advice, guidance, feedback, monitoring results, and implementation results can be shared easily and widely with</p>	<p>management goals and objectives through a collaborative process.</p> <p>The FCH management plan will consider the following topic areas upon further discussion with affected First Nations:</p> <ul style="list-style-type: none"> a. Management principles and goal b. Current conditions c. Limiting factors d. Future conditions e. Habitat restoration and rehabilitation measures, and other offsetting measures where required f. Management objectives and thresholds g. Management tools and actions h. Implementation i. Monitoring j. Adaptive management and review k. Communication 		<p>FCH based on gaps identified by the desktop review (11c). This monitoring falls within YG’s mandate to manage wildlife and will not be tied to project specific timelines. However, monitoring results will be made available to the FCHOC for consideration when evaluating project effects and adaptive management throughout the life of the project.</p> <p>Yukon government will engage with affected First Nations to initiate the development of a collaborative management plan for the FCH (11d). Management planning is an existing process and tool used by YG to develop goals, objectives and recommendations associated with a herd at the range level. Data, information, and recommendations will be made available to the FCHOC to be considered at a project specific level and the FCHOC can make recommendations to the management planning team about project pressures on the herd.</p>

Term No.	Term & Condition	Variation	Status	Rationale
	communities and decision makers			
12	YESAB: The Proponent shall ensure that LFN and RRDC have opportunities to participate in and influence the development of environmental and socio-economic management plans and closure objectives developed for the Project to ensure that potentially affected First Nations can collaboratively design, collect, report, manage and communicate the results of the monitoring programs to their citizens.	N/A	Accept	
13	YESAB: The Proponent shall ensure that LFN has the opportunity to be part of the Proponent–Kaska environmental, cultural and heritage management program.	N/A	Accept	
14	YESAB: The Proponent shall sponsor on-the-land culture activities that promote sharing of Traditional Knowledge and practices in the Project area for the duration of construction and operation of the mine. The camp details, location and structure will be developed by potentially affected First Nations and span construction, operational and closure phases of the Project.	N/A	Accept	
15	YESAB: The Proponent shall provide allowance for up to 14 days of unpaid leave to all Yukon First Nation employees to allow	N/A	Accept	

Term No.	Term & Condition	Variation	Status	Rationale
	<p>for the exercising of Aboriginal rights related to:</p> <ul style="list-style-type: none"> a. the pursuit of traditional land use activities; this will be 14 days to allow sufficient time on the land; and attending culturally important events (potlaches, dances, ceremonies, culture camps). 			
16	<p>YESAB: Proponent shall maintain in trust a transition fund with sufficient funds to ensure, in the event of an unscheduled closure:</p> <ul style="list-style-type: none"> a. Funds for education and retraining; b. Maintenance of the employee assistance program (EAP); and c. Payment of back wages and severance <p>for affected employees from Watson Lake and Ross River employed by the project at time of closure. The amount of funds and their administration shall be conducted by a suitable party. The administrator shall have a local representative in either Ross River or Watson Lake to aid in ensuring the fund meets its objectives.</p>	N/A	Accept	
17	<p>YESAB: Shall ensure staff have access to money management and budgeting information and resources through on-line tools.</p>	N/A	Accept	
18	<p>YESAB: Recruitment for care and maintenance positions shall be done with preference for former</p>	N/A	Accept	

Term No.	Term & Condition	Variation	Status	Rationale
	qualified mine employees by the body overseeing care and maintenance.			
19	YESAB: The setting of security shall take into account the potential for care and maintenance costs required to maintain environmental protections over a period between a temporary closure and decommissioning.	N/A	Accept	
20	YESAB: Security requirements shall take into consideration the potential for early unscheduled closure and the need for care and maintenance requirements to maintain environmental safeguards prior to decommissioning.	N/A	Accept	
21	YESAB: The Proponent shall develop mandatory, regular harassment prevention training in consultation with a qualified expert, to be delivered to all the Proponent's employees, contractors and consultants working at the site.	N/A	Accept	
22	YESAB: The Proponent shall ensure that human resource staff complete training to enable them to effectively support employees who disclose workplace harassment. In order to increase reporting of sexual harassment and assault, human resource staff shall provide all new staff with information about ways in which they may best record and provide evidence of harassment or bullying and what happens after they	N/A	Accept	

Term No.	Term & Condition	Variation	Status	Rationale
	make a disclosure of workplace harassment and how they will be protected from reprisals.			
23	<p>YESAB: Proponent shall modify their proposed Mentor program for Yukon First Nations employees to:</p> <ul style="list-style-type: none"> • ensure that women have access to a mentor or supervisor who regularly checks in to address any negative experiences related to the male-dominated work environment, and who pays special attention to potential cases of abuse; • develop a formal feedback process to ensure that enquiries are regularly made to First Nations employees to ensure that they are able to voice concerns and have addressed any negative experiences; and • involve both LFN and RRDC in further developing this Program to ensure that it meets the needs of First Nation employees. 	N/A	Accept	
24	YESAB: The Proponent shall, in consultation with a qualified expert and both LFN and RRDC, develop gender appropriate and gender- and sexuality-specific policies and processes which promote a safe, respectful and inclusive environment for	N/A	Accept	

Term No.	Term & Condition	Variation	Status	Rationale
	women and gender and sexual minorities.			
25	YESAB: The Proponent shall develop, with a qualified expert, an Anti- Harassment and Bullying Policy that outlines processes and actions to address any harassment or bullying which may take place within the Project's scope.	N/A	Accept	
26	YESAB: The Proponent shall ensure that the on-site First Aid Technician or Emergency Medical Technician is trained in Mental Health First Aid and/or has formal mental health training to provide short-term or crisis support at the mine site, referrals to other mental wellness supports or navigation to other systems.	N/A	Accept	
27	YESAB: The Proponent shall ensure that on-site employees have the ability to utilize the EAP services available (i.e. ensure that a private phone line or Internet is available to discretely reach EAP services).	N/A	Accept	
28	<p>YESAB: To address and mitigate impacts to employees who are or become victims of domestic abuse, the Proponent must create a policy that:</p> <ul style="list-style-type: none"> • outlines clear procedures for the workplace to work with affected employees and provide appropriate resources and support; 	N/A	Accept	

Term No.	Term & Condition	Variation	Status	Rationale
	<ul style="list-style-type: none"> • plans for and addresses safety concerns that affected employees may have while at work to ensure all workers are safe from threats of domestic violence; and • includes a personal safety plan for employees suffering from domestic violence. 			
29	YESAB: The Proponent shall inform all BMC employees that their eligible dependents have access to the Employee Assistance Plan (EAP).	N/A	Accept	
30	YESAB: The Proponent shall develop standards for behavior at work and codes of conduct against sexual harassment and gender-based violence on the job site and in the broader community, including standards/codes of conduct in relation to the sex trade, and shall distribute education and awareness campaign materials on gender-based violence.	N/A	Accept	
31	N/A	The Proponent shall identify alternative/contingency measures for treatment of ABM pit water in their updated comprehensive adaptive management plan, prior to project initiation. The AMP shall provide descriptions of the types of treatment alternatives and their implementation timelines, prior to project initiation. The Proponent shall identify trigger values for when alternatives must	New Term	The 2018 Water Quality Model report, included as part of the Proposal documentation, provided a summary of the in-situ treatment method that is proposed for treatment of ABM pit water, including an overview of the results obtained using this method at various pit lakes in the United States.

Term No.	Term & Condition	Variation	Status	Rationale
		be implemented and, if monitoring shows exceedances and alternative treatment is implemented, how discharges will be addressed until new water treatment becomes operational.		However, the rationale and scientific basis for the parameter percent removals assigned to the in-situ treatment in the water quality model were not provided in sufficient detail.
32	N/A	The Proponent shall assess the effluent, as well as predicted concentrations in the receiving environment, for acute toxicity and effects to fish and benthic organisms in the Project's receiving environment. This should reflect the species and populations in the receiving environment.	New Term	New term added to ensure that effluent is protective of the receiving environment for fish and fish habitat and specific to the environment and species observed.
33	N/A	The Proponent shall ensure the adaptive management plan addresses potential leakage from the Class A storage facility. The AMP should outline monitoring, triggers and actions associated with the Class A storage facility that address leakage scenarios.	New Term	New term requiring an Adaptive Management Plan (AMP) to identify, capture and treat any leakage from the Class A storage facility.
34	N/A	The Proponent shall provide to responsible regulators the worst case scenario estimate for water quality predictions for Geona Creek and Finlayson Creek, and use this data to reduce the uncertainty in water quality predictions for the Project.	New Term	New term requiring that water quality modelling predictions including the worst- case scenario are provided to regulators.
35	N/A	The Proponent shall develop an updated Water Quality Model and a comprehensive Adaptive Management Plan to be included in the licensing	New Term	New term added to require updated modelling and AMP for the regulatory licensing process.

Term No.	Term & Condition	Variation	Status	Rationale
		process. The AMP should address potential changes in WQ in Geona Creek d/s of the CWTS.		
36	N/A	The Proponent shall develop and implement adaptive management measures based on monitoring for the onset of acidic conditions, that allows for early detection, management, and mitigation of acidic conditions and metal leaching developing on site.	New Term	Term has been modified for clarification and is now included as a specific mitigation instead of a s.110(b).
37	N/A	The Proponent shall develop an ambient air monitoring and adaptive management plan for all Criteria Air Contaminants (CACs), based on updated (2025) standards.	New Term	New term added to ensure that air quality monitoring and associated management plan requirements will comply with the 2025 standards.
38	N/A	<p>The Proponent shall develop a Caribou Effects Monitoring and Mitigation Program, as part of the WPP for review and approval under the QML. The Proponent will provide the proposed program for review to the FCHOC. As described in Mitigation No. 10, the FCHOC will review and provide input on the effects monitoring program that will be incorporated into the approval of the program during the QML review.</p> <p>The Caribou Effects Monitoring and Mitigation Program shall be designed in consideration of the following objectives:</p> <ol style="list-style-type: none"> 1. Evaluating effectiveness of the 	New Term	This term is added to replace and expand on monitoring conditions s.110 C and D. The Caribou Effects Monitoring and Mitigation Program will set out effects hypothesis, clear objectives, methods and adaptive management to ensure that project related effects can be accurately monitored and mitigated, in relation to all stages of the project. The Program will use existing baseline data, the additional 2 years of data collected by the proponent (term 11b) and any new range

Term No.	Term & Condition	Variation	Status	Rationale
		<p>Proponent's caribou mitigations/Wildlife Protection Plan.</p> <ol style="list-style-type: none"> 2. Evaluating effects of the project on disturbance and displacement of the FCH. 3. Consideration of effects at various stages of the project, including during pre-construction, construction, operations, and closure phase. 		<p>wide data as inputs to understanding project related effects. The development and initiation of this program will provide a robust understanding of project interactions with the FCH.</p> <p>Throughout the life of the Project, the FCHOC will have an active role in providing input into the Caribou Effects Monitoring and Mitigation Program through the Wildlife Protection Plan. The FCHOC will review effects monitoring results annually and provide direction to adapt the monitoring program, and/or the Wildlife Protection Plan, as needed.</p>

Appendix C

Condition	Condition BMC's Response
No new roads built outside of proposed	Agreed.
Haul road access not to be widened.	For safety reasons the road needs to be widened for trucks.
Close Access Road in spring & fall while caribou migrate through area	<p>Agreed to management program.</p> <p>Although a 3 month closure of access each year will not work, BMC will have Wildlife Protection Plans & Traffic Management Plans that will dictate how the access road will be managed during migration periods. This will include stopping traffic when caribou are present near the access road.</p>
No fly zones during caribou calving/post-calving and sheep lambing time	<p>Agreed.</p> <p>Flight route planning to be part of operating plans. Note that Finlayson airstrip will be used, and wind direction may dictate flight approach.</p>
Project must be dry stack tails.	Agreed
BMC to pay for RRDC Water Engineer to meet with BMC & YESAB engineers to reach consensus on tails management.	<p>Agreed.</p> <p>BMC has funded Dena Cho and will fund annual review of tails and other management.</p>
Mine closure with money to do so.	<p>Agreed.</p> <p>BMC will post closure bond with Yukon Government.</p>
After Mine Closure, infrastructure to be given to RRDC to tourism etc.	<p>Agreed.</p> <p>Will be incorporated into mine closure plan. BMC & RRDC can work together on this.</p>
Co management of Fish & Wildlife Area.	<p>Agreed.</p> <p>BMC has proposed an environmental management and review committee that will directly involve Kaska. BMC has incorporated this into our planning, and we will also incorporate the details into the SEPA changes. BMC also prepared to set up Kaska Caribou Research Centre out of mine profits</p>
Establish Ross River Oversight Board made up of land Stewards of that area.	<p>Agreed.</p> <p>BMC has proposed a role for Elders/Stewards/Dena Cho in the development and ongoing environmental management and review of site programs.</p>

There should be an RRDC representative as one of the executives of the Project. Involved in all decision making.	Agreed. BMC intends to employ a considerable number of RRDC and other Kaska at the mine and anticipates that Kaska will fill many management and supervisory roles. BMC scholarship and training program is designed to prepare Kaska for important roles on the mine site.
Community ratification process.	This is an internal matter for Ross River however BMC has proposed an environmental management and review process that has direct involvement by community representatives and those representatives need to be empowered to represent community.
BMC to provide funding to 2-3 Dena land Guardians to monitor and enforce Dena laws throughout the life of the mine.	Agreed. BMC has proposed an environmental management and review proposal (see above) that will directly involve Kaska and will provide funding for land guardian program.
Conduct major ceremony to bless area.	Agreed.
No hunting or fishing by non-Dena employees.	Agreed. Plus, BMC Policy is that the mine should not be used by people wanting to hunt and there will be a no shooting zone around the mine for safety reasons.
BMC to contribute to Dena World View DVD, use it for in job training.	Agreed. Details to be worked on and included in revised SEPA.
BMC to assist in purchase of Inconnu Lodge.	Agreed. Obligation to be incorporated in revised SEPA under Business Funding. BMC notes Inconnu Lodge may not be for sale.
Assist in establishment of Protected Area to south of KZK.	No objection in principle however details need to be provided to BMC.
Repatriation/rematriation of any Grave and Funeral pyre site.	Agreed. Elders to advise BMC on this.
If BMC sells Project all plans and RRDC conditions to be inherited by new buyer.	Agreed. This is already in the existing SEPA.
No use of liquified natural gas on site.	Not agreed. BMC needs to transport LNG on highway and use compressed natural gas on site in power generation. BMC will source other renewable options to reduce compressed natural gas usage if it can.

SEPA negotiations to be community based.	This is a matter for RRDC to resolve internally.
No development without consent.	BMC is committed to delivering a positive response for as many of the Elders' Conditions to Consent as we can. However, BMC notes that there are some "asks" that cannot be agreed to.