SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v. Government of Yukon*, 2011 YKSC 84

Date: 20111115
S.C. No. 10-A0148
Registry: Whitehorse

Between:

Ross River Dena Council

Plaintiff

And

Government of Yukon

Defendant

And

Yukon Chamber of Mines

Intervenor

Before: Mr. Justice R.S. Veale

Appearances:

Stephen Walsh	Counsel for Ross River Dena Council
Penelope Gawn and Laurie Henderson	Counsel for Government of Yukon
Richard Buchan and Kevin O'Callaghan	Counsel for Yukon Chamber of Mines

REASONS FOR JUDGMENT

INTRODUCTION

[1] Ross River Dena Council applies for a declaration that the Government of Yukon has a duty to consult prior to recording the grant of quartz mineral claims within the lands comprising the Ross River Area. Ross River Dena Council is a First Nation for which no Final Agreement is in effect. A duty to consult could arise if the three part test

in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("Haida Nation") is met.

[2] This is the first time that this Court has been asked to find a duty to consult prior to the recording of quartz mineral claims. It is also somewhat unique as the recording of a quartz mineral claim by the Mining Recorder is not a discretionary act under the "free entry" system established by the *Quartz Mining Act*, S.Y. 2003, c. 14. Section 74(2) of the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*") imposes a duty to consult on the Government of Yukon in Class 2, 3 and 4 mining exploration programs. However, this duty to consult is not engaged at the stages of recording a quartz mineral claim or conducting a Class 1 exploration program.

[3] This application is based upon Admissions of Fact and documents pursuant to Rule 19, which is the Summary Trial procedure in the Rules of Court. It is also based upon four affidavits from the Government of Yukon and three affidavits from the Yukon Chamber of Mines, which provide important and extensive background and context. The parties consented to the intervention of the Yukon Chamber of Mines. The Chamber's intervention has been helpful in providing the history and justification of the free entry system. Counsel should be commended for working together in Case Management to bring this matter on in seven months without unnecessary cross-examination or examination for discovery.

[4] With respect to the remedy sought, Rule 5(21) grants the Court the discretion to make binding declarations of right whether or not consequential relief is claimed.

BACKGROUND

[5] Ross River Dena Council is a Kaska First Nation for which no Final Agreement is in effect. There are 14 Yukon First Nations, 11 of which have signed Final Land Claim Agreements and Self-Government Agreements based upon the Umbrella Final Agreement dated May 29, 1993.

[6] The Governments of Yukon and Canada began negotiating a Final Agreement with Ross River Dena Council in 1996. Negotiations with Liard First Nation, also a Kaska First Nation, were conducted separately at that time.

[7] In 1999, the Kaska wished to negotiate at the same table with the goal of reaching a single Kaska Final Agreement and Self-Government Agreement or, alternatively, separate but similar agreements for Ross River Dena Council and Liard First Nation.

[8] Negotiations continued up until June 21, 2002, when the mandate of the Government of Canada to negotiate land claims expired. A formal comprehensive offer to settle the land claims of Ross River Dena Council and Liard First Nation was made and not accepted. There have been no Yukon land claim negotiations since that date.

The Ross River Area

[9] There is no dispute about the Ross River Area. It is the northwestern part of the Kaska Traditional Territory which Ross River Dena Council, Liard First Nation, and Kaska Dena Council identified in the Umbrella Final Agreement. The Kaska Traditional Territory, which represents 23% of Yukon land, covers the southeastern part of Yukon.

[10] There are three maps prepared by the Government of Yukon that have been filed in this case. All show a similar Kaska Traditional Territory. However, the map entitled

'Ross River Dena Council/Liard First Nation Traditional Territory / Crown Land Withdrawal from Disposal and Mineral Staking to Facilitate the Settlement of First Nation Claims' (hereafter the "Withdrawal Map"), dated August 2, 2011 actually delineates the Ross River Area. This map indicates that the Ross River Area encompasses 63,110 square kilometres (roughly equivalent to an area the size of Latvia or Lithuania). The Ross River Area is approximately 13% of Yukon land.

[11] The Withdrawal Map shows Crown lands withdrawn from disposal and mineral staking in the Ross River Area. The purpose of the withdrawals is to give "interim protection" to lands selected by the First Nation during land claim negotiations as potential Settlement Land that would ultimately be protected by Final Agreements. Most withdrawals in the Ross River Area are to protect lands identified by Ross River Dena Council, but several parcels were identified by Liard First Nation. These withdrawals comprise 8% of the Ross River Area, and are in effect to March 31, 2013. The 8,633 active mineral claims also designated on the map comprise 14% of the Ross River Area.

Yukon Mining

[12] The Yukon has experienced such an explosion of quartz claim staking in recent years that it is often referred to as the second gold rush. In 2010, the Director of Mineral Resources reported that 79,993 quartz claims were staked, increasing the total number of quartz claims in good standing to 158,419 at the end of 2010. Exploration costs for 2010 were estimated at $160 million, with gold projects capturing 58% of expenditures, zinc-lead 15%, copper and copper-molybdenum 12%, silver 10% and other minerals

5%. In 2010, there were over 130 active hard-rock exploration programs, with 83 recording expenditures greater than $100,000 and 36 spending more than $1 million.

[13] The current year has seen even more activity. Mineral exploration expenditures for 2011 are estimated to be more than $250 million. By the end of June 2011, there were 226,961 quartz claims in good standing. There are currently three operating mines and one is in Kaska Territory.

The Kaska Agreements

[14] There are three agreements between the Government of Yukon and Ross River Dena Council that are relevant to this application, as they represent either an acknowledgement of an asserted Ross River Dena Council claim to aboriginal rights and title (the Government of Yukon position) or that Ross River Dena Council has aboriginal rights and title, rights and interests in and to the Ross River Area (the Ross River Dena Council position).

[15] In January 1997, the Kaska Tribal Council (of which Ross River Dena Council is a member) and the Government of Yukon signed 'An Accord on the Devolution of Federal Programs, Responsibilities and Powers' ("the Accord"). The purpose of the Accord was to reach an agreement on the devolution of federal resource programs to the Government of Yukon no later than April 1999. Neither the Kaska Tribal Council nor the Ross River Dena Council reached an agreement. The third recital in the Accord states:

> Whereas the member governments of the KTC [Kaska Tribal Council] have continuing aboriginal rights, title and interests within the Yukon, ...

[16] The second agreement, dated January 1997 between the Government of Yukon, the Council of Yukon First Nations, Yukon First Nations (including Ross River Dena Council), the Kaska Dena Council and the Kaska Tribal Council dealt with the transfer of control of Yukon oil and gas lands to the Government of Yukon from Canada. It contains the following recital:

> Yukon Indian People, subject to Settlement Agreements, have aboriginal rights, titles and interests in and to the Yukon which are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

It also included a specific recital in similar wording for the Kaska, which includes Ross River Dena Council.

[17] The second agreement also contains paragraph 2.1:

> 2.1 Nothing in this Agreement shall be construed so as to abrogate or derogate from, nor identify or define, any aboriginal rights, titles, interests or treaty rights of Yukon Indian People or any other aboriginal people of Canada.

[18] The third agreement signed by the Government of Yukon and the Kaska (which includes Ross River Dena Council), entitled "Bi-lateral Agreement" and dated March 8, 2003, had a term of 24 months. The Bi-lateral Agreement recognized that the land claims negotiations between the Kaska, Yukon and Canada had ended with Canada's formal withdrawal based on the expiry of its mandate on June 21, 2002. The Bi-lateral Agreement expressed the interest of Yukon and the Kaska in establishing a partnership on a government-to-government basis. Specifically, the opening recital stated:

> Whereas Yukon acknowledges, in agreements entered into with the Kaska in January, 1997, that the Kaska have aboriginal rights, titles and interest in and to the Kaska Traditional Territory in the Yukon;

[19] Under the heading "Objectives", the Bi-lateral Agreement stated, among other things:

> 2.1 The following objectives shall govern the relationship, on a government to government basis, between Yukon and the Kaska in respect of the management, development and beneficial enjoyment of the lands and resources within the Kaska Traditional Territory in the Yukon:
>
> (a) the conclusion of just and equitable Kaska Agreements shall continue to be of the highest priority to the parties and Yukon and Kaska shall jointly make best efforts to re-engage Canada in negotiations towards Kaska agreements;
>
> (b) dispositions of interests in and authorizations for exploration work and resource development on lands and resources within the Kaska Traditional Territory shall be granted only in accordance with the process set out in 3.3, 3.4 and 3.5. ...

[20] Under the heading "Kaska Consent", the Bi-lateral Agreement states, in part:

> 3.3 Yukon shall not agree to any significant or major dispositions of interests in lands or resources or significant or major authorizations for exploration work and resource development in the Kaska Traditional Territory without consulting and obtaining the consent of the Kaska. ...

[21] The Bi-lateral Agreement expired according to its terms on May 9, 2005, but the Government of Yukon extended the term to August 8, 2005. The forms in the *Quartz Mining Act* were changed to ensure that any person wishing to record a claim in Kaska Traditional Territory was given a notice that the lands where the claims were located "are subject to unsettled aboriginal land claims".

The Devolution Transfer Agreement

[22] On October 29, 2001, the Government of Canada and the Government of Yukon entered into the Devolution Transfer Agreement. In the Devolution Transfer Agreement, Canada agreed to transfer the management of land and waters in Yukon to the Government of Yukon, effective April 1, 2003. The objective of the Devolution Transfer Agreement was comprehensive:

> Objective
>
> 1.1 The objective of the Parties in entering into this Agreement is to provide for the transfer from Canada to the YTG of the resources and responsibilities associated with NAP [Northern Affairs Program] and to do so in a manner that respects the protection provided by the Constitution of Canada for any existing aboriginal, treaty and other rights of the aboriginal peoples of Canada and that is consistent with Self-Government Agreements and any existing fiduciary duties or obligations of the Crown to aboriginal peoples of Canada.

[23] To achieve the transfer of management and control of resources to Yukon, Canada had to change the *Yukon Act* to ensure that the Yukon had the power to make laws to manage public lands and waters as well as to dispose of rights or interests to those lands. Specifically relevant to this case was the agreement of Canada to repeal the *Yukon Quartz Mining Act* and Yukon to legislate a mirroring *Quartz Mining Act*.

[24] The Devolution Transfer Agreement also contains the following section:

> 2.7 Following the Effective Date, the YTG shall Consult with Yukon First Nations with respect to any proposed amendment or repeal of the *Yukon Act* (Canada) provided that Canada consults with the YTG prior to the introduction of any such proposed amendment or repeal in the House of Commons.

[25] To all intents and purposes these legislative objectives were achieved and, effective April 1, 2003, the Government of Yukon began to record the location of quartz mineral claims within the boundaries of the Ross River Area without prior consultation with Ross River Dena Council.

Quartz Mining Act

[26] Pursuant to the Devolution Transfer Agreement, Canada repealed the *Yukon Quartz Mining Act*, and Yukon enacted the *Quartz Mining Act*, which came into effect April 1, 2003. As noted, the Yukon *Quartz Mining Act* mirrored the federal *Act*, with the exception of adding Part 2, Land Use and Reclamation, consisting of sections 129 through 153. Part 2 also contains s. 130, which states:

> 130. The purpose of this Part is to ensure the development and viability of a sustainable, competitive and healthy quartz mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Yukon.

[27] Section 12 of the *Quartz Mining Act* provides that "[a]ny individual 18 years of age or older may enter, locate, prospect, and mine for minerals on ... any vacant territorial lands". While the parties to this litigation have a vigorous disagreement about whether the duty to consult arises prior to recording the grant of a quartz mineral claim for a number of reasons to be discussed below, there is no disagreement that sections 18 to 49 of the *Quartz Mining Act* set out the requirements to locate a mineral claim.

[28] To record a mineral claim, the locator must provide the mining recorder with three things:

(1) a plan showing the location of the mineral claim;

(2) the payment of a fee; and

(3) the prescribed application with an affidavit or solemn declaration as to the contents of the application.

[29] The Mining Recorder follows a checklist for recording claims, and considers, among other things, whether the claim is located in Kaska Traditional Territory. If yes, the locator is given a notice that "[t]he land in which this mineral claim is located is subject to unsettled aboriginal land claims". The Mining Recorder then issues a Record of Mineral Claim, assigning a Grant Number and setting out the Mining District, the area where the claim is situated, as well as a Claim Sheet Number. The Record of Mineral Claim indicates the date the claim was located and recorded and the date the claim is effective to, being one year from the date of recording. At this point, the locator is referred to as the 'holder of a mineral claim' which does not exceed 1500 feet by 1500 feet. To keep the quartz claim in good standing, the claimholder must perform assessment work to a value of $100 per year or pay $100 in lieu of the work. On the performance of assessment work or payment in lieu, the claim is automatically renewed. A claim may be held indefinitely by the claimholder. A claimholder may also group a number of claims together, not exceeding 750 in number. The claimholder may then carry out assessment work on one or more claims, and that work will apply to the group of claims.

[30] The *Quartz Mining Act* is based upon the "free entry system", which consists of

(a) the right of entry onto lands owned by the Crown or Commissioner (s. 12);

(b) the right of the miner to stake a claim in order to receive the mineral rights (s. 41); and

(c) the right to lease and enter into production (s. 70).

[31] As per s. 2 of the *Quartz Mining Act*:

> "entry" means not only the record of a mineral claim in the books of a mining recorder, but also the grant that may be issued for that claim;

[32] The act of staking and locating a quartz mineral claim causes minimal environmental disturbance. I accept the fact that the Yukon mining industry has been built on the foundation that there is a right of free entry, subject to the exceptions set out in the *Quartz Mining Act* and *YESAA*, to enter, locate and prospect for minerals. Specifically, s. 78(1)(a) of the *Quartz Mining Act* states that the holder of a mineral claim is entitled to all the minerals found in or under the lands "together with the right to enter on and use and occupy the surface of the claim."

[33] From the perspective of the Yukon Chamber of Mines, deciding to stake a mineral claim is a strategic and highly confidential activity. The Chamber points out that there is considerable expense and financial risk in prospecting and staking a quartz mineral claim under the free entry system. The advantage of the free entry system is that a prospector can locate a mineral showing, after considerable research and on-the-ground activity, and maintain its confidentiality until the mineral claim is recorded. It is common knowledge in the mining industry that only a small portion of the claims staked will ever proceed to the development or mining stage.

Mining activity and the *YESAA*

[34] The *Quartz Mining Act* identifies four classes of exploration programs that reflect an increasing intensity of land use.

[35] This court action focuses on Class 1 exploration programs, which have the least significant environmental impact. In a Class 1 exploration program, the holder of a claim

is neither required to notify government nor obtain any permits prior to undertaking Class 1 activities, which are regulated by the *Quartz Mining Land Use Regulation* (OIC 2003/64). Thus, the Government of Yukon, and presumably Ross River Dena Council, may have no knowledge of a Class 1 exploration program activity, either in location or extent.

[36] Class 2, 3 and 4 exploration programs and development and production activities are recognized to have significant potential environmental impacts. A mining land use permit must be obtained prior to undertaking a Class 2, 3 or 4 exploration program and a licence must be obtained prior to engaging in development and production. Prior to the issuance of authorizations an assessment must be made pursuant to *YESAA*. Any citizen can participate in the process, and First Nations, in whose traditional territories the activities are proposed, are notified and consulted. In particular, s. 74(2) of *YESAA* requires a decision body (Government of Yukon in this case) considering a recommendation in respect of a Class 2, 3 or 4 project to consult a First Nation for which no final agreement is in effect, if the project is located in the First Nation's traditional territory. In my view, in the context of Class 2, 3 and 4 activities, the duty to consult begins as soon as the applicant submits a proposal under *YESAA* and continues on behalf of government long after the decision body issues a decision document: see *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.*, 2011 YKSC 55 at para. 119.

[37] The Yukon Chamber of Mines points out that the current mining regime was recommended to the Minister of Indian Affairs and Northern Development by the Yukon Mining Advisory Committee in a report dated April 1992. The Committee was made up

of representatives from the Government of Canada, Government of Yukon, Council for Yukon Indians, Klondike Placer Miners' Association, Yukon Conservation Society and Yukon Chamber of Mines. The Yukon Mining Advisory Committee recommended that mineral development activities at the lower end of the spectrum be allowed to proceed with minimal regulatory constraints and delays, while those activities with more significant impacts upon the environment or aboriginal interests would require assessment and consultation with Yukon First Nations and affected parties.

[38] As stated above, this application is for a declaration that the duty to consult arises prior to the recording of a grant of quartz mineral claims. However, if the duty to consult arises, it could affect a claimholder's commencement of Class 1 exploration programs, which currently do not require notification, assessment or permitting.

Class 1 exploration programs

[39] The attached Schedule A is a table entitled "Exploration Program Class Criteria" ("the Table") that is included in the *Quartz Mining Land Use Regulation*. It sets out 22 activities that might occur in an exploration program. The Table indicates the least intensive activity in Class 1 with the more intensive in Classes 2 and 3. A Class 4 exploration program is one that includes an activity that exceeds any of the criteria in a Class 3 exploration program. For example, the Regulations do not authorize new access roads, upgrading of access roads or trails for a Class 1 exploration program. However, 19 other activities, including construction of camps, storage of fuel, construction of lines and corridors, clearing and trenching are all permitted in Class 1 exploration programs, subject to specific limitations. To give examples, clearings are permitted not exceeding eight per claim, including helicopter pads and camps.

Trenching is limited to 400 m^3 per claim. Limited off-road use of vehicles with low ground pressure is permitted, as is the use of 1000 kilograms of explosives in any 30-day period. Class 1 exploration programs also permit the construction of underground structures that do not require the removal of more than 500 tonnes of rock to the surface.

[40] Schedule 1 of the *Regulation* also contains specific operating considerations, which are very comprehensive and, if followed, are designed to rehabilitate or reclaim the land to its pre-activity state. While rehabilitation is a laudable statutory objective, it is hard to imagine quickly rehabilitating land after the harvesting of trees permitted in s. 80(1) of the *Quartz Mining Act* or the removal of 500 tonnes of rock. In other words, while Class 1 exploration programs may be less intensive than Class 2, 3 or 4, they may have significant impact depending on which activity is proceeding.

ISSUES

[41] The are a number of issues that must be addressed:

1. Does the issuance of a Record of Mineral Claim meet the three-part test to establish a duty to consult? That is:

    (i) Does the Crown have knowledge, actual or constructive, of a potential aboriginal claim or right;

    (ii) Is there contemplated Crown conduct; and

    (iii) Is there a potential that the contemplated conduct may adversely affect an aboriginal claim or right?

2. If the three-part test is met, should declaratory relief be granted?

3. If declaratory relief is granted, does the duty to consult arise before or after the mineral claim is issued?

ANALYSIS

The Duty to Consult

[42] There is a significant amount of precedent from the Supreme Court of Canada on the duty to consult and, where appropriate, to accommodate a First Nation with no final agreement in settlement of aboriginal claims: See *Haida Nation,* above, *Taku River Tlingit v. British Columbia (Project Assessment Director),* 2004 SCC 74 *and Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43. The duty to consult may also arise after a final agreement: See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53.

[43] The most up-to-date and comprehensive discussion of when the duty to consult arises is found in *Rio Tinto* at paras. 39-50. Reading all these paragraphs is recommended; however, it is a tedious practice to quote decisions at great length, so I will be as selective as possible. The first part of the test requires Crown knowledge of a potential claim or right. *Rio Tinto* says the following:

> (1) Knowledge by the Crown of a Potential Claim or Right
>
> [40] To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 34. Constructive knowledge arises when lands are known or

> reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:
>
> > Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

[44] The Government of Yukon agrees that it has knowledge of the assertion of an aboriginal right or claim by Ross River Dena Council in the Ross River Area. However, the Government of Yukon denies that any of the agreements it has made should be interpreted as an express acknowledgment that Ross River Dena Council has established aboriginal rights, title and interests in and to the Ross River Area. The Government of Yukon considers such claims to be assertions rather than actual recognition of aboriginal rights or title.

[45] In contrast, counsel for Ross River Dena Council submits that the Kaska agreements explicitly acknowledge title, and, per *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, this title "encompasses the right to exclusive use and occupation of the land." Ross River Dena Council submits that any mineral claim will impact its exclusive use and occupation.

[46] In my view, the agreements do not amount to an acknowledgement that Ross River Dena Council has established aboriginal title to the full Ross River Area in the sense of exclusive use and occupation, although clearly the Government of Yukon has recognized that claims to aboriginal rights and title are extant and not yet defined. The fact that negotiations have been taking place for many years supports the view that the claims to aboriginal rights and title are credibly asserted but not established. It does not make sense to conflate the words in the agreements so that an acknowledgement of rights and title within the Ross River Area is an acknowledgement of aboriginal title to the whole area. I have no doubt that Ross River Dena Council asserts such a claim and as counsel indicates, the Kaska Tribal Council (representing Ross River Dena Council among others) has an outstanding court action in the Federal Court of Canada in this regard. But the nature, extent and scope of the asserted aboriginal rights have not been established. I conclude that the acknowledgements by the Government of Yukon in the three agreements are in the context of an assertion rather than an acceptance of an established aboriginal title to the Ross River Area. However, the Ross River Dena Council claim is not tenuous but in the category of a strong case sufficiently credible to meet the threshold required by the first element of the test for the duty to consult.

[47] I should add at this point that the claim of Ross River Dena Council for special costs based on the alleged resiling of the Government of Yukon from its acknowledgement of aboriginal rights and title is denied. The Government of Yukon acknowledges the asserted claim of Ross River Dena Council to the Ross River area and indeed acknowledges that the first part of the test for the duty to consult has been established.

[48] *Rio Tinto* discusses the second part of the duty to consult test starting at para. 42:

> (2) Crown Conduct or Decision
>
> [42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.
>
> [43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.
>
> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices...We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

[49] The Government of Yukon and the Chamber of Mines submit that the *Quartz Mining Act* does not give rise to Crown conduct or a decision based upon the exercise of discretion and that registration is a mandatory act required by statute. Counsel submits that there is therefore no government action or decision to which the duty to consult attaches. If I accept this submission, there can be no duty to consult despite Ross River Dena Council having satisfied the first element of the test.

[50] The submission is best expressed by the Chamber of Mines in its brief, which I summarize as follows:

1. the existence and ownership of a quartz mineral claim comes into being when a person locates the mineral claim by staking it in accordance with the *Quartz Mining Act*;
2. since the mineral claim comes into existence upon being located, no Crown grant or action is required;
3. the Mining Recorder has no discretion to refuse to record a claim that conforms with the *Quartz Mining Act*;
4. the role of the Mining Recorder is solely to record a claim without the exercise of any discretion or decision making authority.

[51] In this submission, the executive branch of government is merely carrying out a statutory requirement (i.e. recording the staking and location of quartz claims) imposed by the legislative branch with no ability to exercise discretion. The government is not actually making a decision or taking an action, since the staking and location of a quartz claim by a third party triggers a statutory duty to automatically record the claim if it meets the statutory requirements. As the statute itself precludes the exercise of discretion, Ross River Dena Council's challenge, according to the Chamber's submissions, should properly be made against the legislation and not the administrative actor.

[52] The issue of whether the duty to consult only arises in the context of a discretionary decision was argued in *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697. In that case, the First Nation applied for declaratory relief alleging that its aboriginal title and rights were infringed by logging pursuant to a tree farm licence issued by the province. The First Nation had been

consulted by the provincial government before the licence issued. The province had recently introduced a policy initiative called the "Forest and Range Agreement Program" pursuant to the *Forestry Revitalization Act.* The provincial government submitted that the duty to consult was not triggered by the Crown's general management of forestry permits and approvals but rather by specific decisions that infringe on s.35 Constitutional rights. Dillon J. stated the following about the Crown's duty to consult, at para. 94:

> [94] ... The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled ... (my emphasis)

[53] Similarly, in *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, the First Nation successfully judicially reviewed a decision approving a Forest Stewardship Plan. Grauer J. stated at para. 131:

> [131] Finally, it is consistent with the observations of the Court of Appeal for British Columbia that the constitutional duty to consult and accommodate is "upstream" of the statutes under which the ministerial power has been exercised, so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution: ... (my emphasis)

[54] It is true that the duty to consult often arises in judicial review cases where the court is examining a decision involving discretionary action by government or a board or tribunal. In my view, that does not mean that only discretionary decisions can attract the duty to consult. The duty to consult is a constitutional principle that applies "upstream"

of a statute like the *Quartz Mining Act*. It would be surprising if a statute could be sheltered from a constitutional principle merely by eliminating discretion in government action or conduct. *Haida Nation* and *Rio Tinto* are not limited to discretionary decisions but are expressly meant to apply to Crown conduct overall. The question of whether government conduct includes legislative action was left unanswered by the Supreme Court of Canada at para. 44 of *Rio Tinto*. While I can appreciate the position of the Government of Yukon and the Chamber of Mines that legislative conduct is at issue here, it does not negate the constitutional duty to consult and accommodate pending claims resolution. The Government of Yukon does take action through the issuance of a Record of Mineral Claim, albeit without the exercise of discretion. As stated in the *Klahoose First Nation* case, the government cannot follow a legislative mandate in a manner that offends the Constitution.

[55] In my view, a conclusion that the duty to consult only arises in a government decision with discretion is too narrow. The test is not simply a determination of whether there is a decision as opposed to administrative action, or a decision with discretion, but rather whether there is <u>any</u> conduct or action of the Crown that attracts the consideration of whether a constitutional principle is engaged to ensure the honour of the Crown.

[56] In a further submission, the Government of Yukon submits that if its conduct overall with the Ross River Dena Council has complied with the honour of the Crown, the duty to consult is not engaged. In other words, the duty to consult only arises in circumstances where the honour of the Crown has not otherwise been fulfilled. This submission derives from a statement made by Binnie J. in *Beckman*, *supra*, at para. 44:

> The concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.

[57] There is no doubt that the governments of Canada, Yukon and First Nations, as well as mining and conservation interests, have had input into the legislation now in place. But that does not mean that the duty to consult will not arise because the honour of the Crown has already been discharged. This would suggest that the honour of the Crown can be upheld in a general way which would permit the Crown to allow exploitation of a claimed resource without any consultation. In *Haida Nation*, McLachlin C.J. stated that the honour of the Crown "infuses" the process of treaty-making and treaty interpretation. But at para. 27 she stated:

> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. (my emphasis)

[58] The argument that the honour of the Crown in Yukon may have been satisfied with the First Nations that have Final Agreements did not succeed in the *Beckman* case where Binnie J. concluded at para. 57 that:

> The decision maker was required to take into account the impact of allowing the Paulsen application on the concerns

> and interests of members of the First Nation. He could not take these into account unless the First Nation was consulted as to the nature and extent of its concerns. Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation. Nevertheless, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum. It was not burdensome. But nor was it a mere courtesy.

[59] That is not to say that the past and current efforts of the Government of Yukon to maintain the honour of the Crown are irrelevant. On the contrary, they are of considerable importance in determining whether the honour of the Crown has been discharged when the duty to consult applies to government conduct. This is reflected in the statement of Binnie J. in the Little Salmon Carmacks judgment at para. 54:

> ...Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17 (CanLII), 2010 SCC 17, [2010] 1 S.C.R. 557.

[60] The Government of Yukon makes a further submission that we are not dealing with a case like *Haida Nation*, where the Haida Nation had a cultural and aboriginal claim to the timber that was being harvested. In this case, we are addressing mineral rights to which no specific aboriginal claim is made. It strikes me that this argument is belied by the fact that many of the settled Yukon claims have granted mineral rights as part of the settlement. However, in my view, all that is required is an asserted claim to

title, and the Government of Yukon has acknowledged this in its various agreements with Ross River Dena Council and its negotiations. This is not to mention the claims for other obvious aboriginal rights such as hunting, fishing, and trapping, which may be adversely impacted by resource extraction activities.

[61] The Government of Yukon and the Chamber of Mines make an additional submission that this is not a duty to consult case at all. Rather, they submit that Ross River Dena Council must make a constitutional challenge to the *Quartz Mining Act* as an infringement on its aboriginal title. I have already found that Ross River Dena Council has an asserted claim rather than actual established aboriginal title and rights, despite the wording of the agreements. Had I found that Ross River Dena Council had established aboriginal rights, this constitutional challenge submission might have some merit. Interestingly, this was the way that *Mikisew Cree* proceeded before reaching the Supreme Court of Canada. Binnie J. dealt with this approach at para. 59:

> Where, as here, the Court is dealing with a proposed "taking up" it is not correct (even if it is concluded that the proposed measure if implemented would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

[62] I conclude that, despite the non-discretionary nature of the government conduct and the legislative scheme that governs it, the duty to consult is engaged when the Mining Recorder records a mineral claim. The second element to attract the duty to consult, that is Crown conduct or a decision, has been met.

[63] *Rio Tinto* considers the third part of the *Haida* test starting at para. 45:

> (3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right
>
> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41...

[64] The Government of Yukon and the Chamber of Mines submit that the impact here is speculative because there is no evidentiary basis on which to assess the proposed conduct. If Ross River Dena Council's claim is put forward solely on the basis that its aboriginal title is adversely impacted in that it will not have exclusive use and

occupation of the land, I have already found that the wording of their agreements does not amount to an established aboriginal title.

[65] On the other hand, it is not difficult to see the potential for adverse impact on hunting and trapping and fishing rights, for example, if all of the activities permitted in a Class 1 exploration program took place on a staked and registered claim. The Supreme Court of Canada is explicit that "a potential for adverse impact suffices". That potential exists whenever the Mining Recorder issues a Record of Mineral Claim.

[66] The Government of Yukon also submits that there is no adverse impact because the operating conditions in Schedule 1 of the *Quartz Mining Land Use Regulation* provide for land reclamation. These operating conditions, to the extent they can reduce impact, are certainly laudable, but there are clear limitations to the reclamation possible after trees are cut, trenching done and up to 500 tonnes of rock removed. The operating conditions do not eliminate the potential for adverse impact. I also query how the government can monitor Class 1 exploration programs, when they do not require any notice or permit.

[67] The Government of Yukon submits that it is speculative to suggest that the recording of a quartz mineral claim will adversely affect the asserted aboriginal rights of Ross River Dena Council. It says that there is no causal connection between the recording of a mineral claim and potential adverse impacts. The government submits that locating a mineral claim involves the planting of two posts in the ground and blazing a line between them, followed by the recording of the mineral claim in the record book. It further states that the location and recording of the quartz claim does not reduce or remove the Yukon's legal authority to regulate the development of mineral resources.

[68] I have found that the recording of a mineral claim is Crown conduct. It is the perfection of the right to carry out exploration programs which can have an obvious impact on land and resources. The duty to consult does not require an immediate physical impact on lands and resources to be triggered, but rather the potential for adverse impacts on aboriginal claims or title. Exploration programs which are not subject to any notice, permission or assessment certainly carry the potential for adverse impacts on the aboriginal rights asserted here. In my view, they cannot be treated as speculative in the sense of being theoretical, hypothetical or academic.

[69] To a certain extent, the recording of a quartz mineral claim is similar to the transfer of a Tree Farm Licence ("T.F.L.") in the *Haida* case, although the size of a single mineral claim is very small compared to the size of a T.F.L. As McLachlin C.J. stated in *Haida*:

> [75] The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).
>
> [76] I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply

> analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

[70] I accept that there is a significant distinction between the tree cutting policy in British Columbia and the policy in the Yukon for Class 1 exploration programs. In the mining context, there is historically no requirement to give notice of plans or receive a permit before exploration begins. The identification of trees as worthy of cutting is quite different from the prospecting and exploration required to determine whether a mineral showing has any potential. However, in my view, at this stage of considering the triggering of the duty to consult, the government conduct is very similar whether it is tree licences or mineral claims. There is clearly a causal connection between the recording of a mineral claim and the potential for adverse impacts through a Class 1 exploration program.

[71] The Government of Yukon submits that there is no way to have a meaningful consultation prior to the recording of a mineral claim. This highlights a major difference between a Tree Farm Licence and a mineral claim. In the case of a Tree Farm Licence, the trees exist for all to see and assess. There are no secrecy or confidentiality concerns as there are in the mining business where the claim holder does not want to disclose knowledge of the proposed area to be explored at a stage where the claim holder has no rights to the mineral and may be disclosing valuable commercial

information. To some extent, the same argument may apply to a Tree Farm Licence but this commercial sensitivity really goes to the heart of the mining business.

[72] A second aspect in the government's submission is the administrative nightmare that would occur if hundreds or thousands of individual duties to consult arise before the issuance of a mineral claim. This would impose an onerous obligation on both the Government of Yukon and First Nations without a final settlement. However, the impact of such an obligation could be substantially mitigated by applying the grouping concept already in place in the *Quartz Mining Act*.

[73] I conclude, in the context of the *Quartz Mining Act* and *YESAA*, that the appropriate time for consultation is after the grant of the mineral claim, when the holder of the claim has some security of tenure and the First Nation is able to determine its potential adverse impact. I recognize that this timing of the duty to consult places the right to occupy and mine a mineral claim before the establishment or agreement on the nature and extent of the Ross River Dena Council aboriginal title. However, it also recognizes the right of the Crown to manage the resource in consultation with the First Nation.

[74] For the purposes of this court action, a duty to consult after the recording of the claim could only extend to notice, because in the absence of proposed exploration there is no context that would expand the duty beyond this. In other words, the Government of Yukon would be required to notify the Ross River Dena Council when mineral claims are recorded in the Ross River Area. This is not particularly onerous as, in satisfaction of this duty, the Government could simply provide the First Nation with the monthly report it now receives from the Mining Recorder under s. 6 of the *Quartz Mining Act*. I

note that the Chamber of Mines, while not conceding that there should be a duty to consult, acknowledges that the earliest point that the Crown could undertake a consultation would be after the mineral claim is recorded.

Declaratory Relief

[75] The question remains whether the declaratory relief sought should be granted. Declaratory orders are discretionary orders. The scope of the discretion was described in *Canada v. Solosky*, [1980] 1 S.C.R. 821 at p. 832 as follows:

> As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:
>
> > The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.
>
> As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)

[76] There are two Yukon cases that have denied declaratory orders. In *Tr'ondëk Hwëch'in v. Canada*, 2004 YKCA 2, the Tr'ondëk Hwëch'in applied for a declaration that certain pre-existing mining claims in Tombstone Territorial Park were to be managed according to the objectives of the Tr'ondëk Hwëch'in Final Agreement. There was no actual dispute about the facts regarding the management of the mining claims before the court. The trial judge, observing that section 130 of the *Yukon Quartz Mining Act*

required the operation of the mining claims to uphold the essential socio-economic and environmental values of the Yukon, declared that the claims could be managed according to the *Quartz Mining Act*, provided that the exercise of discretion by the government was in accordance with the objectives in s. 1 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement. The Yukon Court of Appeal set aside the declarations for the following reasons at para. 11:

> I appreciate the point, made by counsel for the appellant, that this was an application for the construction or interpretation of a document, namely the THFA [Tr'ondëk Hwëch'in Final Agreement]. However, when one considers the scope of the declarations sought by CUMI [Canadian United Minerals Inc.] and Tr'ondëk herein, it appears to me that what was really being sought from the Supreme Court was something in the nature of an advisory opinion. I believe that the courts ought to be cautious in acceding to requests of this sort. A court may of course grant declaratory relief where no other relief is sought. But a court may properly exercise its discretion to refuse a declaration where the relief sought is not related to an existing and defined *lis*.

[77] In *Tr'ondëk Hwëch'in v. Yukon*, 2007 YKCA 1, in an application for summary judgment, the Court of Appeal agreed with the trial judge that certain declarations were hypothetical and would serve no useful purpose. The Court of Appeal also wrote at para. 28 as follows:

> In any event, whether a defence has been shown or not, the judge retains discretion under Rule 18(2) to grant or withhold summary judgment. In this case, that discretion is supplemented by the discretion described in *Canada v. Solosky*, *supra*, to grant or withhold declaratory relief. In my view, the primary basis for the dismissal of the application for summary judgment was the judge's exercise of this discretion.

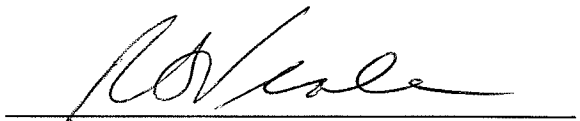
[78] Here, Ross River Dena Council seeks a declaration that the Government of Yukon has a duty to consult prior to recording the grant of quartz mineral claims in the Ross River Area. I have concluded that the three element test in *Haida Nation* and *Rio Tinto* has been met. It is not a hypothetical case, in the sense that there is ongoing quartz mining activity in the Ross River Area and there are currently 8,633 active quartz claims. In my view, it is appropriate to grant a declaration that the Government of Yukon has a duty to consult after the issuance of a mineral claim. The duty to consult that arises at this stage is simply to give notice to the First Nation that a mineral claim has been issued. This can be satisfied through providing the report prepared by the Mining Recorder under s. 6 of the *Quartz Mining Act*. This declaration does not require any further duty upon the Government of Yukon than notice.

[79] There is some utility in this declaration. It provides a remedy to the dispute between the First Nation and the Government of Yukon. It would not be useful in the interest of judicial economy or costs to the parties to suggest that another court action be commenced on a specific mineral claim to resolve this issue. At the same time, it is not an onerous duty for the government, but its performance will provide the First Nation with valuable information about potential impacts on its traditional territory.

[80] It would be naïve to suggest that this decision will resolve all future issues between the First Nation and the Government of Yukon respecting the grants of mineral claims. But this declaration avoids the necessity of further litigation on the issue of when the duty to consult commences. It is not necessary or fruitful to have further litigation on this issue involving a mining company filing a claim.

[81] It is not uncommon, in cases where a declaration is made based on a constitutional principle to suspend the effect of the declaration for a period of time to allow dialogue and consultation to take place: See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 116 – 124. The Government of Yukon has specifically requested time to review its quartz mining regime, and counsel for Ross River Dena Council has also suggested the appropriateness of dialogue. I am also cognizant that this ruling involves a change in procedure that may have other ramifications. Accordingly, the declaration that the Government of Yukon has a duty to consult arising after the grant of a quartz mineral claim requiring notice to the First Nation is suspended for a period of one year.

[82] Costs may be spoken to at Case Management if necessary.



VEALE J.

Schedule "A"

EXPLORATION PROGRAM CLASS CRITERIA

Item	Column 1 Activity	Column 2 Class 1 Criteria	Column 3 Class 2 Criteria	Column 4 Class 3 Criteria
1.	Construction of structures other than underground structures	Structures without foundations intended for use for a period of not more than 12 consecutive months	Structures without foundations	Structures with foundations
2.	Number of person-days per camp	Not exceeding 250	Not exceeding 250	More than 250
3.	Number of persons in a camp at any one time	Not exceeding 10	More than 10	More than 10
4.	Storage of fuel, total amount stored	Not exceeding 5000L	Not exceeding 40,000L	More than 40,000L
5.	Storage of fuel, per container	Not exceeding 2000L	Not exceeding 10,000L	More than 10,000L
6.	Construction of lines	Not exceeding 1.5m in width and cut by hand or with hand held tools	More than 1.5m in width or cut with tools that are not hand held	More than 1.5m in width or cut with tools that are not hand held
7.	Construction of corridors – width	Not exceeding 5m in width	Not exceeding 5m in width	Not exceeding 10m in width
8.	Construction of corridors – length	Total length not exceeding 0.5km	Total length not exceeding 0.5km	Total length or more than 0.5km
9.	Trenching	Not exceeding (a) $1200m^3$ on a group of three adjoining claims in the program, provided that no claim in the program forms part of more than one group; or (b) $400m^3$ per claim that is not part of a group of three adjoining claims referred to in paragraph (a)	Total volume not exceeding $1200m^3$ per claim per year	Total volume not exceeding $5,000m^3$ per claim per year to a maximum of $10,000m^3$ over the life of the exploration program
10.	Number of clearings per claim, including existing clearings	Not exceeding 8	Not exceeding 8	More than 8
11.	Number of clearings, helicopter pads and camps	No more than 2 of the 8 clearings referred to in item 10	No more than 2 of the 8 clearings referred to in item 10	More than 8
12.	Clearings – removal of vegetative mat	No removal of vegetative mat within 30m of a water body	Removal of vegetative mat	Removal of vegetative mat
13.	Surface areas of clearings	Not exceeding $200m^3$, except for clearings for helicopter pads and camps which cannot exceed $500m^3$	(a) Not exceeding $400m^3$ per clearing. If only trees and brush are removed; (b) Not exceeding $500m^3$ per clearing, for helicopter pads and camps; or (c) Not exceeding $1,000m^3$, if vegetative mat is removed	(a) More than $400m^3$ per clearing, if only trees and brush are removed; (b) More than $500m^3$ per clearing, for helicopter pads and camps; or (c) More than $1,000m^3$, if vegetative mat is removed
14.	Establishing new access roads, per exploration program	Not authorized	Not exceeding 5 km	Not exceeding 15 km

15.	Upgrading of access roads, per exploration program	Not authorized	Not exceeding 10 km	Not exceeding 30 km
16.	Establishment of trails, other than temporary trails, per exploration program	Not authorized	Not exceeding 10 M in width and 15 km in total length	Not exceeding 15 m in width and 40 km in total length
17.	Establishing or using temporary trails, per exploration program	Not authorized on Category A Settlement Land or on Category B Settlement Land On land other than Category A Settlement Land or Category B Settlement Land, establishing a temporary trail or using a temporary trail that was established for another program if (a) the temporary trail width does not exceed 7m or 1m more than the width of the equipment to be moved along the temporary trail, whichever is less; (b) the total temporary trail length does not exceed 3km; and (c) the temporary trail is only used for the purpose of moving sampling equipment between test sites.	Not exceeding 10 m in width and 15 km in total length	Not exceeding 15 m in width and 40 km in total length
18.	Use of vehicles on existing roads or trails	Within the design limits or tolerances of the road or, if design limits or tolerances of roads or trails are not known, vehicles with a gross vehicle weight of less than 40t for roads, and less than 20t for trails	Within the design limits or tolerances of the road or, if design limits or tolerances of roads or trails are not known, vehicles with a gross vehicle weight or less than 40t for roads, and less than 20t for trails	Within the design limits or tolerances of the road or, if design limits or tolerances of roads or trails are not known, vehicles with a gross vehicle weight of more than 40t for roads, and less than 20t for trails
19.	Off-road use of vehicles in summer	Low ground pressure vehicles only	Vehicles with a gross vehicle weight not exceeding 20t, that are used over a distance of not more than 15 km	Vehicles with a gross vehicle weight of more than 20t, that are used over a distance of not more than 40 km per year
20.	Off-road use of vehicle in winter	Low ground vehicles or vehicles with a gross vehicle weight not exceeding 40t used over a distance of not more than 15 km	Vehicles over than low ground pressure vehicles, used over a distance of not more than 25 km	Vehicles other than low ground pressure vehicles, used over an unlimited distance
21.	Use of explosive	Not exceeding 1,000kg in any 30 day period	More than 1,000 kg in any 30 day period	More than 1,000 kg in any 30 day period
22.	Construction of underground structures	Construction in which not more than 500t of rock is moved to the surface	Not more than 40,000t of rock is moved to the surface per year and not more than a total of 200,000t is moved to the surface for the exploration program	Not more than 100,000t of rock is moved to the surface per year and not more than a total of 200,000t is moved to the surface for the exploration program