COURT OF APPEAL OF YUKON

Citation: *Ross River Dena Council v. Yukon (Government of)*, 2024 YKCA 18

Date: 20241206
Docket: 24-YU914

Between:

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

Appellant
(Petitioner)

And

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

Respondents
(Respondents)

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Butler
The Honourable Justice Charlesworth

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

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Place and Date of Hearing:	Whitehorse, Yukon September 12–13, 2024
Place and Date of Judgment:	Whitehorse, Yukon December 6, 2024

Written Reasons by:
The Honourable Justice Griffin

Concurring Reasons by:
The Honourable Mr. Justice Butler (Page 53, para. 207)

Concurred in by:
The Honourable Justice Charlesworth

Summary:

Ross River Dena Council, on behalf of the Kaska Nation, appeals from a judicial review of a decision made on June 15, 2022 by the Canadian and Yukon governments (Decision Bodies), allowing a proposed mining project on the lands of the Kaska Nation to proceed to the regulatory permitting stage under a number of terms and conditions. On judicial review, the judge found that overall the Decision Bodies had met their duty to consult and accommodate, except with respect to its treatment of a submission from Kaska on June 14, 2022. Kaska alleges that the judge made errors in her assessment of the consultation on economic feasibility of the project, the reciprocal duty that Kaska owed the Crown, and her choice of remedy.

Held: Appeal allowed (per Griffin J.A., with Butler J.A. and Charlesworth J.A. concurring and concurring reasons by Butler J.A.): Under the framework of the Yukon Environmental and Socio-economic Assessment Act and the common law duty to consult, the issue of economic feasibility was properly a topic for the Decision Bodies to consider. It was unreasonable for the Decision Bodies to refuse to consider this topic meaningfully and to not engage in dialogue with Kaska before deciding to approve the project. It was not enough for the Decision Bodies to listen to the concerns and defer consideration of this issue to the post-approval stage. Deep consultation required a dialogue before the approval. As a remedy, the Court would allow the appeal and vary the judge's order to allow for consultation on Kaska's concerns about the economic feasibility of the project.

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Reasons for Judgment of the Honourable Justice Griffin:

OVERVIEW

[1] This is an appeal from a judicial review of a decision made June 15, 2022 (the "Decision") by the Yukon government and two Canadian government departments (the "Decision Bodies") that allowed a proposed mining project on the traditional lands of the Kaska Nation to proceed to the regulatory permitting stage, subject to terms and conditions.

[2] Ross River Dena Council ("RRDC") brings this appeal on behalf of the Kaska Nation and all members of the Kaska Nation. I will refer to the appellant as "Kaska", which is the manner it has chosen in this proceeding.

[3] This appeal raises issues about the Crown's duty to consult and accommodate First Nations whose claims to Aboriginal rights and title may be affected by government decisions.

[4] The reviewing judge, Chief Justice Duncan, concluded that the Crown had met its duty to consult and accommodate except with respect to its treatment of a submission from Kaska, dated June 14, 2022 (the "June 14 Submission"). In reasons for judgment indexed as 2024 YKSC 1 (the "Reasons"), the judge found the Decision Bodies had failed to engage in a dialogue directly with Kaska about this document before issuing the Decision.

[5] As a remedy for this breach of the duty to consult, the judge set aside the Decision for the limited purpose of allowing a consultation on the June 14 Submission. She ordered that consultation take place for one day, with the possibility of a second day, and she specified the timelines within which the consultation meeting should be held (60 days) and the date by which a new decision document should be issued (within another 30 days, with no extensions).

[6] In February 2024, Kaska filed a notice of appeal and subsequently applied for a stay of the judge's order. The stay application was dismissed: 2024 YKCA 4.

[7] The parties have since met, and a new decision document was issued on March 8, 2024 (the "2024 Decision"). The parties agree that the within appeal is not moot, despite the fact that the 2024 Decision has not been judicially reviewed and is not before this Court. With the exception of the Attorney General of Canada whose position is less clear on this point, the parties also agree that this appeal is not premature. That is because this appeal is focused on whether the judge was in error in holding that the Decision Bodies' obligation to consult was met other than with respect to their treatment of the June 14 Submission.

BACKGROUND

The Project and the parties

[8] I will adopt the definitions and much of the background facts outlined in the judge's detailed Reasons.

[9] On March 3, 2017, BMC Minerals Ltd. ("BMC") brought a proposal (the "Proposal") to the Yukon Environmental and Socio-economic Assessment Board ("YESAB") to develop an open pit and underground copper, lead, and zinc mine within the traditional territory of the Kaska on the Kudz Ze Kayah Lands (the "Project"). BMC is the proponent of the Project.

[10] Through this Project, BMC proposes to mine about 5,500 tonnes of ore per day, producing about 180,000 tonnes of zinc, 60,000 tonnes of copper, and 35,000 tonnes of lead concentrates each year for 10 years. The Project is expected to span about 38 years, accounting for the time of construction (two years), the operating phase (10 years), and the decommissioning, reclamation and closure phase, including the conclusion of closure monitoring.

[11] The Project site on the Kudz Ze Kayah lands are a core area of Kaska traditional territory. Kudz Ze Kayah ("KZK") means "caribou country" in the Na'hani' Dena language. The lands hold value for the Kaska Nation for cultural and environmental reasons, including for its vital wildlife habitats, sacred sites, and traditional hunting and gathering areas.

[12] The Kaska Nation includes RRDC, Liard First Nation including Daylu Dena Council ("LFN"), Dease River First Nation, and Kwadacha Nation. Kaska claims Aboriginal rights and title within its traditional territory. RRDC and LFN are the two communities in Yukon that are the closest to the proposed Project site.

[13] While some First Nations in Yukon have entered into treaties under a process known as the Umbrella Final Agreement ("UFA"), Kaska has not and is not a signatory to the UFA. The history of the UFA is discussed in other authorities, such as *Beckman v. Little/Salmon/Carmacks First Nation,* 2010 SCC 53 [*Beckman*] at paras. 130–132 and *First Nation of Nacho Nyak Dun v. Yukon,* 2017 SCC 58 at paras. 2, 7–11.

[14] The Project site also lies within the range of the Finlayson Caribou Herd ("FCH"). The FCH is part of the Northern Mountain population of Woodland Caribou, a herd in decline that is listed as a species of special concern in the *Species at Risk Act,* S.C. 2002, c. 29; it has been relied on as a food source by Kaska for generations. The Project is situated in a core area for the FCH habitat, including calving, post-calving, and rutting habitat.

[15] The KZK lands are significant to Kaska for additional reasons. There are sacred burial sites and trails of importance. Kaska harvests other large game animals, fish, trap, gather and trade on the lands.

[16] The health of the FCH is of extreme importance to Kaska, and a great deal of the consultation process focused on whether the Project would cause adverse effects to the FCH and if so, whether these effects could be mitigated.

[17] In addition, the Project lands are close to three abandoned, failed mining projects, known as the Wolverine, Faro, and Ketza River. That history adds to Kaska's concerns about the development of this Project on its traditional lands.

[18] As recognized by the reviewing judge, the stakes in this case were high because the Project has the potential for significant commercial investment and

return, but also the potential to create significant adverse effects in Kaska's traditional territory.

The Decision Bodies and the consultation process

[19] The three Crown entities involved in the decision-making process are the Government of Yukon ("Yukon"), Natural Resources Canada ("NRCan"), and the Department of Fisheries and Oceans Canada ("DFO") (the latter two will be referred to as "Canada", and together the three bodies will be referred to as the "Decision Bodies"). These bodies are involved because they will ultimately need to decide whether to issue regulatory authorizations for the Project if it goes ahead past their initial approval stage.

[20] For example, in order for the Project to proceed, NRCan will be required to authorize a license for the manufacturing and storage of explosives; DFO will be required to authorize work that could affect fish habitat. Various departments of Yukon will be required to issue regulatory authorizations or permits if the Project proceeds. More specifically, the proponent will need to meet regulatory requirements for mining permits under Yukon's *Quartz Mining Act*, S.Y. 2003, c. 14 and regulations; and licenses will be needed under Yukon's *Waters Act*, S.Y. 2003, c. 19.

[21] Early on, the Decision Bodies advised RRDC and LFN that, to assist in meeting their duty to consult, they would be relying on the process outlined in the federal legislation — the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ["*YESAA*"] and its regulations.

[22] The purposes of *YESAA* are, in part, to require that the environmental and socio-economic effects of projects are considered before the projects are undertaken; to provide a comprehensive, neutrally conducted assessment process applicable in Yukon; and "to guarantee opportunities for the participation of Yukon Indian persons — and to make use of their knowledge and experience — in the assessment process": *YESAA,* s. 5(2).

[23] The YESAB is made up of an Executive Committee ("EC") of three members and four other board members: *YESAA*, s. 8. Of YESAB's seven members, three are appointed on the nomination of the Council of Yukon First Nations, including one EC member. The Yukon and Canadian governments nominate and appoint the remainder and Canada appoints the Chairperson. Evaluations of a project may be conducted by the EC or a panel of the YESAB. In this case, the project evaluation was conducted by the EC because of the requirements in the regulations, and I will hereinafter refer to its role instead of referring to YESAB.

[24] The EC invited submissions from the public as well as Kaska, and it followed up with information requests, including to the proponent BMC. The EC retained five independent consultant teams to advise it on topics related to hydrology and aquatic resources, wildlife and wildlife habitat, engineering and geotechnical, and socio-economic effects, as well as two other consultants to assist it, one in relation to the information concerning the FCH, and the other in providing technical advice in evaluating proposal documents.

[25] Section 58(1) of *YESAA* provides that at the conclusion of the screening, the EC must choose one of four options for recommendations to the decision bodies for the project, variations of proceed or to not proceed, all turning on whether the EC concludes that the project is likely to have "significant adverse environmental or socio-economic effects" that can or cannot be mitigated.

[26] A decision body as defined in *YESAA* is an entity that must issue a regulatory authorization for a project to proceed; it can include a First Nation, the territorial minister or agency, any federal agency, or the federal minister: *YESAA*, s. 2(1). Where the EC makes a recommendation to a decision body, the decision body must issue a decision document accepting the recommendation or it can refer the recommendation back to the executive committee or panel for reconsideration: s. 76. The decision body is first required to consult with affected First Nations for which no final agreement is in effect: s. 74(2).

[27] By letter dated October 13, 2020, the EC issued a written document assessing the Proposal and making an initial recommendation that the Project be allowed to proceed ("Screening Report"). The EC's assessment report was 261 pages in length, plus additional pages containing references and tables.

[28] The Screening Report addressed numerous topics in relation to the Proposal, including its impacts on water resources, wildlife, traditional land use, economy, human health and safety, community wellbeing, heritage resources, and climate. Many of these impacts were recognized to be in relation to Kaska communities. The EC found that while the Project would result in significant adverse effects, the application of certain identified terms and conditions would eliminate, control, or reduce those adverse effects.

[29] The EC proposed numerous terms and conditions, including requirements of additional study, monitoring, future assessments, adaptive management, and the provision of financial security by the proponent which would take into account the potential for early unscheduled closure, retraining, and the need for care and maintenance requirements to maintain environmental safeguards. One of the terms included an oversight committee that would include participation by LFN and RRDC, and would be involved in the implementation and monitoring of mitigation strategies.

[30] On January 22, 2021, the federal Decision Bodies referred the Screening Report recommendation back to the EC for reconsideration because there were insufficient explanations as to why the recommended mitigation measures would sufficiently eliminate, control or mitigate the associated significant adverse effects and how the First Nations' interests, including from a rights perspective, had been considered within the analysis of the screening report and recommendation. Yukon did not support this approach and took the position it was unnecessary because the EC had conducted a comprehensive review and analysis of the Project and the recommendation to proceed with mitigation and monitoring was reasonable.

[31] As part of the reconsideration stage, the EC re-examined its recommendation and requested, received, and reviewed new information.

[32] On March 29, 2021, the four EC members were split on the Project, but they were still unanimous that the Project, as proposed, would result in significant adverse effects. They were deadlocked on whether those effects could be adequately mitigated (the "Referral Conclusion"). The differences centered largely on whether terms and conditions could adequately mitigate the significant adverse impact of the Project on the FCH, appreciating that the caribou resource is very important to Kaska culture and traditions.

[33] Given the EC was deadlocked and unable to issue a new recommendation, pursuant to s. 77(2) of *YESAA*, the EC was deemed to have reissued its original recommendation from October 2020.

[34] The Decision Bodies were then required under s. 77(3) of *YESAA* to issue a document accepting, rejecting or varying the recommendation of the EC. If accepted, or accepted with variations, the next stage would be the regulatory permitting process.

[35] In a letter dated April 12, 2021, LFN wrote to Canada setting out its views on how Canada should proceed given the deadlocked Referral Conclusion. LFN urged Canada to reject the Project because the "significant adverse effects on the FCH cannot be effectively mitigated under the current proposal". The letter primarily focused on LFN's view that FCH-mitigation measures would be designed to safeguard the mine's financial viability, rather than to protect the caribou herd. However, LFN also raised concerns about the economic viability of the mine.

[36] In a further letter dated April 28, 2021 to the federal Decision Bodies ("April 28 Letter"), the Kaska Chiefs summarized concerns regarding the Screening Report, explaining their position that the recommendation to proceed with the Project should be rejected, stating, among other things:

> The Kaska First Nations would like to thank you for seeking our concerns regarding the *Kudz Ze Kayah* (KZK) Project Screening Report and Recommendations. After discussions among ourselves, and among our technical teams, we have concluded that there is no option other than to reject the KZK Screening Report and Recommendations. Our reasons for this relate to the assessment process, the location of Project, the sensitive nature

> of the Finlayson Caribou Herd (FCH), the significant cumulative effects, and the obvious deficiencies in the mitigation measures, which we view as insurmountable. A panel would merely revisit a project that has already been revealed to be fundamentally flawed.

[37] The reference to cumulative effects was a reference to the fact that there were already several mining projects within the KZK area that had failed, thereby cumulatively increasing the adverse effects from the proposed Project. While the topic of past failed mining projects was addressed in the Screening Report, this was not to the satisfaction of Kaska who continued to inform the Decision Bodies of its view that the proposed mitigating conditions would not be effective, particularly with respect to the FCH.

[38] Kaska also objected continuously to the consultation process and the Crown's reliance on the *YESAA* screening process. The April 28 Letter sets out Kaska's vision that a rejection of the Screening Report would result in a submission of a new and redesigned project, one that could be considered in a proper consultation process.

[39] The Decision Bodies did not accept Kaska's recommendation for an outright rejection of the Project.

[40] Instead, the Decision Bodies sought to explore with Kaska whether modified terms and conditions might address its concerns. In this regard, by letters dated July 5 and July 16, 2021, the Decision Bodies invited further meetings with Kaska to discuss the Project and to vary the recommended terms and conditions to address Kaska's concerns. LFN responded on August 3, 2021, asking for an outline and draft language of the proposed varied conditions, prior to any meeting, so as to allow it to do its own internal review and meet with technical experts. It further explained that COVID-19 was hitting the community hard, and other circumstances were straining its internal resources.

[41] In September and October 2021, the Decision Bodies provided draft modified terms and conditions to Kaska and sought its input on those conditions either by way of meeting or written submission.

[42] Ultimately after unsuccessful attempts to meet, Kaska and the Decision Bodies met in January 2022. The meeting was intended by the Decision Bodies to discuss the proposed modified terms and conditions, but there was insufficient time. Kaska's position was that the Project should be rejected and a new process followed, as indicated in the April 28 Letter. The Decision Bodies took the position that modifications to terms and conditions might be able to address Kaska concerns, and they sought Kaska's input on those modifications.

[43] More back and forth exchanges occurred between the parties.

[44] Then, on May 25, 2022, the Decision Bodies announced their intention to make a decision by June 15, 2022. At the same time, they said they still wanted to obtain Kaska's views on modified terms and conditions that would allow the Project to proceed.

[45] On June 14, 2022, Kaska provided a lengthy written submission to the Decision Bodies.

[46] The Decision Bodies issued the Decision on June 15, 2022. Although the Decision Document referred to Kaska's June 14 Submission, the Decision Bodies never met with Kaska to discuss that submission.

Decision (June 15, 2022)

[47] Ultimately, the Decision Bodies accepted the EC's recommendation from October 2020 that the Project be allowed to proceed without a review and subject to terms and conditions. However, the Decision Bodies made certain changes and additions to the EC's earlier recommended terms and conditions. A total of 38 terms and conditions and two monitoring measures were contained in the Decision, adding eight new conditions and modifying five from that recommended by the EC: Reasons at para. 49.

[48] In the Decision, the Decision Bodies reviewed and summarized the level of consultation that each of the Crown entities engaged in with Kaska. Given that the

Project was to be within Kaska's traditional territories, the Decision Bodies recognized the required duty to consult, both at common law and pursuant to s. 74(2) of *YESAA*, was at "the deep end of the spectrum".

[49] The Decision outlined the key substantive issues that Kaska raised with the Decision Bodies, including concerns related to the FCH, water resources and aquatic life, air quality, traditional land use, economic feasibility, cumulative effects, personal safety and community well-being, and the request for rejection.

[50] The Decision Bodies said that they were satisfied that they had met their consultation obligations both at common law and under *YESAA*: Decision at p. 3.

Judicial review decision (2024 YKSC 1 – "Reasons")

[51] RRDC (on behalf of Kaska) brought an application for judicial review in which it raised a number of issues with the Decision, alleging that Yukon and Canada had breached their duty to consult with Kaska on all potential outcomes of the Project proposal and failed to accommodate Kaska reasonably.

[52] The reviewing judge agreed with the parties that the applicable standard of review was reasonableness: Reasons at para. 56.

[53] The judge stated that the correctness standard may apply to the legal question of the existence, extent and content of the duty to consult, but here those matters were not at issue. The Decision Bodies had accepted the existence of their duty to consult Kaska about issuing authorizations for the Project, and that deep consultation was required because of Kaska's asserted rights and territory, the proximity of the Project to Kaska's communities, and the scope of the Project: at paras. 56, 63.

[54] The judge observed that the duty of deep consultation includes a need for a discussion of the consultation process, including whether community consultation is needed; to meet in good faith with an open mind to discuss issues and concerns raised; to seriously consider the concerns raised; to make efforts to mitigate in an

attempt to minimize adverse impacts; and to advise of the course of action taken and why. Deep consultation also requires written explanations that show the concerns of the Indigenous group(s) were considered and that show the impact that they had on the decision: at para. 63, citing *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [*Haida Nation*] at para. 44. The judge said that it is the quality not the quantity of consultation that determines the substance of the depth of consultation: at para. 63.

[55] The judge recognized that the Crown had both a statutory duty to consult pursuant to *YESAA*, and a common law duty to consult emanating from the honour of the Crown because the government decisions to allow the Project to proceed could adversely affect Kaska's Aboriginal rights or title: at paras. 60–62.

[56] The judge found that the Decision Bodies had reasons for relying on the *YESAA* process, and that the process yielded considerable information that was made available to the public for comment.

[57] The judge explained why the Crown relied on the Y*ESAA* process to assist in their consultation obligations:

> [31] There were three reasons for relying on the *YESAA* process to assist in the Crown consultation obligations:
>
> a) the *YESAA* process is designed to consider the potential adverse environmental and socio-economic effects of a project in addition to the interests, perspectives, and views of First Nations. While YESAB does not directly assess or make findings about a project's impacts on asserted or established Aboriginal or Final Agreement rights, those rights help to inform or guide the choice of Valued Environmental and Socio-economic Components ("VESECs") used in a YESAB assessment. The rights also provide relevant context to determining the significance of likely adverse effects on identified VESECs;
>
> b) the direct participation of Indigenous people in the *YESAA* process is a significant component of the assessment, especially given the stated purposes of the statute to protect and promote the well-being of Yukon Indian persons, to guarantee opportunities for their participation, and to make use of their knowledge and experience in the assessment process; and

> c) the assessment process includes the submission of a detailed project proposal, supplementary information requests, public comment periods, exchange of information among all parties, and opportunities for First Nations to raise concerns directly to the Executive Committee during the stages of adequacy and screening.

[58] The judge explained the large amount of information provided to YESAB over a lengthy period, in relation to the project:

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

[59] The judge also found as a fact that Crown consultation went beyond the four corners of the *YESAA* process, with the Decision Bodies directly engaging with Kaska: at paras. 32–34.

[60] The judge noted that funding was provided to Kaska to assist it in participating in the process, including $260,000 annually and over $1.5 million in funding that was made available, but not all of which was used: at paras. 36–38.

[61] The judge identified the issues raised by Kaska on judicial review:

a) the Decision Bodies failed to consult meaningfully on all decision outcomes, including an outcome that rejected the Project;

b) the Decision Bodies improperly narrowed consultation, including:

   i. focusing disproportionately on the FCH impacts and failing to consider the full spectrum of Kaska concerns, including concerns related to air quality; traditional land use; health and safety of women and girls; and the economic feasibility of the mine;

ii. failing to adequately consider cumulative effects;

iii. refusing to consult on a Kaska-led Indigenous assessment process or Kaska-led assessments;

iv. failing to consult meaningfully on Kaska jurisdiction and legal orders; and,

v. refusing to facilitate or consider input of Kaska Elders or consider Elders' Conditions;

c) the Decision Bodies failed to consult on the June 14 Submission; and,

d) the Decision Bodies deferred consultation to the regulatory process.

[62] The judge analyzed each issue in turn. She rejected Kaska's arguments except with respect to the June 14 Submission.

[63] The judge found that the Decision Bodies did not fail to consult meaningfully on all decision outcomes. She reviewed the history of the consultation and meetings between the parties.

[64] The judge also concluded that it was unreasonable for Kaska to fail to respond substantively to the modified terms and conditions that the Decision Bodies provided in the fall of 2021. In her view, this frustrated the good faith attempts to mitigate the concerns expressed by Kaska. In contrast, the judge found the Decision Bodies had maintained an open mind, including considering the option of rejecting the Project. However, she said it was reasonable for the Decision Bodies to want to hear Kaska's substantive response to the modified terms and conditions before discussing rejection fully and considering it as an option: at para. 107.

[65] The judge disagreed that there had been an improper narrowing of consultation. Instead, she found that the Decision Bodies were open to and did hear all concerns raised by Kaska. They tried to address its concerns in various ways

such as by referring the Screening Report for reconsideration and developing modifications to the terms and conditions: at para. 109.

[66] Overall, she found that there was a reasonable level of deep consultation on the issues raised by Kaska. This was demonstrated through the thoroughness of the information exchanged and provided to the EC; the additional information provided, reviewed, and considered during the reconsideration and decision stage; the discussions and letter exchanges that occurred throughout the assessment process on specific issues (especially between January 2021–June 2022); and "perhaps most significantly", the terms and conditions and the additions and modifications to them by the Decision Bodies: at para. 128.

[67] The judge also found that the Decision Bodies had put reasonable safeguards in place through the terms and conditions and in response to Kaska's concerns: at para. 138.

[68] The area in which the judge found the Decision Bodies failed in the duty to consult was with respect to the June 14 Submission. The judge found the Decision Bodies' sudden setting of a hard deadline to issue the decision by June 15, 2022 did not demonstrate good faith; there was information provided in the June 14 Submission that required a dialogue; and the setting of the June 15 deadline may have been improperly influenced by external timing pressures: at para. 192. In her view, the June 14 Submission required further dialogue and by that time, the decision was already overdue by many months. Although it was not a breach of the duty to consult and accommodate to suggest that consultation would continue during and beyond the regulatory process, it was unreasonable to defer consultation on the June 14 Submission to a time period after the Decision was issued: at para. 210.

[69] As a remedy, the judge set aside the Decision and ordered consultation on the June 14 Submission to take place for a full day within 60 days of the court's decision. She also ordered that no further submissions be exchanged other than an agreed upon agenda and that a new decision document should be issued within 30 days of the consultation meeting: at paras. 239–243.

ISSUES ON APPEAL

[70] On appeal, Kaska submits the Decision Bodies did not adequately consult with it on the topic of the economic feasibility of the Project. Kaska does not repeat its challenge to the Decision Bodies' consultation on the several other topics that it pursued before the reviewing judge.

[71] Kaska raises two additional issues: (1) it says that the judge was unduly critical of the "reciprocal duty" Kaska owed in the consultation process and this affected the judge's analysis of the reasonableness of the Decision Bodies' consultation; and, (2) the judge granted an impermissibly prescriptive remedy with respect to the June 14 Submission.

[72] The respondents take the position that the Crown fulfilled its duty of deep consultation on all relevant issues. Further, they say that the judge's comments on Kaska's reciprocal duty in the consultation process do not give rise to any reviewable error. Further, their position is that this Court owes deference to the judge's exercise of discretion regarding remedy.

STANDARD OF REVIEW

[73] On an appeal from a judicial review decision, the applicable standard of review is whether the reviewing court identified and applied the proper standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 45. The appeal court owes no deference to the court of first instance, meaning that the appeal court is effectively reviewing the tribunal decision itself on the applicable standard of review: *Agraira* at paras. 45–46. This has been described as the appeal court "stepping into the shoes" of the reviewing judge; see also *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42 at paras. 10–12.

[74] For example, in *Agraira*, the Supreme Court of Canada focused on whether the Minister's decision was reasonable rather than on whether the reviewing court made an error in its own review of the Minister's decision.

[75] This appellate approach of "stepping into the shoes" of the reviewing court also applies when the subject of the review is a decision affecting Aboriginal rights. However, the question being asked in these cases may be somewhat different than a typical judicial review because it might focus on the interpretation of treaty rights, or, where there is no treaty, whether the government met the standard of reasonableness in its duty to consult with First Nations prior to making the decision: see the discussion of standard of review in *First Nation of Na-Cho Nyäk Dun v. Yukon (Government of)*, 2024 YKCA 5 at paras. 87–92; see also *Makivik Corporation v. Canada (Attorney General)*, 2021 FCA 184 [*Makivik*] at paras. 64, 79.

[76] The following principles guide the standard of review in cases questioning the adequacy of the government's consultation and accommodation of First Nations in the course of decision making:

a) Reasonableness is the presumed standard of review of an administrative decision (where, as here, there is no contrary statutory standard of review or statutory appeal mechanism). The reviewing court asks whether the decision was reasonable, taking into account all relevant context: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 23, 33 [*Vavilov*].

b) Reasonableness is the standard that applies to a court's assessment of the adequacy of the decision maker's process of consultation and accommodation of First Nations prior to making the decision: *Haida Nation* paras. 61–63; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras. 77, 82 [*Ktunaxa*];

c) There are some exceptions to the reasonableness standard of review, where the matter raises certain types of legal questions: constitutional questions; general questions of law of central importance to the legal system as a whole; questions regarding the jurisdictional boundaries between two or more administrative bodies; and questions when courts and administrative bodies have concurrent first instance jurisdiction over a

> legal issue in a statute: *Vavilov* at para. 53; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at para. 43. Questions regarding the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act*, *1982,* are constitutional questions subject to the correctness standard: *Vavilov* at para. 55; see also *Haida Nation* at paras. 61, 63; *First Nation of Na-Cho Nyäk Dun* at para. 87(a); *Makivik* at para. 77; *Ontario (Attorney General) v. Restoule*, 2024 SCC 27 [*Restoule*] at paras. 109, 113.

[77] Although it does not arise on this appeal, it has also been held that questions of procedural fairness are reviewable on a standard of correctness: *Makivik* at para. 77.

[78] Where an administrative decision maker interprets a statute, the court on judicial review evaluates the reasonableness of the decision, including considering whether the decision is consistent with the modern principle of statutory interpretation. Justice Jamal put it this way in *Mason*:

> [68] As already noted, a court evaluating the reasonableness of an administrative decision on a question of statutory interpretation "does not undertake a *de novo* analysis of the question or 'ask itself what the correct decision would have been'" ([*Vavilov*] para. 116). Instead, the court "must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached" (para. 116).
>
> [69] Although an administrative decision maker need not "engage in a formalistic statutory interpretation exercise in every case" (para. 119), its decision must be consistent with the "modern principle" of statutory interpretation, which focusses on the text, context, and purpose of the statutory provision. The decision maker must demonstrate in its reasons that it was alive to those essential elements (para. 120). The omission of a minor aspect of the text, context, or purpose is unlikely to undermine the decision as a whole: omissions are not "stand-alone grounds for judicial intervention" (para. 122). In each case, "the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker" (para. 122). For example, an administrative interpretation may well be unreasonable if it fails to consider the potentially harsh consequences of its interpretation of a statutory provision for a large class of individuals, and whether, in light of those consequences, the legislature would have intended the provision to apply in that way (paras. 191-92). And even if a decision does not explicitly consider the meaning of a relevant provision, the court may be able to discern the

> interpretation adopted from the record and evaluate whether it is reasonable (para. 123).
>
> [70] In interpreting a statute, an administrative decision maker may draw on its institutional expertise and experience and rely on considerations that a court would not have thought to employ, but which "enrich and elevate the interpretive exercise" (paras. 93 and 119; *Canada Post*, at para. 43). As Professor Audrey Macklin explains, courts should be "genuinely receptive to input beyond the usual techniques that courts use to discern text, context and purpose. These may include operational implications, alignment with broader statutory mandate, and so on" ("Seven Out of Nine Legal Experts Agree: Expertise No Longer Matters (in the Same Way) After *Vavilov*!" (2021), 100 S.C.L.R. (2d) 249, at p. 261). By being receptive to such factors, courts acknowledge that administrative decision makers have a role to play in elaborating the content of the schemes that they administer (*Vavilov*, at para. 108). Reasonableness review demands both that administrative decision makers demonstrate their expertise through their reasons and that judges pay "[r]espectful attention" to the ways in which their reasons reflect that expertise (para. 93; P. Daly, "*Vavilov* and the Culture of Justification in Contemporary Administrative Law" (2021), 100 S.C.L.R. (2d) 279, at pp. 285-86).
>
> [71] Finally, a court may conclude during a reasonableness review that "the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision" (*Vavilov*, at para. 124, citing *Dunsmuir*, at paras. 72-76, and *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52). In such a case, although a court should "generally pause before definitively pronouncing upon the interpretation" of a statutory provision, the court may conclude that remitting the question to the administrative decision maker may serve no useful purpose (*Vavilov*, at para. 124). It must be stressed that the possibility of a single reasonable interpretation is not a *starting point* of reasonableness review, as this would be contrary to a "reasons first" approach. Rather, it is a *conclusion* that a reviewing court may draw *as a result of* a proper reasonableness review, as part of the court's consideration of the appropriate remedy.
>
> [Italic emphasis in original; underline emphasis added.]

[79] As mentioned, it was common ground among the parties on judicial review, and the judge agreed, that reasonableness was the standard of review that applied to assessing the adequacy of the Decision Bodies' consultation and accommodation: Reasons at para. 56.

[80] I note that this was not a case where the reviewing judge was required to make original findings of fact, such as weighing disputed affidavit evidence to determine what happened in the course of an administrative process, or weighing

disputed testimony of witnesses about historical facts such as in *Restoule*. Where a reviewing judge is required to make original findings of fact, deference to those findings are owed, absent showing a palpable and overriding error: *Onni Wyndansea Holdings Ltd. v. Ucluelet (District)*, 2023 BCCA 342 at para. 58; *Mason* at para. 73.

[81] Here, there was a well-documented record of what actually took place in the *YESAA* and Decision Bodies' consultation process, none of which appears disputed.

[82] As for the judge's choice of remedy, this is a discretionary decision that will ordinarily attract deference on appeal. This means that absent an error of law, the appellant must show a palpable and overriding error to justify appellate interference: *Makivik* at paras. 65, 153.

PRINCIPLES GOVERNING CROWN CONSULTATION WITH FIRST NATIONS

[83] The overarching question on appeal is whether it was reasonable for the Decision Bodies to find that the consultation and accommodation of Kaska asserted rights and title was adequate, prior to the Decision allowing the Project to proceed to the regulatory stage.

[84] This question must be assessed in light of governing principles regarding the Crown duty to consult with and to accommodate First Nations who assert as yet unproven Aboriginal rights or title, where the Crown's contemplated action may adversely impact those asserted rights or title. The duty of honourable dealing toward Aboriginal peoples arises from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in control of those persons: *Haida Nation* at para. 32. With this assertion came a duty on the Crown to act fairly and honourably, and to protect Aboriginal people from exploitation.

[85] The common law duty to consult is grounded in the honour of the Crown, which is enshrined in s. 35(1) of the *Constitution Act, 1982*, recognizing and affirming existing Aboriginal and treaty rights. The content of the duty can range from limited consultation to deep consultation, depending on the strength of the Aboriginal

claim and the seriousness of the impact on the right or title. Each case must be considered individually: *Haida Nation* at paras. 39, 43–45.

[86] The Supreme Court of Canada addressed these common law principles in *Haida Nation*, and later summarized them in *Ktunaxa* as follows:

> [80] The holdings of *Haida Nation*, as they pertain to this case, may be summarized as follows:
>
> - The duty to consult and, if appropriate, accommodate pending the resolution of claims is grounded in the honour of the Crown, and must be understood generously to achieve reconciliation (paras. 16-17).
> - The Crown, acting honourably, cannot "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation"; it must consult and, if appropriate, accommodate the Aboriginal interest (para. 27).
> - The duty to consult is triggered by the Crown having "[k]nowledge of a credible but unproven claim" (para. 37).
> - The content of the duty to consult and accommodate varies with the strength of the claim and the significance of the potential adverse effect on the Aboriginal interest (para. 39). Cases with a weak claim, a limited Aboriginal right, or a minor intrusion may require only notice, information, and response to queries. At the other end of the spectrum, a strong *prima facie* case with significant intrusion on an important right may require the Crown to engage in "deep consultation" and to accommodate the interest by altering its plans. Between these extremes lie other cases (paras. 43-45).
> - When the consultation process suggests amendment of Crown policy, a duty to reasonably accommodate the Aboriginal interest may arise (para. 47).
> - The duty to consult and, if appropriate, accommodate the Aboriginal interest is a two-way street. The obligations on the Crown are to provide notice and information on the project, and to consult with the Aboriginal group about its concerns. The obligations on the Aboriginal group include: defining the elements of the claim with clarity (para. 36); not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached (para. 42).
> - The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. However, it does not give Aboriginal groups a veto over developments pending proof of their claims. Consent is required only for *proven* claims, and even then only in certain cases. What is

> required is a balancing of interests, a process of give and take (paras. 45 and 48-50).
>
> [Italic emphasis in original; underline emphasis added.]

[87] Further, *Ktunaxa* summarized the steps involved in the consultation process:

> [81] The steps in a consultation process may be summarized as follows:
>
> 1. Initiation of the consultation process, triggered when the Crown has knowledge, whether real or constructive, of the potential existence of an Aboriginal right or treaty right and contemplates conduct that might adversely affect it;
>
> 2. Determination of the level of consultation required, by reference to the strength of the *prima facie* claim and the significance of the potential adverse impact on the Aboriginal interest;
>
> 3. Consultation at the appropriate level; and
>
> 4. If the consultation shows it is appropriate, accommodation of the Aboriginal interest, pending final resolution of the underlying claim.
>
> This summary of the steps in a consultation process is offered as guidance to assist parties in ensuring that adequate consultation takes place, not as a rigid test or a perfunctory formula. In the end there is only one question – whether in fact the consultation that took place was adequate.
>
> [Emphasis added.]

[88] In the present case, the Decision Bodies had not only a common law constitutional duty to consult, they also had a statutory duty to consult pursuant to *YESAA*.

[89] Section 74(2) of *YESAA* imposes an obligation on a decision body to consult with a First Nation for which no final agreement is in effect if the project is to be located wholly or partly in the First Nation's territory, or if the project might have significant adverse environmental or socio-economic effects. Section 74(1) also requires a decision body to give full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation.

[90] The companion cases of *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.,* 2017 SCC 40 at para. 24 [*Clyde River*] and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 considered whether the Crown can

rely on regulatory processes to fulfill its duty to consult. In those cases, the Supreme Court of Canada held that "while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate": *Clyde River* at para. 22.

[91] Whether the statutory duties and powers of the regulatory agency enable it to do what the duty to consult requires in the circumstances will inform whether the Crown is able to rely in whole or in part on the process to fulfill its duty to consult. The ultimate responsibility for the adequacy of consultation still remains with the Crown: *Clyde River* at para. 30.

[92] The adequacy of the Crown's consultation does not require perfection, but reasonableness. The question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Haida Nation* at para. 62, citing *R. v. Gladstone*, [1996] 2 S.C.R. 723, 1996 CanLII 160 at para. 46. Perfect satisfaction of the duty is not required, but the Crown is required to make reasonable efforts to inform and consult.

[93] The judge correctly noted that meaningful consultation means more than simply listening without any intention to modify the Crown's proposed conduct:

> [64] The Court in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 ("Tsleil-Waututh Nation"), stated at para. 499:
>
> > Meaningful consultation is not intended simply to allow Indigenous peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage*), 2005 SCC 69, [2005] 3 S.C.R. 388, paragraph 54).
>
> [65] The Court went on to state at para 501:
>
> > ... [M]eaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation. This serious consideration may be demonstrated in the Crown's consultation-related duty to provide written reasons for the Crown's decision.

> [66] The consultation process does not require agreement or a particular outcome. The Crown is required to act in good faith to provide meaningful consultation, not a specified result (*Haida Nation* at para. 42; *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para. 37).
>
> [Emphasis added.]

[94] I note on appeal Kaska argues that the question of the scope of the duty to consult and accommodate is a question of law, reviewed on a standard of correctness: *Haida Nation* at para. 61; see also *Beckman* at para. 48.

[95] However, Canada suggests that "scope" in this context refers to where on the spectrum of consultation the duty to consult lies: is it at the deep end or something more limited?

[96] Here, the Decision Bodies agreed that deep consultation was required. I agree with Canada that the question of the scope of the duty to consult and accommodate is not at issue on this appeal.

[97] The question is whether, in light of this duty to deeply consult, the Decision Bodies reasonably consulted and accommodated Kaska prior to reaching the decision to allow the Project to proceed to the regulatory stage.

Issue 1: Did the Decision Bodies reasonably consult with Kaska on the topic of economic feasibility?

[98] Kaska says that the Decision Bodies refused to consult with it on the topic of economic feasibility of the Project, and that this was unreasonable.

[99] Canada says that there was adequate consultation on economic feasibility, which will continue during the regulatory process, particularly during the permitting stage. Yukon says the economic feasibility of the Project is not relevant to Kaska's asserted Aboriginal rights, but what is relevant is the impact of the Project on asserted Aboriginal rights and that Kaska was consulted about those impacts. BMC supports the positions of the two governments.

[100] I will consider Kaska's arguments about the alleged errors in the approach to consultation by first setting out what consultation actually occurred on the topic of economic feasibility. I will then consider whether that consultation was reasonable.

What consultation occurred on the topic of economic feasibility?

[101] As mentioned, the location of the Project was close to several large mining projects that had failed. Kaska was concerned that these previous projects had been approved by the Yukon government without sufficient due diligence.

[102] As part of its submissions to the EC, LFN provided a report by Golder Associates dated July 2020 (the "Golder Report"), by way of cover letter dated October 8, 2020 ("October 8 Letter"). The October 8 Letter from LFN explained, as one of three areas of "ongoing grave uncertainty, focused primarily on project fundamentals":

> LFN raises questions about how the Proponent has determined the economics and profitability of this proposed mine; including who pays for remediation and closure and how. In order for LFN to gain independent assurance about the credibility of this proponent and its project's economics and finances, and to remove an entire category of uncertainty, LFN has undertaken this work itself. In the future it is LFN's hope that the Crowns, YESAB, the Yukon Water Board also collaborate with First Nation rights holders in commissioning this kind of independent analysis of major project economics and finances and do so in transparent ways that encourage understanding, debate and the **removal of uncertainty**.
>
> [Emphasis in original.]

[103] The October 8 Letter also summarized the reasons for LFN's lack of confidence in the financial models supporting the economic feasibility of BMC's Proposal, relying on the Golder Report:

> **Golder memo: Uncertainty about the economic feasibility of the KZK mine**
>
> Canada and Yukon have a near-perfect record of approving and licensing mines that go broke and must be cleaned up at taxpayer expense. As part of our independent assurance policy, LFN commissioned Golder to conduct an expert review of BMC's June 2019 43-101 Technical Report ("TR"). The review identifies several problems with BMC's financial models and projections that raise serious questions about the economics of the project, including the funding of mine closure activities and responsibilities. The

> report's author concludes that BMC's optimistic predictions are based on incomplete information and questionable assumptions.
>
> Specifically:
>
> 1. It is not clear how BMC plans to pay for post-production activities such as closure and reclamation, and its cost estimates do not meet the standards for a Definitive Feasibility Study ("DFS").
>
> 2. BMC has assumed that it will have ready markets for mineral concentrates in East Asia, but some of the concentrates do not meet import requirements in key markets. LFN's review concludes on page 3 that, "[s]ignificant limits on concentrate sales or prices significantly below those forecast in the TR will be fatal to the Project," and notes that pricing and market risks have not been appropriately addressed.
>
> 3. BMC eventually intends to decommission its proposed overflow water treatment plant after mining finished in 2029, but the passive wetland treatment system that will replace it is unproven technology in the north, and BMC has no contingency plan if the wetland system does not work. The company assumes that perpetual active treatment of pit lake outflows will not be necessary, and so does not consider the potential costs in its financial modeling.
>
> 4. BMC's geological model does not align with the results of its metallurgical testing program, which according to the review: "do not appear to be adequate for a definitive feasibility study." The shortcomings of the metallurgical testing program raise questions about the characteristics of the ore to be mined, and the disconnect between the metallurgy work and the geological model create uncertainty about mine design, metal recovery and waste rock management, and by extension, environmental effects, cost estimates and the financial viability of the mine.
>
> LFN wants to be assured that what is developed is a responsible financial model that avoids another mine where clean-up is funded by taxpayers. Our expert's analysis points to significant uncertainty in that regard.
>
> [Emphasis added.]

[104] The above passage was an accurate summary of the Golder Report, which was prepared by an engineering firm based in Vancouver. The Golder Report was a review of a June 2019 report filed by BMC with the Ontario Securities Commission, known as a National Instrument (NI) 43-101 Technical Report (TR). A TR is required by the securities regulators as part of the protection of investors in mining projects. It is meant to set out certain scientific and technical information regarding mining projects and to provide expert assessments of the material risks.

[105] The Golder Report commented both on BMC's economic projections as well as on mine closure costs and financing to pay for those costs. Regarding economic

projections, as presented, BMC's TR suggested that the mine would be a viable project and that it would reap a 40% internal rate of return. However, the Golder Report noted that this was based on certain rudimentary assumptions and was not supported by advance sales contracts. The Golder Report concluded that the BMC TR made risky assumptions about revenue projections for the ore concentrates.

[106] BMC was holding out the prospect of providing a 2.7% share of profits to Kaska as part of its Project proposal. Federal and Yukon income tax was projected to be a 23.6% share. The Golder Report highlighted the risks that these profits would not be forthcoming.

[107] Golder also identified the primary economic risk to the Project was the marketability of the concentrates proposed to be mined.

[108] Golder noted that some of the previous studies of the concentrates showed elevated levels of deleterious elements: for example, cadmium levels in the zinc exceeded what could be imported into China with other potential problems for markets in Korea and Japan. There were also deleterious elements in the copper and lead concentrates that could exceed various Asian import standards. Thus, Golder expressed the concern that the economic projections for the Project did not account for the risk that deleterious elements in the concentrates might make some of the concentrates unmarketable in Asia, which was the only proposed market.

[109] In Golder's opinion, the metallurgical testwork samples did not appear adequate for a definitive feasibility study. The samples used were from four drill holes, rather than an expected larger number of holes.

[110] Golder also questioned the fact that BMC's TR did not disclose any previous metallurgical data gained from the prior owner of the site, Cominco, which had explored and studied the Project area from 1992 through 1998. Cominco's data was acquired by BMC and used in a preliminary feasibility study, but it was not used in the definitive feasibility study summarized in the TR. Golder recommended there be further metallurgical sampling and testwork.

[111] Regarding mine closure, the Golder Report suggested the BMC report was unclear on how post-production costs would be funded, as the salvage value of the mine would not be sufficient to fund mine closure. Golder also noted that even if the mine closure was fully funded, the 104-hectare project site would be materially changed with a deep lake filling the open pit and other existing valley terrain altered by waste storage facilities that would need to be stable and effectively sealed.

[112] From October 2020 and on, Kaska was consistent in raising both aspects of the Golder Report with the Decision Bodies — the issue of economic feasibility of the mine and the risks of inadequate financing of mine closure.

[113] In the period when the Decision Bodies were considering what to do about the Referral Conclusion, Canada held a meeting with some Kaska representatives on April 1, 2021. According to the minutes taken by Canada, a number of issues were discussed. Among them, Kaska asked Canada whether it had looked at the Golder Report which demonstrated that "it seems to be a narrow bandwidth for this to be a profitable mine and be cleaned up", and whether it was a factor in Canada's decision making. The minutes do not record Canada engaging on that issue, beyond listening.

[114] In a letter dated April 12, 2021, LFN wrote to Canada and set out its views that Canada should either rely on s. 59 of *YESAA* to reject the recommendation against sending the Project to a panel review, or alternatively, LFN would support a decision to reject the Project outright. In addition to LFN's stated views about adverse effects on the FCH, LFN also stated that neither YESAB nor any Decision Body had addressed uncertainties about the financial viability of the Project, as raised in the Golder Report. This observation was correct.

[115] For example, in the Screening Report, the EC did not explore the topic of whether there was sufficient metallurgical testing to support BMC's predictions as to the marketability in Asia of the ore that would be mined.

[116] Nor did the Decision Bodies address this point in their deliberations.

[117] The EC's approach was to consider the second aspect of the concerns raised in the Golder Report, namely, the impact of an unscheduled closure of the mine. The EC referred in some detail to the history of unsuccessful mining projects in Yukon. While it did not consider the reasonableness of the projections for this mine, it instead acknowledged the risk that it might not be successful, and considered terms and conditions that might mitigate that risk.

[118] The Decision Bodies relied on those terms and conditions as answering any concerns Kaska had about the economic feasibility of the Project. But the terms and conditions were all premised on the Project being approved by the Decision Bodies, and proceeding through the regulatory stage, at which time sufficient security and other measures would be put in place to mitigate against the harmful effects of early mine failure.

[119] The Decision Bodies' approach of looking at adverse effects of the proposed mine and asking whether terms and conditions might mitigate effects, including the setting of security set during the regulatory phase, was highly relevant and a necessary part of consultation with Kaska. The record establishes that there was deep consultation on these issues. But for Kaska it was only one-half of the picture, and only one part of the concerns highlighted in the Golder Report. The terms and conditions did not address Kaska's concerns about the inadequate assumptions and data supporting the revenue projections of the mine, that is, the economic feasibility of the Project.

[120] Kaska was asking the broader question: if the mine economics are too uncertain and high risk, and the mine is going to create significant adverse effects, why approve the Project in the first place? Is it even worth it?

[121] The Decision Bodies refused to engage with Kaska on this question of economic feasibility of the mine, beyond deferring to what might occur during the regulatory phase, which would be after the Decision Bodies approved the Project proceeding.

[122] In a letter to the Decision Bodies dated January 28, 2022, Kaska again raised concerns that the expert analysis it provided questioning the economic feasibility of the Project had not been addressed, and asked that this be part of the agenda for their next meeting.

[123] At a meeting between Kaska and the Decision Bodies on March 30, 2022, Kaska raised the issue of "mine economics" again. The minutes prepared by Canada of that meeting set out that Yukon's representative explained that post-approval of the Project by the Decision Bodies, and during the regulatory permitting stage, the mine's reclamation and closure plan is looked at and a security review is conducted to ensure that sufficient security is in place should mine economics not be viable or if the company abandons the Project. Yukon explained that it expected to consult with First Nations in determining the appropriate amount of security.

[124] At that meeting, Kaska indicated its view that before the Decision Bodies make their decision to approve the Project, mine economics and risk assessment needed to be discussed, and explained that LFN provided the Golder Report in order to spur that conversation and to move it along. Kaska reinforced its position that what it wanted to talk about was more than just the amount of security.

[125] Yukon's response was that it would not look at the viability of the Project as that was up to the mining company. It also took the position that the *YESAA* process did not review economic feasibility, it just looked at environmental and socio-economic impacts. Canada's position was similar to Yukon's: it does not review economic feasibility.

[126] The Decision Bodies also shared their views with Kaska that requiring the proponent to provide security would be a way of ensuring mitigation of the risk that the mine was not feasible and failed, and the provision of security was a matter that could be and would be addressed in terms and conditions attached to any approval, and would be addressed in more detail during the permitting phase of the process when more would be known about the mine closure plan and mine reclamation plan. For example, two security reviews would occur during the Yukon regulatory phase,

one related to the water license, and the other related to the quartz mining license. Yukon indicated it expected to consult and engage with Kaska about security, including such topics as whether a project should secure funding for five years of liability or only two. Further, the Decision Bodies suggested that if mitigation was required due to impacts on Aboriginal rights, they would require it, regardless of the cost to the proponent.

[127] The Decision Bodies wrote to Kaska by letter dated April 27, 2022. Among other topics, that letter acknowledged that Kaska had raised questions about the economic viability of the project, including providing the Golder Report. Again, the Decision Bodies took the position that they would not discuss the economic feasibility of the Project, beyond identifying that the question of what security might be needed to mitigate the impacts of the mine would be addressed during the regulatory phase. The letter explained the Decision Bodies' views that "[t]he *YESAA* process focuses on the assessment of significant environmental and socio-economic effects of proposed projects, and, as with other impact assessment processes, does not review the economic feasibility of a proposal for a recommendation on a project" (emphasis added).

[128] In addition, the Decision Bodies informed Kaska in their April 27, 2022 letter, that it was their view the regulatory process in advance of issuing a quartz mining license was much more robust than had occurred with previous failed mines, and would require a greater level of certainty in mine planning, water treatment, site characterization (including geochemistry), adaptive management practices and monitoring requirements. While this was helpful consultation on mitigation of adverse effects, none of this had to do with Kaska's concerns that the economic projections for the Project were flimsy, as identified in the Golder Report.

[129] Canada ultimately produced a comprehensive report of its consultation record, the Consultation Assessment Report dated June 15, 2022 (the same date as the Decision). That report is consistent with the above noted approach taken by Canada and Yukon.

[130] BMC prepared an updated NI 43-101 Feasibility Study in December 2020. However, Canada's documents suggest that Canada did not look at the updated study, consider it, or discuss it with Kaska, or raise any barrier to discussion of the topic other than simply forming the view that it was not a proper topic. As stated in Canada's Consultation Assessment Report, Canada was simply "aware" that BMC had prepared an updated feasibility study and:

> … it may have addressed several of the First Nations' concerns, as identified through their July 2020 commissioned review, however it remains unknown whether the First Nations have reviewed this document or whether they have had discussion about these concerns directly with the Proponent.
>
> [Emphasis added.]

[131] Canada's Consultation Assessment Report stated that Kaska had, through its submissions and provision of the Golder Report, expressed "[u]ncertainty around the Proponent's assumptions and plans regarding markets for its concentrate products". It summarized Canada's response as follows:

a) By noting that the *YESAA* process "currently focuses on the assessment of significant environmental and socio-economic effects of proposed projects and, as with other impact assessment processes, does not review the economic feasibility of a project for a final conclusion or determination"; and,

b) Canada was relying on Yukon's commitment to have further discussions with Kaska during the regulatory process about the "financial security setting process". In this regard, Canada stated it was aware that "the economic feasibility of the Project will receive further scrutiny in the regulatory phase" through the Yukon Quartz Mining and Water Licensing processes, so that the provision of sufficient security by proponents will be managed by Yukon, and it would be a topic on which there can be ongoing consultation with First Nations.

   [Emphasis added.]

[132] Canada's first response as summarized above, requires consideration of whether it was reasonable to assert that "economic feasibility of the Project" was outside of the *YESAA* process. This was the same position that Yukon took with Kaska.

[133] The second response contains some ambiguity: was Canada expecting that Kaska's concerns about economic feasibility of the Project, based on the issues raised in the Golder Report, would be addressed by Yukon in the future during the regulatory permitting stage, after the Decision Bodies made a decision allowing the Project to proceed?

[134] This ambiguity was not clarified in the Decision. The Decision briefly set out a summary of the issues surrounding the economic feasibility of the Project. The Decision acknowledged that Kaska had provided the Golder Report to the EC. The Decision also stated that some of the risks in that Report would be addressed during the regulatory process, and that security determinations would also be made as part of the Quartz Mining Licence review.

[135] The Decision further acknowledged that Kaska had questions and concerns remaining about this issue, but stated:

> However, based on the above [regulatory process], and with the implementation of terms and conditions #16 to #20, the Decision Bodies are confident that outstanding questions about the economic viability of the Project will be addressed through further consultation during the regulatory phase, and that potential impacts on Aboriginal rights are minimized.
>
> [Emphasis added.]

[136] In other words, the Decision suggested that Kaska's questions about the economic viability of the Project did not need to be addressed prior to the Decision Bodies making a decision to approve the Project, but it would be addressed later through further consultation during the regulatory phase.

Was there reasonable consultation on economic feasibility?

[137] The review above shows that the Decision Bodies took two approaches to Kaska's desire to be consulted about the economic feasibility of the Project.

[138] First, the Decision Bodies indicated to Kaska during the consultation process that the *YESAA* process did not include consultation on this issue.

[139] Second, the Decision Bodies suggested to Kaska during the consultation process that any concerns about economic feasibility could be addressed later during the regulatory stage, but only with a focus on the question of what security and other measures could be put in place in the event there was an early mine failure.

[140] These two approaches effectively denied Kaska the opportunity to be consulted on the question of the economic feasibility of the Project before the Decision Bodies made their decisions to approve the Project moving forward to the regulatory permitting phase. In my view, this was unreasonable. I will address both approaches in turn.

Interpretation of YESAA

[141] During the consultation process, the Decision Bodies' interpretation of *YESAA* formed one basis for their position that they would not consult with Kaska on economic feasibility.

[142] As mentioned above when setting out the principles of judicial review, subject to limited exceptions, the reasonableness standard applies to a review of an administrative decision maker's decision, including where that decision maker interprets a statute. An administrative decision maker's task is to interpret the contested statutory provision "in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue": *Vavilov* at para. 121.

[143] The Court in *Vavilov* emphasized the importance of administrative decision makers providing justification in the reasons where the decision has a profound impact on an individual's rights and interests: at paras. 133–135. Here, the Decision Bodies provided no reasons for their position that the *YESAA* process did not include consultation on economic feasibility, even where that issue is raised by an affected First Nation.

[144] Here, the Decision Bodies were not interpreting their governing statute but a statute containing provisions regarding the duty to consult. Kaska submits that because the duty to consult is a constitutional duty, this means the correctness standard of review applies. However, in my view, the question of statutory interpretation here was not a constitutional question. Answering it did not limit the constitutional duty to consult deeply, which exists at common law. Rather, it informed the approach to the Crown process of consultation. I am therefore of the view that the reasonableness standard applies to this Court's evaluation of the Decision Bodies' interpretation of *YESAA*.

[145] The question for this Court is whether the Decision Bodies were reasonable in interpreting *YESAA* as imposing a process that precluded consultation with Kaska on the topic of economic feasibility.

[146] In my view, it was unreasonable for the Decision Bodies to conclude that the *YESAA* process did not include consultation with First Nations on the topic of economic feasibility. Such a conclusion is inconsistent with the text, context and purpose of the statute.

[147] Section 5(2) sets out the purpose of *YESAA*:

> (2) The purposes of this Act are
>
> > (a) to provide a comprehensive, neutrally conducted assessment process applicable in Yukon;
> >
> > (b) to require that, before projects are undertaken, their environmental and socio-economic effects be considered;
> >
> > (c) to protect and maintain environmental quality and heritage resources;

> (d) to protect and promote the well-being of Yukon Indian persons and their societies and Yukon residents generally, as well as the interests of other Canadians;
>
> (e) to ensure that projects are undertaken in accordance with principles that foster beneficial socio-economic change without undermining the ecological and social systems on which communities and their residents, and societies in general, depend;
>
> (f) to recognize and, to the extent practicable, enhance the traditional economy of Yukon Indian persons and their special relationship with the wilderness environment;
>
> (g) to guarantee opportunities for the participation of Yukon Indian persons — and to make use of their knowledge and experience — in the assessment process;
>
> (h) to provide opportunities for public participation in the assessment process;
>
> (i) to ensure that the assessment process is conducted in a timely, efficient and effective manner that avoids duplication; and
>
> (j) to provide certainty to the extent practicable with respect to assessment procedures, including information requirements, time limits and costs to participants.
>
> [Emphasis added.]

[148] The phrase “socio-economic effects” is defined in s. 2(1) of *YESAA*; it “includes effects on economies, health, culture, traditions, lifestyles and heritage resources” (emphasis added).

[149] Further, the assessment process requires consideration of a broad number of matters, pursuant to s. 42:

> 42 (1) In conducting an assessment of a project or existing project, a designated office, the executive committee or a panel of the Board shall take the following matters into consideration:
>
> (a) the purpose of the project or existing project;
>
> (b) all stages of the project or existing project;
>
> (c) the significance of any environmental or socio-economic effects of the project or existing project that have occurred or might occur in or outside Yukon, including the effects of malfunctions or accidents;
>
> (d) the significance of any adverse cumulative environmental or socio-economic effects that have occurred or might occur in connection with the project or existing project in combination with the effects of other projects for which proposals have been submitted under subsection

> 50(1) or any activities that have been carried out, are being carried out or are likely to be carried out in or outside Yukon;
>
> (d.1) any studies or research undertaken under subsection 112(1) that are relevant to the project or existing project;
>
> (d.2) the need for effects monitoring;
>
> (e) alternatives to the project or existing project, or alternative ways of undertaking or operating it, that would avoid or minimize any significant adverse environmental or socioeconomic effects;
>
> (f) mitigative measures and measures to compensate for any significant adverse environmental or socio-economic effects;
>
> (g) the need to protect the rights of Yukon Indian persons under final agreements, the special relationship between Yukon Indian persons and the wilderness environment of Yukon, and the cultures, traditions, health and lifestyles of Yukon Indian persons and other residents of Yukon;
>
> (g.1) the interests of first nations;
>
> (h) the interests of residents of Yukon and of Canadian residents outside Yukon;
>
> (i) any matter that a decision body has asked it to take into consideration; and
>
> (j) any matter specified by the regulations.
>
> …
>
> (4) A designated office, the executive committee or a panel of the Board may also take into consideration any matter that it considers relevant in the assessment of a project or existing project.
>
> [Emphasis added.]

[150] Clearly the consideration of a project's "effects on economies" can include positive effects (such as provision of jobs for local people, or providing tax revenues for governments to fund programs) as well as negative effects (such as destruction of one type of economic activity in order to promote another). Considering whether a proponent's view of the positive economic effects of the project are likely, or so fraught with unsound assumptions as to be unreliable, falls well within the realm of "socio-economic effects".

[151] Not only are the interests of First Nations a mandatory consideration in ss. 42(1)(g) and (g.1), the screening stage requires the EC to consult with First Nations pursuant to s. 57:

> Preliminary determination
>
> 57 (1) Where a proposal for a project is submitted or referred to the executive committee under paragraph 50(1)(a) or 56(1)(d), the executive committee shall consider whether the applicable rules have, in its opinion, been complied with and notify the proponent accordingly.
>
> Screening by executive committee
>
> (2) The executive committee shall commence a screening of a project as soon as possible after it notifies the proponent affirmatively under subsection (1) and advises the proponent that, in its opinion, the proponent has in its proposal taken into consideration the matters referred to in paragraphs 42(1)(b), (c) and (e) to (h) and has consulted first nations and the residents of communities in accordance with subsection 50(3).
>
> Information and views
>
> (3) The executive committee may seek any information or views that it believes relevant to its screening.
>
> Information and views
>
> (4) Before making a recommendation under paragraph 58(1)(a), (b) or (c), the executive committee shall seek views about the project, and information that it believes relevant to the screening, from any first nation consulted under subsection 50(3) and from any government agency, independent regulatory agency or first nation that has notified the executive committee of its interest in the project or in projects of that kind.
>
> [Emphasis added.]

[152] Section 50(3) also requires a proponent to consult a First Nation in whose territory the project will be located or might have significant environmental and socio-economic effects.

[153] Section 3 of the *YESAA* provides how the statutory duty to consult should be exercised:

> Where, in relation to any matter, a reference is made in this Act to consultation, the duty to consult shall be exercised
>
> (a) by providing, to the party to be consulted,
>
> (i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,
>
> (ii) a reasonable period for the party to prepare its views, and
>
> (iii) an opportunity to present its views to the party having the duty to consult; and
>
> (b) by considering, fully and fairly, any views so presented.
>
> [Emphasis added.]

[154] As a party to be consulted, Kaska was invited to provide and present its "views". This is a very wide and general description and obviously capable of including views on the economic feasibility of the Project. Thus, to the extent Kaska provided its views that the Project may not be economically feasible, the only reasonable reading of s. 3 is that the mandated duty to consult required full and fair consideration of those views.

[155] I acknowledge that what the EC ultimately does with the information it receives and considers is focused quite narrowly pursuant to s. 58. Section 58(1) of *YESAA* provides that at the conclusion of the screening, the EC must choose one of four options for recommendations to the Decision Bodies for the Project, all turning on whether it concludes that the project is likely to have "significant adverse environmental or socio-economic effects" that can or cannot be mitigated. Namely, it can recommend: proceed without a review; proceed with terms and conditions; not be allowed to proceed; or require a review.

[156] Specifically, s. 58 provides:

> 58 (1) At the conclusion of its screening of the project, the executive committee shall
>
> > (a) recommend to the decision bodies for the project that the project be allowed to proceed without a review, if it determines that the project will not have significant adverse environmental or socio-economic effects in or outside Yukon;
> >
> > (b) recommend to those decision bodies that the project be allowed to proceed without a review, subject to specified terms and conditions, if it determines that the project will have, or is likely to have, significant adverse environmental or socio-economic effects in or outside Yukon that can be mitigated by those terms and conditions;
> >
> > (c) recommend to those decision bodies that the project not be allowed to proceed and not be subject to a review, if it determines that the project will have, or is likely to have, significant adverse environmental or socio-economic effects in or outside Yukon that cannot be mitigated; or
> >
> > (d) require a review of the project, if, after taking into account any mitigative measures included in the project proposal, it cannot determine whether the project will have, or is likely to have, significant adverse environmental or socio-economic effects.

[157] Section 58 limits what recommendations the EC may make. None of those recommendations involve reaching a conclusion about the "economic feasibility" of a project. However, nothing in s. 58 provides a limit on the consultation and analysis that leads to those recommendations.

[158] Given the wide amount of information the EC may properly consider before making its recommendations, it is not reasonable to read *YESAA* as precluding the EC from considering the economic feasibility of a proposed project when "fully and fairly" (*YESAA,* s. 3(b)) considering the views of a First Nation.

[159] Further, as already mentioned in a review of the principles that govern the duty to consult, s. 74 of *YESAA* imposes an obligation on a decision body to consult with a First Nation for which no final agreement is in effect on the potentially adverse socio-economic and environmental effects of a proposed project in the First Nation's traditional territory. This provision also requires a decision body to give full and fair consideration to scientific information, traditional knowledge, and other information that is provided with the recommendation.

[160] For these reasons, when *YESAA* is read in the context of its purpose and plain language, I do not see any reasonable interpretation as supporting a conclusion that the consultation required of the EC or the Decision Bodies excluded any consideration of a First Nation's views on the economic feasibility of a project.

[161] In addition, even if the Decision Bodies interpreted the *YESAA* process narrowly as not requiring the EC to consider the economic feasibility of the Project, the Decision Bodies' own common law duty to consult was not limited by *YESAA*. Indeed, the Decision Bodies recognized this generally, stating that they relied on the *YESAA* process but augmented it "to ensure the duty to consult and accommodate is met prior to a decision being made": Decision at p. 2. This duty was certainly broad enough to include consultation with Kaska on its concerns about the economic feasibility of the Project. By responding to Kaska's concerns about economic feasibility, with the position that consultation on economic feasibility was outside of

the *YESAA* process, the Decision Bodies shut down consultation on this topic prior to the Decision.

[162] Kaska says, given the history of failed mining projects in its territory and in Yukon in general, during the consultation process it ought to have had an opportunity to provide its views on the question of whether BMC's proposal was or was not economically viable, and to be consulted on those views, that is, to have those views fully and fairly considered.

[163] I accept Kaska's argument, to the extent it held views on the economic viability of the Project, and wished to share those with the EC and Decision Bodies, that it was properly a topic to be considered by the Decision Bodies under both *YESAA* and pursuant to their common law duty to consult.

[164] Under *YESAA* and the Decision Bodies' common law duty to consult, Kaska ought to have been permitted a say on what it felt were deficiencies or problems with BMC's projections related to the economic feasibility of the Project. It ought to have been listened to and had its views considered if it had concerns about whether the Project was feasible or too high risk to justify the adverse effects.

[165] The next question to consider is whether the deferral of consultation to the regulatory stage was a reasonable way to address Kaska's concerns about the economic feasibility of the Project.

Was deferring consultation to the regulatory stage a reasonable approach to address concerns about the economic feasibility of the Project?

[166] The Decision Bodies told Kaska that its concerns about the economic feasibility of the Project could be addressed during the regulatory permitting stage of the Project, which would be after the decision approving the Project to move forward.

[167] I return to this statement in the Decision:

> However, based on the above [regulatory process], and with the implementation of terms and conditions #16 to #20, the Decision Bodies are

> confident that outstanding questions about the economic viability of the Project will be addressed through further consultation during the regulatory phase, and that potential impacts on Aboriginal rights are minimized.
>
> [Emphasis added.]

[168] To the extent the above emphasized statement was intended to reassure Kaska that Yukon would consider economic feasibility of the Project in consultation with Kaska later, during the permitting phase of the Project, it was potentially misleading. There was no basis for the Decision Bodies' "confidence" that this would happen, and it was inconsistent with their earlier positions in meetings with Kaska.

[169] Both Canada and Yukon took the position with Kaska that the economics of the Project would only be relevant to setting of security to be addressed if the Project was approved.

[170] Terms and conditions #16 to #20, referred to in the Decision, have nothing to do with the bigger picture of economic feasibility of the Project, in the sense that Kaska wished to discuss with the Decision Bodies prior to approval of the Project. Rather, these terms had to do with ensuring there was money set aside by BMC in the event the mine failed early, for things such as re-training of employees and care and maintenance requirements. These terms and conditions were unchanged from those proposed by the EC.

[171] Certainly the terms and conditions are important and showed some accommodation of Kaska's concerns about how it might be protected from the costs of mine failure. But that was not the "economic feasibility" issue that Kaska wanted to discuss.

[172] To the extent there might be any remaining ambiguity in this regard, during the hearing of this appeal, Yukon confirmed that the question of economic feasibility of the Project will not be a topic of consultation during the regulatory, permitting phase. Rather, the economic discussions at that stage will involve only the setting of financial security to address mitigation of the mine's adverse effects. These requirements may be so costly as to affect the viability of the mine and the decision

of BMC to proceed, but they will not affect the government decisions approving permits or licenses for the mine.

[173] Yukon is quite clear in its position: it is of the view that the question of economic feasibility of the mine is not a proper topic of consultation with Kaska. It is a policy question for governments, and Yukon leaves it to the proponent to decide whether it wishes to proceed. Yukon submits that Kaska is only entitled to be consulted on the potential negative impacts of the mine, assuming it proceeds.

[174] In my view, Yukon's position is not in accord with the Crown's constitutional duty to consult whenever government conduct might impact asserted Aboriginal rights and title. The two governments' decision to approve the Project proceeding to the regulatory stage is itself conduct that impacts Kaska's asserted Aboriginal rights and title, and as such, Kaska is entitled to meaningful consultation before that decision is made.

[175] Again, Kaska wanted to be consulted on economic feasibility before the Project was approved by the Decision Bodies, to have the potential risks of the Project considered in light of the viability of the proposed economic benefits first. It wanted to question not just whether adverse effects of the Project could be mitigated, but whether the harms should be avoided altogether because the economics of the Project were just too risky and not worth causing those harms in the first place. Imposing security and other conditions if the mine closed prematurely did not address Kaska's concerns that this large open pit mine should not proceed in the first place if there was not enough data or information to reasonably project that it would deliver economic benefits.

[176] I accept that the consultation process engaged in here by the EC and adopted and supplemented by the Decision Bodies was thorough on a wide range of issues. I also recognize that there is no requirement for governments to address explicitly in their written decisions every single issue raised in consultation with First Nations: see *Ktunaxa* at para. 139. It is conceivable some issues raised by First Nations might be tangential or minor or subsumed in the consultation on other

issues and not need much if any dialogue, as consultation is only required to be reasonable. However, the level of consultation required here was at the deep end of the spectrum. The topic of economic feasibility of the Project was not a minor or irrelevant point. It was a “big picture” question. Kaska wanted to question the very economic rationale for going forward with the Project.

[177] Kaska was asking: is there enough information to have confidence that the Project will actually provide any economic benefits, so as to outweigh the detrimental effects and risks to Kaska? It is the governments’ role ultimately to decide such a policy-laden question, not a court’s role on judicial review. However, the court’s supervisory role is to ensure that the governments meet their constitutional duty of consultation with affected First Nations before the governments make the decision.

[178] It is possible that if the Decision Bodies found that consultation on economic feasibility was properly within the scope of *YESAA*, they would have considered it appropriate to review the updated BMC technical report, discuss both it and the Golder Report with Kaska, or ask the EC to obtain more information on this topic pursuant to ss. 42(1)(i) and 43 of *YESAA*. I am not suggesting this was the only way to engage on the issue, but meaningful engagement with Kaska on the topic was required in order for consultation to be reasonable prior to the Decision Bodies issuing a decision. Refusing to consult with Kaska on this factor made the Decision fall short and rendered it unreasonable.

[179] In my view, it was not enough for the Decision Bodies simply to listen to Kaska’s concerns in this regard and refer it to the regulatory stage, post-approval. Deep consultation required dialogue <u>before</u> approval of the Project. The Decision Bodies’ refusal to consider this topic meaningfully and engage in dialogue with Kaska before making the decision to approve the Project was unreasonable.

[180] I will briefly consider the other grounds of appeal and then address what remedy should follow.

Issue 2: Did the judge misapply the "reciprocal duty" required of Kaska and err in assessing what was required of the Crown to discharge its duty to consult and accommodate?

[181] The duty to consult is a "two-way street". As summarized in *Ktunaxa* at para. 80, the Crown's obligations are to provide notice and information on the project and to consult with the Indigenous group about its concerns. The obligations on the Indigenous group include: defining the elements of the claim with clarity; not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached: *Ktunaxa* at para. 80.

[182] Good faith is required at all stages and from both sides: *Haida Nation* at para. 42.

[183] Every case must be approached individually to determine what the honour of the Crown may require in particular circumstances: *Haida Nation* at para. 45.

[184] As a second ground of appeal, Kaska asserts that the judge misapplied these concepts and was unduly critical of Kaska's response to efforts by the Crown to engage in consultation.

[185] For example, in her Reasons, the judge commented on the reciprocal duty of Kaska:

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

[186] This ground of appeal takes aim at an isolated comment of the reviewing judge with respect to reciprocal duties. Neither the judge's decision nor that of the Decision Bodies turned on any assessment of reciprocal duty.

[187] In my view, this ground of appeal overlooks the standard of review on appeal from a judicial review and does not justify a conclusion that the Decision Bodies failed to consult reasonably with Kaska. The Decision is not critical of Kaska's participation in the consultation process. The Decision Bodies did not attempt to cut consultation short on any topic based on any criticisms of Kaska's participation in the consultation process (leaving aside the judge's findings with respect to the June 14 Submission, which are unchallenged on appeal).

[188] Several topics and concerns were raised by Kaska with the EC and with the Decision Bodies during the consultation process. The judge's thorough reasons summarize the deep and extensive discussions that occurred on many of these other topics and the accommodation by way of terms and conditions attached to the Decision Bodies' approval of the Project. I find no basis for questioning the adequacy of consultation and accommodation on any other issue, other than as I have described with respect to the issue of economic feasibility.

[189] I would therefore not accede to this ground of appeal.

Issue 3: Was the remedy impermissibly prescriptive such that it restricted the Crown's ability to discharge its constitutional duties and prevented the meaningful consultation that was required?

[190] As mentioned, a judge's choice of remedy involves an exercise of discretion and is therefore entitled to deference on appeal. Generally, an appellate court should not interfere with a judge's exercise of discretion absent an error of law or principle or a palpable and overriding error of fact: *Makivik* at paras. 65, 153; *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 at para. 26.

[191] Here, the reviewing judge tailored the remedy to the breach she identified — the failure of the Crown to consult with Kaska about the June 14 Submission. As such, she set aside the Decision "for the limited purpose of allowing a consultation meeting on the June 14, 2022 submission to occur" (emphasis added).

[192] The judge's tailored remedy was in the context of her in-depth understanding of the content of the June 14 Submission and the consultation that preceded it. The

judge was also aware of the fact the consultation process had taken an extraordinarily long time. No error of law is shown. The remedy the judge chose was within the available range of remedies.

[193] I am not persuaded Kaska has established any error in the judge's remedy related to the June 14 Submission.

Issue 4: What is an appropriate remedy on appeal?

[194] Based on the reasons above in dealing with the first issue on appeal, I am of the view it was unreasonable for the Decision Bodies to approve the Project proceeding to the regulatory permitting stage because they failed in their duty to reasonably consult and accommodate Kaska about concerns relating to the economic feasibility of the Project.

[195] For the Reasons of the reviewing judge, I am of the view the Decision Bodies' consultation and accommodation leading up to the Decision was otherwise reasonable, except with respect to the June 14 Submission, also for the reasons of the judge.

[196] Where a court concludes that the Crown has not met its duty to consult and/or accommodate, there are a variety of remedies available to the court, including to set aside the decision that was made in breach of the duty: see e.g., *Clyde River* at para. 24; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69. A number of decisions have suggested that as a general rule, where a decision affecting Aboriginal or treaty rights is made without compliance with the duty to consult, quashing will be the appropriate remedy: Jack Woodward, *Aboriginal Law in Canada* (Toronto: Thomson Reuters Canada, 2020) Online: Westlaw Canada at §5:42 [Woodward, *Aboriginal Law*].

[197] The Court in *Clyde River* at para. 24 said:

> Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be

> quashed on judicial review. That said, judicial review is no substitute for adequate consultation.

[198] At the superior court level, other types of orders that may or have been granted where there is a breach of the duty to consult include orders to consult meaningfully or in good faith; to discuss particular issues; to consider particular types of accommodation; to appoint appropriate representatives to conduct the consultation; to appoint a mediator; or to enter into a consultation protocol: see Woodward, *Aboriginal Law* at §5:42.

[199] The Court in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 said that the remedy for a breach of the duty to consult varies with the situation; it can lead to relief ranging from injunctive relief to damages to an order to carry out the consultation prior to proceeding further with the proposed government conduct: at para. 37; see also *Restoule* at paras. 274–277.

[200] It seems to me that the most effective remedy here is to set aside the Decision Document and remit the matter to the Decision Bodies to allow for consultation on Kaska's concerns about the economic feasibility of the Project.

[201] However, Kaska seeks additional orders that would require the Decision Bodies to complete a meaningful and deep consultation with Kaska about the Project and prohibit the Decision Bodies from issuing a new decision about the Project until the other terms of the order are completed.

[202] In my view, it is not necessary to make additional directions of the nature sought by Kaska. The reciprocal duties involved in consultation and accommodation are well known by the parties. Other than as indicated in these reasons, the Crown has engaged in a detailed and thorough process of deep consultation and accommodation.

[203] I am also of the view that not enough is known by this Court to give precise directions regarding the timing of additional consultation on the economic feasibility

of the Project. It is clear that given the length of time consultation has already taken, all the parties should avoid delay in any further consultation.

[204] As noted by Yukon, this result will effectively remove the foundation of the 2024 Decision that was made in the interim period for consultation on the June 14 Submission. That 2024 Decision cannot stand and will be a nullity. The respondents were aware of this potential outcome when they opposed Kaska's application for a stay.

[205] In the circumstances of this case, I would allow the appeal and vary the judge's order as follows: I would set aside the Decision and remit the matter to the Decision Bodies to allow for consultation on Kaska's concerns about the economic feasibility of the Project.

[206] I would order costs of the appeal to the appellant.

"The Honourable Justice Griffin"

I agree:

"The Honourable Justice Charlesworth"

Reasons for Judgment of the Honourable Mr. Justice Butler:

[207] I have had the privilege of reading the detailed reasons of my colleague, Justice Griffin. Her reasons provide an excellent summary of the background leading to the Decision, including the lengthy and comprehensive consultation that took place between the Decision Bodies and Kaska. I take no issue with my colleague's statement of the applicable standard of review and of the principles governing the Crown's duty to consult with First Nations. I also take no issue with Justice Griffin's disposition of the three issues raised on appeal, nor with her reasoning in arriving at those conclusions.

[208] My reasons are directed at the first issue: whether the Decision Bodies' consultation with Kaska about the economic feasibility of the Project was adequate. In light of the extensive consultation that took place, and our conclusion that the Decision Bodies failed to satisfy their duty to consult on economic feasibility, I think it worthwhile to highlight the challenges that arose during the consultation process. I do so in part to highlight how the Decision Bodies' misunderstanding of their role in relation to the topic of economic feasibility led to this unfortunate conclusion.

[209] I would first note that the parties have used the term "economic feasibility" (or "economic viability") as something of a catchall phrase. It seems to me that the parties and the Decision Bodies had different perspectives on the economic feasibility of the Project, and as a result were referring to different aspects of economic feasibility when the topic was discussed. In my view, the Decision Bodies did not properly understand their role in relation to these different perspectives during the consultation process.

[210] I would identify at least three distinct perspectives on the economic feasibility of the Project:

> 1) From the perspective of the proponent, BMC, the question involves a complex assessment of the costs to finance and construct the mine, including meeting conditions imposed by government, providing the amount of security required for remediation and for early or unexpected closure, and considering

> future metal prices and markets. It goes without saying that BMC will evaluate the Project's viability continuously during the planning and regulatory phase, as well as throughout the life of the mine, should it reach that stage of development.
>
> 2) From the perspective of Kaska, the economic feasibility considerations are quite different. It does not have any direct concern about the cost to finance and construct the mine, nor to meet any conditions imposed. Rather, the concern is whether the Project will be constructed and remain in service for its expected lifespan, so that it will be able to provide employment and other socio-economic benefits. An important consideration from Kaska's perspective is whether the risks and detriments posed by the Project—including the exploitation of resources in the lands over which Kaska claims title—are worth the offered benefits.
>
> 3) As my colleague explained, the Decision Bodies were required by s. 42(1) of *YESAA* to consider "the purpose of the project", "the significance of … socio-economic effects of the project", "the interests of first nations", and "the interests of residents of Yukon and of Canadian residents outside Yukon". Clearly, this requires considering the views of Kaska and BMC on the economic feasibility of the Project. This requires more than an analysis of the environmental impacts: it requires considering whether the Project is worthwhile for the people of Yukon, including First Nations. In other words, it is a multifaceted cost-benefit analysis that should take into account the perspectives of BMC and Kaska on the Project's economic feasibility.

[211] In my view, the consultation on the topic of economic feasibility got off to a poor start when the Decision Bodies took the view that their ability to consider the topic was limited. I will refer to the June 15, 2022 Crown Consultation Assessment Report prepared by the Government of Canada (the "CCAR"), to summarize how consultation on the topic of economic feasibility of the Project proceeded. The CCAR states that after the delivery of the Golder Report on October 8, 2020:

> … Canada reviewed the [Golder Report] and understands the First Nations' concerns about the Project economics and viability given the history and context of abandoned mines in Kaska Dena Traditional Territory. Canada notes that the YESAA process currently focuses on the assessment of significant environmental and socio-economic effects of proposed projects and, as with other impact assessment processes, does not review the economic feasibility of a project for a final conclusion or determination.
>
> [Emphasis added.]

[212] The CCAR notes that in 2022, the parties engaged in discussions regarding mine closure issues. After bilateral discussions with the Yukon government, the Decision Bodies concluded that the existing terms and conditions were sufficient to deal with those issues:

> Understanding the territorial regulatory process, Canada is aware that the economic feasibility of the Project will receive further scrutiny in the regulatory phase through the QML [Quartz Mining Licence] and Water Licensing processes. Canada understands that the detailed project design and planning that occurs in the regulatory phase integrates mine closure and reclamation, and that YG [the Yukon Government] has made changes to their security setting process following the Wolverine Mine closure to better address changes to on-site peak liabilities and full payment of security by proponents. These changes will help to ensure that the issue of future financial viability, as market and economic conditions evolve, will continue to be reviewed and managed by YG.
>
> …
>
> Further to the above, Canada is aware that Proponents are required to meet certain professional standards to complete ore deposit valuation, final mine planning and provide certainty for project financing and investment. These standards include the completion of updated NI 43-101 Technical Reports, pre-feasibility and rigorous feasibility studies by qualified professionals. Canada is aware that the Proponent filed an updated NI 43-101 Feasibility Study in December 2020, after [the Golder Report]. This updated Feasibility Study may have addressed several of the First Nations' concerns as identified through [the Golder Report], however it remains unknown whether the First Nations have reviewed this document or whether they have had discussion about these concerns directly with the Proponent.
>
> [Emphasis added.]

[213] The CCAR describes the federal Decision Bodies' conclusion on the issues of mine closure and the Project's financial viability as follows:

> Specific to the Project, Canada acknowledges that YG, as the government responsible for implementation of the *Quartz Mining Act*, will be required to consult with LFN and RRDC during the QML regulatory phase. This will result

> in additional avenues for Kaska input on the Project, setting of financial securities and closure and reclamation objectives, as well as implementation of any new or additional mitigation measures resulting from adaptive management of the Project. As noted previously, YG also committed to additional dialogue with LFN and RRDC, in advance of the QML process, on these issues. With the EC's recommended terms and conditions and further refinement of Project design details, Canada is confident that LFN's and RRDC's outstanding questions related to financial viability and setting and collection of securities can be addressed through further consultation and dialogue with YG before and throughout regulatory process. Canada expects this consultation will work to provide the additional assurance that the First Nations are seeking regarding concerns that the Project will become another example of a mine clean-up paid for by taxpayers.
>
> Given information provided by LFN and RRDC throughout the assessment process and decision stages, including in their June 14, 2022 letter, Decision Bodies acknowledge that LFN and RRDC have questions and concerns remaining about this issue. However, based on the above, and with the implementation of Mitigation Measures No. 16 to No. 20, the [federal Decision Bodies] are confident that outstanding questions about the economic viability of the Project will be addressed through further consultation during the regulatory phase, and that potential impacts on Aboriginal rights will be minimized.
>
> [Emphasis added.]

[214] Drawing on Canada's description of the consultation process in the CCAR, I would make the following observations.

[215] First, Canada's statement that the *YESAA* process "does not review the economic feasibility of a project for a final conclusion or determination" is correct to some extent, but fails to acknowledge the role the Decision Bodies play when approving a project to proceed to the regulatory phase. In this case, the federal Decision Bodies did not review the Project with a view to arriving at a "final conclusion or determination" on whether it is economically feasible. That is not the role of the Decision Bodies, but a decision to be made by, and from the perspective of, the proponent BMC. Evidently, BMC had determined that the Project was worth pursuing.

[216] However, the fact that the federal Decision Bodies could not make a "final conclusion or determination" on economic feasibility does not mean that they could not consult regarding the economics of the Project based on the information and

submissions of Kaska and BMC. The Decision Bodies could and should have considered the reasonableness of the concerns raised by Kaska and the responses given by BMC. These are considerations that would go into the mix of factors to be considered in making the initial approval decision and, if approval is granted, in crafting the conditions of approval. By refusing to consider economic feasibility, the Decision Bodies ignored a consideration that was important to both Kaska and BMC, albeit for very different reasons.

[217] Second, it is surprising and unfortunate that the Decision Bodies did not engage with BMC's response to the Golder Report, the updated NI 43-101 Technical Report (the "Updated BMC Report"). This report was apparently provided to Kaska, but as noted in the CCAR, it "remains unknown whether the First Nations have reviewed this document or whether they have had discussion about these concerns directly with the Proponent".

[218] It is equally unfortunate and surprising that the Updated BMC Report was referred to only in passing in some of the communications and documents produced in the judicial review. Not only is there no information about the discussions that may have taken place between BMC and Kaska after delivery of the Updated BMC Report, but it appears that there was no further consultation between Kaska and the Decision Bodies about the competing reports regarding the feasibility of the Project. In addition, given that the principal ground of appeal focuses on the topic of economic feasibility, it is surprising that the Updated BMC Report was not included in the appeal books. This indicates to me that the position taken by the Decision Bodies effectively shut down discussion on the topic.

[219] Third, I would observe that the Decision Bodies were correct to say that consultation on the factor of economic feasibility would continue through the regulatory phase. It is obvious that BMC would continue to evaluate the economic feasibility of the Project from its own perspective. The decisions made by the regulatory bodies during the regulatory phase would impact BMC's economic feasibility analysis and would require further consultation with Kaska. Only after the

completion of the regulatory phase would BMC have a more complete understanding of financing, costs, and market conditions. At that time, it would make its final determination on the Project's viability.

[220] However, there is merit to Kaska's contention that once the Decision was issued, an important opportunity to consult on economic feasibility—as Kaska understood that term—was already gone. BMC's final determination on the viability of the Project is very different from the determination that the Decision Bodies made in approving the Project to proceed to the regulatory phase. By limiting its considerations at this initial stage, the Decision Bodies eliminated an important factor from the consultation process.

[221] Finally, as my colleague points out at para. 120 of her reasons, the essential question raised by Kaska is a broad one: whether the Project is "worth it." This question is not solely, or even primarily, a question of economic feasibility. It is a broader question that involves a consideration of all the factors, including economic feasibility, that the Decision Bodies must consider in granting approval to move to the regulatory phase.

[222] In summary, I am of the view that the *YESAA* process facilitated lengthy, thorough and extensive consultation. It could have reached the required level of deep consultation had the Decision Bodies not adopted a position that inappropriately limited the factors to be considered.

"The Honourable Mr. Justice Butler"

I agree:

"The Honourable Justice Charlesworth"