COURT OF APPEAL OF YUKON

Citation: *Ross River Dena Council v. Yukon (Government of)*, 2024 YKCA 4

Date: 20240229
Docket: 24-YU914

Between:

Ross River Dena Council, on its own behalf, and on behalf of all members of the Kaska Nation and Kaska Nation

Appellant
(Petitioner)

And

Government of Yukon (Deputy Minister, Executive Council Office), The Attorney General of Canada, and BMC Minerals Ltd.

Respondents
(Respondents)

Before: The Honourable Mr. Justice Fitch
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated January 2, 2024 (*Ross River Dena Council v. Yukon (Government of)*, 2024 YKSC 1, Whitehorse Docket 22-AP008).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference):	M. Youden E. Hobbs
Counsel for the Respondent, Government of Yukon (Deputy Minister, Executive Council Office) (via videoconference):	I.H. Fraser
Counsel for the Respondent, Attorney General of Canada (via videoconference):	M. Anderson-Lindsay B. Fetch
Counsel for the Respondent, BMC Minerals Ltd. (via videoconference):	R. Millen K. O'Callaghan C. Hildebrand

Place and Date of Hearing:	Whitehorse, Yukon February 28, 2024
Place and Date of Judgment:	Whitehorse, Yukon February 29, 2024

Summary:

On an application for judicial review from a decision allowing a proposed mining project on First Nation traditional lands to proceed to the regulatory stage, the judge found the Crown had met its duty to consult, save for its failure to address a few discrete issues raised in a submission provided by the First Nation on the eve of the decision. The judge set aside the initial decision, ordered a focused consultation on these issues, and set a deadline for a new decision that incorporates findings made in the further consultation. The appellant appeals, arguing that the Crown failed to discharge its duty to consult throughout the entire process, on issues and in ways going beyond its failure to consult on the issues raised in the late-filed submission. The appellant applies to stay the term of the order requiring the issuance of the new decision by the stipulated deadline. The appellant says there is a serious issue to be decided on appeal and advances three ways in which irreparable harm will be occasioned if the new decision is made before the appeal is heard on its merits. The appellant further submits that the balance of convenience militates in favour of granting the stay. Held: The stay application is dismissed. With respect to irreparable harm, the appellant has not demonstrated that the appeal will be rendered moot if the stay is denied. The additional harms relied on by the appellant are either speculative or unsupported by the evidence. Significantly, there is no evidence that the appellant's traditional lands and resources will be altered in any material way before the underlying appeal is decided. Greater harm would flow from an order granting the stay than will be occasioned by an order dismissing the application.

FITCH J.A.:

I. Nature of the Application

[1] The appellant, Ross River Dena Council ("RRDC"), applies on its own behalf and on behalf of the Kaska Nation ("Kaska") and all of its members, for an order staying paragraph 7 of the order pronounced by Chief Justice Duncan on January 2, 2024 (the "Duncan Order"), pending the determination of the appeal. Counsel for the parties referenced the appellant collectively as "Kaska" throughout their submissions and, for convenience, I will do the same.

[2] The Duncan Order set aside a decision made on June 15, 2022, by the Deputy Minister, Executive Council Office for Yukon ("Yukon"), Natural Resources Canada, and Fisheries and Oceans Canada (collectively, the "Decision Bodies") that allowed a proposed mining project located within Kaska's traditional territory to proceed to the regulatory stage (the "Decision Document"). The decision was set aside on grounds that the Crown failed in its duty to consult, but only in respect of

issues raised in a written submission provided by Kaska on June 14, 2022 (the "June Submission"). The Chief Justice directed that further consultation be undertaken to the end of addressing the concerns raised by Kaska in the June Submission.

[3] Paragraph 7 of the Duncan Order requires the Decision Bodies to issue a new decision (the "New Decision Document") within 30 days of the final day on which the further consultation contemplated by the order occurs.

[4] The further consultation was concluded on February 8, 2024. I am advised that the Decision Bodies understand they are obliged to issue the New Decision Document on or before March 8, 2024.

[5] By this application, Kaska seeks to stay issuance of the New Decision Document until its appeal is heard. On that appeal, Kaska asserts, among other things, that the judge erred in her assessment of the adequacy of the consultation undertaken in this case. Kaska's concerns, and its grounds of appeal, go well beyond the Crown's failure to consult in relation to the June Submission.

[6] For the reasons that follow, the application for a stay is dismissed.

II. Background

[7] In March 2017, the proponent of the project, BMC Minerals Ltd. ("BMC") brought forward a proposal to develop an open pit and underground copper, lead, and zinc mine within Kaska's traditional territory (the "Project").

[8] Kaska is comprised of five Kaska First Nations, two of which—the RRDC and Liard First Nation ("LFN")—have communities based in Yukon. The RRDC and LFN are the two Kaska First Nations closest to the proposed Project site. None of the members of Kaska in the Yukon is a signatory to the Umbrella Final Agreement ("UFA"). Kaska specifically rejected a treaty-based land claim agreement based on the UFA. Kaska claims Aboriginal rights and title within their traditional territory.

[9] The Project holds significant cultural and environmental value for Kaska and encompasses vital wildlife habitats, sacred sites, and traditional hunting and gathering areas.

[10] The Project site lies within the range of the Finlayson Caribou Herd ("FCH"). The FCH forms part of the Northern Mountain population of Woodland Caribou, which is listed as a species of special concern in Schedule 1 of the *Species at Risk Act*, S.C. 2002, c. 29. Kaska has relied on the FCH as a food source for generations.

[11] The Project lands are also close to three abandoned mining projects. Chief Dylan Loblaw, elected chief of the RRDC, deposes in an affidavit filed in support of this application that these mines were abandoned after they failed, leaving their proponents bankrupt. In each case, emergency remediation was required to address the pollution caused by the mining operations to Kaska's traditional lands. This is another historical feature that serves to frame Kaska's concerns about the potential development of the Project.

[12] As the Chief Justice observed, the stakes in this case are high. The Project has the potential to return significant economic benefits, but also has the potential to create adverse effects in Kaska's traditional territory.

[13] Against this background, both levels of government advised LFN and RRDC in the early days of the Project proposal that they would, to the extent possible, be relying on the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 [the "*YESAA*"] and its regulations to assist in meeting their duty to consult.

[14] The *YESAA* provides a legislative framework for evaluating the environmental and socio-economic impacts of development projects in Yukon. Section 5(2) of the *YESAA* mandates a "comprehensive, neutrally conducted assessment" before a proposed project is undertaken to evaluate its "environmental and socio-economic effects". In addition, the legislation is expressly designed to: protect and promote the well-being of Indigenous people in Yukon; 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 depend; recognize and, where practicable, enhance the traditional economy of Indigenous people in Yukon and their special relationship with wilderness environment; and, guarantee opportunities for the participation of Indigenous people in Yukon by making use of their knowledge and experience in the assessment process.

[15] The *YESAA* imposes a statutory obligation on a decision body to consult with a First Nation without a Final Agreement on the potentially adverse socio-economic and environmental impacts of a proposed project in the First Nation's traditional territory: s. 74 of *YESAA*. Thus, the Decision Bodies in this case, which were formed under the *YESAA* framework, were under a statutory and constitutional obligation to consult with Kaska before allowing the Project to move forward to the regulatory phase.

[16] The proposal was submitted to the Yukon Environmental and Socio-economic Assessment Board (the "YESAB") and was assessed by its Executive Committee. After carrying out assessments under the *YESAA* and its regulations, the YESAB submitted their recommendations to the Decision Bodies. The Decision Bodies are required to issue a Decision Document based on YESAB's findings within a prescribed time.

[17] On June 15, 2022, more than five years after BMC's submission of the proposed Project to the YESAB, the Decision Bodies issued a Decision Document allowing the Project to proceed to the regulatory stage. The Decision Document attached 38 terms and conditions, and two monitoring measures directed primarily at BMC and the Yukon government.

[18] Issuance of the Decision Document does not guarantee ultimate approval for the construction of the Project. Rather, it permits the Project to proceed to the next phase of obtaining licensure from regulatory authorities.

[19] On June 14, 2022—the day before issuance of the Decision Document—the Decision Bodies received the June Submission filed jointly by RRDC and LFN. The

submission reiterated Kaska's opposition to the making of a decision allowing the Project to proceed to the next phase. The June Submission was also the first time Kaska specifically responded to a number of issues, including proposed terms and conditions relating to water quality and management of the FCH.

[20] On September 2, 2022, the RRDC, on behalf of Kaska, filed a petition seeking judicial review of the Decision Document. The RRDC alleged the June 15, 2022 decision was unreasonable because the Decision Bodies failed in their legal duty to consult with and reasonably accommodate Kaska. In addition, RRDC submitted that the decision should be set aside on procedural fairness grounds.

[21] There was no application made at that time to stay the Decision Document pending the judicial review.

III. Supreme Court Decision

[22] The judicial review was heard by Chief Justice Duncan on April 11–18, 2023. In reasons for judgment ("RFJ") delivered January 2, 2024 (indexed as 2024 YKSC 1), the Chief Justice summarized the issues raised by RRDC, including:

a) Whether the Yukon and Canadian governments breached their duty to consult with Kaska on all potential outcomes of the Project proposal, including its rejection;

b) Whether the Decision Bodies unduly narrowed the scope of consultation with Kaska;

c) Whether the Decision Bodies failed to meaningfully grapple with the June Submission filed by RRDC and LFN;

d) Whether the Decision Bodies improperly deferred consultation to the regulatory phase of the Project; and

e) Whether Yukon and Canada breached the duty of procedural fairness owed to Kaska by not engaging in a further consultative process following receipt of the June Submission.

[23] It was common ground in the proceeding below that the reasonableness standard of review applied. What is reasonable in a given situation will depend, in part, on the constraints imposed by the legal and factual context of the decision under review: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 90 and 105.

[24] Consistent with the guidance *Vavilov* provides, Chief Justice Duncan noted that an understanding of the duty to consult—which is a significant constraint imposed by the factual and legal context in which the impugned decision was made—is crucial to assessing the reasonableness of the Decision Document. The Chief Justice acknowledged that, before making its decision, the Decision Bodies had to fulfil their common law duty to consult Kaska emanating from the honour of the Crown, as well as their statutory duty to consult Kaska under the *YESAA*.

[25] The judge noted that 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 at para. 35. She also observed that the duty to consult 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 at para. 34.

[26] The parties agreed that the level of consultation owed by the Crown to Kaska is deep. The judge recognized that the duty of deep consultation includes the obligation to: discuss the consultation process; meet in good faith with an open mind to discuss issues and concerns raised; seriously consider those concerns; make efforts to mitigate in order to minimize adverse impacts of a proposed project; and advise of the course of action taken and why.

[27] Relying on *Haida Nation* at para. 44, the judge accepted that, in this case, deep consultation required written explanations capable of showing that Kaska's concerns were duly considered. The judge emphasized, however, that even though the Crown is required to act in good faith and meaningfully consult, the duty to consult does not require achievement of agreement or a particular outcome: *Haida Nation* at para. 42.

[28] I provide this background context because it assists in framing the application of the test for a stay and, most particularly, assessment of the public interest and where the balance of convenience lies in this case.

[29] The Chief Justice concluded that the Crown acted reasonably in fulfilling its duty to consult with the exception of the June Submission: RFJ at paras. 231–238. As she put it:

> [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.

[30] She held that the failure to respond to Kaska's concerns set out in the June Submission was not reasonable. She provided the following reasons for coming to this conclusion:

> [192] There are three reasons why the Decision Bodies' position on the [June 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 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 [exerted by the proponent].
>
> …
>
> [207] Here, the [June 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 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.

[31] While the Chief Justice acknowledged that the duty to consult would continue throughout the regulatory process, she held that it was unreasonable to defer consultation on the June Submission until after the Decision Document was issued. In other words, she found it unreasonable for the Decision Bodies to defer consultation to the regulatory process when "consultation was inadequate or has serious shortcomings in the first assessment stage". She said this:

> [199] … [D]eep consultation required [the Decision Bodies] to explain to Kaska why the information in the [June 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.

[32] In light of her findings, Chief Justice Duncan held that the appropriate remedy was to set aside the Decision Document and refer the decision back to the Decision Bodies for further consultation, limited to the issues raised in Kaska's June Submission. She directed that the consultation meeting take place on or before March 2, 2024, over a period of no more than two days. By paragraph 7 of the order, she directed the Decision Bodies to issue a new decision within 30 days of the final day of the consultation meeting, with no extensions allowed.

[33] For convenience, the salient terms of the order are set out below:

> THIS COURT ORDERS that:
>
> 1. The June 15, 2022 decision document issued by the Government of Yukon, Natural Resources Canada, and Fisheries and Oceans Canada (together, the "Decision Bodies") is set aside for the limited purpose of allowing a consultation meeting on the June 14, 2022 submission to occur.
>
> 2. The consultation meeting shall be held by no later than March 2, 2024 and may be chaired by a neutral third party.

> 3. The meeting shall be scheduled for one full day, with the possibility of a second day if agreed to by the Applicant and the Decision Bodies.
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> 4. 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.
>
> 5. Particular attention should be provided to the comments and questions in the June 14, 2022 submission on the modified terms and conditions.
>
> 6. Where the Decision Bodies are of the view that they have answered concerns raised by Kaska Nation elsewhere, they should so advise.
>
> 7. The Decision Bodies shall issue their decision document within 30 days of the final day of the consultation meeting. There will be no extensions of this deadline.

[34] On February 1, 2024, the RRDC filed a Notice of Appeal with this Court seeking orders: setting aside the Duncan Order; quashing the Decision Document; directing the Decision Bodies to engage in deep and meaningful consultation with Kaska regarding the Project; and remitting the matter back for redetermination.

[35] The stated grounds of appeal are that the Chief Justice "erred in her assessment of the Crown's constitutional duty to consult, the adequacy of that consultation, and the remedy to be granted to the petitioner".

[36] On February 8, 2024, the parties concluded their consultation meetings in compliance with the Duncan Order.

[37] On February 16, 2024, the RRDC brought this application to stay paragraph 7 of the Duncan Order, the effect of which is understood by the parties to require the Decision Bodies to issue a New Decision Document by March 8, 2024. In essence, the appellant seeks an order forestalling conclusion of the assessment process contemplated by the *YESAA* framework.

[38] As is evident from the timeline, an expeditious determination of this application is required.

IV. Legal Framework

[39] Pursuant to s. 13 of the *Court of Appeal Act*, R.S.Y. 2002, c. 47, a judge of this Court may grant a stay "on those terms that are just". The test for a stay under

s. 13 follows the well-known tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 337, 340–42, 1994 CanLII 117 (S.C.C.).

[40] As applied to this case, the *RJR-MacDonald* test requires the appellant to demonstrate on the balance of probabilities that: (1) there is a serious question to be determined on appeal; (2) Kaska will suffer irreparable harm if the stay is refused; and, (3) the balance of convenience favours granting the stay. The overarching consideration is whether granting the stay is in the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607 at para. 9; *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia*, 2022 BCCA 289 at para. 6 (Chambers).

V. Positions of the Parties

Appellant

[41] The appellant submits that the appeal raises serious questions of legal significance pertaining to the scope and nature of the Crown's constitutional duty to consult. Counsel for Kaska expanded on the grounds of appeal to some extent in oral argument. Kaska will submit that Chief Justice Duncan erred in assessing what the Crown had to do to discharge its duty of deep consultation in this case. Further, Kaska will submit that fulfilment of a statutory duty to consult does not necessarily discharge the Crown's constitutional duty to consult. Finally, Kaska will argue that the judge erred in concluding that the Crown failed in its duty to consult only in one narrow respect.

[42] Kaska advances three ways in which irreparable harm will be suffered if the stay is not granted. All of the appellant's submissions on irreparable harm assume that the New Decision Document will—consistent with the original Decision Document—advance the Project to the next phase. As the new decision is not known at this stage, Yukon says the stay application is premature. If the Project is not approved, there is no reason for a stay. Indeed, the appeal itself would become moot. I will address Yukon's argument later in these reasons.

[43] Returning to the appellant's submissions, Kaska says that issuance of a New Decision Document by the Decision Bodies may render the appeal moot, thereby irreparably damaging its right to have the appeal heard on the merits. The appellant's position on this point turns, in large measure, on its interpretation of the underlying order. The appellant says that the Duncan Order, which set aside the Decision Document, leaves it open to the Decision Bodies to make a new decision based on the entirety of the record, not just on the contents of and the consultation surrounding the June Submission. As I understand it, the appellant says the new decision would effectively supersede the Decision Document and render the appeal moot. The appellant relies on *InterOil Corporation v. Mulacek*, 2016 YKCA 13 (Chambers), among other authorities, in support of its mootness argument.

[44] Second, noting that the overarching purpose of the duty to consult is reconciliation between Indigenous groups and the Crown, the appellant submits that refusal of the sought-after stay could irreparably damage the goal of reconciliation between the Crown and Kaska. The appellant relies on *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.*, 2011 ONSC 7708 at paras. 49–53, *Haida Nation v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 290 [*Haida Nation FC*] at para. 54, and *Canada (Attorney General) v. Cold Lake First Nations*, 2015 FC 1197 at para. 38, in support of the proposition that failure by the Crown to fulfil its duty to consult may be sufficient to constitute irreparable harm. The appellant also relies on the affidavit of Chief Loblaw, who deposes that issuance of the New Decision Document prior to the determination of the appeal may have a lasting and deleterious impact on future Crown-Kaska relations.

[45] Third, the appellant submits that approval of the Project would result in irreparable harm to its traditional lands and resources for which no adequate compensation is available. Given the size and proposed output of the mine, the appellant submits that approval of the Project will entail a permanent loss of natural resources from, and a scarring of, its traditional lands.

[46] The appellant acknowledges that the Project would be subject to further regulatory approvals even if the New Decision Document permits it to move forward. It submits, however, that a decision to advance the Project to the regulatory phase will likely provide "clear momentum" for the Project to move towards its ultimate construction. It also argues that deficiencies in consultation during the initial assessment phase cannot be remedied retroactively: see *White River First Nation v. Yukon Government*, 2013 YKSC 66 at para. 127.

[47] Finally, the appellant submits that the balance of convenience militates in favour of granting the stay.

[48] First, safeguarding its ability to challenge the adequacy of the consultation serves the public interest, as it is vital to the goal of reconciliation and furtherance of the *YESAA*'s legislative mandate.

[49] Second, the appellant notes that, as the Project is delayed, granting the stay will simply maintain the Project in its status quo. The appellant relies on this as a factor favouring the imposition of a stay: *Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507 at paras. 112, 117–118.

[50] Third, the appellant submits that, absent a stay, it will lose any ability to exercise its constitutionally protected rights and interests.

[51] Fourth, the appellant emphasizes that Kaska has the right to have its appeal decided on its merits.

[52] Finally, the appellant notes that if the application is dismissed, the Decision Bodies will be compelled to issue a New Decision Document that may itself be subject to judicial review. This raises the specter of multiple decisions being under various stages of judicial review and appeal concurrent with the required regulatory review. This potential state of affairs would introduce significant and unnecessary procedural complexity and expense.

[53] To summarize, the appellant submits that it is in the interests of justice to grant the stay because the protection of Kaska's interests, and other important public interests, outweighs any prejudice flowing from a modest delay in the pursuit of the Project.

Respondents

1. Attorney General of Canada

[54] The Attorney General of Canada ("AGC") opposes granting the stay application, asserting that the appellant has failed to satisfy the *RJR-MacDonald* test.

[55] First, the AGC submits (as do the other respondents) that the appellant's motion materials fall short of providing the information necessary to enable meaningful evaluation of the merits of the underlying appeal. The AGC notes that a simple enumeration of the grounds of appeal does not meet even the low merits threshold contemplated in *RJR-MacDonald*.

[56] Second, the AGC contends (as do the other respondents) that the appellant has failed to establish that it would sustain irreparable harm if the stay is refused. The AGC submits that the question on this prong of the test is whether a refusal to grant a stay could so adversely affect the appellant's interests that the harm could not be remedied by success on appeal.

[57] The AGC also argues (as do the other respondents) that each of the three types of harms alleged by the appellant are based on speculation, unsupported by the evidence.

[58] With respect to the first type of harm alleged by the appellant, the AGC submits (as do the other respondents) that the issuance of a New Decision Document in accordance with paragraph 7 of the Duncan Order will not render the appeal moot. Further, the notion that refusal of the stay will cause irreparable damage to the goals of reconciliation and the maintenance of respectful Crown/Kaska relations is speculation, not evidence of irreparable harm. The

appellant's concerns respecting the potential impact on the Project lands and surrounding natural resources is also said to be premised on a series of speculative assertions. The AGC notes that no construction will take place at the regulatory approval stage. Thus, even if the New Decision Document allows the Project to move forward and the Project is granted the various regulatory approvals it requires, there is no evidence that land or natural resources will be lost or significantly affected by any mining activity before the underlying appeal is heard and determined. Indeed, the evidence adduced by BMC, which I will discuss momentarily, is to the contrary.

[59] Finally, on the balance of convenience, the AGC submits that issuance of the New Decision Document will not impair the appellant's ability to have its appeal heard and determined on its merits, nor will it result in the loss of lands and resources as alleged. Conversely, a stay preventing the release of the New Decision Document would unnecessarily delay advancement of the Project, resulting in public inconvenience that outweighs any inconvenience to the appellant.

2. BMC

[60] BMC similarly submits that the appellant has failed to satisfy the *RJR-MacDonald* test.

[61] First, BMC says Kaska has not attempted to articulate how the Chief Justice erred—it just baldly alleges she did. In these circumstances, BMC submits that Kaska's appeal does not even meet the low merits threshold on a stay application. Even if it does, BMC submits that the apparent weakness of the appeal should inform the Court's analysis under the balance of convenience prong of the *RJR-MacDonald* test. BMC relies on *Ross River Dena Council v. The Attorney General of Canada et al.*, 2009 YKCA 2 at para. 17 and *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, [1992] 3 W.W.R. 279, 64 B.C.L.R. (2d) 96 (C.A.) at para. 23 to support its position on this point.

[62] On the question of mootness, BMC submits that the appeal concerns the adequacy of the consultation that occurred prior to the June Submission. BMC notes

that the matter was remitted to the Decision Bodies "for the limited purpose of allowing a consultation meeting on the [June Submission] to occur." In rendering the New Decision Document, the Decision Bodies must therefore proceed on the footing that the consultation engaged in prior to the June Submission reasonably discharged the Crown's constitutional and statutory duty to consult.

[63] In further response to the irreparable harm claim, BMC relies on the affidavit of its Vice President of External Affairs, Allan Nixon, concerning the likely timelines of the Project (assuming that the New Decision Document advances the Project to the regulatory phase). Mr. Nixon describes the various regulatory approvals that BMC will require, and the further consultations or public hearings that will be required at each stage. He deposes that, even on an optimistic view of the timeline for the Project, commencement of construction on the Project site will not occur before October 2025.

[64] Mr. Nixon also notes that the Project employs members of Kaska. He deposes that if the stay is granted, BMC will need to reduce a significant percentage of its workforce, harming not only BMC but local Kaska businesses and community members. I understand this evidence to be adduced in support of a submission that the balance of convenience tips in favour of refusing the stay.

3. Government of Yukon

[65] Yukon agrees with the submissions of the AGC and BMC that the appellant has failed to meet the test for granting a stay, and that issuance of the New Decision Document "is not synonymous with approval of mine construction."

[66] Yukon submits that the appeal would not be rendered moot by dismissal of the stay application. The fundamental basis underlying the impugned order is that the Crown reasonably discharged its duty of consultation, save for the items addressed in the June Submission. Against this background, Yukon submits that if the order of Chief Justice Duncan—premised, as it is, on the adequacy of the consultation undertaken up to the June Submission—was set aside, the New Decision Document would necessarily fall with it.

[67] On the balance of convenience, Yukon also submits that there is a compelling public interest in permitting the process of consultation and decision making to be completed. On this point, Yukon relies on *British Columbia (Attorney General) v. Reece*, 2023 BCCA 257 at paras. 54–55.

[68] Finally, Yukon submits that the stay application is premature as it remains uncertain whether the New Decision Document will allow the Project to proceed to the next stage. Yukon suggests that the appellant will be in a better position to provide specific, concrete support for its stay application after the New Decision Document is issued: *Reece* at paras. 93–105.

VI. Analysis

Prematurity as a Threshold Question

[69] While there is merit in Yukon's position on this issue, given the nature of the issues that arise on this application I consider that the interests of justice are best served by a judicial determination of the application on its merits.

Serious Question to be Determined

[70] The merits threshold is low. As the Court explained in *RJR-MacDonald*, "[a] prolonged examination of the merits is generally neither necessary nor desirable" at 338. A court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious: *RJR-MacDonald* at 341. The question is whether there is some merit to the appeal, in the sense that there is a serious question to be determined, not whether the applicant can establish a strong *prima facie* case: *RJR-MacDonald* at 335.

[71] There is some force in the submission of the respondents that the materials filed in support of the application do not permit even a cursory review of the merits of the appeal. Given the complexity of the issues raised and the further articulation of the grounds of appeal in oral argument, I am, nevertheless, satisfied that the appellant has met this prong of the test.

Irreparable Harm

[72] "Irreparable harm" refers to harm that cannot be quantified in monetary terms or otherwise cured: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 24. The word "irreparable" invites consideration of the nature of the harm suffered rather than its magnitude: *RJR-MacDonald* at 341. At this stage of the analysis, the focus is on the irremediable nature of the harm an appellant may suffer if the stay is denied but the appeal ultimately allowed: *RJR-MacDonald* at 341. While proof of the certainty of irreparable harm is not required, there must be a foundation, beyond mere speculation, capable of supporting a claim of irreparable harm: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras. 59–60. In *Reece*, this Court said this:

> [93] … To support a finding of irreparable harm, the evidence must be more than a series of possibilities, speculations or general assertions. The evidence needs to be sufficiently precise to demonstrate a real probability that unavoidable irreparable harm will occur without an injunction. …

[73] The appellant accepted in oral argument that the formulation in *Reece* of the standard applicable to irreparable harm claims accurately summarizes the law.

[74] I accept, of course, the appellant's position that irreparable harm may be occasioned if refusing to grant a stay effectively renders the appeal moot: see, for example, *Romspen Investment Corp. v. Chemainus Quay and Marina Complex Ltd.*, 2012 BCCA 292 at para. 15 (Chambers). Indeed, I think it is fair to say that the appellant's mootness argument is the cornerstone of its claim to irreparable harm and its submission that the balance of convenience militates in favour of granting the stay.

[75] I am not, however, persuaded that the appellant's appeal from the Duncan Order will be rendered moot if the stay is denied. The appeal concerns the adequacy of consultation undertaken by the Crown prior to the June Submission. If the extent of the consultation undertaken to that date is characterized on appeal as being inadequate and, therefore, productive of an unreasonable decision, the prior failure to consult will not be cured by a New Decision Document that allows the Project to

proceed based on the further and focused consultation ordered by the Chief Justice. I agree with Yukon's position that, even if the Decision Bodies allow the Project to proceed based on the additional consultation undertaken in February 2024, success on the appeal would undermine the foundation upon which any subsequent approval rests. I note, as well, that the respondents confirmed in oral argument that they have no intention of asserting at a future date that the appeal should be dismissed as moot.

[76] Further, on the uncontested evidence of Mr. Nixon—assuming, again, that the New Decision Document allows the Project to proceed to the regulatory phase and that it thereafter passes all regulatory hurdles—construction of the Project is unlikely to commence until the fall of 2025 at the earliest. In the meantime, the tangible and concrete dispute will not disappear if the stay is dismissed, nor will the ability of the appellant to seek vindication of its position in this Court.

[77] In these circumstances, I fail to see how refusal of the appellant's stay application renders the appeal moot by foreclosing the appellant's ability to pursue the relief it seeks on appeal.

[78] Given my conclusion on this point, I do not see that *InterOil* assists the appellant. Unlike the court's approval of the sale of shares in *InterOil*, which would have resulted in the transaction closing before the appeal could be heard, a decision to allow the Project to move into the regulatory phase (if that decision is made), will not trigger construction of the Project before the appeal can be determined. Rather, various regulatory authorities must "apply their statutory mandates and criteria to determine whether to issue a license" before the Project moves on from the regulatory phase to construction: RFJ at para. 216.

[79] I am also unable to accept the appellant's position that refusing the stay will irreparably impair Crown-Indigenous relations or pursuit of the goal of reconciliation through consultation. While I accept that Kaska harbours a deep and genuine sense of aggrievement that the consultation done in this case did not take proper account of its concerns, the appeal provides the means through which remedial relief can be

granted. If the appellant's position prevails, the consultative process—and the goal of reconciliation it is meant to serve—will be re-engaged, at least to the extent the Court considers necessary. In other words, if the appellant is ultimately successful on appeal, the harm said to have been done is reparable through judicial intervention.

[80] I turn next to address the appellant's position that refusing the stay will result in irreparable harm being done to Kaska's traditional lands over which it asserts title. I accept the appellant's submission that it is important to evaluate the claim to irreparable harm from an Indigenous perspective—one that considers their unique relationship with the land. But doing so does not assist the appellant in this case. For the reasons already expressed, there is no evidence that the land, or the natural resources found on the land, will be altered in any material way before the appeal is decided.

[81] In my view, this is what distinguishes the case at bar from authorities relied on by the appellant, including *Wahgoshig*. In that case, no consultation had been undertaken. Despite this, mineral exploration was occurring on Treaty 9 lands—exploration that involved drilling, as well as clearing forest and bulldozing access routes to drill sites. The point is this: harmful alteration of the land was occurring in circumstances where there had been "a concerted, willful effort not to consult": *Wahgoshig* at para. 58.

[82] Similarly, in *Haida Nation (FC)*, the judge hearing the injunction application accepted that irreparable harm to the herring fishery would likely occur unless an interim order was made enjoining the reopening of a commercial herring fishery in Haida Gwaii.

[83] The court in *Cold Lake* reviewed both cases and acknowledged that "… in some circumstances, the failure by the Crown to consult before it acts may be sufficient to constitute irreparable harm": at para. 38. However, the court noted that interlocutory relief was granted in *Wahgoshig* and *Haida Nation (FC)* based on

"evidence of material harm to the resource in question": at para. 38. Similar to the situation in *Cold Lake*, evidence of this sort is lacking in the present case.

[84] Finally, I do not accept the appellant's position that irreparable harm will be occasioned if the stay is refused because the Decision Bodies' approval will provide "clear momentum" to carry the Project through the regulatory or licensing phase. A claim to irreparable harm cannot stand on such subjective and unsubstantiated grounds. Even assuming that the Decision Bodies allow the Project to proceed after the further consultation ordered by the Chief Justice, the appellant's submission unfairly assumes that the bodies charged with determining whether the Project meets regulatory requirements will not perform their jobs adequately. I note, as well, that there is precedent for denying the proponent of an undertaking a licence in the face of a decision document allowing the undertaking to proceed to the regulatory phase: *Western Copper Corporation v. Yukon Water Board*, 2011 YKSC 16.

Balance of Convenience

[85] To assess the balance of convenience, the parties' competing interests must be weighed to determine which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits: *RJR-MacDonald* at 341–342, and 344.

[86] The appellant properly emphasizes that the public interest is always a relevant factor in determining the balance of convenience when governmental conduct is challenged on constitutional grounds. The appellant is also right to emphasize that "the vital importance of consultation in promoting and achieving reconciliation" is an important aspect of the public interest: see *Reece* at para. 59. The public interest in upholding the honour of the Crown by allowing a First Nation the opportunity to address issues important to the achievement of reconciliation may well carry considerable weight in the balance of convenience: see *William v. British Columbia (Attorney General)*, 2019 BCCA 112 at para. 50 (Chambers).

[87] At the same time, the appellant is right to acknowledge that the public interest encompasses societal concerns as well as the interests of identifiable groups. The

point was made in *RJR-MacDonald* at 344. The public interest in this case includes the promotion of responsible economic development in the region and, relatedly, the public interest in permitting the approval process to be fully completed: *Reece* at para. 55.

[88] A good deal of Kaska's argument on the balance of convenience rests on the assertion that it should have the opportunity to challenge a decision on the basis that consultation was inadequate before the "die is cast" and consequential harm is occasioned. The difficulty I have with this submission is that the appeal is not moot and can be heard and determined before the tangible harm Kaska fears will materialize.

[89] At the end of the day, the balance of convenience comes to this: a stay of paragraph 7 of the Duncan Order would forestall issuance of the New Decision Document. But issuance of the New Decision Document would not affect Kaska's ability to have its appeal heard and determined on the merits, nor would it result in the loss of lands or natural resources in Kaska's traditional territory. At most, if the New Decision Document goes against Kaska's interests, the Project will move to the regulatory approval stage, not to project implementation or construction. Conversely, a stay would result in unnecessary delay in the making and implementation of a decision about whether the Project will move forward.

[90] Having considered all of these circumstances, including the important public interests the appellant seeks to vindicate by pursuing the appeal, I am of the view that the balance of convenience lies in favour of dismissing the stay application. In my view, the competing interests at play in this case are best resolved by permitting the Project to proceed through the regulatory phase while the appeal unfolds.

[91] If dismissing the application would have resulted in significant interference with Kaska's traditional territory before the appeal could be resolved, I might have come to a different conclusion. But there is no evidence before me to suggest that this will occur. On the record before me, I am of the view that greater harm would

flow from an order granting a stay than will be occasioned if the application is dismissed.

[92] I should note that I have come to this conclusion without needing to assess the relative strength of the appeal in determining where the balance of convenience lies.

[93] An order expediting the hearing of the appeal was mooted in oral argument. I am satisfied, however, that the parties are working co-operatively to ready the appeal for hearing as quickly as possible. In the circumstances, I do not see that such an order at this time would serve any practical purpose.

[94] I wish to record that I have also considered the appellant's submission that a refusal to grant a stay in this case will result in the unnecessary expenditure of funds and add a layer of procedural complexity to this proceeding that could otherwise be avoided. I am not persuaded that the expense and procedural complexity highlighted by the appellant can be avoided in this case by an order granting a stay.

VII. Disposition

[95] The stay application is dismissed.

"The Honourable Mr. Justice Fitch"