# SUPREME COURT OF YUKON

Citation: *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.,* 2011 YKSC 55

Date: 20110704
S.C. No. 10-A0118
Registry: Whitehorse

Between:

LIARD MCMILLAN, on his own behalf and on behalf of
all the other members of LIARD FIRST NATION, and LIARD FIRST NATION

Petitioners

And

THE MINISTER OF ENERGY, MINES AND RESOURCES, and
THE YUKON GOVERNMENT, and
ROBERT HOLMES, in his capacity as Director of Mineral Resources, Ministry of Energy, Mines and Resources,
SELWYN CHIHONG MINING LTD. and
YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT BOARD

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

| | |
|---|---|
| Drew Mildon | Counsel for the Petitioners |
| Laurie Henderson and Julie DesBrisay | Counsel for Yukon Government |
| Charles Willms and Kevin O'Callaghan | Counsel for Selwyn Chihong Mining Ltd. |
| Joseph J. Arvay, Q.C. and James F. Bishop | Counsel for Yukon Environmental and Socio-economic Assessment Board |

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] Liard First Nation applies for an order to quash, suspend, or stay the Decision Document of the Director of Mineral Resources dated July 23, 2010 (the "Decision

Document”), stating that the Selwyn Resources Underground Exploration Program (the “Selwyn Project”) be allowed to proceed subject to recommended terms and conditions. The Decision Document accepts the recommendation from the Watson Lake Designated Office (the “Designated Office”) in the Designated Office Evaluation Report dated June 16, 2010 (the “Evaluation Report”) with some variation of the recommendations. The Decision Document permits Selwyn Chihong Mining Ltd. (“Selwyn Chihong”) to proceed to apply for a water licence from the Yukon Water Board, which had been applied for but not yet decided at the time of this hearing.

[2] Liard First Nation submits that the Evaluation Report prepared by the Designated Office is incomplete, deficient and fails to comply with the statutory requirements of the *Yukon Environmental and Socio-economic Assessment Act,* S.C. 2003, c. 7 (“*YESAA*”). Liard First Nation also submits that the Decision Document fails to address the deficiencies and incompleteness of the Evaluation Report as well as meet the statutory requirements in *YESAA*. The First Nation also claims the Director breached the duty of fairness, natural justice and the duty to consult Liard First Nation.

[3] Liard First Nation seeks its remedy against the Director and not against the Designated Office. In *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.,* 2011 YKSC 29, I granted the Yukon Environmental and Socio-economic Assessment Board (“YESAB”) party status to address the alleged deficiencies in the Evaluation Report. YESAB hires the staff of the designated offices and makes rules for the conduct of evaluations.

[4] This Court has already considered the relationship between a Decision Document and the Yukon Water Board in *Western Copper Corporation v. Yukon Water*

*Board,* 2011 YKSC 16. This judgment considers, among other issues, the relationship between an Evaluation Report and the Decision Document that is based upon it. While *YESAA* requires a consideration of both environmental and socio-economic matters, this judgment will focus on the environmental issues raised by Liard First Nation.

[5] This judgment, necessarily mired in legal and environmental terminology, speaks to the relationship between the Liard First Nation, the Yukon Government and Selwyn Chihong in determining how a mining project should proceed. It is but a snapshot of a sometimes adversarial assessment process. But in the context of the duty to consult, long after the last ounce of zinc has been mined, the Yukon Government and the Liard First Nation will have a continuing relationship as they search for common ground.

**BACKGROUND**

[6] Liard First Nation is a Kaska First Nation for which no final agreement is in effect. There are 14 Yukon First Nations, and 11 have signed final land claims agreements and self-government agreements based upon the Umbrella Final Agreement dated May 29, 1993. The environmental assessment procedure set out in *YESAA* gives effect to terms of the Umbrella Final Agreement negotiated by Canada, Yukon and Yukon First Nations.

[7] Liard First Nation's traditional territory lies in the southeast part of Yukon. The Selwyn Project is located in Kaska Traditional Territory. This application is brought by Chief Liard McMillan and Liard First Nation. The members of the Liard First Nation reside in and around Watson Lake, Yukon. Ross River Dena Council, the other First Nation consulted about the Selwyn Project, is also a Kaska First Nation.

[8] Selwyn Chihong is developing a zinc-lead formation in the Howard's Pass area, which straddles the border of Yukon and Northwest Territories, approximately 260 kilometres north of Watson Lake. The border is defined by the watershed divide between the Yukon and MacKenzie Rivers. The watershed of the Yukon portion of the Selwyn Project drains westward via Don Creek to the Pelly River and then to the Yukon River.

[9] Selwyn Chihong has claims and leases covering 32,130 hectares, the majority of which are situated in Yukon. Selwyn Chihong is a joint venture of Selwyn Resources Ltd. and Chihong Canada Mining Ltd.

[10] Although the zinc-lead formation was discovered in the 1970s, no appreciable development work was done on the formation from 1983 – 1999, owing to low zinc prices. However, activity included surface trenching, the collection of soil samples, diamond drilling at 218 sites, construction of two camps, airstrips and an 80-kilometre access road. During this period, approximately 100,000 tonnes of ore and waste rock were brought to the surface and stockpiled. Recent diamond drilling exploration activities took place between 2005 and 2010.

[11] The current infrastructure includes two fully-permitted 50-person camps. The scope of the proposed Selwyn Project includes expansion of the existing camps and infrastructure to support a larger workforce. The underground development or test adit will include 2,340 metres of underground drifting, 500 metres of crosscuts and the extraction and surface storage of up to 200,000 tonnes of ore and development rock.

[12] The Selwyn Project is not described as an operating mine but includes the following activities which are anticipated to operate for a period of 10 years:

- Extraction and surface storage of 200,000 tonnes of development rock
- Extraction of 30 tonnes of bulk samples for testing
- 60,000m of underground diamond drilling
- Construction of a water treatment plant
- Use of explosives
- Rock stockpile storage
- Construction of surface laydown area
- Mechanized Trenching
- Diamond drilling – helicopter and Cat support drill pads
- Trail upgrading, construction and maintenance
- Line Cutting
- Road upgrading, construction and maintenance
- Reclamation/Closure
- Installation of underground well for XY camp
- Operation and maintenance of XY camp and expansion of capacity from 50 to 100 persons
- Operation and maintenance of Don Camp and expansion from 50 to 60 persons
- Dewatering activities and storage, treatment and discharge of water
- Solid waste incinerator
- Sewage treatment plant
- Fuel storage, use and transportation
- Airport maintenance and upgrading, including extension of the XY airstrip

- Waste management for camp, solid waste and special waste

[13] The primary focus of this court application is 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 Liard First Nation. Acid rock drainage and metal leaching, for example, is of particular concern to Liard First Nation. Water consumption for camp usage and underground development activities may require approximately 296,900 litres of water per day. Water will come from Don Creek for both the camps and the initial underground development. Eventually, it is anticipated that groundwater inflows to the underground working area will supplant the Don Creek source for the underground development. The proposed water management system involves surface water and seepage movement, underground waste water from underground development activities, rock stockpile seepage, water storage in up to 8 contingency storage ponds and a proposed water treatment plant.

[14] The Selwyn Project is a quartz mining activity. It is one of approximately 1170 project proposals that have been assessed under *YESAA* since November 2005. The Watson Lake Designated Office has completed 132 assessments, of which 31 relate to quartz mining. This compares to 36 quartz mining assessments at the Dawson City Designated Office and 53 at the Mayo Designated Office. No annual breakdown has been provided but the pace of mining, exploration and development activity has increased in the 2010 – 2011 period. It is sometimes referred to colloquially as the second goldrush.

**The *YESAA* Process**

[15] The Selwyn Project proposal was first submitted to the Designated Office on November 25, 2009. YESAB maintains an Online Registry for each project to allow public access to proposals and documents generated during the assessment process. The Court used the Online Registry during the hearing.

[16] The initial information provided for the Selwyn Project consists of some 400 pages and includes:

- Underground Exploration Program Report
- Hydrometeorology Report
- Estimated Ground Inflow to Proposed XY Test Underground Mine
- Water Treatment Plant Conceptual design
- Comprehensive Water Management Plan
- Description of Natural Features
- Predicted Water Chemistry Associated with Development Drifting at the XY Deposit
- Baseline Water Quality Data
- Standard Operating Procedures for Work in and Around Water

[17] The Designated Office identified a number of information deficiencies in December 2009 and required supplementary information before it considered the Selwyn Project proposal sufficiently complete to begin the assessment.

[18] On December 23, 2009, the Designated Office commenced the assessment. The Designated Office notified the proponent, the Yukon Government's Director of Mineral Resources (the "Decision Body"), Liard First Nation, and Ross River Dena Council of

the assessment and invited them to submit comments. Liard First Nation and Ross River Dena Council are both First Nations with claims to aboriginal rights and title but with no final agreements in effect. They were advised that the Selwyn Project may have significant environmental or socio-economic effects in their respective traditional territories.

[19] On January 4, 2010, the Designated Office issued a public notice of the Selwyn Project proposal and invited comments.

[20] The Designated Office Rules provide for an initial period of 35 days for submissions. At the request of the Yukon Government, Liard First Nation and Ross River Dena Council, the comment period was extended an additional 35 days and finally to March 16, 2010, the maximum extension allowed. During the extension period, Environment Canada and the Yukon Government (Environment) filed extensive comments.

[21] Liard First Nation submitted a letter dated March 16, 2010, from Chief Liard McMillan referencing their claimed aboriginal rights and title and the potential for the project to cause serious negative impacts on them. The letter raised the duty to consult “from the earliest stages through to the end of the life of the project.” The letter also raised a concern about insufficient financial resources available to the First Nation to adequately assess the Selwyn Project.

[22] At the end of the submission period, extensive comments had been received which required additional information from the proponent. Selwyn Chihong agreed to withdraw the Selwyn Project proposal and resubmit it on March 17, 2010, thereby starting the clock again for submissions.

[23] On March 18, 2010, the Designated Office issued another request in writing to the Yukon Government, Liard First Nation and Ross River Dena Council for their views. On March 19, 2010, a second public notice was issued requesting comments.

[24] An additional Information Request was sent on March 22, 2010 to the proponent based on comments from Yukon Government departments and Environment Canada, raising many but not all of the government's comments. The information provided in response to the Information Request became part of the proponent's proposal.

[25] On March 22, 2010, the Watson Lake Mining Recording Office, on behalf of the Chief Mining Land Use of the Yukon Government, sent a letter to the Chief and Council of Liard First Nation informing them of the Selwyn Project proposal. The letter was specifically intended to initiate consultation with the First Nation pursuant to s. 74(2) of *YESAA,* which requires the Decision Body to consult with First Nations without a final agreement. The letter proposed consultation on any potential adverse effects on the aboriginal rights of Liard First Nation arising from the Selwyn Project. The letter invited Liard First Nation to participate in the *YESAA* evaluation and provide views or comments to the Designated Office by April 6, 2010. The specific wording in the March 22, 2010 letter is as follows:

> ... This letter is to make sure that you know about the proposed project and to initiate consultation with your First Nation about any potential adverse effects on your asserted aboriginal rights that may arise in respect of this project, as well as to initiate consultation pursuant to s. 74(2) of the *Yukon Environmental and Socio-economic Act*.

[26] On April 6, 2010, the Designated Office extended the time for submissions to April 27, 2010.

[27] The Director of Mineral Resources, Yukon Government, received a review of additional information on the Selwyn Project proposal from its consultant, SLR Consulting, dated April 22, 2010. The Yukon Government provided the Designated Office with its further review comments from the Department of Environment and the Water Resources Branch.

[28] On May 18, 2010, the Designated Office granted a final extension for submissions to June 1, 2010, specifically at the request of Liard First Nation as it advised that it had put resources towards providing views and information on the Selwyn Project proposal.

[29] The Liard First Nation filed a letter dated May 30, 2010, and attached a detailed Review Report prepared by Bill Slater Environmental Consulting dated May 9, 2010 ("Slater Report # 1"). The letter raised the lack of financial resources for the First Nation to review the project, YESAB statutory failures and included nine main issues identified in the Slater Report # 1 relating to water management.

[30] The Designated Office issued a 122-page Evaluation Report on June 16, 2010, recommending that the Selwyn Project proceed subject to 52 terms and conditions to mitigate the significant adverse affects that the Designated Office determined the Project will have.

[31] On June 29, 2010, the Watson Lake Mining Recording Office, on behalf of the Decision Body, faxed Liard First Nation a letter enclosing a Draft # 1 Decision Document dated July 23, 2010, the latter date being the 37-day deadline for issuing its Decision Document.

[32] The June 29, 2010 letter indicated that the Decision Body was conducting a technical review of the Evaluation Report. The letter invited Liard First Nation's comments on the Draft # 1 by July 13, 2010, as part of the consultation pursuant to s. 74(2) of *YESAA*.

[33] The Decision Body faxed a further letter dated July 9, 2010, following the technical review, and enclosed Draft # 2 for comments by July 13, 2010.

[34] On July 14, 2010, a Liard First Nation advisor e-mailed the Decision Body referencing the tight time frame and requesting clarification of the changes from Draft # 1 to Draft # 2 of the Decision Document. The changes were e-mailed to the advisor on July 15, 2010.

[35] On July 22, 2010, the Director of Mineral Resources, eight Yukon Government employees and two SLR Consultants met with Chief Liard McMillan, Bill Slater, and four other representatives of the First Nation in Watson Lake. Six Yukon Government representatives were in person and five were via teleconference. Four of the First Nation representatives were in person and two by teleconference.

[36] The July 22, 2010 meeting was set for the specific purpose of consulting the Liard First Nation on the Evaluation Report and Draft # 2 of the Decision Document. The Slater Report # 2 was presented at the meeting. It addressed the Evaluation Report Document and the Draft Decision Document in the context of whether the concerns raised in Slater Report # 1 had been met. The Yukon Government representatives were given time to review the report before the meeting started. Bill Slater took the meeting attendees through the Slater Report # 2 and advised that there were serious potential impacts that had not been addressed or assessed in the Evaluation Report. Some of

the Yukon Government consultants and scientists present at the July 22, 2010 meeting agreed that some of the issues raised by the Slater Report # 2 needed to be addressed by the proponent. However, they did not consider the Decision Document to be final authority for the Selwyn Project to proceed and believed some matters could be addressed at the Yukon Water Board after the Decision Document was issued. Liard First Nation considered the Selwyn Project had significant environmental problems that were not properly assessed, making the Draft # 2 Decision Document premature.

[37] The Decision Body issued the Decision Document on July 23, 2010, with some changes arising out of the July 22, 2010 meeting with Liard First Nation.

**The Evaluation Report for the Selwyn Project**

[38] As noted, on June 16, 2010, the Designated Office, pursuant to s. 56(1)(b) of *YESAA,* recommended to the Decision Body that the Selwyn Project be allowed to proceed, subject to specified terms and conditions as the Designated Office determined that the project will have "significant adverse environmental or socio-economic effects" that can be mitigated by those terms and conditions.

[39] The Designated Office summarized as follows:

> Views and information on this project were submitted by Liard First Nation, Ross River Dena Council, Yukon Government, Environment Canada, Department of Fisheries and Oceans and Yukon Conservation Society. Four valued components were identified for consideration in this assessment: aquatic resources; wildlife and wildlife habitat; environmental quality; and health and safety. The Designated Office considered the mitigation measures proposed by the proponent as well as existing legislation. We determined that the project would have significant adverse effects to all of these values. We have recommended mitigation measures that will adequately eliminate, reduce or control these significant adverse effects

> so that they are no longer considered significant. The project is recommended to proceed on this basis.

[40] The submission of counsel for Liard First Nation is that the Designated Office has, in effect, provided no environmental assessment of the Selwyn Project at all because of insufficient information or evidence on volume, contaminants and treatment of water. In other words, Liard First Nation submits that extensive background data is required so that the Designated Office can actually make an assessment on an evidentiary basis. The lack of sufficient background data was also raised earlier in the written submissions of Environment Canada and Yukon Government to the Designated Office.

[41] The Director of Mineral Resources retained external expertise to assist the Yukon Government in evaluating the additional information. The SLR Report dated April 22, 2010, raised concerns at p. 2 as follows:

> Our primary comment is the need for the proponent to acknowledge the uncertainties of likely water volumes and water quality, and provide a clear demonstration of the contingency plans to deal with these uncertainties.
>
> In general, the hydrogeologic characterization of the site is incomplete. There is no understanding of ground water pathways or existing ground water chemistry. Rather, the proponent has elected to be reactive to what may transpire as the mine develops. For example, they expect to drill ahead of the adit and evaluate ground water inflow as they proceed, and then mitigate inflows as they are found. While this is a pragmatic and common method in mining applications, the lack of any prior definition of what might be found raises the risk of unforeseen circumstances considerably. Therefore it is not unreasonable for the review agencies to ask for a higher level of contingency planning and concrete commitments in place in order to be comfortable that the mine can be operated without major environmental issues developing.

[42] The Yukon Department of Environment did not receive answers to all its questions about the Selwyn Project and concluded that the hydrogeologic characterization of the site was incomplete. Nevertheless, Environment stated on April 26, 2010:

> In summary, the application seems feasible and there are no critical technical flaws that would prevent the undertaking from proceeding, provided the key issues of water volumes, storage and treatment capacity are addressed.

[43] I am not going to address every detail covered in the Evaluation Report. Rather, I will consider how it approached some of the main water issues raised by Liard First Nation with the assistance of its environmental assessment expert.

[44] The following concerns, based upon the Slater Report # 1, are found at para. 33 of the Liard First Nation Outline filed in court. After each bolded submission, I set out the response in the Evaluation Report, as presented by counsel for YESAB.

> **33(a) The company used an inappropriate location (W10) to model the impacts of its proposed effluent discharge limits. The location it chose of its analysis is upstream on Don Creek from a barrier to fish migration (i.e., no fish present) and where background water quality is of already poor quality (i.e., natural loadings of contaminant metals are already high).**

[45] According to YESAB, this submission was approached in the Evaluation Report at p. 69 as follows:

> Some concerns were raised over the appropriateness of using water quality data for station H10W10 to determine the background water quality characteristics used to calculate release criteria given that:
>
> - H10W10 is downstream of three mineralized streams whereas the underground exploration site is upstream of these natural tributaries;

- Effluent discharged from the historic adit reports to Don Creek upstream of W10H10 and is therefore represented in the background concentrations for COCs [presumably Contaminants of Concern];

- Data for Don Creek, upstream of the work area is available (station w56) that monitors background water quality conditions prior to inputs from historical or new underground development.

As mentioned above, these concerns, although valid from an effects monitoring viewpoint, are not considered to be limitations to establishing discharge criteria.

[46] On this issue, the Evaluation Report concluded at p. 72:

> The proponent's assessment of effects to aquatic resources in fish bearing water indicates that effluent discharge criteria that were developed to be protective of aquatic life at station H10W10 are likely to be protective of aquatic resources farther downstream. However, taking into account the concerns and recommendations previously discussed in this section, the discharge criteria should be updated prior to licensing and modeled to reassess the potential effects at H5W5.

[47] The Liard First Nation says at para. 33(b) of its Outline:

> **33(b) The volumes of water flowing from the mine could be greater than predicted, and insufficient information is available about groundwater flows under the site. Contaminant loads downstream in Don Creek could be much greater than estimated as a result.**

[48] This concern was also expressed by Environment Canada, Yukon Government (Environment), Liard First Nation and Ross River Dena Council. The Evaluation Report discussed the concern and concluded as follows at p. 57:

> The proposed activities will impact the groundwater regime in the vicinity of the underground development however there is very little background data available to understand groundwater flow rates, pathways and quality. The project

> would benefit from an increased understanding of the site's groundwater regime through a comprehensive ground water monitoring program that would characterized (sic) the background condition prior to the underground development activities, as discussed in section 5.3.7 of this report. This monitoring program could then be used to monitor effects to the groundwater from all project activities during operation and decommissioning.

[49] The Liard First Nation says at para. 33(c) of its Outline:

> **33(c) There is insufficient information about the proposed water treatment plant to determine if it is economically and technically feasible, and will remove all potential contaminants to the levels proposed by the company to ensure safety to the downstream aquatic environment. Copper may become very challenging to manage at the concentrations proposed.**

[50] According to YESAB, the Evaluation Report addressed this concern as follows in section 5.6.7 entitled "Water Treatment Plant" at p. 78:

> The proposed effluent criteria for many of the main potential metal contaminants (lead, zinc, nickel and cadmium) fall within the range of expected performance of a lime treatment system. For copper, as seen in table 5.6.7-1, the proposed criterion is equal to the maximum predicted concentration in the untreated seepage and no additional removal is anticipated. Comments provided by Bill Slater, prepared on behalf of the Liard First Nations (Document no. 052-1), underline the challenge of treating this element beyond 0.01mg/L for mine effluents with elevated copper concentrations. Therefore, if copper were to become a contaminant of concern for the underground development site, given the level of detail provided in the project proposal, it is uncertain whether the proposed water treatment system could meet the proposed discharge criteria.
>
> Given the theoretical nature of the proposed water treatment technologies and the predicted effluent that will require treatment, we consider that the proponent should provide demonstrated evidence that the proposed water treatment plant will perform as described. The results of bench-scale

> tests on site water should be required prior to licensing for all licence parameters.

[51] The Liard First Nation says at para. 33(d) of its Outline:

> **33(d) The geochemistry test-work done for the project may significantly underestimate the concentrations of acid drainage and some metals that will be released. Most of the rock being mined is either 'potentially acid generating' or 'uncertain', but the study concludes that the overall rock mass is 'net acid consuming' and therefore not likely to generate acid drainage. A number of assumptions are made in the company's analysis which are biased toward underestimating the resultant concentrations of acid and/or metals – these could be much higher than predicted. This has serious post-closure implications.**

[52] YESAB says that the Evaluation Report addresses this issue in section 7.4 ("Project Effect – Potential for Acid Rock Drainage and Metal Leaching") at pp. 113 – 116.

[53] It concluded that the evidence to date indicated "low potential for acid rock generation and potential for metal leaching".

[54] Further, the Evaluation Report stated that "Considering the high volume of rock contemplated for extraction, we have determined that this would result in significant adverse effects". Thus a number of mitigations were recommended, including the following one:

> The proponent shall ensure that no ARD/ML [acid rock drainage/metal leaching] is released to the environment except as dictated by a water use license.

[55] The Evaluation Report acknowledged that appropriate implementation, monitoring and enforcement would be required.

[56] The Liard First Nation says at para. 33(e) of its Outline:

> **33(e) Mine drainage from the wasterock storage piles is not adequately characterized, either in terms of concentrations or potential pathways of release to the environment. The company assumes that drainage volumes can be controlled and collected for treatment where necessary, but there is no clear analysis, for example, of drainage into the groundwater system below the rock storage pile and where this might end up.**

[57] According to YESAB, this concern is addressed in section 5.5 of the Evaluation Report entitled “Project Effects – Rock Stockpile Storage Facility”. It concluded at p. 66:

> The potential effects to water resources will be irreversible under temporary or permanent closure plans since the rock stockpile remains under these scenarios. Therefore the potential risk to groundwater is considered to constitute a significant adverse effect and requires further mitigation.

[58] The recommendation of the Evaluation Report is to require that ponds, ditches and storage areas be constructed with engineered liners prior to placement of rock in the rock stockpile storage facility.

[59] I attach as Schedule 1 a summary of issues raised by Liard First Nation and how they were addressed in the Evaluation Report and the Decision Document. Schedule 1 was prepared by counsel for the Government of Yukon. While Schedule 1 cannot be considered as a factual finding of satisfaction with the Evaluation Report or Decision Document, it does indicate how and to what extent issues raised in the environmental assessment were addressed.

**Decision Document**

[60] The Decision Document essentially accepts the Evaluation Report’s recommendation that the Selwyn Project be allowed to proceed, subject to specified

terms and conditions. Some conditions are accepted as-is and some are varied. Under the heading “Yukon Government Decision”, the Decision Body stated as follows:

> Liard First Nation did offer specific comments, particularly with respect to the need to protect aquatic resources, including fish, in lower Don Creek, downstream of the proposed project location. Several of the identified concerns led to changes in the draft decision document and are reflected in the attached final decision document. Of particular note are recommendations 7, 11, 14, 29, 34 and 36.
>
> Issuance of the decision document does not end the review of the proposed project. As the proposed project proceeds to the next stage of the regulatory process the Yukon Government will continue to consult with Liard First Nation and the Ross River Dena Council as required.

[61] The Liard First Nation acknowledged that the Decision Document dated July 23, 2010, incorporated some of its stated concerns and some recommendations from its Slater Report # 2, which was presented at the consultation on July 22, 2010. Nevertheless, Liard First Nation says that the Decision Document failed to address the incompleteness of the assessment and deferred the assessment of significant environmental effects of the Selwyn Project until after project is underway.

[62] For example, Liard First Nation points out that in Recommendation 1 of the Decision Document, baseline groundwater quality will be defined “prior to construction” rather than before a decision to allow the project to proceed.

[63] Also, in Recommendation 8, the Decision Document accepted the recommendation of the Evaluation Report as follows:

> The proponent will provide demonstrated evidence that the proposed water treatment plant will perform as described. This demonstration could be done through bench-scale testing or alternatively through initial treatment of waters from the existing adit and seepage/runoff collected from

> existing rock stockpiles. Testing will be completed prior to receiving flows and the proposed underground development.

[64] The Decision Body also varied Recommendations 5, 6 and 7 of the Evaluation Report on the justification that the recommended mitigations were “too prescriptive and have been reworded to broaden the mitigations to better reflect the role and responsibilities of the Yukon Water Board.”

**ISSUES**

[65] The following issues will be addressed:

1. What is the appropriate standard of review to be applied by the court in reviewing the Evaluation Report, the Decision Document, the duty to consult and the duty of fairness?
2. Did the Designated Office in its Evaluation Report meet the statutory requirements of *YESAA,* and did it reasonably assess the environmental impacts of the Selwyn Project?
3. Did the Decision Document of the Director of Mineral Resources meet the statutory requirements of *YESAA,* and did it reasonably accept, reject or vary the recommendations?
4. Did the Yukon Government breach its duty to consult, consider and respond to Liard First Nation’s concerns as required by *YESAA*, the Constitution and the common law?

**The Legislative Framework**

[66] *YESAA* gives effect to the Umbrella Final Agreement negotiated in 1993 by Yukon First Nations, Canada and the Yukon Government, which provides for an assessment process of environmental and socio-economic effects (s.5).

[67] Assessment is defined by *YESAA* as an evaluation, in this case, by a designated office (s.2(1)).

[68] The purposes of the *YESAA* are set out under s. 5(2)(a) to (j) 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.

[69] 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, by 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.

[70] Yukon has been divided into six assessment districts with Designated Offices located in Dawson City, Mayo, Haines Junction, Teslin, Watson Lake and Whitehorse. The staff of each Designated Office is composed of employees of the Board assigned to that office.

[71] Project proposals subject to assessment under *YESAA* are submitted to a Designated Office or to the Executive Committee, depending on the activities proposed.

[72] Section 39 of *YESAA* sets out the general requirement that a Designated Office "shall give full and fair consideration to scientific information, traditional knowledge and other information provided to it or obtained by it under this *Act*."

[73] Pursuant to s. 42(1) of *YESAA*, a Designated Office "shall take the following matters into consideration":

> (a) the purpose of the project or existing project;
>
> (b) all stages of the project or existing project;
>
> (c) the significance of any environmental or socio-economic effects of the project or existing project that have occurred or might occur in or outside Yukon, including the effects of malfunctions or accidents;

> (d) the significance of any adverse cumulative environmental or socio-economic effects that have occurred or might occur in connection with the project or existing project in combination with the effects of
>
> > (i) other projects for which proposals have been submitted under subsection 50(1), or
> >
> > (ii) other existing or proposed activities in or outside Yukon that are known to the designated office, executive committee or panel of the Board from information provided to it or obtained by it under this Act;
>
> (e) alternatives to the project or existing project, or alternative ways of undertaking or operating it, that would avoid or minimize any significant adverse environmental or socio-economic effects;
>
> (f) mitigative measures and measures to compensate for any significant adverse environmental or socio-economic effects;
>
> (g) the need to protect the rights of Yukon Indian persons under final agreements, the special relationship between Yukon Indian persons and the wilderness environment of Yukon, and the cultures, traditions, health and lifestyles of Yukon Indian persons and other residents of Yukon;
>
> (h) the interests of residents of Yukon and of Canadian residents outside Yukon;
>
> (i) any matter that a decision body has asked it to take into consideration; and
>
> (j) any matter specified by the regulations.

[74] To this point in *YESAA*, the statute has used the word “consideration” in both ss. 39. and 42 to describe the mandatory tasks of the Designated Office. In ss. 55 and 56, the words “evaluation” and “determination” are introduced:

> Evaluation of Projects by Designated Offices
>
> 55. (1) Where a proposal for a project is submitted to a designated office under paragraph 50(1)(b), the designated office shall

(a) consider whether the applicable rules have, in its opinion, been complied with and notify the proponent accordingly; and

(b) determine whether the project will be located, or might have significant environmental or socio-economic effects, in the territory of a first nation.

(2) A designated office shall commence the evaluation of a project as soon as possible after it notifies the proponent affirmatively under paragraph (1)(a).

(3) A designated office may seek any information or views that it believes relevant to its evaluation.

(4) Before making a recommendation under any of paragraphs 56(1)(a) to (c), a designated office shall seek views about the project, and information that it believes relevant to the evaluation, from any first nation identified under paragraph (1)(b) and from any government agency, independent regulatory agency or first nation that has notified the designated office of its interest in the project or in projects of that kind.

56. (1) At the conclusion of its evaluation, a designated office shall

(a) recommend to the decision bodies for the project that the project be allowed to proceed, if it determines that the project will not have significant adverse environmental or socio-economic effects in or outside Yukon;

(b) recommend to those decision bodies that the project be allowed to proceed, subject to specified terms and conditions, if it determines that the project will have significant adverse environmental or socio-economic effects in or outside Yukon that can be mitigated by those terms and conditions;

(c) recommend to those decision bodies that the project not be allowed to proceed, if it determines that the project will have significant adverse environmental or socio-economic effects in or outside Yukon that cannot be mitigated; or

> (d) refer the project to the executive committee for a screening if, after taking into account any mitigative measures included in the project proposal, it cannot determine whether the project will have significant adverse environmental or socio-economic effects.

[75] I now turn to the role of a Decision Body when it receives a recommendation. Section 74 of *YESAA* requires that a Decision Body "considering a recommendation in respect of a project shall give full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation."

[76] Further, *YESAA* sets out in s. 74(2):

> A decision body considering a recommendation in respect of a project shall consult a first nation for which no final agreement is in effect if the project is to be located wholly or partly, or might have significant adverse environmental or socio-economic effects, in the first nation's territory.

[77] Section 3 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.

[78] Section 75 requires a Decision Body to issue a Decision Document within the prescribed period, set as 37 days by SOR/2005-380.

[79] As set out in s. 83(2), the Decision Document “shall be implemented” by a territorial agency, such as the Yukon Water Board, taking any action that enables a project to be undertaken.

[80] The relationship between a Decision Document and a regulatory body like the Yukon Water Board was considered by this Court in *Western Copper Corporation v. Yukon Water Board*. At para. 119, I stated:

> ... the development assessment process prescribed by YESAA is a planning tool that precedes the more technical regulatory licensing process under the Waters Act and the QMA. The development assessment process in YESAA is not for licensing or permitting projects but rather a process that ends with a decision document that accepts [varies or rejects] 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.

[81] Pursuant to s. 86(b), the Yukon Water Board may not set terms of a licence that conflict with a decision document.

## THE STANDARD OF REVIEW

### Issue 1: What is the appropriate standard of review to be applied by the court in reviewing the Evaluation Report, the Decision Document, the duty to consult and the duty of fairness?

[82] I have concluded that reasonableness is the appropriate standard of review for each of the Evaluation Report, the Decision Document, the duty to consult and the duty of fairness. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada concluded that there are only two standards of review, correctness and reasonableness. That decision makes it clear that the previous “two variants of reasonableness” have

been collapsed into a single reasonableness (para. 45). As Binnie J. put it at para. 144, the standard of reasonableness is a “big tent”.

[83] *Dunsmuir* (paras. 51 – 55) set out the following factors to determine the standard of review:

(a) questions of fact, discretion and policy as well as situations where the legal issues cannot easily be separated from the factual issues will generally attract a standard of reasonableness;

(b) the existence of a privative clause is an indicator that the standard of review is reasonableness;

(c) the existing case law can be relied on, with the result that reasonableness will generally be applied where a tribunal is interpreting its own statute or has developed a particular expertise;

(d) questions of law that are of central importance to the legal system will attract the correctness standard but reasonableness may be applied for questions that do not rise to that level, depending on the context.

[84] At para. 62, the Court in *Dunsmuir* summarized the following steps:

1. determine whether previous jurisprudence has already determined the appropriate standard of review; and
2. if further analysis is required, the above factors must be considered.

[85] I am satisfied that the standard of reasonableness should be applied.

[86] I rely on the jurisprudence in *British Columbia (Ministry of Environment, Lands and Parks, Wildlife Branch, Deputy Director) v. British Columbia (Environmental Appeal Board)* (1998), 108 B.C.A.C. 50; *Inverhuron & District Ratepayers’ Association v.*

*Canada (Minister of the Environment)*, 2001 FCA 203; and *South Etobicoke Residents & Ratepayers Association Inc. v. Ontario Realty Corp.* (2005), 75 O.R. (3d) 641 (C.A.).

[87] I will quote only from the *Inverhuron* case as the comments are particularly apt for the case at bar.

[88] Sexton J., in applying the standard of reasonableness to the decision of a responsible authority upon receipt of a screening level environmental assessment, stated at paras. 36 and 38:

> This Court has recognized that policy concerns militate in favour of a more deferential standard of review. The environmental assessment process is already a long and arduous one, both for proponents and opponents of a project. To turn the reviewing Court into an "academy of science" -- to use a phrase coined by my colleague Strayer J. (as he then was) in *Vancouver Island Peace Society v. Canada* -- would be both inefficient and contrary to the scheme of the Act. ...
>
> ...
>
> This does not mean, however, that the Court's approach to reviewing the Minister's decision ought to be so deferential as to exclude all inquiry into the substantive adequacy of the environmental assessment. To adopt this approach would risk turning the right to judicial review of her decision into a hollow one.

[89] There is no doubt that both YESAB and the Director have considerable expertise in environmental matters. The YESAB office is staffed by Assessment Officers with appropriate credentials, environmental assessment experience and continuing education. The Director is involved in all the mining related environmental assessments and has departmental expertise as well as the resources to obtain outside expertise as was done in this case.

[90] While there is no privative clause requiring deference, deference should be given based on the questions of mixed fact and law raised in this application. There should also be considerable discretion accorded to the Designated Office and the Decision Body in applying the multitude of policy objectives raised by project assessments. These policy objectives are sometimes contrary in their application and thus require a balancing of policy objectives to which deference should be granted.

[91] I conclude with the *Dunsmuir* approach as follows from para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[92] As has been said many times before, the question for the court is not whether it agrees with the recommendations or decisions made, but whether they are “within the range of acceptable and rational solutions.”

[93] With respect to the duty to consult and the duty of fairness, there has been no disagreement that both these duties apply to the Yukon Government in these circumstances. Because the issue is whether the duty has been met through the process used, reasonableness is the appropriate standard of review.

**Issue 2: Did the Designated Office in its Evaluation Report meet the statutory requirements of *YESAA,* and did it reasonably assess the environmental impacts of the Selwyn Project?**

[94] I have set out the salient statutory requirements of *YESAA* above. The purposes of the *Act* are set out in s. 5(2). While all the purposes must be borne in mind during an assessment, at its root, an assessment is a comprehensive and neutral consideration of the environmental and socio-economic effects of a project before it is undertaken. The assessment process must be timely, efficient and effective, and provide certainty for information requirements, time limits and costs. There will necessarily be conflicts among these objectives that will require trade-offs.

[95] In s. 42, under the heading “Matters to be considered”, it is significant that the designated office “shall take into consideration” the significance of any environmental effects of the project that have occurred or might occur (s. 42(1)(c)).

[96] The operative word is “consider”. *YESAA* does not use words like “resolve” or “determine” in s. 42. Again, s. 39 of *YESAA* requires that a designated office “shall give full and fair consideration” to scientific information, traditional knowledge and other information provided to it.

[97] In the case of *De Beers v. Mackenzie Valley Environmental Impact Review Board,* 2007 NWTSC 24, Charbonneau J. interpreted the word “consideration” in a very similar context at para. 38 as follows:

> In my view, the ordinary meaning of the word "consideration" does not imply a requirement for an exhaustive review of the subject matters listed at Paragraphs 117(2)(a) to (e), nor a requirement that findings be made on all those topics.

[98] In that case, the statute required that the assessor make a “determination” of the scope of the project. The trial judge went on to say at para. 39:

> I also find that the interpretation advanced by De Beers does not fit well with other provisions of the *Act*, particularly Subsection 117(1). I find it telling that Parliament used the word "determination" in Subsection 117(1) of the *Act* and the word "consideration" in Subsection 117(2). Parliament must have intended different requirements under the two provisions. "Consideration" means something less than "determination". In my view the use of the word "consideration" in Subsection 117(2) simply means that the Review Board's obligation is to take into account the factors or elements listed in the paragraphs that follow. It does not mean the Review Board has an obligation to make a determination about all of these elements.

I am in agreement that “consideration” means take into account but it does not require a resolution or a determination of the significance of the environmental effects.

[99] One of the main criticisms of Liard First Nation is that there was insufficient information or background data provided by Selwyn Chihong and that the Designated Office could not make an evidentiary finding. As I indicated in the *Western Copper* case, the environmental assessment process is not a permitting or regulatory process but rather a planning one to ensure that environmental recommendations are taken into consideration before projects are undertaken. With respect to the Selwyn Project, I am satisfied that most of the environmental concerns raised by the Liard First Nation were considered by the Designated Office in its Evaluation Report. In the opinion of the Designated Office, its consideration did not require further scientific evidence. That is not to say that the views expressed in Slater Reports # 1 and # 2 do not have validity, but rather that the planning process does not require finality at this stage. It is my view that the Evaluation Report is a planning tool that balances the objectives of protecting and maintaining environmental quality at the same time as conducting an assessment process in a timely, efficient and effective manner. I have no doubt that more research

could be done and indeed may be ordered by the Water Board, but that does not render the Evaluation Report insufficient.

[100] On the other hand the word “determined” connotes the meaning of making a finding, deciding or resolving. In the context of s. 55(1)(b), this would mean finding that the project was located in a particular traditional territory or “might have significant environmental ... effects.” Similarly, in s. 56(1), the determination would be whether the project will have significant adverse environmental effects that can or cannot be mitigated. The word “mitigate” means to make less intense or severe. Another word would be “moderate”.

[101] In its Evaluation Report, the Designated Office determined that the Selwyn Project will have significant adverse effects on aquatic resources as well as wildlife and environmental quality. It also determined that the significant adverse environmental effects can be mitigated. The position of Liard First Nation and its experts is that such a determination could not have been made without further research and background data. If the requirement is that the Designated Office’s determination be made to a scientific certainty, then arguably that certainty has not been established. But neither has the Evaluation Report claimed such a certainty. It stated in its Summary:

> “... We have recommended mitigation measures that will adequately eliminate, reduce or control these significant adverse effects so that they are no longer considered significant. The project is recommended to proceed on this basis.”

[102] The fundamental objection of Liard First Nation is based upon the alleged failure of failure of YESAB to resolve uncertainties, as expressed in the Slater Report # 2 at page 3:

> YESAB has taken the position that there are uncertainties that can be resolved during the project's operation. In our view, such a conclusion is premature and cannot be reached because there is not a thorough understanding of potential effects and the expected performance of proposed mitigation measures. If the project proceeds under these circumstances, there is a high risk that the site will have unacceptable drainage in the long-term, and that impacts to fish values in lower Don Creek and below will accrue. Allowing the project to proceed under these conditions poses unquantified and potentially significant risk to fish and fishing in the affected waters.

[103] And further at page 5:

> Completing a defensible assessment will require additional work by the company to characterize potential effects and demonstrate how mitigation measures will perform. This information, when available, could be the subject of a future assessment and would allow assessors and regulators to determine whether the proposed project warrants a positive YESAA recommendation and decision.

[104] The Stater Report # 2 challenged the Evaluation Report in two ways. Firstly, it stated that the uncertainties arise from lack of sufficient data and research and could not readily be resolved. Secondly, because of the uncertainties, there was no basis on which to determine how the proposed mitigation measures could perform.

[105] In my view of *YESAA*, the Evaluation Report does not have to provide finality and resolve all uncertainty prior to the regulatory procedure. The Evaluation Report is not a licensing or regulatory decision but rather a recommendation that the project can proceed to the Yukon Government for a Decision Document and, if the recommendation is accepted, proceed to the regulatory phase with the Water Board and the Mining Branch. The Water Board, which has greater expertise in water matters, has the power to refuse to issue a licence. This was precisely what occurred in the *Western Copper* case, where the Water Board would not issue a water licence despite the

recommendation of the Evaluation Report and Decision Document. The Water Board has the obligation under s. 12(14) of the *Waters Act* to not issue a licence unless it is satisfied that the project "would not adversely affect" the use of waters. In addition, the Water Board must be satisfied that any waste will be treated and disposed of in a manner that will maintain water quality standards prescribed. As stated in *Western Copper* at para. 126:

> I conclude that the development assessment process of *YESAA* is a planning tool that reviews a proposal for a project with a consideration of its broad environmental and socio-economic consequences. This is a different mandate than that of the Water Board, which decides whether an application can be licensed. The discretion of the Water Board to not issue a licence exists even after the issuance of a positive decision document under *YESAA*. ...

[106] I am also satisfied that the Evaluation Report provides adequate transparency and intelligibility in its recommendation. Liard First Nation was given the opportunity to participate in a transparent process where its concerns were considered, although not necessarily resolved to its liking. Nevertheless, the Evaluation Report states clearly why it recommended the Selwyn Project proceed.

[107] I conclude that the Evaluation Report reasonably considers the significance of the environmental effects of the Selwyn Project. 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. 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.

**Issue 3: Did the Decision Document of the Director of Mineral Resources meet the statutory requirements of *YESAA,* and did it reasonably accept, reject or vary the recommendations?**

[108] The Decision Body here is the Director of Mineral Resources of the Yukon Government. Pursuant to s. 74(1) of *YESAA*, the Decision Body was required to give "full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation." I will address the duty to consult in s. 74(2) separately.

[109] Section 75(1) simply states that the decision body "shall issue a decision document … accepting, rejecting or varying the recommendation." Under s. 80, "a decision body shall include in a decision document the reasons for which it rejected or varied any recommendation."

[110] I note that the Decision Body in this case was an active participant in the process conducted by the Designated Office. This participation is contemplated by ss. 55(4) and 74(1) of *YESAA* and by the Designated Office Rules. In my view, the Decision Body must consider the submissions and reports submitted to the Designated Office to comply with its statutory obligation to give "full and fair consideration." Without the participation of the Decision Body in the early stages of the *YESAA* process, it would be

extremely difficult to meet the tight timeline to issue a Decision Document and comply with s. 74(1). I do not find that the Decision Body must review every document submitted to the Designated Office. Nevertheless, it cannot give “full and fair consideration” to scientific information and traditional knowledge without an awareness of the information provided to the Designated Office. The Decision Body cannot fail to consider important scientific information on the grounds that it was not specifically appended to the Evaluation Report.

[111] The Decision Body must give full and fair consideration to the scientific information and traditional knowledge presented to the Designated Office. But it does not have the obligation to prepare a further assessment or evaluation. Rather the Decision Body accepts, rejects or varies the recommendations made by the Designated Office, and in the latter case must give reasons. In my view, a Decision Body should reject the recommendation of an Evaluation Report if it found the evaluation wanting or insufficient in failing to consider significant concerns raised by a First Nation, Yukon or Canada.

[112] However, this is not such a case, and the Decision Body accepted the recommendation that the Selwyn Project proceed. In some limited circumstances, the Decision Body varied the terms and conditions to defer to the role and responsibility of the Water Board which does not offend the planning process but recognizes the distinct role and expertise of the Water Board. I should point out that both the Water Board and YESAB are independent of the Yukon Government and under no obligation to recommend or licence projects.

**Issue 4: Did the Yukon Government breach its duty to consult, consider and respond to Liard First Nation's concerns as required by *YESAA,* the Constitution and the common law?**

[113] Although the duty to consult is legislated in s. 74(2) and s. 3 of *YESAA*, its genesis is tracked in the Supreme Court of Canada's judgments in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, *Taku River Tlinglit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69. These principles were refined more recently in the *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, where Binnie J. said:

1. The honour of the Crown and its obligation to deal honourably with Aboriginal peoples is a constitutional principle (para. 42);
2. The concept of the duty to consult is a valuable adjunct to the honour of the Crown in a supporting role and not independent of its purpose (para. 44);
3. Reconciliation between Aboriginals and non-Aboriginals is not an accomplished fact but a work in progress (para. 52);
4. The duty in *Little Salmon/Carmacks First Nation* was at the lower end of the spectrum and not burdensome because there was a treaty in place and also a relatively low potential for infringement of a claimed right. This is unlike the *Haida Nation* case where a duty to consult and (if appropriate) accommodate existed because the proposed development might have significant impacts on Aboriginal rights (para. 53).

[114] In the *Haida* case, McLachlin C.J. set the parameters for the scope and content of the duty to consult and accommodate in paras. 39 – 51. While those paragraphs should be read in full, I will attempt to encapsulate the scope and content in summary form:

a) good faith is required on both sides and although there is no duty to agree, there must be a meaningful process of consultation (para. 42);

b) applying the concept of a spectrum, where the claim to title is weak and the potential for infringement minor, the only duty may be to give notice, disclose information and discuss any issues raised in response to the notice (para. 43);

c) where the right is strong and potential infringement is of high significance, deep consultation, aimed at finding a satisfactory interim solution, may be required. And I quote:

> … While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. … (para. 44)

d) each case must be approached individually and flexibly since the level of consultation required may change as the process goes on and new information comes to light (para. 45);

e) the duty to accommodate may require consultation and negotiation to avoid irreparable harm or to minimize the effect of infringement (para. 47).

[115] The Chief Justice concluded the scope and content discussion at para. 51, as follows:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

[116] In the *Taku River Tlingit* case, the companion judgment to the *Haida* case, the scope and content of the duty to consult and accommodate was summarized as follows, at para. 32:

> In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

[117] I should add that third parties have no duty to consult and accommodate (paras. 52 – 56 of *Haida*). Here, some discussion has taken place between Selwyn Chihong and representatives of Liard First Nation but no funding or Socio-Economic Participation Agreement has been negotiated.

[118] It must be understood at the outset that the very existence of duty to consult and accommodate is not disputed in any way. However, the scope and content of the duty to consult and accommodate in the case at bar is quite distinct from the *Taku River Tlingit* case. The Liard First Nation has a strong *prima facie* case for a land claim as it

has been involved in negotiations with Yukon and Canada for some years, although without successful conclusion. The Selwyn Project is not an operating mine but nonetheless has potential for significant negative impacts on the Liard First Nation's claim. Liard First Nation is certainly entitled to more than the minimum receipt of notice, disclosure of information and discussion. Indeed, the language of s. 3 of *YESAA* requires full and fair consideration of their views. At the very least, Liard First Nation is entitled to consultation "significantly deeper" than the minimum, and accommodation where possible. While I have no difficulty with the statutory definition of the duty to consult, it is my understanding of the constitutional nature of the duty that each situation or context may require a different response or depth of consultation, depending on the matter in issue. Simply meeting the procedural requirements may not always be sufficient.

[119] The Yukon Government explicitly recognized in its letter dated March 22, 2010, that it has a duty to consult Liard First Nation about potential impacts on its asserted aboriginal rights from the Selwyn Project in addition to its s. 74(2) duty to consult under *YESAA*. This is consistent with the ongoing nature of the duty to consult as expressed in *Haida* (paras. 27 and 76) and *Taku River* (para. 46). The continuing duty to consult has also been explicitly recognized by the Decision Body.

[120] The first question is whether the First Nation received notice in sufficient form and detail to review the Decision Document. The context in which the Decision Document was prepared is important here. Liard First Nation had notice of the Selwyn Project since December 2009. There was sufficient time to prepare its submission by May 30, 2010, which included valuable expert opinion in the form of the Bill Slater

Report # 1. I should add at this point that Liard First Nation has provided significant input concerning risks and uncertainties about the Selwyn Project that have been considered at this stage and should be addressed by the Water Board as well. The First Nation is not alone in its concerns, as indicated in the SLR Report dated April 22, 2010.

[121] The First Nation also received a copy of the Evaluation Report in sufficient time to have Bill Slater Report # 2 prepared and presented to the decision body. While I recognize that the time frame of 35 days between the date of the Evaluation Report and the date of the Final Decision Document is tight, it was manageable in this case. While it is not part of this judicial review, it would be useful for the parties to the Umbrella Final Agreement to consider extending this time frame. Although I am satisfied that the Yukon Government was aware of Liard First Nation's views in Slater Report # 1, I understand the concern that meeting one day and issuing the final Decision Document the next raises questions about "considering, fully and fairly, any views so presented." Nevertheless, the consultation in this case was full and fair to the extent that eleven government employees knowledgeable about both the evaluation process and the scientific information met for the better part of a day with members of the First Nation and their consultants to consider each other's view. It is undoubtedly a considerable improvement from the consultation in *Little Salmon/Carmacks First Nation*.

[122] Although I have made no specific finding on the timelines, I do recognize that the timeline for environmental assessment of projects and the funding available for meaningful participation must be assessed from time to time based upon the size and frequency of large projects like the Selwyn Project. It will be a challenge for First

Nations to participate when the development of mining claims is proceeding at a fast pace. It is notable that the application for the Selwyn Project had to be withdrawn and refiled in order to ensure the assessment process was a meaningful one.

[123] Arguably, the Selwyn Project will have a significant impact on the Aboriginal rights of Liard First Nation to the extent that a resource will be extracted with significant potential impacts to their claimed land. On the other hand, the Liard First Nation has the benefit of the assessment process negotiated by other Yukon First Nations, although as non-signatory to a Final Agreement, Liard First Nation may not consider the process to be adequate. However, from the standpoint of this Court reviewing the reasonableness of the duty to consult, and where appropriate to accommodate, I am satisfied that the substantive duty has been met in this case. There is no obligation to reach agreement but there was an obligation to ensure that Liard First Nation had sufficient information to prepare its views, time to prepare them and an opportunity to present to the Director and his team of representatives. There has been accommodation in terms of the changes that were made as a result of the meeting on July 22 in Liard First Nation's community. I conclude as well that there was no breach of the duty of fairness to Liard First Nation.

[124] To summarize, the application to quash, suspend or stay the Decision Document is dismissed. Counsel may speak to costs at Case Management, if necessary.

VEALE J.

**SCHEDULE 1:**
**SUMMARY OF ISSUES IDENTIFIED BY LIARD FIRST NATION AND TRACKING OF CONSIDERATION OF THESE MATTERS IN THE EVALUATION REPORT, THE DRAFT DECISION DOCUMENT, REVIEW REPORT # 2 AND THE DECISION DOCUMENT ISSUED BY THE DIRECTOR**

| **Column One:** **Issue identified by Liard First Nation** | **Column Two:** **Where Identified by LFN** | **Column Three:** **Where the Issue is Addressed in the Evaluation Report** | **Column Four:** **Where the Issue is Addressed in draft # 2 Decision Document** | **Column Five:** **Issue Identified by LFN (Slater) in Review Report # 2** | **Column Six:** **Issue as Addressed in the Decision Document**[1] |
|---|---|---|---|---|---|
| adverse impacts on caribou | Petition – para. 17(a)<br><br>Outline – Para. 34 | Pages 28-29, 94-98, 129-30<br><br>Recommendations #27, 28, 29, 20 | Recommendations #27, 28, 30 | Page 4 (indirectly) | Recommendations #27, 28, **29 (re-inserted with note that mitigation intended to protect woodland caribou),** 30 |
| Inappropriate location (W10) to model downstream impacts; some concentrations will not meet downstream water quality objectives in lower Don Creek (W5) | Petition – para. 17(b)/(d)<br><br>Outline – paras 33(a), 40-41<br><br>Review Report # 1 Page 21 | Pages 67-70, 71-72, 80, 82, 84-85<br><br>Recommendations #7, 15, 16 | Recommendations #7, 15, 16 | Pages 2-4 | Recommendations #7 **(varied with specific reference to protection of aquatic resources downstream, including at station W5, and with broader language to better reflect the role of the Water Board in determining appropriate discharge criteria),** 15, 16 |
| Uncertainty about groundwater flows beneath site and volumes of water to flow from the site | Petition – para. 17(c),(d)<br><br>Outline – Para. 33(b)<br><br>Review Report #1 Page 22 | Pages 56-59, 62-63, 75, 78, 82, 83, 125<br><br>Recommendations #1, 2, 3, 9, 12 | Recommendations #1, 2, 3, 9, 12 | Pages 2-3 | Recommendations #1, 2 **(noting expectation that proponent will work collaboratively with regulator in designing the monitoring program)**, 3, 9, 12 |

[1] Bold text in this column indicates a change made to the Decision Document as a result of consultation with Liard First Nation held pursuant to s.74(2) of YESAA

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|---|---|---|---|---|---|
| Uncertainty about effectiveness of proposed water treatment plant | Petition – Para. 17(d),(e)<br><br>Outline – para. 33(c), 42<br><br>Review Report #1 Pages 22-23 | Pages 77-78, 83<br><br>Recommendations #8, 9 | Recommendations #8, 9 | Pages 1,2 | Recommendations # 8, 9 |
| Acid generation and metal concentrations in downstream waters | Petition – para. 17(b)<br><br>Outline Para. 33(d)<br><br>Review Report #1 Pages 25-26 | Pages 60, 63-64, 88, 92, 113-16<br><br>Recommendations #46-49 | Recommendations # 46-49 | Not identified | Recommendations #46-49 |
| Inadequate characterization of drainage from waste rock storage piles | Petition Para.17(c), (d)<br><br>Outline – Para. 33(e)<br><br>Review Report #1 pages 25-26 | Page 63-66, 73, 79, 82, 83, 88-91, 124<br><br>Recommendations #4,10,23,24 | Recommendations #4, 10, 23 (removing requirement to monitor seepage prior to construction), 24 | Page 2 (indirectly) | Recommendations #4,10, 23 **(re-inserted requirement to monitor seepage prior to construction)**, 24 |

**SCHEDULE 1:**
**SUMMARY OF ISSUES IDENTIFIED BY LIARD FIRST NATION AND TRACKING OF CONSIDERATION OF THESE MATTERS IN THE EVALUATION REPORT, THE DRAFT DECISION DOCUMENT, REVIEW REPORT #2 AND THE DECISION DOCUMENT ISSUED BY THE DIRECTOR**

| **Column One:** **Issue identified by Liard First Nation** | **Column Two:** **Where Identified by LFN** | **Column Three:** **Where the Issue is Addressed in the Evaluation Report** | **Column Four:** **Where the Issue is Addressed in draft #2 Decision Document** | **Column Five:** **Issue Identified by LFN (Slater) in Review Report #2** | **Column Six:** **Issue as Addressed in the Decision Document** |
|---|---|---|---|---|---|
| Basis for water quality objectives not following standard protocols | Petition – para. 17(b)<br><br>Outline – para. 40<br><br>Review Report #1 Page 21 | Pages 45-46, 67-69, 71 | Not Addressed | Page 2 | Recommendation #7 (as varied in Decision Document draft #2) |
| Contingency storage for contaminated water may not be adequate | Petition – para. 17(c)<br><br>Review Report #1 page 24 | Pages 58-59, 63, 74-75, 84<br><br>Recommendations #3, 12, 13 | Recommendations #3, 12, 13 | Not identified | Recommendations #3, 12, 13 |
| Monitoring required for broader range of parameters | Not Identified | Pages 79-80, 83<br><br>Recommendation #11 | (Recommendation #11 removed to allow Water Board to determine appropriate timing for monitoring) | Page 4 | **Recommendation #11 (re-inserted but noting that Water Board may determine if monitoring should be done even more frequently)** |
| Analysis required for all licensed parameters | Not Identified | Pages 79, 84<br><br>Recommendation #14 | Recommendation #14 (removed requirement for on-side analysis of all licensed parameters due to inconsistency with recommendation #6, which required analysis at accredited laboratories) | Page 4 | **Recommendation #14 (re-inserted as set out by YESAB, noting on-side analysis would be done in addition to sampling at accredited laboratory)** |

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| **Column One:** **Issue identified by Liard First Nation** | **Column Two:** **Where Identified by LFN** | **Column Three:** **Where the Issue is Addressed in the Evaluation Report** | **Column Four:** **Where the Issue is Addressed in draft #2 Decision Document** | **Column Five:** **Issue Identified by LFN (Slater) in Review Report #2** | **Column Six:** **Issue as Addressed in the Decision Document** |
|---|---|---|---|---|---|
| Selwyn should take on liability of previous owners for historic adit | Not identified | Page 92-93<br><br>Recommendation #26 | Not addressed (existing liability lies with previous owner; water modelling will consider the historic adit's impacts) | Page 4 | Not addressed (work on the adit is not included in project scope; its reclamation will be dealt with through separate process) |
| Protection of migratory birds, although already legislated, should be included as mitigations | Not identified | Pages 28, 94-95, 104-107<br><br>Recommendations #34, 36 | Not addressed (mitigations already covered by *Migratory Birds Convention Act* and *Wildlife Act)* | Page 4 | **Recommendations #34, 36 (both re-inserted, with note that #34 is interpreted to intend mitigation of effects to raptors and migratory birds)** |