COURT OF APPEAL OF YUKON

Citation: *First Nation of Na-Cho Nyäk Dun v. Yukon (Government of)*, 2024 YKCA 5

Date: 20240409
Docket: 22-YU899

Between:

First Nation of Na-Cho Nyäk Dun

Respondent
(Petitioner)

And

Government of Yukon

Appellant
(Respondent)

And

Metallic Minerals Corp.

Respondent
(Respondent)

And

Champagne and Aishihik First Nations

Intervener

Before: The Honourable Madam Justice Shaner
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of Yukon, dated January 31, 2023 (*First Nation of Na-Cho Nyäk Dun v. Yukon (Government of)*, 2023 YKSC 5, Whitehorse Docket 20-AP013).

Counsel for the Appellant:	I.H. Fraser L. Hawkings
Counsel for the Respondent, First Nation of Na-Cho Nyäk Dun:	N. Frame M. Gibson
Counsel for the Intervener, Champagne and Aishihik First Nations (via videoconference):	K. Blomfield G. Hermansen

Place and Date of Hearing:	Whitehorse, Yukon November 22, 2023
Written Submissions Received:	February 2, 16, and 26, 2024
Place and Date of Judgment:	Whitehorse, Yukon April 9, 2024

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Shaner
The Honourable Mr. Justice Abrioux

Summary:

This is an appeal from an order made on judicial review setting aside a decision made by the Director of the Mineral Resources Branch of the Government of Yukon. The impugned decision permitted a mineral exploration project in the respondent First Nation's traditional territory to proceed to the regulatory approval and permitting stage. The reviewing judge's decision was made on the basis that Yukon had breached the duty to consult, and on several alternative bases. The reviewing judge also issued three declarations sought by the First Nation. The appellant, the Government of Yukon, contends the reviewing judge erred, including in her application of the standard of review. It seeks to have the reviewing judge's order, including the declarations, set aside: Held: Appeal allowed in part. The reviewing judge did not err in her duty to consult analysis; in particular, she did not err in identifying or applying the appropriate standard of review. The appeal of the order setting aside that decision and remitting the project application for reconsideration is dismissed. However, two of the three declaratory orders were unavailable to the reviewing judge. Those declarations are set aside.

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Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] Prescribed classes of development projects in Yukon must be assessed under the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"), before they can proceed to any regulatory approval or permitting processes. The *YESAA* was enacted to meet a commitment in the Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon, and a commitment made in the First Nation of Nacho Nyak Dun Final Agreement between the First Nation of Na-Cho Nyäk Dun, the Government of Canada and the Government of Yukon (the "Treaty"), both of which were made on May 29, 1993.

[2] On March 15, 2021, the First Nation petitioned to quash a February 19, 2021 decision of the Director of the Mineral Resources Branch of the Government of

Yukon (the "Director" and "Yukon", respectively) permitting a mineral exploration project proposed by Metallic Minerals Corp. (the "Project") to proceed to the regulatory approval and permitting stage.

[3] For reasons indexed at 2023 YKSC 5, Chief Justice Duncan quashed and set aside the Director's decision and remitted Metallic Minerals' application for reconsideration.

[4] In addition to that order, she granted declarations that:

a) in issuing its decision on the Project, Yukon had failed to meet its duty to consult and, if necessary, accommodate in relation to the First Nation's Aboriginal and treaty rights;

b) Yukon breached its duty to act in a way that accomplishes the intended purposes of the Treaty; that is, to ensure the First Nation's meaningful participation in the management of land and resources in its traditional territory; and

c) Yukon breached its duty of good faith in the performance of an Intergovernmental Agreement with the First Nation to develop a small-scale land use plan for the Tsé Tagé watershed (the "Beaver River Land Use Plan"), by failing to consider the effect of the impugned decision on the ongoing land use planning process under that agreement.

[5] She dismissed the First Nation's petition for declarations that:

a) Yukon failed in its duty to diligently implement the promises in the Treaty, including the promise to engage in land use planning set out in Chapter 11 of the Treaty; and

b) Yukon breached its duty to keep promises made in the Intergovernmental Agreement to develop the Beaver River Land Use Plan.

[6] Yukon appeals both the order quashing the decision and remitting it for further consultation and reconsideration by the Director, and the orders granting declaratory relief.

Background

The Umbrella Final Agreement and the Treaty

[7] The First Nation is a self-governing Yukon First Nation with a traditional territory of over 160,000 km², 130,000 km² of which are within the boundaries of the Yukon. “Na-Cho Nyäk Dun” in Northern Tutchone means “the people that come from these ancestral waters”, referring to the watersheds in the traditional territory.

[8] The Umbrella Final Agreement was the product of two decades of negotiations. It has been described as a “monumental agreement that set the stage for concluding modern treaties in the Yukon” and one which “established a collaborative regional land use planning process that was adopted in modern land claims agreements between Yukon, Canada, and First Nations”: *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 at para. 2 [*FNNND 2017*]. It provides the framework for individual “Final Agreements” with Yukon First Nations.

[9] The First Nation was one of the first four Yukon First Nations to sign a comprehensive land claims agreement, including the Treaty and a Self-Government Agreement in 1993. Each of these “Final Agreements” (or “modern treaties”) is a “land claims agreement” within the meaning of s. 35(3) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11: *The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 18 at para. 8 [*FNNND 2015*]. Each contains the provisions in the Umbrella Final Agreement, as well as specifically negotiated “Specific Provisions” applicable to the First Nation.

[10] In entering into the Treaty, the First Nation surrendered undefined Aboriginal rights, title, and interests in its traditional territory in exchange for defined treaty rights, including: title to settlement lands; financial compensation; rights to harvest

fish, wildlife and forest resources; and rights of representation and involvement in land use planning and resource management in their traditional territories.

[11] The Treaty is to be interpreted in a manner consistent with principles embodied in the recitals:

> WHEREAS:
>
> …
>
> the First Nation of Nacho Nyak Dun wishes to retain, subject to this Agreement, the aboriginal rights, titles and interests it asserts with respect to its Settlement Land;
>
> the parties to this Agreement wish to recognize and protect a way of life that is based on an economic and spiritual relationship between Nacho Nyak Dun and the land;
>
> the parties to this Agreement wish to encourage and protect the cultural distinctiveness and social well-being of Nacho Nyak Dun;
>
> …
>
> the parties to this Agreement wish to enhance the ability of Nacho Nyak Dun to participate fully in all aspects of the economy of the Yukon; …

[12] Section 2.6 of the Treaty sets out rules of interpretation, including the following at s. 2.6.7:

> Objectives in Settlement Agreements are statements of the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.

[13] The Treaty contains many provisions calling for “consultation” between Yukon and the First Nation. Chapter 1 provides:

> “Consult” or “Consultation” means to provide:
>
> (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
>
> (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
>
> (c) full and fair consideration by the party obliged to consult of any views presented.

[14] There are specific references to “consultation”, as defined, in respect of many issues dealt with by the Treaty.

[15] Of particular importance for the purposes of this appeal are Chapter 11 and Chapter 12. Chapter 11 contains provisions for “Land Use Planning”, and Chapter 12 contains provisions for “Development Assessment”. The divergent opinions of the parties to these proceedings relate, in part, to the nature of their obligations in respect of land use planning.

[16] Chapter 11 and 12 contain no significant Specific Provisions, but adopt, without amendment, the provisions of the Umbrella Final Agreement. They include few specific references to “consultation” but, rather, set up processes that are consultative in nature. The definition of “consult” or “consultation” contained in Chapter 1 of the Treaty thus has little apparent application to Chapter 11.

[17] The objectives of Chapter 11 are, among other things:

> 11.1.1.1 to encourage the development of a common Yukon land use planning process outside community boundaries;
>
> 11.1.1.2 to minimize actual or potential land use conflicts …;
>
> 11.1.1.4 to utilize the knowledge and experience of Yukon Indian People in order to achieve effective land use planning;

[18] The chapter provides for the creation of the Yukon Land Use Planning Council, and calls for it to make recommendations to Yukon and each affected Yukon First Nation on, among other things:

> 11.3.3.1 land use planning, including policies, goals and priorities in the Yukon; and
>
> 11.3.3.2 the identification of planning regions and priorities for the preparation of regional land use plans;

[19] It provides that Yukon and any affected First Nation may agree to establish a Regional Land Use Planning Commission to develop a regional land use plan and states:

> 11.4.5 In developing a regional land use plan, a Regional Land Use Planning Commission:
>
> …
>
> 11.4.5.3 shall ensure adequate opportunity for public participation;
>
> 11.4.5.4 shall recommend measures to minimize actual and potential land use conflicts…
>
> 11.4.5.5 shall use the knowledge and traditional experience of Yukon Indian People…;
>
> 11.4.5.6 shall take into account … traditional land management practices;

[20] Chapter 11 further provides for the development of Sub-Regional and District Land Use Plans: s. 11.8.0.

[21] Consultation between Yukon and the First Nation is only expressly referred to in the sections of Chapter 11 addressing the way in which recommended land use plans developed by Regional Land Use Planning Commissions are to be approved (see s. 11.6), and the preparation of budgets for Regional Land Use Planning Commissions (see s. 11.9). With respect to approval of recommended regional land use plans, the Treaty provides:

> 11.6.2: Government, after Consultation with any affected Yukon First Nation and any affected Yukon community, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying on Non-Settlement Land.
>
> …
>
> 11.6.3.2: Government shall then approve, reject or modify that part of the plan recommended under 11.6.3.1 applying on Non-Settlement Land, after Consultation with any affected Yukon First Nation and any affected Yukon community.
>
> 11.6.4: Each affected Yukon First Nation, after Consultation with Government, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying to the Settlement Land of that Yukon First Nation.
>
> 11.6.5: If an affected Yukon First Nation rejects or proposes modifications to the recommended plan, it shall forward either the proposed

> modifications with written reasons or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon:
>
> 11.6.5.1 the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to that affected Yukon First Nation, with written reasons; and
>
> 11.6.5.2 the affected Yukon First Nation shall then approve, reject or modify the plan recommended under 11.6.5.1, after Consultation with Government.
>
> [Emphasis added.]

[22] The reviewing judge found that "[s]ince the 1990s, the [First Nation] had been requesting land use planning in their entire traditional territory using the process set out in Chapter 11 of the Treaty": at para. 19. She also found, however, that "[t]he land use planning provisions in Chapter 11 have not yet been implemented for the [First Nation]": at para. 15.

[23] The result is that nearly half of the First Nation's traditional territory remains outside of any land use planning process, and Yukon and the First Nation have not yet established a Chapter 11 Regional Land Use Planning Commission for the Northern Tutchone Planning Region (where the Project would be located). Yukon notes that, although the First Nation has argued that Yukon is responsible for the failure to establish the Commission, the reviewing judge explicitly declined to make a finding that Yukon had acted in breach of its obligations in this regard.

[24] The First Nation emphasizes that its traditional territory is under development pressure and generates competing land use interests. Forty-three percent of all quartz mining claims in the Yukon are in the First Nation's traditional territory. It regards land use planning as an "urgent priority".

[25] Chapter 12 of the Treaty deals with the assessment of "Projects". It describes the role of a "Yukon Development Assessment Board" established pursuant to "Development Assessment Legislation". It provides, in respect of these bodies, that:

> 12.4.2 YDAB and each Designated Office shall consider the following matters when carrying out their functions:
>
> 12.4.2.1 the need to protect the special relationship between Yukon Indian People and the Yukon wilderness Environment;
>
> 12.4.2.2 the need to protect the cultures, traditions, health and lifestyles of Yukon Indian People and of other residents of the Yukon;
>
> 12.4.2.3 the need to protect the rights of Yukon Indian People pursuant to the provisions of Settlement Agreements;
>
> 12.4.2.4 the interests of Yukon residents and Canadians outside the Yukon;
>
> 12.4.2.5 alternatives to the Project or alternative ways of carrying out the Project that avoid or minimize significant adverse environmental or socio-economic effects;
>
> 12.4.2.6 measures for mitigation of and compensation for significant adverse environmental and socio-economic effects;
>
> 12.4.2.7 any significant adverse effect on Heritage Resources;
>
> 12.4.2.8 the need for a timely review of the Project;
>
> 12.4.2.9 the need to avoid duplication and, to the greatest extent practicable, provide certainty to all affected parties and Project proponents with respect to procedures, information requirements, time requirements, and costs; …
>
> [Emphasis added.]

[26] The *YESAA* is the "Development Assessment Legislation" enacted as a result of Chapter 12. The Yukon Environmental and Socio-economic Assessment Board ("YESAB") is the "Yukon Development Assessment Board" contemplated by the chapter. In simple terms, the YESAB's role under the *YESAA* is to provide a recommendation to a "decision body" based upon its assessment of a project submitted for evaluation. In practice, project assessments are most often conducted by a YESAB designated office.

[27] *YESAA* assessments must take a wide range of matters into consideration, including environmental and socio-economic effects, cumulative effects, the need to

protect treaty rights and other interests of First Nations: see *YESAA* at s. 42. Once the responsible designated office has concluded its assessment, it issues a report and, generally speaking, recommends the project under review be allowed to proceed; be allowed to proceed subject to terms and conditions; or not be allowed to proceed at all: s. 56(1).

[28] This recommendation is provided to the responsible "decision body", which is required to issue a "decision document" which accepts, rejects or varies the recommendation of the designated office. A permissive decision document, like the one under review in this case, enables a project to proceed out of the *YESAA* assessment process and into the regulatory authorization and permitting stage.

[29] In this case, the assessment was conducted by the designated office in Mayo, Yukon (the "Designated Office"). The decision body was Yukon's Director of the Mineral Resources Branch.

The Project and the Director's Decision

[30] On February 11, 2020, Metallic Minerals applied for assessment of the Project pursuant to the *YESAA*.

[31] Pursuant to criteria set out in applicable regulations, exploration programs are categorized into classes. Categorization ranges from the least intrusive activities in Class 1 to the most intrusive activities in Class 4. The Project was categorized as Class 3/4.

[32] The reviewing judge described the Project as follows:

> [26] The Project consists of 52 quartz mining claims over 1,086.8 hectares. It is located entirely within Na-Cho Nyäk Dun traditional territory and more specifically, entirely within the Tsé Tagé watershed area that is the subject of land use planning under the Intergovernmental Agreement. The application seeks approval for activities including prospecting, geological mapping and rock sampling, soil sampling, ground and airborne geophysics, drone aerial photography, heli-portable excavation, trenching, drilling,

> bedrock interface sampling and bedrock sampling. In order to carry out these activities, Metallic Minerals wants to construct:
>
> a. new temporary and permanent trails up to 5 km and 3 km long, and 5 m wide;
>
> b. new roads up to 2 km long and 5 m wide;
>
> c. new cut lines up to 5 km long and 1.5 m wide;
>
> d. new corridors up to 2.5 km long and 1.5 m wide;
>
> e. up to 50 new clearings up to 500 m²;
>
> f. a new 600 m² camp to house 20 seasonal workers;
>
> g. a new 60 m² helipad;
>
> h. up to 100 trenches 15 m long, 2.5 m wide and 2 m deep; and
>
> i. up to 150 drill holes to a depth of 100 m.
>
> Helicopter use is proposed for up to three hours each day.

[33] She noted:

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

[34] Project activities are designed to support helicopter and ground-based mineral exploration activities every summer for 10 years.

[35] The Tsé Tagé (or Beaver River) watershed, in which the Project would be located, is a pristine wilderness area in the traditional territory of the First Nation, referred to by the First Nation's ancestors as a "breadbasket for hard times". It is considered to be an area of beautiful, serene and untouched wilderness. Although the Project area is located mostly on sparsely vegetated slopes above the treeline, it is in an area that provides habitat for sheep, caribou and moose. It is Non-Settlement Land under the administration and control of the Commissioner of Yukon.

[36] Metallic Minerals' application was assessed by the Designated Office. From April 24 to May 29, 2020, the Designated Office received submissions from the First Nation, Yukon, the Yukon Conservation Society, the Mayo District Renewable

Resources Council, Midnight Sun Outfitting, Transport Canada, Environment and Climate Change Canada, and Fisheries and Oceans Canada.

[37] On July 24, 2020, the Designated Office issued its evaluation report assessing the potential effects of the Project on wildlife and wildlife habitat, environmental resources, heritage resources, and human uses of the land. It determined that there was potential for significant adverse environmental and socio-economic effects, but such effects could be mitigated by appropriate terms and conditions. It recommended the Project be allowed to proceed, subject to seven mitigating conditions relating to wildlife, invasive species, aquatic resources, and heritage resources.

[38] That evaluation report then went to the decision body, the Director. On February 19, 2021, the Director issued a decision document, varying the recommendation of the Designated Office (the “Decision Document”). The Director accepted six of the seven conditions recommended by the Designated Office, and added seven conditions Yukon had proposed in a draft decision document shared with the First Nation. The added terms were apparently intended to afford additional protection to flora, fauna and heritage resources.

[39] The Director also issued a letter directly to the First Nation to supplement the reasons for the decision given in the Decision Document. The letter responded to the First Nation’s submission that the Project should not be allowed to proceed until after completion of the Beaver River Land Use Plan. The reviewing judge held that this letter formed an integral part of the Decision Document for the purpose of providing the rationale for the decision. In the letter, Yukon took the position that neither the Treaty nor the Intergovernmental Agreement contemplated the cessation of development activities pending the completion of a land use plan; that the process for addressing concerns in the interim was the *YESAA* process; and that Yukon has a responsibility to balance the interests of all Yukoners, including development and conservation interests.

[40] As noted by the reviewing judge, "[t]he decision is the final stage in the assessment process, before the project moves to the regulatory authorization stage": at para. 4. Accordingly, the effect of the Decision Document is to permit the Project to proceed out of the *YESAA* assessment stage and into the regulatory authorization and permitting phase.

The Intergovernmental Agreement

[41] In 2017, with Chapter 11 land use planning still not implemented in the entirety of their traditional territories, the First Nation asked Yukon to initiate Chapter 11 land use planning for the Stewart River watershed, which includes the Tsé Tagé watershed. Around that time, a project proposed by ATAC Resources Ltd. in the Tsé Tagé watershed area brought the question of land use planning in the region to the fore.

[42] ATAC had a mining land use approval to engage in mining exploration in the watershed. In 2016, it proposed to build a 65 km all-season road to facilitate access to a gold deposit. The proposal was submitted for assessment under the *YESAA*. A designated office of the YESAB recommended the road construction proceed.

[43] Consultation with the First Nation in respect of the ATAC project followed. As an "accommodation measure", after community consultations, Yukon agreed, in January 2018, to enter into an Intergovernmental Agreement with the First Nation, with the central objective being to develop a small-scale land use plan for the Tsé Tagé watershed: the "Beaver River Land Use Plan".

[44] Beyond that overarching objective, the Intergovernmental Agreement includes the following more specific objectives:

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

b) recommending measures to minimize actual and potential land use conflicts throughout the Tsé Tagé watershed;

c) using the traditional knowledge and experience of First Nation citizens …;

d) taking into account traditional land use by First Nation citizens and their traditional land management practices;

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

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

[45] The Intergovernmental Agreement prohibited any regulatory action approving the construction of the road proposed by ATAC until the completion of the Beaver River Land Use Plan. Completion of that plan was expected in 2023, but this has not yet occurred. The First Nation asserts the plan is "likely [to] include significant restrictions on development in the area of Tsé Tagé ... because of the sensitivity of the area—both from an environmental perspective and from [the First Nation's] historical use of the area."

[46] The Intergovernmental Agreement does not, however, prohibit other proposals from proceeding through the *YESAA* assessment process and then advancing into the regulatory approvals and permitting processes stage.

The Consultation Process

[47] The following description of the consultation process that followed the Metallic Minerals application is drawn from the more complete account of the process at paras. 34–52 of the reviewing judge's reasons for judgment.

[48] As I have noted, the application for assessment in respect of the Project was made on February 11, 2020.

[49] On March 24, 2020, Yukon initiated the consultation process by requesting the First Nation's views on potential adverse effects of the application on treaty rights, and by encouraging the First Nation to participate in the *YESAA* process.

[50] In submissions on May 29, 2020, to the Designated Office and to Yukon, the First Nation expressed concerns about the environmental impacts of the Project, and took the position that development should not continue unimpeded while the land use planning process under the Intergovernmental Agreement was ongoing. As the reviewing judge observed, the First Nation "situated this Project in the context of the ongoing significant development pressures in their traditional territory, risking the ever-increasing disappearance of pristine wilderness for the exercise of their s. 35 rights, especially in the absence of land use planning": at para. 167.

[51] On July 24, 2020, the YESAB issued its evaluation report and recommendation. The report concluded the proposed activities were "likely to have significant adverse effects on wildlife and wildlife habitat, environmental resources, and heritage resources". As I have noted, it recommended the Project be allowed to proceed, with seven terms and conditions considered sufficient to mitigate the adverse effects. It did not address how or whether Project approval could be reconciled with the ongoing process of developing and implementing the Beaver River Land Use Plan.

[52] On July 27, 2020, the Yukon Mining Lands Officer requested further comments from the First Nation. The First Nation responded by repeating its position that the Project could not be approved in the absence of a land use plan for the area. The First Nation also identified proposed mitigations if the Project were to proceed.

[53] On August 5, 2020, Yukon provided a first draft of a decision document to be issued by the Director to the First Nation.

[54] On August 18, 2020, the First Nation provided its comments on the draft decision document. It reiterated the view that impacts to its Chapter 11 treaty rights

could not be mitigated or accommodated unless all approvals for the Project were deferred until after a land use plan was in place. It also provided specific comments on the conditions proposed by Yukon in the draft decision document.

[55] On August 19, 2020, the Mining Lands Officer advised the First Nation of additional proposed terms and conditions to those set out in the YESAB recommendation intended to address wildlife and habitat concerns identified by the First Nation. As I have noted above, Yukon expressed the view that the Final Agreements do not contemplate the cessation of all development activities until land use plans are complete.

[56] On September 3, 2020, Yukon gave the First Nation a draft of the decision document that incorporated changes to the terms and conditions. Yukon requested comments by September 10, 2020.

[57] On September 24, 2020, at a teleconference held shortly after community consultations in respect of the ATAC road proposal were concluded, the First Nation requested similar direct consultations with the community in respect of the Project. It repeated its position that the Treaty would be breached if the Project were to be approved before the completion of land use planning. On September 29, 2020, that position was set out in writing. The First Nation proposed, as a compromise, that it be agreed that Yukon would make no decision on the *final regulatory approval* of the Project until the Beaver River Land Use Plan was complete, and that any decision on the final regulatory approval of the Project would be consistent with the final Beaver River Land Use Plan.

[58] On October 9, 2020, Yukon again advised the First Nation of its position that there could be no cessation of development pending the completion of a land use plan.

[59] On October 16, 2020, the First Nation expressed disappointment about the conclusion of consultation, and reiterated that Yukon was required to engage in deep consultation, including directly and in-person with citizens of the First Nation.

[60] On November 17, 2020, the responsible Minister advised the First Nation that consultation was not concluded, and no decision document or authorization had been issued.

[61] On November 26, 2020, the Mining Lands Officer wrote to the First Nation outlining the changes made to the draft decision document, and confirmed Yukon sought to re-engage the First Nation in consultation about the Project. However, he repeated Yukon's position that the Final Agreements do not contemplate the cessation of all development activities until the completion of land use plans. Further, he advised that Yukon rejected the request for community consultation on the ground it was "not feasible" to conduct individual project consultation.

[62] The draft decision document that was attached to the October 9, 2020 letter was again delivered to the First Nation (as an attachment to the November 26th letter) with a request for comments by December 4, 2020.

[63] On December 1, 2020, the First Nation again wrote to the Minister. The First Nation largely reiterated its position, particularly in respect of the need for community consultation. In response, the Minister wrote to the First Nation on December 29, 2020, as follows:

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

[64] No further consultation about the Project occurred after this letter.

Judgment on Judicial Review

Identification of the Standard of Review by the Reviewing Judge

[65] The chambers judge concluded her discussion of the applicable standard of review as follows:

> [71] Courts since *Vavilov* [*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65] have held the correctness standard exception for constitutional questions … applies to matters of Crown-Indigenous treaty interpretation [citations omitted], as well as to whether the Aboriginal duty to consult exists in any particular case [citations omitted]. Treaties are protected by s. 35 of the *Constitution Act, 1982* and the duty to consult arises from the honour of the Crown, a constitutional principle that informs the purposive interpretation of s. 35. The existence, extent and content of the duty to consult have been legal questions reviewable on the standard of correctness since the 2004 decision of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, ("*Haida*") and *Vavilov* did not change this.
>
> [72] The following questions in this case are reviewable on the standard of correctness:
>
> a. whether the honour of the Crown and duties flowing from it were engaged by the decision under review in this case;
>
> b. the existence, extent and content of the Yukon government's duty to consult about the decision; and
>
> c. the Yukon government's interpretation of the [First Nation's] constitutionally protected treaty rights, assuming those are engaged.
>
> [73] Whether or not the duty to consult was adequate is reviewable on a standard of reasonableness.
>
> [Emphasis added.]

[66] From the discussion that followed, and reading the reasons as a whole, it appears to me that the question the judge intended to describe in para. 73 was: "Whether or not the consultation that occurred was adequate in light of the extent and content of the duty as defined". She considered that question to be reviewable on a standard of reasonableness.

Application of the Standard of Review by the Reviewing Judge

The role and effect of the Treaty in relation to the decision

[67] As a preliminary matter, the reviewing judge considered the role and effect of the Treaty. She first noted, with reference to applicable appellate jurisprudence, that Chapter 11 does, in fact, create treaty rights:

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

[68] She further held (at para. 87) that the purposes and principles emanating from Chapter 11 and the Treaty as a whole must apply when decisions are being made about land and resources in the First Nation's traditional territory. Yukon was obliged, she reasoned, to permit the First Nation to engage in meaningful participation in such decisions. The duty is heightened when the governments are negotiating a land use plan for the same area as the proposed development.

The honour of the Crown was engaged

[69] She held (at paras. 136–138) that the honour of the Crown was engaged in the decision-making process in this case in three ways.

[70] First, it applied in respect of the duty to consult, which exists independently of and alongside any modern treaty. Second, it applied because the decision affected land use planning processes, a mechanism to help fulfill one of the purposes of the Treaty: shared and meaningful participation by the First Nation in the management of public resources. Third, it applied to the promise made in the Intergovernmental Agreement to develop a land use plan for the Tsé Tagé watershed area, which the reviewing judge considered to be a way of fulfilling one of the purposes of the

Treaty—meaningful participation in management of public lands—pending the fulfillment of the Chapter 11 commitments. She concluded:

> [138] … The implementation of the Intergovernmental Agreement is Crown conduct that helps to fulfill the Treaty purpose of meaningful participation of management of land and resources in the traditional territory. The honour of the Crown applies to the Crown's actions in relation to the Intergovernmental Agreement.

There was a duty to consult and deep consultation was required

[71] There was no dispute between the parties that the duty to consult was triggered, and that, therefore, consultation was required to determine the First Nation's view of the effect of the decision on its s. 35 treaty rights: at paras. 136, 139–140.

[72] The source of the parties' disagreement was the extent and content of that duty: at para. 142. Yukon argued the consultation requirement was moderate because, while treaty rights could be affected, the potential adverse impact was low to moderate. Yukon's view reflected its position that Chapter 11 did not create treaty rights which could be impacted by the decision under review. The First Nation argued deep consultation was required.

[73] The reviewing judge found "the duty to consult in this case is towards the higher end of the spectrum, including but not limited to the requirements to discuss consultation process and the need for community consultation, to meet in good faith with an open mind to discuss issues and concerns raised, to seriously consider the concerns raised, to make efforts to mitigate in an attempt to minimize adverse impacts, to advise of the course of action taken and why": at para. 141.

[74] She reasoned that, by failing to situate the Project in the context of development pressures, and by failing to consider the ongoing land use planning process under the Intergovernmental Agreement in the area of the proposed Project, Yukon inappropriately minimized the decision's potential impacts on treaty rights, including the First Nation's right to participate in the management of their land and

resources. This led to Yukon's mischaracterization of the extent of the duty to consult: at para. 151.

Yukon failed to address the First Nation's community consultation request

[75] The reviewing judge held Yukon had failed to appreciate the extent of the obligation to consult, because it erroneously concluded that the First Nation's constitution determined who was authorized to represent the collective in the consultation process. It assumed the ability to determine who should speak for the community without discussing that view with the First Nation, and in the face of the First Nation's request for direct community consultation. It presumed direct community consultation would no be of value to the decision maker, and did not discuss the feasibility of such consultation before refusing the request. The reviewing judge (referring to the First Nation as "FNNND") held:

> [157] … If the First Nation requests the government hear from the rights-holders in the hope this will assist in explaining their concerns fully, then the government must consider this request seriously, in the spirit of reconciliation and fair dealing. If they refuse, the First Nation is owed a more meaningful explanation than this type of consultation is "not feasible."
>
> [158] … there was no indication that the Chief and the government employees were the exclusive representatives of the community's assertion of their s. 35 rights. The Crown cannot rely on their own interpretation of the FNNND's constitution, as they argued at the hearing, especially without discussing it with the First Nation.
>
> [160] … The Yukon government's failure to discuss and consider community consultation was a failure to appreciate the extent of the obligation to consult in this case.

The consultation that occurred was inadequate

[76] The reviewing judge found the consultation which did occur was inadequate, in large part because of Yukon's narrow interpretation of the scope of its duty to consult. The reviewing judge emphasized that, in so holding, she was not imposing a standard of perfection nor giving the First Nation a veto over the Project.

[77] She found Yukon responded reasonably to the environmental and resource-management issues raised by the First Nation. However, Yukon refused to

explore, discuss or acknowledge the effect of any decision on the ongoing land use planning process under the Intergovernmental Agreement. It did not engage in consultation with respect to how the pending decision might impact that process, and its responses during the consultation process demonstrated a failure to acknowledge meaningfully, understand, or address the First Nation's concerns.

[78] The reviewing judge concluded consultation "should have included discussion about the land use planning process, specifically the ongoing Intergovernmental Agreement land use planning process" (at para. 149), holding:

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

[79] The reviewing judge also noted that Yukon could not rely on the YESAB to fulfill its duty to consult. Yukon failed to acknowledge the YESAB's express recognition of the fact that its assessment was not a substitute for land use planning.

Yukon breached a duty to seek to effect the intended purpose of the Treaty

[80] As the judge noted, her finding in respect of Yukon's failure to fulfil the duty to consult was sufficient to set aside the decision under review: at para. 197. However, and although it was unnecessary for her to do so, the reviewing judge went on to consider whether Yukon breached its duty to act in a way that accomplishes the intended purpose of the Treaty.

[81] She found Yukon had indeed breached such a duty, and that this breach was caused by what she regarded as Yukon's failure to recognize the relevance and applicability of the principles and values embodied in Chapter 11 of the Treaty and its failure to engage with the First Nation in relation to the ongoing land use planning process provided for in the Intergovernmental Agreement: at para. 215. The reviewing judge noted the Intergovernmental Agreement was a means of fulfilling the Treaty purpose of meaningful participation of the First Nation in land use planning

(even though the agreement was outside Chapter 11). It was this purpose which was undermined by the decision: see paras. 232–233.

No broader declarations could be made on the evidence

[82] Addressing the assertion that Yukon breached its duty to diligently implement the Chapter 11 promises to establish land use planning processes, the reviewing judge held:

> [213] … [The First Nation argues] the Yukon government breached its obligation to implement land use planning under Chapter 11 by issuing this decision in its absence, thereby undermining the process. While the FNNND may have a legitimate concern resulting from the absence of a completed land use plan for their traditional territory, the failure to implement such a plan does not arise on the facts of this case.
>
> [214] The decision cannot be set aside on this basis in the alternative, and the declaration requested cannot be made. The record does not include sufficient evidence for the Court to determine whether the Yukon government demonstrated "a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise" (*Manitoba Metis* [*Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14] at para. 82) that is, the promise of land use planning under Chapter 11 for the whole traditional territory of FNNND.
>
> [Emphasis added.]

[83] While the reviewing judge was in a position to determine that Chapter 11 rights should have been considered by the decision maker in relation to the specific decision in issue, she was not in a position to "explore the history of the Chapter 11 implementation process to date": at para. 212.

The Director's decision was unreasonable

[84] Finally, the reviewing judge determined that the impugned decision was unreasonable, from an administrative law perspective, for two reasons. First, for reasons that follow from the foregoing analysis: because it could not be justified in light of the legal constraints on the decision maker, specifically: (a) the constitutional duties to consult and to act in a way that accomplishes the intended purpose of the Treaty, and (b) the duty to act in good faith in the performance of the Intergovernmental Agreement. Second, while the decision was not irrational or

incoherent, it did not engage the submissions and evidence provided by the First Nation.

[85] With respect to what she described as “the duty to act in good faith in the performance of the Intergovernmental Agreement”, the reviewing judge found that, by deciding to permit the Project to proceed without any acknowledgement of, or discussion about, its effect on the Beaver River Land Use Plan negotiations, Yukon made a decision “that could defeat the ultimate objectives of the Intergovernmental Agreement”: at para. 250. She issued a declaration that Yukon breached its duty by failing to consider the effect of the decision on the ongoing land use planning process under the Intergovernmental Agreement: at para. 260.

Grounds of Appeal

[86] Yukon submits our task is to step into the shoes of the reviewing judge, and that we should find that the Director could reasonably have concluded that the consultation that occurred was sufficient to discharge the Crown’s obligations. It contends the reviewing judge erred:

a) by finding that Yukon’s duty to consult was at “the higher end of the spectrum”;

b) by reviewing the adequacy of Yukon’s consultation efforts, rather than reviewing the reasonableness of Yukon’s conclusion that its consultation efforts were adequate;

c) in identifying the nature, scope, and effect of the First Nation’s Chapter 11 treaty rights—in particular by finding that the honour of the Crown had not been met because Yukon failed to meet a duty to act in a way that accomplished the intended purpose of a treaty; and

d) in identifying the nature, scope and effect of the Intergovernmental Agreement—in particular, by finding that there had been a breach of the duty to act in good faith in the performance of the agreement.

Standard of Review on Appeal

[87] There is no substantial dispute with respect to the standard of review we should employ. Both parties rely upon statements in *Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 at paras. 45–47, and *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131 at para. 36, to the following effect:

a) In general, we must effectively "bypass the decision of the judge who conducted the initial judicial review". In the words of Deschamps J. in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 247, we must "step into the shoes" of the lower court judge. For that reason, findings on the intensity and scope of the Crown's duty to consult are reviewable on the standard of correctness, whether the finding is one made by the administrative decision maker or the reviewing court.

b) However, where the reviewing judge made findings of fact or mixed fact and law based on the consideration of evidence at first instance, rather than on a review of the administrative decision, these findings are reviewable on the standard of palpable and overriding error in accordance with *Housen v. Nikolaisen*, 2002 SCC 33.

[88] When addressing the duty to consult owed to the First Nation by Yukon, we must bear in mind the subtle distinction between questions of law and questions of mixed law and fact as was described by McLachlin C.J. in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73:

> [61] On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing

> court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> [62] The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> [63] Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.
>
> [Emphasis added.]

[89] The Supreme Court of Canada later elaborated, in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54:

> [77] The Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 62. The chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable.
>
> …
>
> [82] After an extensive regulatory process and negotiations with the Ktunaxa spanning two decades, the Minister concluded that the s. 35 duty of consultation and accommodation had been satisfied, and authorized the [project] … [A] court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* for itself. Rather, it must ask whether the administrative decision maker's finding on the issue was reasonable. The question before us is whether the Minister's conclusion, that consultation and accommodation sufficient to satisfy s.35 had occurred, was reasonable.
>
> [83] The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. The question is not

> whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.

[90] On this appeal, we are therefore called upon to decide whether the reviewing judge correctly identified and applied the standard of review by asking:

a) Did the Director make a palpable error in assessing the facts upon which the description of the intensity and scope of consultation was based?

b) On his findings of fact, did the Director correctly assess the intensity and scope of the Crown's duty to consult?

c) And, if so, did the Director reasonably conclude that the consultation that had occurred was sufficient to meet the Crown's obligations?

[91] In addressing the last question, I bear in mind the helpful observations of the Federal Court of Appeal in *Coldwater First Nation v. Canada (Attorney General*), 2020 FCA 34:

> [26] This is a statutory judicial review, not a statutory appeal. In such circumstances, there is a presumption that the standard of review is reasonableness (*Vavilov*, paragraphs 23–32), and none of the exceptions to reasonableness review identified in *Vavilov* apply.
>
> [27] In *Vavilov*, the Supreme Court held that questions as to "the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982* … require a final and determinate answer from the courts" and, thus, must be reviewed for correctness (*Vavilov*, paragraph 55). …
>
> [28] In conducting this review, it is critical that we refrain from forming our own view about the adequacy of consultation as a basis for upholding or overturning the Governor in Council's decision. In many ways, that is what the applicants invite us to do. But this would amount to what has now been recognized as disguised correctness review, an impermissible approach (*Vavilov*, paragraph 83):
>
> > It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a

> general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable. [Emphasis in original.]
>
> [29] Rather, our focus must be on the reasonableness of the Governor in Council's decision, including the outcome reached and the justification for it. The issue is not whether the Governor in Council could have or should have come to a different conclusion or whether the consultation process could have been longer or better. The question to be answered is whether the decision approving the Project and the justification offered are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review.
>
> [30] There are many such circumstances. The Supreme Court emphasized in *Vavilov* that reasonableness is a single standard that must account for context. In its words, "the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case" (*Vavilov*, paragraph 89). Thus, reasonableness "takes its colour from the context" and "must be assessed in the context of the particular type of decision making involved and all relevant factors" [citations omitted]. In other words, the circumstances, considerations and factors in particular cases influence how courts go about assessing the acceptability and defensibility of administrative decisions [citations omitted].

[92] The First Nation urges us to bear in mind that the reasonableness review must be informed by an appreciation of the nature and extent of the duties flowing from constitutionally protected treaty rights, citing *Redmond v. British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para. 26; *Coldwater* at para. 27; and *FNNND 2017* at paras. 33–34. The corollary of that proposition is that a decision that is not so informed is necessarily unreasonable. The First Nation also asserts that, while reasonableness is a deferential standard, there must necessarily be adequate scrutiny of Yukon's conduct: *FNNND 2017* at para. 34; *Wells v. Canada (Attorney General)*, 2018 FC 483 at para. 54.

Required Standard of Consultation

[93] Yukon contends the reviewing judge's conclusion that the duty to consult required consultation "towards the higher end of the spectrum" was in error, and the rationale given for it—that the Project would have significant adverse impacts on a s. 35 treaty right to "participate meaningfully in the co-management of the land and resources through land use planning"—does not, as a matter of law, support it.

[94] Yukon argues there is no rigid test to determine the depth of consultation required for impacts to treaty rights. Citing *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 33–34 and 63–64, and *Haida Nation* at para. 39, it contends, however, that the analysis requires:

a) identification of the treaty rights which could be affected by the decision;

b) identification of the possible adverse effect on the exercise of those rights; and

c) assessment of the seriousness of any potentially adverse effects.

[95] It urges upon us a lower standard of consultation than was required by the reviewing judge, which it says is called for by application of these criteria.

[96] The first step in this analysis requires us to identify the treaty rights affected by the February 19, 2021 decision of the Director permitting the Project to proceed to the regulatory approval and permitting stage. The required extent of the duty to consult is tied to the seriousness of the impact on the underlying treaty right: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 36.

[97] The reviewing judge considered the impugned decision to adversely affect the First Nation's s. 35 treaty right "to participate meaningfully in the land and resource management of their traditional territory" (at para. 149). She later described this treaty right as a right "to participate in the management of their land and resources" (at para. 151).

[98] Yukon contends she erred in this respect (and thus, in her analysis of the extent of requisite consultation), because the treaty right created by Chapter 11 is a right to a process of negotiation that *may* (but not must) lead to the establishment of a land use planning process. If a Regional Land Use Planning Commission for the region is created, *then* the First Nation would acquire a right pursuant to Chapter 11 to participate in a land use planning process. Thus, Yukon submits, *participation* in a land use planning process is a future and contingent right. For that reason, Yukon says the impugned decision has no adverse impact on the *right to negotiate* the establishment of the Commission.

[99] In support of its position that the right to meaningful participation in the land use planning process pursuant to Chapter 11 is a *contingent right*, acquired by the First Nation *only after* it and Yukon agree to create the Commission, Yukon relies upon *FNNND 2015*, where Chief Justice Bauman wrote:

> [129] I begin by qualifying to a small extent the actual bargain struck in Chapter 11. That qualification flows from s. 11.4.0 which contemplates the creation of Regional Land Use Planning Commissions. The planning process under scrutiny here began with the creation of the Peel Watershed Regional Planning Commission. Under s. 11.4.1, the creation of [a Regional Planning Commission] [is] discretionary; it required the agreement of Yukon and any affected Yukon First Nations. While the affected First Nations under the UFA and the Final Agreements acquired the right to meaningful participation in the planning process once the Commission was established by agreement of the parties, they did not acquire the threshold right to the development of regional land use plans. The process leading to the development of the plans first requires the agreement of Yukon to set it in motion under Chapter 11.
>
> [Emphasis added.]

[100] These comments are *obiter*, because the relevant Regional Planning Commission in that case (the Peel Watershed Regional Planning Commission) had already been created. The comments do, however, provide some support for Yukon's position.

[101] The provisions of Chapter 11 must be interpreted in light of modern treaty interpretation principles, read in light of the treaty text as a whole and the treaty's *objectives*: *FNNND 2017* at paras. 36–37; see also Treaty at ss. 2.6.1, 2.6.6

and 2.6.7. The "clear objective" of Chapter 11 is described by the Supreme Court in *FNNND 2017* in the following terms:

> [47] In short, it is a clear objective of Chapter 11 to ensure First Nations meaningfully participate in land use management in their traditional territories. As well, the Chapter 11 process is designed to foster a positive, mutually respectful, and long-term relationship between the parties to the Final Agreements.
>
> [Emphasis added.]

[102] In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, the Court referred to the bargain struck in Chapter 11, writing that:

> [9] … Under the Yukon treaties, the Yukon First Nations surrendered their Aboriginal rights in almost 484,000 square kilometres, roughly the size of Spain, in exchange for defined treaty rights in respect of … participation in the management of public resources.
>
> …
>
> [36] Under the treaty, the LSCFN surrendered all undefined Aboriginal rights, title, and interests in its traditional territory in return for which it received … rights to representation and involvement in land use planning [Chapter 11].
>
> [Emphasis added.]

[103] In my view, it is fair to conclude, as the reviewing judge appears to have, that Chapter 11 confers treaty rights upon the First Nation to "participate meaningfully in the management of lands and resources in its traditional territory", including through the development of land use plans.

[104] To accept Yukon's narrow reading of Chapter 11 "as if it were an everyday commercial contract", to use the words of Supreme Court in *Beckman* (at para. 10), would result in a treaty that "will not accomplish its purpose"—that purpose being to further reconciliation by (among other means) affording the First Nation a right to representation and involvement in land use planning.

[105] The second and third steps of the analysis require us to identify the possible adverse effects on the exercise of the treaty right; and assess the seriousness of those effects. Yukon contends the circumstances of this case closely parallel those

in *Beckman*, where the Supreme Court of Canada held that the depth of the duty to consult lay towards the lower end of the spectrum: at para. 57.

[106] The impugned decision in *Beckman*, the approval of an application for a land grant, permitted the taking up of a parcel of 65 hectares of surrendered land for agricultural purposes. The decision was not one which called for "consultation" as defined by the Umbrella Final Agreement and incorporated in the LSCFN Treaty (another "Final Agreement" entered into by a Yukon First Nation). As Binnie J. noted in that case, at para. 5: "The treaty refers to consultation in over 60 different places but a land grant application is not one of them." While the Yukon government argued that, because consultation was not specifically required by the LSCFN Treaty in relation to a land grant, the duty to consult was excluded in the circumstances, this argument was rejected.

[107] At all levels, the courts in *Beckman* held that there was a duty to consult but that it was at the "lower end of the spectrum". That outcome was, in part, a result of the wording of the Umbrella Final Agreement and the LSCFN Treaty, which is wording also found in the Treaty in this case. To this end, Binnie J., writing for the majority, held:

> [74] This "lower end of the spectrum" approach is consistent with the LSCFN Treaty itself which sets out the elements the parties themselves regarded as appropriate regarding consultation (where consultation is required) as follows: [reference to the Treaty definition of "consult and "consultation" omitted]. …
>
> [75] In my view, the negotiated definition is a reasonable statement of the content of consultation "at the lower end of the spectrum". The treaty does not apply directly to the land grant approval process, which is not a treaty process, but it is a useful indication of what the parties themselves considered fair, and is consistent with the jurisprudence from *Haida Nation* to *Mikisew Cree*.

[108] However, the determination in *Beckman* that consultation at the lower end of the spectrum was sufficient also largely reflected the relatively simple question before the decision maker: whether to approve the grant to Mr. Paulsen, a Yukon resident, of 65 hectares of surrendered land bordering on the settlement lands of the Little Salmon/Carmacks First Nation and forming part of its traditional territory. It was

of significant importance to the decision that the Little Salmon/Carmacks First Nation expressly disclaimed any allegation the grant would violate the LSCFN Treaty, which contemplated that surrendered land might be taken up from time to time for other purposes, including agriculture. As Binnie J. observed:

> [14] … The Paulsen application had been pending almost three years before it was eventually approved. It was a relatively minor parcel of 65 hectares whose agricultural use, according to the advice received by the Director (and which he was entitled to accept), would not have any significant adverse effect on First Nation's interests.

[109] He further reasoned:

> [57] 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.
>
> [Emphasis added.]

[110] Yukon contends the issue in the case at bar is, similarly, simple: whether a project that will have minimal environmental or socio-economic impact that cannot be remediated should be approved by the Director. However, the First Nation says, and the reviewing judge agreed, Yukon could not presumptively divorce its land planning obligations from the process of approving this Project.

[111] In *Beckman*, Binnie J. was critical of the LSCFN's attempt to broaden the scope of the decision maker's enquiry. He observed:

> [80] It is impossible to read the record in this case without concluding that the Paulsen application was simply a flashpoint for the pent-up frustration of the First Nation with the territorial government bureaucracy. However, the result of disallowing the application would simply be to let the weight of this cumulative problem fall on the head of the hapless Larry Paulsen (who still awaits the outcome of an application filed more than eight years ago). This would be unfair.

[112] To some extent, in my view, this case is about whether the First Nation's insistence upon consideration of the impact of the impugned decision on land planning, and the Beaver River Land Use Plan in particular, was a legitimate request in relation to the Metallic Minerals application or, rather, the erection of an inappropriate obstacle to approval of a specific project as a result of similar pent-up frustration with respect to the inability to draft and implement a land use plan for the Tsé Tagé watershed.

[113] The First Nation, relying on *Nunatsiavut v. Canada (Attorney General)*, 2015 FC 492 at para. 168; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 43 [*Clyde River*]; and *Haida Nation* at para. 44, contends the reviewing judge correctly held Yukon had a duty to engage in consultation of an intensity at the higher end of the spectrum because the Project could adversely affect their treaty rights. Specifically, the First Nation says those rights are:

a) rights to participate meaningfully in the management of lands and resources in their traditional territory, including through land use planning (as discussed above); and

b) rights to carry out traditional practices in the Tsé Tagé watershed area.

[114] The potential for adverse effects on the former was clearly the principal reason for the submission that deep consultation was required. The First Nation argues consultation toward the higher end of the spectrum was required to ensure that approval of industrial land uses in the absence of the intended joint land use planning process does not defeat the purposes of the Treaty, and undermine the compromise that was made to achieve reconciliation.

[115] It is not clear to me that the extent to which the Project threatened to adversely affect the First Nation's right to carry out traditional practices in the watershed area was not or could not have been addressed through the *YESAA* process. As I note below, *YESAA* provides that, in assessing a project, the YESAB

is to consider the need to protect the rights of Yukon Indian persons under Final Agreements.

[116] In my view, the question in this case is really about the appropriate subject matter of Yukon's consultation with the First Nation. It comes down to whether Yukon was required to engage in *any consultation* with the First Nation with respect to how approval of Metallic Minerals' application would impact the First Nation's treaty right to participate meaningfully in the management of lands and resources in its traditional territory, including through land use planning.

[117] I share the opinion of the reviewing judge that such consultation was required. The intensity of consultation required in a given case is, of course, contextual and issue specific. As the Supreme Court of Canada noted in *Rio Tinto Alcan*:

> [36] The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 32.

[118] It is not an error to say that adverse effects upon established treaty rights generally require richer consultation than adverse effects on less well-established rights: see *Clyde River* at para. 43. In the case at bar, the consultation required was of sufficient intensity to ensure the Project's potential impact on the First Nation's s. 35 treaty rights was appreciated by the decision maker. That consultation did not occur. As a result, the First Nation's views on how approval of the Project could affect the development of the Beaver River Land Use Plan, or how the effect of the decision on land use planning might be mitigated, were not heard.

[119] There is also, in this case, a legitimate question as to whether negotiation might stave off possible infringement of the First Nation's treaty rights as a result of the cumulative effects of development. In *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, Karakatsanis and Brown JJ. observed:

> [42] … [I]t may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context

> (J. Woodward, *Native Law* (loose-leaf), vol. 1, at pp. 5-107 to 5-108). Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234, at para. 117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project (*West Moberly*, at para. 119).
>
> [Emphasis added.]

See also *Fort McKay First Nation v. Prosper Petroleum Ltd*., 2020 ABCA 163 at paras. 80–83.

[120] In assessing the potential for a decision to adversely affect treaty rights, we are not to weigh purely speculative adverse effects, but neither are we to consider only the immediate effects of the challenged decision. We are required to take a generous, purposive approach. In *Rio Tinto Alcan*, the Chief Justice, writing for the Court, described the manner in which we should weigh the potential impact of a decision on treaty rights or claims:

> [46] … [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. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources.

[121] In my opinion, the reviewing judge did not err in describing the potential impact of the Director's decision on the First Nation's treaty right to participate meaningfully in the management of lands and resources in its traditional territory,

including through land use planning. Her conclusion in this respect informed her conclusion regarding the extent and depth of required consultation: that the duty was "towards the higher end of the spectrum".

Adequacy of Consultation

[122] Yukon says the role of the court on judicial review is not to assess the adequacy of the consultation engaged in by the parties, but, rather, to determine whether the decision maker could reasonably have been satisfied that the consultation that had occurred was adequate. It contends the reviewing judge erred by conducting an independent evaluation of the adequacy of Yukon's consultation efforts, rather than reviewing the reasonableness of the Director's conclusion with respect to the requisite consultation. It says that, in doing so, the reviewing judge misconceived the issue, and it urges this Court not to repeat the error. Further, it reminds us that the Supreme Court of Canada has noted on a number of occasions that perfection is not the required standard when assessing the conduct of Crown officials.

[123] Yukon calls for what it refers to as "a *Vavilov* analysis" of the reasonableness of the Director's conclusion that there had been adequate consultation. Citing *Beckman* as an example of a case where consultation has been appropriately undertaken by a delegate of the decision maker, Yukon says the *YESAA* process provided a structure for the First Nation to communicate its concerns to Yukon.

[124] There are problems with this submission. It is correct to say the Treaty provides that, while carrying out its functions, the YESAB shall consider the need to protect the rights of Yukon Indian People pursuant to the provisions of Settlement Agreements. It is also correct to say that the *YESAA* provides that, in assessing a project, the YESAB shall take into consideration "the need to protect the rights of Yukon Indian persons under final agreements": see *YESAA* at s. 42(1)(g). However, the YESAB expressly recognized limitations in their process, writing in its evaluation report that "the [YESAB] assessment process is not an appropriate substitute for land use planning".

[125] Further, as the reviewing judge noted, Yukon did not take the position during the YESAB process that YESAB could or should consider the First Nation's position that the Beaver River Land Use Plan should be completed before consideration of Metallic Minerals' application. Nor did Yukon give adequate notice to the First Nation that it would be relying on the YESAB process to fulfill its duty to consult, so as to ensure the First Nation had an opportunity to ensure YESAB was wholly apprised of their concerns. As Karakatsanis and Brown JJ., writing for the Court, noted in *Clyde River*:

> [23] [B]ecause the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

[126] The reviewing judge does appear to have addressed the question whether the consultation in this case was objectively adequate, rather than whether the decision maker reasonably could have concluded the consultation met the requisite standard. She found Yukon failed "to consult properly" (at para. 10); that "[t]he consultation in this case was inadequate and did not meet the duty owed as a result of the honour of the Crown" (at para. 141); and that "[t]he Yukon government's disregard of the effect of the decision on land use planning in general and on the ongoing land use planning process in particular was a failure of the duty to consult" (at para. 178).

[127] However, it is clear that the root of the inadequacy identified by the reviewing judge was Yukon's failure to engage with the First Nation on an issue of central importance. It is implicit in her judgment that, as a result of this shortcoming, it was not open to the decision maker to find that consultation was adequate in the circumstances. She held Yukon's response to the First Nation's position that development should not continue unimpeded while the Beaver River Land Use Plan process was ongoing precluded effective consultation as Yukon had failed "to acknowledge meaningfully, understand, or address the FNNND concerns": at

para. 172. Noting that certain officials had expressed confusion with respect to the First Nation's position, she observed:

> [177] The Yukon government's confusion appears to have been genuine, due to their view that the Project would not have significant adverse effects on the rights of the FNNND. However, it would have been appropriate for the Yukon government to ask the FNNND why they viewed the adverse effects of the proposed Project more seriously than the Yukon government did. Significantly, the Yukon government did not inquire with anyone about the ongoing BRLUP process, and how it may be affected by the Project.

[128] In the circumstances of this case, little turns on the distinction between: (a) whether consultation was objectively inadequate; and (b) whether the Director might reasonably have considered the consultation to have been adequate. If the Director did consider consultation to have been adequate, it was due to an erroneous appreciation of the constitutionally-mandated scope of consultation. The responsible Minister regarded consultation as a process intended "to understand and mitigate the impacts of exploration projects to the rights of the [First Nation]", but expressly did not engage in addressing the First Nation's position that exploration authorizations should not be issued in the Tsé Tagé watershed until the sub-regional land use planning was complete. The Director appears to have regarded that question as one outside the decision-maker's remit.

[129] Because consultation with respect to the effect of the Project on the development of a land use plan was required, it was not open, in this case, for Yukon to leave consultation to the YESAB. As noted above, the YESAB is not equipped to perform adequate consultation in that respect. Its assessment process is not designed to determine whether approval of a specific project will impair the ability of a party to the land use planning process to exclude an area from industrial development.

[130] In my view, it is difficult to reconcile Yukon's position that the *YESAA* process could discharge its obligation to consult in this case with the then recently concluded Intergovernmental Agreement. While it is certainly correct to say that the Intergovernmental Agreement did not prohibit other proposals from proceeding through the *YESAA* assessment process and then advancing into the regulatory

approvals and permitting processes stage, it did prohibit regulatory action approving the ATAC project until the completion of the Beaver River Land Use Plan. In doing so, it implicitly recognized that the granting of specific permits might limit the First Nation's ability to protect the Tsé Tagé watershed pending the completion of a land use plan for the area. It reflected the consensus (at least in relation to the ATAC project) that permitting specific projects to proceed does, in fact, impact the planning process.

[131] In light of the Intergovernmental Agreement, it also seems to me to be impossible to argue that the First Nation here was letting the weight of the cumulative land use planning problem fall on the head of the applicant, Metallic Minerals. In my view, the consultation required was certainly broad enough to include consultation on the question of why the Metallic Minerals application should be approved prior to the completion and implementation of the Beaver River Land Use Plan.

[132] I agree with the view expressed by the reviewing judge that, while the Crown has considerable discretion over its consultation process, consultation that does not respect the First Nation's right to meaningful participation in land and resource management cannot withstand the reasonableness review prescribed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[133] When the reviewing judge's reasons are considered as a whole, it becomes apparent that her conclusion that consultation was inadequate in this case was founded, not upon a weighing of the nature and extent of the consultation which had occurred (questions that leave considerable room for differences of opinion), but, instead, upon whether a specific issue was engaged at all. She wrote:

> [191] The refusal of the Yukon government to engage with FNNND on the issue of the effect of its decision on the ongoing land use planning for that area was unreasonable. Proper consultation required the Yukon government to consider, explore, discuss and assess with the FNNND the effect of the approval of the Project on the BRLUP process. The failure to do this was a critical omission, because of the connection of the BRLUP process to

> FNNND's exercise of its s. 35 Treaty rights, and it meant the duty to consult was not met.
>
> [Emphasis added.]

[134] In my view, the First Nation is correct to say that Yukon's "failure to meaningfully grapple with key issues or central arguments" it raised resulted in Yukon being unable to establish that it was "actually alert and sensitive to the matter before it", as is required to meet the standard of reasonableness: see *Vavilov* at para. 128.

Party to be Consulted

[135] I am also of the view that Yukon failed to engage in the extent of consultation required in this case by failing to adequately address the First Nation's request that there be direct consultation with the community.

[136] Yukon defends the decision not to accept that request by asserting, correctly, that the duty to consult is owed to the First Nation, not to individual members: *Behn v. Moulton Contracting Ltd*., 2013 SCC 26 at para. 30. It equates the community the First Nation sought to have consulted in this case with Johnny Sam, the member of the Little Salmon/Carmacks First Nation whose trap line was affected by the land grant in issue in that case. In *Beckman*, Binnie J. noted that:

> [35] … [T]he entitlement of the trapper Johnny Sam was a derivative benefit based on the collective interest of the First Nation of which he was a member. I agree with the Court of Appeal that he was not, as an individual, a necessary party to the consultation.

[137] Yukon says whatever obligation it had to consult with the First Nation could be discharged through consultation with a representative person or body. It argues the duty to consult here is an adjunct to the implementation of the Treaty and "can only run from Yukon to the First Nation that is a party to the agreement".

[138] There is no issue with these propositions. There is also no doubt, as the Alberta Court of Appeal noted in *Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443 at para. 39, that the Crown "has discretion as to how it structures the consultation process".

[139] As Mactavish J. put it in *Enge v. Canada (Indigenous and Northern Affairs)*, 2017 FC 932:

> [144] The Crown has discretion as to how it structures the consultation process and how the duty to consult is met: *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 203, [2016] 4 F.C.R. 418, leave to appeal refused, [2016] S.C.C.A. No. 386, SCC 37201, *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2013 ABCA 443 at para. 39; 566 A.R. 259 (Alta. C.A.).
>
> [145] Perfect satisfaction of the duty to consult is not required. As long as the Crown "makes reasonable efforts to inform and consult the First Nations which might be affected by the Minister's intended course of action, this will normally suffice to discharge the duty": *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, at para. 54, [2008] F.C.J. No. 946.
>
> [146] In all cases, the fundamental question is what is necessary to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake: *Haida Nation*, above at para. 45. The honour of the Crown also mandates that it balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims: *Haida Nation*, above at para. 45. Consequently, any decision affecting Aboriginal or treaty rights that is made without proper consultation will not be in compliance with the duty to consult, and should be quashed on judicial review: *Clyde River*, above at para. 24.
>
> [Emphasis added.]

[140] When the representatives of a First Nation speak for the collective, they are the exclusive representatives of the assertion of s. 35 rights.

[141] However, I agree with the reviewing judge that the Crown cannot rely on its own interpretation of the First Nation's constitution to limit or define the Crown's consultation obligations. It seems to me obvious that the duty to consult entails some consideration of the submissions of the party to whom the duty is owed with respect to the most effective means of discharging the obligation. Yukon cannot refuse requests made by a First Nation for community or in-person hearings without some justification for doing so. The question before us is not whether in-person hearings are *always* required, or whether they may properly *be insisted upon* by one party, but, rather, whether it was reasonable to refuse the request of the First Nation for the reason set out in the Mining Lands Officer's letter of November 26, 2020: it was "not feasible" to engage in such consultation.

[142] I agree with the views expressed by the Chief Justice below that Yukon was obliged to treat the First Nation's request for community consultation seriously. Recognition of that obligation is necessary to maintain the honour of the Crown. It was, of course, open to the Crown to decline the request for community consultation. However, if it decided to refuse the request, it was obliged to provide the First Nation with, to borrow the language of the reviewing judge, "a more meaningful explanation than this type of consultation is 'not feasible'" (see para. 157).

Addressing Treaty Rights

[143] As I noted above, Yukon argues that, in describing the First Nation's Treaty rights, the reviewing judge did not distinguish between a right to participate in the process that might result in a land use plan and the right to a land use plan. It takes issue with the reviewing judge's finding (at paras. 215–217, 223–237) that Yukon's failure to consult specifically on the question of the effect of approval of the Metallic Minerals application on the Beaver River Land Use Plan process led to Yukon breaching its duty to act in a way that accomplishes the intended purpose of the Treaty.

[144] I would not accede to Yukon's argument on this ground.

[145] As noted, the reviewing judge held that Chapter 11 creates a treaty right that she described as a "Treaty right to participate meaningfully in the land and resource management of their traditional territory" (at para. 149); and a "Treaty right to participate in the management of their land and resources" (at para. 151). She described land use planning as a process "intended to uphold … s. 35 Treaty rights" (at para. 232). And, she was of the opinion that the intended purpose of the Treaty was to "ensure meaningful participation in the management of land and resources in the traditional territory" (at paras. 235–236).

[146] Yukon says the First Nation alleged two types of harm to its treaty rights:

a) the impact the Project might have on the land itself (which the Director concluded would be minimal in the first instance, and ultimately would be fully remediated at the Project's conclusion); and

b) the impact the Project might have on the right to establish and participate in a land use planning process.

[147] Addressing the second class of harm, Yukon says (as I noted above) that there is "no threshold right to the development of regional land use plans under Chapter 11", and the Director's decision cannot impact any treaty rights contained in Chapter 11 "until the parties have agreed upon a Chapter 11 land use planning process—which they may not do for many more years, if even at all". Yukon argues that approval of the Project cannot be said to be inconsistent with the development of a land use plan and that land use planning can and does continue even in areas where permits have previously been granted by treating those permits as continuing non-conforming uses.

[148] It argues the treaty right created by Chapter 11 is a right to a process of negotiation which may lead to the establishment of, and participation in, a land use planning process. Chapter 11 does not, however, confer any right to establish or protect any particular state or use of land or any other element of the natural environment.

[149] Yukon contends present uses of land do not constitute "removal of that land from the land use planning process", nor could the uses approved for the Project "undermine" a land use planning process. It argues that "[i]f it were otherwise, then no land use planning could ever take place on any land that had been used in any way before the land use planning regime came into effect".

[150] In my opinion, this argument addresses a straw man. It is not suggested by the First Nation, nor did the reviewing judge suggest, that the impugned decision would preclude *any planning process* or the development of *any land use plan*. Nor

was it suggested that the First Nation had a right to a specific plan that includes significant restrictions on development in the area of the Tsé Tagé watershed because of the sensitivity of the area. The First Nation simply asserts that it had a treaty right to meaningful participation in the management of land and resources in its traditional territory pending the completion of a land use plan, and that, in recognition of that right, Yukon had entered into the Intergovernmental Agreement and begun the process of creating the Beaver River Land Use Plan.

[151] The reviewing judge addressed the challenge to the Director's decision, correctly, in my opinion, as one founded upon a *right to process* rather than a *right to a specific result*. That is reflected in her conclusion that maintenance of the honour of the Crown required Yukon, at a minimum, to:

a) pursue the Chapter 11 purpose of "meaningful participation by the [First Nation] in the management of land and resources in the traditional territory," which includes "understanding the impacts of the decision on the [First Nation's] ability to exercise their Treaty rights" (at para. 235); and

b) consider and discuss "the effect of the decision on the land use planning process contemplated in Chapter 11 and ongoing in the Intergovernmental Agreement" (at para. 236).

Addressing the Intergovernmental Agreement

[152] Yukon contends there was no constitutional duty to consult specifically on the yet-to-be-established Beaver River Land Use Plan; there was no suggestion of dishonesty or bad faith conduct by Yukon; and that Yukon did not fail to give effect to any of the express terms of the Intergovernmental Agreement. There is, therefore, no basis for finding that Yukon breached its "common law duty of good faith performance of contractual obligations".

[153] Yukon says that both the text of the Intergovernmental Agreement and the context of its negotiation demonstrate the clear intention of the parties that it would not "create, modify, or affect" the First Nation's s. 35 treaty rights under Chapter 11.

It says, while the reviewing judge accurately observed that the Intergovernmental Agreement was negotiated "outside of the process described in Chapter 11 of the Treaty", she erred in concluding the agreement heightened the duty to consult.

[154] In my opinion, the question whether the reviewing judge was correct to say Yukon breached its duty of good faith in the performance of the Intergovernmental Agreement honestly turns upon whether it can fairly be said that approval of the Project might adversely affect Beaver River land use planning.

[155] Yukon, citing passages in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, describing the difficulty in ascertaining the nature and extent of good faith duties in contract cases, says there are "considerable doctrinal difficulties in attempting to transpose the conceptual framework of an obligation of good faith in the performance of obligations from the common law of contracts into the regime of constitutional law that prescribes and regulates the Crown's duty to maintain the honour of the Crown in its dealings with First Nations".

[156] In my opinion, there is no doubt that the Intergovernmental Agreement, an instrument negotiated between Yukon and the First Nation, should be interpreted in accordance with the organizing principle of good faith described in *Bhasin v. Hrynew*, 2014 SCC 71. Specific good faith duties derive from that organizing principle, including the duty of honest performance, described in *Wastech* (at para. 4) as a requirement "that parties exercise or perform their rights and obligations under the contract having appropriate regard for the legitimate contractual interests of the contracting partner."

[157] As the reviewing judge observed, the First Nation and Yukon made the Intergovernmental Agreement with the development of the Beaver River Land Use Plan as a key promise because the Chapter 11 planning process called for by the Treaty had not come to fruition:

> [228] The negotiation of the [Beaver River Land Use Plan] within the Intergovernmental Agreement was a way of fulfilling the intended purpose of

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

[158] In *Fort McKay First Nation* (at para. 83), Greckol J.A., concurring in the result, held that the honour of the Crown requires "that the Crown keep promises made during negotiations designed to protect treaty rights." In my view, this is a correct statement of the law.

[159] I agree with the First Nation's submission that approval of a development project in an area where land use planning is occurring may undermine the land use planning process, and the s. 35 treaty rights which that process is intended to uphold, because it will reduce the amount of undeveloped land available if and when a land use plan is negotiated and implemented.

[160] Yukon says the reasons of the reviewing judge reflect the view that, once there has been some use of the land in question, land use planning will become ineffective. That view is said to rest upon a misconception: that remediation is impossible, and that, once developed, land is forever taken out of land use planning. It argues that the Project will not take affected land out of planning; that after 10 years of perhaps non-conforming use, the land will be remediated, and that the real impact of the permit will be minimal.

[161] The problem with that argument is that it is Yukon's response to the concern that the decision will impede or impair land planning and, in effect, a response to concerns with respect to which there has been no consultation.

[162] Even if it is correct to say that Metallic Minerals will be required to remediate the effects of its exploration, in the interim, the land will be disturbed and ultimately, even if remediated, it will not be untouched. I agree that, by permitting the exploration project proposed by Metallic Minerals to proceed to the authorization

stage without consulting the First Nation, Yukon did not act in a way that was consistent with the obligation assumed in the Intergovernmental Agreement to negotiate the Beaver River Land Use Plan as a means of meaningfully engaging the First Nation in land and resource management in this small area of their traditional territory.

Unreasonableness

[163] The judge's finding on the question of the "unreasonableness" of the impugned decision related only to the failure to consult on the impact of the Project on land use planning.

[164] Yukon says when the First Nation was no longer prepared to consult on the mitigating terms and conditions for the Project, and was only discussing the impact of approval of the Project on land use planning, it was reasonable for it to consider the mitigating terms and conditions as modified through the process of consultation to have sufficiently addressed the First Nation's concerns about the impact of the Project itself, and to end the consultation. Yukon submits that the reviewing judge's reasons do not explicitly take issue with the adequacy of Yukon's consultation on the specific environmental impacts of the Project. It says the reasons might fairly be read as accepting that Yukon conducted itself reasonably in this area by adding and clarifying terms and conditions to the YESAB evaluation report and recommendation.

[165] This argument can only succeed in the event we conclude that the First Nation was unjustified in seeking consultation with respect to the impact of approval of the Project on land use planning, including the development of the Beaver River Land Use Plan. For reasons I have expressed above, I would not accede to this argument. I agree with the conclusion of the reviewing judge that proper consultation required Yukon to consult the First Nation with respect to the effect of the approval of the Project on the land planning process, and to honourably address its concerns.

Declaratory Relief

Evidentiary Foundation

[166] In its factum, and at the hearing of the appeal, it was Yukon's position that the reviewing judge properly held that a judicial review application was *not the proper forum* to make a finding on Yukon's alleged failure to diligently implement the Treaty, and that it was inappropriate to grant a declaration that Yukon breached the Intergovernmental Agreement. It argues that, for the same reason, she ought to have dismissed the claims for:

a) a declaration that Yukon breached its duty to act in a way that accomplishes the intended purposes of the treaty; and

b) a declaration that Yukon breached its duty of good faith performance on the Intergovernmental Agreement.

[167] I would not accede to that argument. The reviewing judge dismissed the applications for declaratory relief in relation to compliance with the Treaty and the Intergovernmental Agreement because the declarations could not be granted on the record before her. However, the specific declaratory relief that was granted required only consideration of whether Yukon had discharged its obligation to consult with the First Nation in compliance with its Treaty obligations and promises made during negotiations designed to protect treaty rights before making the impugned decision. That relief could be granted without examining "the history of the Chapter 11 implementation process to date".

The Requirement of Practical Utility

[168] While the *evidentiary foundation* for the declaratory orders was sufficient, we asked the parties and the intervenor for additional submissions on the question whether, in light of the findings of the reviewing judge (which I would uphold), the declaratory orders (all three orders, not only the two expressly challenged by Yukon)

serve any effective purpose. For ease of reference, and because the wording of the declaratory orders is critical, I set out the three declarations in full:

> 1. Yukon, in issuing its Decision on the Project, failed to meet the duty to consult and if necessary, accommodate in relation to FNNND's Aboriginal and Treaty rights recognized and affirmed by section 35(1) of the *Constitution Act, 1982*;
> 2. Yukon breached its duty to act in a way that accomplishes the intended purposes of the FNNND Final Agreement (the "Treaty"), that is, to ensure meaningful participation in the management of land and resources in the traditional territory by refusing to consider the effect of the proposed decision on the land use planning process contemplated in Chapter 11 and ongoing in the intergovernmental agreement FNNND and Yukon entered into on January 21, 2018 (the "Intergovernmental Agreement"); and
> 3. Yukon breached its duty of good faith in the performance of the Intergovernmental Agreement, by failing to consider the effect of the Decision on the ongoing land use planning process under the Intergovernmental Agreement.

[169] The granting of declaratory relief is discretionary, and the exercise of that discretion is ordinarily entitled to deference: *Ewert v. Canada*, 2018 SCC 30 at para. 83; *Makivik Corporation v. Canada (Attorney General)*, 2021 FCA 184 at para. 153; see also *Thomas v. Rio Tinto Alcan Inc.*, 2024 BCCA 62 at para. 338.

[170] However, a court's discretion to grant declaratory relief is engaged only where the threshold criteria are met: see *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at paras. 308–309. Additionally, the "practical utility" requirement, which operates in addition to the "threshold criteria", has been described as a "jurisprudential threshold", the clearing of which renders it open to the judge to exercise their discretion to grant a declaration: see *West Moberly First Nations* at para. 356. Accordingly, where the underlying criteria for declaratory relief are not met, a declaration is not available to the issuing judge. In *West Moberly First Nations*, D. Smith J.A. (at para. 82) expressed the view that declarations that do not meet the underlying criteria are not available at law, and that whether a declaration is available is a question of law, reviewable on the standard of correctness. I agree. In my view, the question of whether it was open to the reviewing judge to grant the impugned declarations is a question of law.

[171] The Supreme Court of Canada described the well-established threshold criteria for declaratory relief in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4:

> [60] … Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought [citations omitted].

See also *Ewert* at para. 81, and *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para. 46.

[172] The value of declarations in Aboriginal law disputes is not contested. However, as the majority of the Court stated in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, declaratory relief will be granted "only where it will have practical utility": at para. 42. In support of this proposition, the majority cited *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 11, where Abella J., for the Court, specified that a declaration "can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties".

[173] In *West Moberly First Nations*, Chief Justice Bauman wrote:

> [309] When [the four criteria described in *Metro Vancouver Housing Corp.*, cited above] are present, a declaration "may be appropriate". In other words, these four conditions are generally necessary but not in themselves sufficient for declaratory relief to be inevitably awarded.
>
> [310] Where these factors are met, a court looks at the practical value of the declaration in assessing if it should exercise its discretion to grant such a remedy …
>
> [311] This Court has also phrased the question as "whether a 'useful purpose' would be served by granting the order". …
>
> [312] An assessment of the practical utility of a declaration necessarily looks at the effect of the requested remedy on the parties' rights …
>
> ...
>
> [313] For a declaration to have practical utility, thus, it must "define" some aspect of the parties' rights …
>
> [314] The question for the court is "whether the declaration is <u>capable of having any practical effect</u> in resolving the issues in the case": *Solosky* [*Solosky v. The Queen*, [1980] 1 S.C.R. 821] at 833 (emphasis added). In

> other words, declarations will only be certain to lack practical utility where it is clear the declaration sought will have no effect.
>
> [Emphasis original; citations omitted.]

[174] The reviewing judge noted that declaratory relief may be granted on an application for judicial review pursuant to R. 54(1) of the Supreme Court of Yukon *Rules of Court*: at para. 253. She canvased the principles underlying the granting of declaratory relief in Aboriginal law cases (at para. 252, 254), and recognized the requirement that a declaration must have practical utility: at para. 252. She concluded declaratory orders were warranted for the following reason:

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

[175] The question, though, is not whether there has been a dispute but, rather, whether the dispute is over—in this case, whether the dispute is resolved by the judgment. In *Solosky v. The Queen*, [1980] 1 S.C.R. 821, Dickson J. wrote (at p. 832): "[i]t is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise" (see also *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at paras. 22–23).

[176] In response to our request for additional submissions, Yukon says the only live controversy between the parties was settled by the substantive order of the application judge to quash the Director's decision because the consultation was not adequate. The declarations were, it contends, "essentially elaborations of, or alternative reasons for, her decision" which "do not have any practical utility in establishing the rights of the parties or directing the further conduct of the parties".

[177] Citing *Nova Scotia (Attorney General) v. Nova Scotia Police Review Board*, 1999 NSCA 151 at paras. 20–23, and Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thomson Reuters, 2016) at 38, Yukon says a declaration does not have practical utility, and will not be an appropriate remedy, if

the conflict between the parties is resolved by a substantive remedy, such as the quashing of a decision.

[178] Yukon also emphasizes the Supreme Court of Canada's directive in *FNNND 2017* (at paras. 33, 60) for judicial forbearance and restraint in the supervision of modern treaty relationships.

[179] The First Nation acknowledges that a declaration can be granted only if it will have practical utility. It says that, to have practical utility, a declaration must define some aspect of the parties' rights. However, citing the judgment *in West Moberly First Nations*, it says it must only be established that there is a *possible* effect on rights stemming from a declaration:

> [330] … that if there is a possible effect on rights stemming from a declaration of law, there is discretion to grant declaratory relief. In other words, the dispute only needs to give rise to a "cognizable threat to a legal interest" and cannot have "merely speculative" effects on future rights, as Dickson J. stated in *Operation Dismantle*.
>
> [331] In other words, while the declaration must "define" or clarify the rights of the parties to some extent, there is no obligation to comprehensively map out all changes to rights stemming from a declaration. By nature, many aspects of the parties' relationship in any legal proceeding are not before the courts. It is a matter of both practicality and logic that courts do not have to understand what a requested declaration would mean for any and every associated right in order to have recourse to this remedy.
>
> [Emphasis original.]

[180] The First Nation submits "[a]ll three declarations address live controversies between the parties and have practical utility in defining Yukon's constitutional obligations and preventing future breaches of the honour of the Crown."

[181] It says the declaratory orders will have the effect described in *Peguis First Nation v. Canada (Attorney General*), 2021 FC 990 at para. 265, and by Mainville J.A., in *Assiniboine v. Meeches*, 2013 FCA 114, as follows:

> [12] … a declaratory judgment is binding and has legal effect. A declaration differs from other judicial orders in that it declares what the law is without ordering any specific action or sanction against a party. Ordinarily, such declarations are not enforceable through traditional means. However, since the issues which are determined by a declaration set out in a judgment

> become *res judicata* between the parties, compliance with the declaration is nevertheless expected, and it is required in appropriate circumstances.
>
> [13] Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities, because it can be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.
>
> [Emphasis added.]

[182] The First Nation argues that declarations relating to breaches of the honour of the Crown are regularly issued where the decision under review is quashed. Quashing a decision is not an adequate substitute for declaratory relief, it argues, where there is a "real issue" or "controversy" regarding the definition and scope of the parties' rights that goes beyond the lawfulness of a specific decision. That, the First Nation argues, is the case here: Yukon did not contest only the reasonableness of the impugned decision, but also "the scope and nature of its obligations and the very existence of the Treaty rights at issue."

[183] The intervenor supports the position taken by the First Nation, but makes submissions only in respect of the second declaratory order.

The First Declaratory Order

[184] Yukon argues the first declaration has no practical utility because it simply repeats the grounds for the application judge's decision to quash the Director's decision. I agree.

[185] The First Nation says the first declaration has practical utility because it renders *res judicata* that:

a) the approval of exploration activities may impact Chapter 11 treaty rights;

b) if so, Yukon must provide "a higher level of consultation" than the "moderate range" argued by Yukon; and

c) the required elements of such consultation include that Yukon must meet in good faith to discuss the First Nation's concerns, answer the First Nation's questions, and "seriously consider the concerns raised".

[186] It contends the declaration clarifies that Yukon cannot unilaterally terminate consultation without meaningfully addressing the issues raised.

[187] The First Nation reads more into the declaration than it says, which is simply that, in issuing its decision *on the Project*, Yukon failed to meet its duty to consult in relation to the First Nation's Aboriginal and treaty rights. The issues the First Nation say become *res judicata* are so only insofar as their resolution is essential to the judgment setting aside the Director's decision. In my opinion, the first declaration says no more than that the Director's decision should be set aside for the reasons expressed in the judgment. For that reason the criteria for granting that declaratory order are not met, and it was therefore not open to the judge to issue it. I would set it aside.

The Second Declaratory Order

[188] Yukon says the second declaratory order repeats the application judge's conclusion that it failed to discharge its obligation to consult because it refused to consider the effect of the proposed decision on the Chapter 11 land use planning process. It submits this conclusion is "necessarily bound up with the factual findings on the nature of the land uses proposed in this case", and, because of that, the declaration will have no practical utility for the parties in the future.

[189] The First Nation contends:

> Chief Justice Duncan held that Yukon breached the duty [to act in a way that accomplishes the intended purposes of the Treaty] by failing to: (1) *recognize* Chapter 11 rights; (2) *recognize* the relevance and applicability of Chapter 11 to the decision; (3) *consider* the effects of the decision on the Treaty purpose that FNNND participate meaningfully in managing land and resources in its Traditional Territory; and (4) *consider* the decision's effect on the land use planning initiative in the Intergovernmental Agreement.

[190] It says this declaration has "distinct" practical utility because it "renders *res judicata* that Yukon is obliged to not only consult with [the First Nation], but also to affirmatively recognize and consider [the First Nation's] Chapter 11 rights before approving projects or otherwise making decisions that may impact those rights."

[191] The declaration is required, it says, because "Yukon expressly refused to consider and made no efforts to act in accordance with Chapter 11 or the Beaver River planning process before unilaterally approving the Metallic Minerals development." It argues "Yukon's blindness to its obligation to advance Treaty commitments makes manifest the practical utility of the second declaration."

[192] Again, in my view, the First Nation reads too much into the declaration. As I have noted above, the order quashing the Director's decision is founded upon the view that Chapter 11 confers rights upon the First Nation to "participate meaningfully in the management of lands and resources in its traditional territory", including through the development of land use plans. The recognition of that right is implicit in the decision of the reviewing judge to quash the Director's decision, which I would affirm. The declaration is not recognition of the First Nation's assertion, made in support of the declaratory relief, that Yukon has "passively ignore[d] or den[ied] the existence of Treaty promises", nor is it recognition of the assertion that "Yukon took no steps whatsoever to advance the Treaty promise of land use planning", as the First Nation contends.

[193] As Bauman C.J.B.C. noted in *West Moberly First Nations* (at para. 331): "By nature, many aspects of the parties' relationship in any legal proceeding are not before the courts." The reviewing judge properly refrained from granting two of the declarations sought because they could only have been made by addressing matters outside the purview of the court on this judicial review. It is in that context that the declaratory orders that were made should be addressed.

[194] The Intervenor, Champagne and Aishihik First Nation ("CAFN"), citing *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 137, says that, where there is divergence between the parties as to the

obligations of the Crown, there is a practical purpose for which declarations are sought. Declaratory orders can be of assistance in extra-judicial negotiations with the Crown in pursuit of the overarching goal of reconciliation. It submits the second declaration relates to a live controversy: "whether the underlying obligations of the Crown in respect of Chapter 11 were being met." It argues that this parallels the situation in *Manitoba Metis*.

[195] CAFN contends the second declaration "provides 'certainty and accountability' arising from a real, not theoretical, dispute about whether Yukon met its obligation to act in a way that accomplishes the intended purposes of the [Treaty], particularly Chapter 11, in relation to the impugned decision." The declaration, CAFN contends, "resolves this dispute".

[196] CAFN further argues that the second declaration is not a general statement of law nor a declaration of fact. Rather, it "usefully clarifies the Crown's obligations, and [the First Nation's] concomitant rights, in respect of the honourable implementation of the Chapter 11 land use planning Treaty provisions."

[197] The second declaratory order does not describe any obligation or right other than Yukon's duty "to ensure the First Nation's meaningful participation in the management of land and resources in its traditional territory". In my view, that definition of the obligation to consult underpins the decision to quash the Director's decision. The judgment resolves that question. Once it is resolved, the declaratory relief does not address a live dispute, and serves no useful purpose. For that reason the criteria for granting the second declaratory order are not met. I would set it aside.

The Third Declaratory Order

[198] With respect to the third declaration, Yukon says whether it breached the Intergovernmental Agreement was not directly at issue on the application for judicial review. The court was not asked to, and did not, interpret the agreement's terms nor offer general guidance on the performance of obligations under the agreement. Rather, the agreement was "relevant only in the context of evaluating the adequacy of Yukon's consultation efforts in this specific instance." Yukon argues that "[t]o the

extent that the court found that there was a breach of the obligation to perform contractual obligations in good faith, then any harm caused by that breach was cured by the quashing of Yukon's decision, ended the live controversy."

[199] At the hearing of the petition for judicial review, the First Nation argued that the impugned decision was unlawful because it breached various duties flowing from the honour of the Crown, including the duty to consult and the duty to keep promises made in the Intergovernmental Agreement.

[200] The First Nation says the third declaratory order "has the practical utility of defining disputed rights under a live agreement that engages the honour of the Crown", and that "it renders *res judicata* that Yukon is obliged to consider and discuss the impacts of mineral exploration approvals on its Intergovernmental Agreement with [the First Nation] and cannot act 'in a way that is not prohibited by the agreement, but nonetheless serves to defeat its ultimate purpose and objectives.'"

[201] In my view, the value and effect of the third declaratory order is not entirely subsumed in the order quashing the Director's decision. The reviewing judge's findings with respect to the necessity of consultation, with a view toward honourably discharging the obligations assumed in the Intergovernmental Agreement, might be considered to be *obiter*, unessential to the outcome, in the absence of the declaratory order. This declaratory order makes it clear that Yukon owes a duty of good faith in the performance of the Intergovernmental Agreement with the First Nation to develop the Beaver River Land Use Plan, and that Yukon was required to consider the effect of the impugned decision on the ongoing land use planning process under that agreement.

[202] For that reason the criteria for making the third declaratory order were met. There is, in the words used in *West Moberly First Nations* (at para. 330), "a <u>possible</u> effect on rights stemming from [the] declaration". Notwithstanding the quashing of the impugned decision, there remained a "cognizable threat to a legal interest", the right to consultation with respect to the effect of other development on Yukon's

ability to give effect to the Intergovernmental Agreement. The reviewing judge had discretion to grant this declaratory relief, and I would not interfere with the exercise of that discretion.

Conclusion

[203] In my opinion, the reviewing judge appropriately identified and applied the correct standard of review of the Director's decision. I would dismiss the appeal of the order setting aside the Director's decision and remitting the Metallic Minerals application for assessment of the Project pursuant to the *YESAA* to the Director for reconsideration.

[204] I would allow the appeal to the extent that I would set aside the first and second declaratory orders on the ground they lack practical utility and were, therefore, unavailable to the reviewing judge. They do not serve a useful purpose other than stating conclusions that are essential to the judgment allowing the judicial review and setting aside the Director's decision.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Shaner"

I agree:

"The Honourable Mr. Justice Abrioux"