SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v YESAB*, 2025 YKSC 14

Date: 20250304
S.C. No. 23-AP002
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
(Director, Mineral Resources Branch,
Department of Energy, Mines and Resources)

APPLICANT

AND

YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT BOARD (Dawson City Designated Office)
TR'ONDËK HWËCH'IN, FIRST NATION OF NA-CHO NYÄK DUN, SILVER47 EXPLORATION CORP., AND
THE ATTORNEY GERNERAL OF CANADA

RESPONDENTS

Before Chief Justice S.M. Duncan

Counsel for the Applicant	I.H. Fraser
Counsel for the Yukon Environmental and Socio-Economic Assessment Board	Brook Land-Murphy and Kate R. Phipps
Counsel for the First Nation of Tr'ondëk Hwëch'in	Micah S. Clark and Brianna Paulin
Counsel for the First Nation of Na-Cho Nyäk Dun	Nuri Frame and Tasha Paramalingman
Counsel for Silver47 Exploration Corp.	Waldemar Braul and Joshua Jantzi
Counsel for the Attorney General of Canada	Keith Cruz and Marlaine Anderson-Lindsay

REASONS FOR DECISION

OVERVIEW

[1] This is an application for judicial review by the Yukon government of the report and recommendation of the Designated Office ("DO") in Dawson City of the Yukon Environmental and Socio-economic Assessment Board ("YESAB"). It recommended to the Yukon government decision body that a proposed mineral exploration program on 779 claims staked by Silver47 Exploration Corp. ("Silver47") in an area covered by the Peel Watershed Regional Land Use Plan ("PWRLUP") not be allowed to proceed. The Yukon government says the DO report and recommendation was unreasonable and its process lacked procedural fairness. As a result, it requests the Court to quash the report and return it to the DO for reconsideration.

[2] The Director, Mineral Resources Branch of the Yukon government, is the decision body under the governing statute, the *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7 ("*YESAA*"). This means they decide whether to accept, reject, or modify the recommendation of the DO. The Yukon government is the applicant in this judicial review.

[3] The DO conducted its assessment over approximately 12 months, during which time it sent five requests for information to the exploration company Silver47, four of them about fish, wildlife, and habitat baseline data. Silver47 consistently responded that they would collect baseline data during their exploration activities and before any development activities occurred.

[4] The DO found that the disturbance and displacement of wildlife as a result of the project activities contributed to significant adverse effects to wildlife and First Nation

wellness. The absence of baseline data limited the ability of the DO to develop terms and conditions that could mitigate significant adverse effects to wildlife and First Nation wellness.

[5] The DO further determined the project did not adhere to the PWRLUP, which in their view required the collection of baseline data in advance of industrial development activities, including exploration activities. The failure to adhere to the PWRLUP contributed to the significant adverse effects on First Nation wellness because of its direct link with the upholding of the integrity of the PWRLUP, as a product of the land use planning process that emerged from the Final Agreements. The DO observed that respecting and upholding the PWRLUP is an essential way to mitigate effects of development activities in the planning region on First Nation wellness.

[6] The Yukon government says the DO recommendation is unreasonable because:

i) its treatment of the requirement for baseline data was inconsistent – on the one hand, the DO said baseline data was required for its recommendation, yet it recommended the project not be allowed to proceed in the absence of baseline data and failed to consider alternatives such as suspending the assessment until the data was provided; imposing terms and conditions applicable before the start of project activities; or referring the project to the executive committee because of the inability to determine significant adverse effects;

ii) the DO exceeded the scope of its statutory authority by determining the project did not conform to the PWRLUP;

iii) the DO inappropriately found the project lacked conformity with the PWRLUP and then used this non-conformity inappropriately as a basis for finding there were significant adverse effects on wildlife and First Nation wellness that could not be mitigated;

iv) the DO acted in a procedurally unfair way by failing to give notice to Silver47 that it needed to provide baseline data or risk a recommendation that the project not proceed.

[7] Silver47 supports the Yukon government's arguments and adds that the DO:

i) applied the incorrect law by not using the definition of development in the *Quartz Mining Act,* SY 2003, c 14 ("*QMA*"), to its analysis of whether baseline data requirements are needed for exploration activities;

ii) 'read in' additional requirements for the project that were not required for other similar projects (i.e. provision of baseline data before exploration);

iii) did not inform Silver47 of the additional requirements; and

iv) did not provide Silver47 with an opportunity to provide information to satisfy the new requirements.

[8] Tr'ondëk Hwëch'in ("TH"), First Nation of Na-Cho Nyäk Dun ("FNNND"), and the Attorney General of Canada ("AGC") oppose the application for judicial review. They say the DO's recommendation is entitled to deference and is reasonable because:

i) the PWRLUP was a critical contextual consideration, arising from the Final Agreements, and the consideration by the DO of the PWRLUP requirement of the proponent to provide baseline data before exploration activities was appropriate, despite the *QMA* definition and despite the

Yukon Land Use Planning Council opinion that the project was in conformity with the PWRLUP;

ii) the DO reasonably interpreted the absence of baseline data in its determination that effective mitigative measures were limited;

iii) Silver47 was provided with sufficient notice and time to provide the requested baseline data;

iv) the DO recommendation that the project not be allowed to proceed in the absence of such data instead of suspending its recommendation, imposing terms and conditions, or referring to executive committee, was a reasonable option, owed deference.

[9] In addition, the two First Nations, the AGC, and YESAB, all argue that the DO report is not amenable to judicial review because it is a recommendation, not a decision, and it does not affect the Yukon government's legal rights, create legal obligations, or have a prejudicial effect.

[10] For the reasons that follow, I dismiss this application because it is not amenable to judicial review. The administrative process has not yet concluded: the DO recommendation is not a decision. The intent of Parliament, demonstrated by the legislative scheme that does not include the provision for a DO reconsideration, is that the decision body's decision whether to accept, reject, or vary the recommendation of the DO is reviewable. The applicable jurisprudence supports this approach.

[11] While the parties urged me to make findings on the merits of the judicial review in the event my decision was to dismiss it for procedural reasons, I decline to do so. The statutory scheme is clear: it does not contemplate court intervention at this stage. In any

event, if I am right in my conclusion to dismiss for lack of reviewability, then any determination on the argument for judicial review will be *obiter* and of no precedential guidance. Further, any judicial findings on the arguments about the assessment process or the report and recommendation at this stage may have an inappropriate impact or influence on any future decision-making process; and may prejudice a future judicial review, if one is brought after a decision of the decision body has been made. That decision will form part of a different record than that currently before the Court. If I am wrong in my decision to dismiss on a preliminary basis and the DO report and recommendation is found by an appellate court to be reviewable, I recognize that without an analysis of the substantive arguments the higher court will have no judicial decision to review, and this may be considered an affront to judicial economy as well as an unnecessary increase to the litigants' expenses. However, to decide the substance of this judicial review application now contradicts the statutory scheme, as well as the principles and practicalities on which my findings that the DO report and recommendation is not judicially reviewable are based.

BACKGROUND

The assessment process

[12] The environmental socio-economic assessment process in the Yukon arose from the Umbrella Final Agreement ("UFA"), the land claims agreement negotiated by the Yukon First Nations, the Yukon government, and the federal government. Each of 11 Yukon First Nations, including TH and FNNND, also negotiated individual Final Agreements and Self-government agreements with specific provisions unique to their

First Nation. All Final Agreements contain the UFA provisions. Final Agreements are modern treaties and protected under s. 35 of the *Constitution Act*, *1982*.

[13] Chapter 12 of the Final Agreements describes the process by which development projects proposed anywhere in the Yukon are assessed. The process is implemented by *YESAA*, a federal statute, consistent with Chapter 12. It creates the YESAB, an independent body responsible for administering a comprehensive, neutrally conducted assessment process. YESAB members are appointed or nominated by Canada, Yukon, and the Council of Yukon First Nations, but the Board is arms-length from all governments.

[14] There are six assessment districts throughout the Yukon. Each district has a designated office, including one in Dawson City, that is responsible for assessment of many project activities in the assessment region. Project proposals can emerge from many industry sectors including mining, forestry, power generation, waste management, recreation, and tourism.

[15] After conducting an adequacy review, to ensure the proponent has provided sufficient information to start the evaluation and has complied with the rules and directives of YESAB, the designated office describes the scope of the project in a statement. The evaluation of the project and any mitigative measures are based on the project scope as determined by the designated office.

[16] At the next stage of evaluation, the designated office notifies the proponent, the Yukon First Nation(s) in whose traditional territory the project is proposed to be located or where it may have significant environmental or socio-economic effects, the decision bodies, and any other person on the notification list. The notification invites views and

information relevant to the evaluation. The designated office also publicizes the evaluation generally for public comment and can request additional information.

[17] Section 42 of *YESAA* sets out what the assessor must consider in an assessment. Some of those considerations relevant to this matter are:

> …
>
> (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;
>
> …
>
> (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;
>
> …

[18] As well the statute gives the assessor discretion to "take into consideration any matter that it considers relevant in the assessment of a project or existing project" (s. 42(4)). The assessor is required to "give full and fair consideration to scientific

information, traditional knowledge and other information provided to it or obtained by it under this *Act*" (s. 39).

[19] After the designated office receives, requests, and analyses information and views it considers relevant to its evaluation, including from First Nations, government or regulatory agencies and others, it then determines the significance of any adverse effects of the proposed project activities and whether those effects can be mitigated. It makes a recommendation to decision bodies, which are one or more of the federal, territorial, or First Nations governments. A decision body is an entity that issues a permit or licence necessary for the project to proceed.

[20] The designated office can recommend one of the following to the decision bodies:

i) the project be allowed to proceed if it finds it will not have significant adverse environmental or socio-economic effects in or outside the Yukon;

ii) the project be allowed to proceed subject to specific terms and conditions if it finds it will have or is likely to have significant adverse environmental or socio-economic effects in or outside the Yukon that can be mitigated by the terms and conditions;

iii) the project not be allowed to proceed if it determines it will have or is likely to have significant adverse environmental or socio-economic effects in or outside the Yukon that cannot be mitigated; or

iv) the designated office can refer the project to the executive committee of YESAB for a screening, if after taking into account any mitigative measures included in the proposal, it cannot determine whether the

> project will have, or is likely to have, significant adverse environmental or socio-economic effects.

[21] Reasons are required for any of the recommendations.

[22] The decision bodies then decide whether to accept, reject, or vary the designated office recommendation within a certain time period prescribed by the *YESAA* regulations. By doing this, the decision bodies are determining whether the project proceeds and, if so, under what terms and conditions. The decision bodies must give full and fair consideration to scientific information, traditional knowledge and any other information provided with the recommendation (s. 74). Decision bodies can also consider other matters raised during their consultation processes required by statute and the *Constitution* before their determination.

[23] There is no authority under *YESAA* for a decision body to return a designated office recommendation to the designated office (s. 75). It may only accept, reject, or vary the recommendation. By contrast, when a panel of the Board established by the executive committee, or the executive committee, makes a recommendation to a decision body, the decision body may either issue a decision accepting the recommendation or refer the recommendation to the panel or executive committee for reconsideration. The panel or executive committee then makes a new recommendation to the decision body, which must then issue a decision document that replaces any previous decision document and accepts, rejects, or varies the new recommendation. If there is no new recommendation within the prescribed time period, the panel or executive committee is deemed to have made the same recommendation made at the conclusion of the screening or review.

The Purposes of *YESAA*

[24] The purposes of *YESAA* are clearly set out in s. 5(2):

> (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.

Land Use Planning and *YESAA*

[25] Chapter 11 of the Final Agreement is about the development, approval and implementation of regional land use planning. It confers treaty rights upon the First

Nations to "participate meaningfully in the management of lands and resources in its traditional territory" (*First Nation of Na-Cho Nyäk Dun v Yukon (Government of),* 2024 YKCA 5 at para. 103). The "Chapter 11 process is designed to foster a positive, mutually respectful, and long-term relationship between the parties to the Final Agreements" (*First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para. 47). The Yukon government and affected Yukon First Nations in the region can agree to establish a Regional Land Use Planning Commission to develop a regional land use plan. Once approved, a land use plan sets out the overarching requirements for the use of land, water and other resources in that region. Section 11.7.1 of the Final Agreement provides that subject to section 12.17.0, the Yukon government "shall exercise any discretion it has in granting an interest in, or authorizing the use of, land, water or other resources in conformity with the part of a regional land use plan…". The planning commission may monitor implementation and compliance with the plan.

[26] Section 12.17.0 of the Final Agreement is reflected in s. 44 of *YESAA*. It ensures regional land use plans are incorporated into assessment processes. The designated office must consider the relevant regional land use plan and invite the regional land use planning commission to advise whether the proposed project conforms with the applicable plan (s. 44(1)). If the commission's advice is that it does not, the designated office must invite representations from the commission (s. 44(2)). While the designated office may recommend a non-conforming project be allowed to proceed, it must also recommend terms and conditions that will bring it into conformity with the plan (s. 44(3)).

[27] Where there is no longer any regional land use planning commission in place, the designated office cannot obtain a formal conformity check required under the

statute. The approach in the Yukon has been to discontinue the planning commissions after the plans are in place, affecting the operability of the conformity check required by s. 44 of *YESAA*.

Peel Watershed Regional Land Use Plan

[28] In 2004, TH, FNNND, Vuntut Gwitchin First Nation ("VGFN"), the Gwich'in Tribal Council ("GTC") and the Yukon government established the Peel Watershed Planning Commission to develop a regional land use plan for the Peel Watershed (the "Plan"). It has been described as one of the largest intact wilderness watersheds in North America, with 68,000 square kilometres in northern Yukon with a nearly untouched ecosystem (*First Nation Na-Cho Nyäk Dun v Yukon (Government of)*, 2023 YKSC 5 at paras. 15, 12). Fifteen years after the PWRLUP began to be developed, and after litigation to the Supreme Court of Canada, on August 22, 2019, it was approved by the parties – Government of Yukon, TH, FNNND, VGFN and the GTC.

[29] The PWRLUP is not legislation; it makes recommendations and provides guidance on environmental protection, heritage and culture protection, and economic development in the region. It applies throughout the Peel Watershed Planning Region on First Nations settlement and non-settlement land. It states its "cornerstone" is "sustainable development," defined as "beneficial socio-economic change that does not undermine the ecological and social systems upon which communities and societies are dependent," almost the same wording as appears in s. 5(2)(e) of *YESAA*, the purpose section of the statute.

[30] The PWRLUP divided the region into 16 landscape management units, each with a land use category.

[31] In their approval letter, the parties endorsed the goals, management strategies and best management practices summarized in Appendix B of the Plan; committed to implement all the recommendations in the Plan, including the policy and research recommendations summarized in Appendix C of the Plan; and committed to ensuring that proponents and resource decision-makers understood and adhered to the Plan.

[32] The uncontradicted affidavit evidence of Tim Geberding, the TH representative on the Peel Senior Liaison Committee, which provided input to and liaised with the Peel Watershed Planning Commission as they developed the Plan, was that the parties intended to implement all of the recommendations in the Plan upon approval.

[33] The policy recommendations in Appendix C include:

> 3 Ensure adequate wildlife and habitat baseline data collection is completed prior to any development activities occurring in the Peel Watershed Planning Region;
>
> 4 Ensure adequate fish, waterbird, aquatic habitat, and water quality baseline data collection is completed prior to any development activities occurring in the Peel Watershed Planning Region; and
>
> …
>
> 6 Ensure adequate heritage and historic resource surveys and data collection are completed, prior to any development activities occurring in the Peel Watershed Planning Region.

[34] The parties also approved an Implementation Plan in or about 2020, prepared by the Peel Plan Implementation Committee. It includes Appendix 3, “Framework for Conformity Evaluation for Proposed Industrial Activities in the Peel Region”. This framework is intended to apply both to activities required to be assessed by YESAB, and those activities that are not. It states, “[a]ny application for an industrial development activity that is deemed out of conformity with the [Peel] Plan will not be

allowed to proceed, unless it is brought into conformity." It defined industrial development activities to include "mining" and "any land use". The parties committed that the information in Appendix 3 will be provided to proponents, distributed to new and current mining claim holders, and will be made available on the Yukon government Energy, Mines and Resources ("EMR") website, in mining recorder's offices, and in YESAB offices. Standard terms and conditions would be developed for specific sectors, including the mining industry.

[35] The parties to the Plan also prepared and approved a standard terms and conditions document, released to the public in September 2022, intended to inform conformity checks for a proposed industrial activity within the Peel Watershed. The document states that "adequate baseline data" on wildlife, terrestrial habitats, heritage, and historic resources "must be collected before any development activities, including exploration, can begin."

[36] The Plan addressed the reality of the absence of a functioning land use planning commission to monitor implementation and compliance with the Plan by providing that the Yukon Land Use Planning Council ("YLUPC") could assume the task of checking conformity of a proposed project with the Plan. This has been occurring since 2009 with the YLUPC providing checks of projects in another planning region, the area included in the North Yukon Regional Land Use Plan. Although this has been the practice, the checks by YLUPC are not formal conformity checks contemplated under s. 44. The YLUPC did not develop the Plan the way the Commission did, and therefore has less familiarity with the Plan, and is not authorized by statute to perform the checks. Their review has been described as a non-binding opinion.

Silver 47 Project Proposal and Designated Office Correspondence with Proponent

Project proposal

[37] On December 7, 2021, Silver47 submitted a project proposal for the Michelle Creek Quartz Exploration Project (the "Project"), located approximately 120 kilometres northeast of Dawson City, in the traditional territories of TH and FNNND. It is also entirely within the PWRLUP region across three Landscape Management Units ("LMU"); LMU 4, West Hart River (wilderness area); LMU 5, Blackstone River (integrated management area); and LMU 6, Hart River (wilderness area). The wilderness areas are part of the Conservation Area, defined in the PWRLUP as areas managed for conservation or protection of ecological and cultural resources, and long-term maintenance of wilderness characteristics. New industrial land-use dispositions, as well as any new surface access, are not allowed in Conservation Areas. The integrated management area is an area where new oil and gas, mining, and other industrial land uses are allowed, including surface access, subject to PWRLUP recommendations and regulatory processes.

[38] Silver47 proposed to conduct mineral exploration activities on its 779 mineral claims. It described the activities as percussion and diamond drilling (150 sites, 60,000 metres total), drill pad construction (up to 200 pads), hand trenching (50 trenches 10 metres x1 metre x1 metre), prospecting, geochemical sampling (up to 10,000 samples), geological mapping, clearing (up to 200 clearings), helicopter flights and pad construction, constructing a camp (up to 40 people) and related waste management activities, water use, fuel storage, and progressive and final reclamation. The activities are to occur from May 15 to October 30 each year for five years.

DO adequacy assessment

[39] The DO concluded the Project proposal was adequate on February 3, 2022, after requesting and receiving additional information from Silver47 about the project area, scope and scale of exploration activities, and the remote camp. It defined the project scope and notified Silver47, the decision body- Mineral Resources branch of EMR, TH, and FNNND.

YLUPC qualified opinion that project conformed to PWRLUP

[40] At the commencement of its assessment, the DO received a qualified opinion from the YLUPC that the proposed project conformed to the PWRLUP. However, the YLUPC expressed uncertainty about whether the policy recommendations in the approved Plan were only for consideration or were binding policy. The YLUPC specifically referenced Appendix C policy recommendation #3: to ensure adequate wildlife and habitat baseline data collection is completed prior to any development activities occurring in the Peel Watershed Planning Region. Later, on July 26, 2022, the YLUPC explained that it reviews proposals in areas with an approved plan and its "opinion as a third party as to whether a project conforms to the plan" was a result of Chapter 11 (s. 11.3.3 and s.11.3.3.5) of the Final Agreements: "[t]he Yukon Land Use Planning Council shall make recommendations to Government and each affected Yukon First Nation on…such other matters as Government and each affected Yukon First Nation may agree." The YLUPC concluded "YLUPC itself is also uncertain whether the current arrangement of having YLUPC provide its *opinion* as third party is appropriate" [emphasis in original].

DO Information requests

[41] The DO evaluation process included the issuance of five information requests to Silver47. Four of the five related to baseline data collection.

March 15, 2022 information request and April 12, 2022 response

[42] On March 15, 2022, the DO's second information request to Silver47 was for a revised and more detailed Wildlife Management Plan that included baseline information about sheep, caribou, furbearers, birds of prey, Dolly Varden char, species at risk and surface disturbance. Silver47 in its response on April 12, 2022, committed to begin baseline water monitoring and to create an updated Wildlife Management Plan for the project area, including conduct of wildlife surveys, during the exploration stage of the project and before development. Silver47 also said it would compile publicly available data.

May 26, 2022 information request and June 1, 2022 response

[43] On May 26, 2022, the DO's next information request to Silver47 expressed concern about the absence of any baseline information before project activities were to commence. The DO requested specific information about Silver47's plan to collect baseline data: how and what information would be collected, and how adverse project effects would be prevented without baseline data. Silver47 responded on June 1, 2022, with a summary of the information it intended to collect during the exploration stage.

July 11, 2022 information request and September 1, 2022 response

[44] On July 11, 2022, the DO's further information request to Silver47 was for more information related to the effects of the Project on fish and wildlife values. The DO referenced comments received from the First Nations that Silver47's responses to that

date did not fulfill the requirement for adequate baseline data before the occurrence of any development, in contravention of the PWRLUP, that their information contained no analysis of the data, and there was no detail about the proposed data collection processes. The First Nations also wrote that the YLUPC view of the project in relation to the PWRLUP was not a true conformity check for the purpose of the UFA or *YESAA*. Silver47's response on September 1, 2022, was that it understood the YLUPC would undertake the Plan conformity checks, that there was a difference between mineral exploration and mineral development. They explained the actions taken thus far to gather baseline data, using the interim definition of adequate baseline data as defined by the First Nations.

September 8, 2022 information request and September 12, 2022 response

[45] On September 8, 2022, the DO's final information request acknowledged Silver47's distinction between mineral exploration and development and their commitment to the collection of baseline data before mineral development activities. The DO requested confirmation that the baseline monitoring program Silver47 described in their response to the previous information request would not occur as part of the exploration project. The DO also asked if Silver47 would provide additional baseline data for fish and wildlife values. Silver47's response on September 12, 2022, stated their understanding that the regulators and YLUPC would determine if baseline monitoring were required for exploration project activities. They noted that baseline data collection had not been requested for other Yukon exploration programs. They confirmed they would commence a baseline data monitoring program once they

received a Class 3 land use approval – i.e. a permit from the decision body to conduct the project exploration activities – and before mineral development activities.

First Nation and Yukon government submissions to DO

[46] Both TH and FNNND provided several submissions to the DO during the course of the assessment. In sum, the First Nations stated the Project proposal did not conform to the PWRLUP because of the absence of adequate baseline data from the proponent. They agreed that baseline data was required before exploration activities commenced. They agreed that the YLUPC was providing a non-binding opinion about conformity of the Project with the Plan, and not a conformity check as set out in s. 44 of *YESAA*.

[47] The Yukon government, through the Department of Environment, also provided comments to the DO during the assessment. They included the identification of the need to provide baseline data arising from the policy recommendations in the PWRLUP, the intention of which is to guide sustainable development and achieve the goals in the Plan. More specifically, the Department of Environment wrote:

> Adequate baseline data … provides a benchmark to determine if changes or effects are occurring or are likely to occur as a result of the activity and other external stresses. Baseline data collection should be robust and repeatable, scientifically defensible, and be able to link to an effects analysis and associated mitigation measures to minimize effects. Baseline data should be collected at the local and regional scales, where appropriate, to adequately capture areas that have the potential to be affected by the project. (Department of Environment YESAA – Assessment Comment, March 7, 2022, at 2-3)

[48] They further wrote:

> The Proponent has not provided adequate baseline data and surface disturbance information to allow for a meaningful evaluation of the proposed project. (at 3)

Designated Office Recommendation and Reasons

[49] The DO reviewed the Project proposal, considered all of the comments on a variety of topics from 13 organizations, including TH, FNNND, the Yukon government, and members of the public, responses to information requests, answers to other queries provided to them, the Plan and the opinion from the YLUPC. It issued its recommendation in the form of an Evaluation Report on December 16, 2022.

[50] The DO's view was that the Project was likely to have significant adverse environmental and socio-economic effects on wildlife and First Nation wellness, and that these effects could not be adequately mitigated. Specifically, based on the information reviewed about the Project, the activities would cause disturbance and displacement of wildlife, creating significant adverse effects, in particular to caribou and sheep. The effectiveness of Silver47's proposed measures to mitigate the harm to wildlife could not be assessed or predicted because there was no baseline data provided about wildlife use of the area. Baseline data enables the extent of the impact of project activities on fish, wildlife and habitat to be determined. It assists in the development of mitigation measures to reclaim or restore the area to its natural state or at least to baseline conditions, and to ensure the goal of sustainable development is fulfilled.

> … Adequate baseline data could, potentially, have helped to inform the development of measures which could effectively and sufficiently mitigate these significant adverse effects. The absence of such information, coupled with the high socio-cultural value of sheep and caribou at the project location, as indicated in the Peel Watershed Regional Land Use Plan (the Plan) and comment submissions, has resulted in the Designated Office being unable to recommend defensible mitigative measures. Accordingly, and based upon the information available to it, the Designated Office concludes that effects to caribou and sheep cannot be adequately mitigated. (Evaluation Report at 1)

[51] Similarly, based on information provided about the Project activities, the DO found they would adversely affect First Nation wellness at a level considered to be high magnitude and irreversible. The absence of the collection, analysis and interpretation of baseline data at the initial project design stage meant that a critical step in the development of mitigation measures to address the adverse impacts to First Nation of the project activities was missing. The DO's ability to recommend confidently mitigative measures to address project effects to First Nation wellness and wildlife was limited due to the absence of baseline data. This conclusion was compounded by the fact that the absence of baseline data in advance of exploration activities was contrary to the PWRLUP:

> Recommending that the project proceed with terms and conditions would undermine the land use planning process and disempower the affected First Nations whose wellness is directly linked to upholding the integrity of the Plan as a product of the land use planning process. Given the relationship of the Plan with the First Nation Final Agreements, it is understood that respecting and upholding the PWRLUP Plan is an essential way of mitigating effects to First Nation wellness from development activities within the planning region. (Evaluation Report at 91)

[52] The DO acknowledged that conformity with the PWRLUP was not necessary in order for it to recommend that a project proceed. If the project did not conform to a land use plan, it would not necessarily preclude a recommendation that the project be allowed to proceed. The DO could consider the way in which it did not conform and use that consideration to support a determination of significance and whether significant adverse effects could be adequately mitigated (Evaluation Report at 55). In considering the project's conformity with the PWRLUP, the DO noted it had received a number of opinions – from YLUPC, TH, FNNND – all of which included relevant and important

information for the DO to weigh. The DO stated it considered those opinions "as context for the significance determination of project effects, in particular effects to wildlife and First Nation wellness …" (Evaluation Report at 56).

[53] The DO's opinion was that the project did not adhere to the policy recommendation of the PWRLUP because the collection, analysis and interpretation of adequate baseline data was required in advance of the project activities, including exploration. The policy recommendations were approved and committed to be implemented by the parties to the Plan. Baseline data collection was essential to achieving the Plan's objectives. The Plan directs that disturbed areas must be reclaimed or restored to their natural state. It is impossible to assess the degree of disturbance, cumulative effects, or the natural state of the land, without a clear understanding of baseline conditions. This led to the limitation on the development of mitigation measures here, and the consequent inability of the DO to consider what measures could be recommended to have the project could conform to the PWRLUP.

PRELIMINARY ARGUMENT – JUDICIAL INTERVENTION IN ADMINISTRATIVE PROCESS

[54] The first question is whether this judicial review may properly be considered by the Court at this time.

Positions of the Parties

[55] All parties except the Yukon government and Silver47 object to the Court's intervention at this time, based on different characterizations of the objection – lack of standing, abuse of process, prematurity, lack of justiciability, or lack of amenability to judicial review. These different characterizations all have the same underlying basis – the DO issued a report and recommendation, not a decision, and reports and

recommendations are not amenable to judicial review. Normally, parties cannot proceed to court until the administrative process has been completed. Further, the relief sought by the Yukon government to refer the recommendation to the DO for reconsideration is statutorily impermissible. As the decision body, the Yukon government must decide whether to accept, reject, or modify the DO report and recommendation. If the decision body decides the Project will be allowed to proceed, it can decide on what terms and conditions, if any. It can reject the DO recommendation based on its own reasoning. The parties say the DO report and recommendation does not affect legal rights, impose legal obligations, or cause prejudicial effects, on the Yukon government or anyone else.

[56] The Yukon government says it can apply for judicial review at this time because: i) the statutory requirement on the decision body to consider the DO recommendation and issue a decision document within a prescribed period of time is an imposition of a legal obligation on the Yukon government; ii) if the DO recommendation is unlawful, then likewise the decision body has no legal basis on which to base its decision; and a rejection of the DO recommendation results in significant additional work by the decision body, which does not fulfill the purpose in s. 5(2)(i), and the requirement in s. 40, to ensure the assessment process is conducted in a timely, efficient and effective manner that avoids duplication; iii) once the Yukon government makes its decision, it cannot judicially review it and there is no effective remedy other than a judicial review at this stage for the Yukon government to address an unreasonable or procedurally unfair decision of the DO; iv) s. 116 of *YESAA* contemplates and provides for a judicial review of the DO report and recommendation.

[57] The Yukon government's argument that this Court should now quash the DO recommendation and return it to the DO, includes that the DO exceeded its authority or jurisdiction by performing its own conformity check with the PWRLUP; it recommended the Project not proceed because of an absence of baseline data after stating that it needed baseline data for the recommendation; and it was insufficiently transparent with Silver47 about the critical importance of baseline data to the recommendation about the exploration project. These arguments are relevant to the procedural determination of reviewability as they are used to support the Yukon government's argument that the report and recommendation are materially flawed, and duplication of effort will be required in order for the decision body to arrive at a decision.

Law

[58] The Federal Court of Appeal in *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 ("*CB Powell*"), described the concept of the appropriate timing of judicial intervention in the context of an administrative process as follows:

> [31] … absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course … only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[59] The policy reasons for this rule include avoiding costs and delays of premature court applications, avoiding waste of judicial resources of hearing an interlocutory judicial review when the applicant may succeed at the end of the administrative process in any event, preventing fragmentation of the decision, and allowing the court to do its

review once it has all of the information about the decision at issue from every stage of the administrative process. This approach also supports the principle of judicial respect for administrative decision makers (para. 32).

[60] The legal authority for the rule has its roots in the common law. The Supreme Court of Canada in *Martineau v Matsqui Disciplinary Bd.*, [1980] 1 SCR 602 at 622-23 wrote:

> … *certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person.

[61] In other words, there must be a modification to a person's legal position before the court intervenes.

[62] This principle has been applied in recent years in cases similar to this one: the context of environmental assessments, albeit in the federal context. In *Gitxaala Nation v Can*ada, 2016 FCA 187 ("*Gitxaala*"), *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 ("*Tsleil-Waututh*"); and *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 ("*Taseko*"), leave to appeal refused [2020] SCCA No 49, the Federal Court of Appeal concluded that for administrative conduct to be subject to judicial review, it had to affect legal rights, impose legal obligations or cause prejudicial effect.

[63] *Gitxaala* consolidated a number of applications for judicial reviews. Some were judicial reviews of an order in council of the Governor in Council requiring the National Energy Board to issue certificates allowing the Northern Gateway pipelines to be constructed on conditions. However, other judicial reviews being heard at the same time were of a report issued by a joint review panel, recommending the issuance of the

certificates. The joint review panel further recommended the Governor in Council conclude that the potential adverse environmental effects of the pipeline project were not likely to be significant. After the release of the report and recommendation of the joint review panel, consultation with 80 different Indigenous groups occurred, and the Governor in Council accepted the recommendation of the joint review panel.

[64] The Federal Court of Appeal dismissed the judicial reviews brought against the joint review panel report and recommendation, because "[n]o decisions about legal or practical interests had been made" (at para. 125). Only the Governor in Council, who was the decision maker through its issuance of an order in council after considering the report and recommendation of the joint review panel and the results of the consultation process, could have their decision judicially reviewed. The legislative scheme showed "that for the purposes of review the only meaningful decision maker is the Governor in Council" (at para. 120). The environmental assessment consisted of gathering, analysing, assessing, and studying information, in order to assist in the development of recommendations to the Governor in Council. It was for the Governor in Council to consider any deficiency in the joint review panel report. In this respect, the report was not immune from judicial review.

[65] The same court followed *Gitxaala* in *Tsleil-Waututh*, another decision about pipeline development and a consolidation of numerous applications for judicial review. Like *Gitxaala*, some judicial reviews sought review of an order in council directing the National Energy Board to issue certificates approving the construction and operation of the Trans Mountain pipeline project, while others sought reviews of the report of the National Energy Board recommending that approval. The Federal Court of Appeal,

following the reasoning in *Gitxaala*, dismissed the judicial review applications of the report and recommendation. The report played no role other than assisting in the development of recommendations submitted to the Governor in Council. Only the decision of the Governor in Council was reviewable.

[66] Next, the Federal Court of Appeal in *Taseko* found that a report prepared by a federal review panel was not amenable to judicial review. That report concluded that an open pit copper-gold mine project near Williams Lake, British Columbia, would likely cause significant adverse environmental effects. The Minister of the Environment then decided that the project was likely to cause significant adverse environmental effects and the Governor in Council agreed, and found these effects were not justified. In considering the reviewability of the panel report, the court applied the reasoning in *Gitxaala* and *Tsleil-Waututh*: since the recommendations of the federal review panel were not binding on the Minister, they had no independent legal or practical effect and were therefore not reviewable. The court rejected counsel's argument that the legislative scheme in *Gitxaala* and *Tsleil-Waututh* was a distinguishable feature that prevented the application of the reasoning in those cases to *Taseko.* In the two earlier cases, the same legislative scheme allowed the Governor in Council to refer the reports and recommendations of the joint review panel or the National Energy Board for reconsideration of any deficiencies. Any judicial review of the reports before reconsideration would pre-empt that reviewing and reconsideration function and would be premature. By contrast, the governing legislation in *Taseko* did not allow for any reconsideration by the joint review panel; it only allowed the Minister to request clarification of the conclusions and recommendations. The legal implications of the

federal review panel's report and recommendation were therefore more substantial in *Taseko* than those in the other cases where the report and recommendations could be reconsidered. The Federal Court of Appeal in rejecting that argument stated that the ability of a report to be reconsidered does not change its essential nature – i.e. a report and recommendation affects no legal rights, carries no legal consequences, and serves only to assist the Minister or the Governor in Council in making their decisions.

[67] Two other recent decisions of the Federal Court of Appeal have upheld this reasoning – *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2023 FCA 191 ("*Mikisew Cree*") at para.107; and *Sierra Club Canada Foundation v Canada (Environment and Climate Change),* 2024 FCA 86 ("*Sierra Club")* at para. 47. In *Mikisew Cree*, the Minister of Environment declined to exercise her discretionary authority under the *Canadian Environmental Assessment Act* 2012 ("*CEAA 2012*") to designate an extension of the Horizon Oil Sands Mine as a reviewable project. By not designating it as a reviewable project, the Minister's opinion was that the physical activity required by the project would not cause adverse environmental effects or public concerns related to those effects. *CEAA 2012* required the Canadian Environmental Assessment Agency ("CEAA") to advise and assist the Minister in exercising these powers and performing these duties under CEAA. To this end, CEAA had prepared an analysis report recommending the project not be designated as a reviewable project. The Federal Court of Appeal emphasized that it was critical to recognize the decision under review was the Minister's decision not to designate the extension project and not CEAA's analysis report and memoranda. "This Court has repeatedly held that such reports, produced by responsible authorities under [*CEAA 2012*], for consideration by

the Minister or the Governor in Council (GIC), are not justiciable on their own because they affect no legal rights and carry no legal consequences" (at para. 107).

[68] Similarly in *Sierra Club*, a regional assessment report was found to be not amenable to judicial review. This case involved offshore exploratory oil and gas drilling activities in an area near Newfoundland and Labrador. The reviewable decision was that of the Minister when they decided to make a regulation that excluded potential projects from project specific assessments. Although the governing legislation, the *Impact Assessment Act*, SC 2019, c. 28, required the Minister to consider the regional assessment report before making the regulation, the Federal Court of Appeal found that the regional assessment report did not involve decision-making and carried no legal consequences. It was, however, "an integral component of sound decision-making" (at para. 49, quoting *Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para. 71).

[69] This line of authority was recently reviewed and confirmed in *Lax Kw'alaams First Nation v Canada (Fisheries, Oceans and Coast Guard),* 2024 FC 1400 ("*Lax Kw'alaams"*). A judicial review was sought of a network action plan ("NAP"), developed through a trilateral planning process among the governments of Canada, British Columbia, and seventeen First Nations. Its purpose was to provide a series of recommendations to guide the implementation of a network of Marine Protected Areas in the Northern Shelf Bioregion of British Columbia. The Minister of Fisheries and Oceans publicly endorsed the NAP but took no further steps. The concern of the Lax Kw'alaams was that the NAP identified zones of protection that would close or restrict commercial fishing, including fishing grounds relied on by the Lax Kw'alaams for

economic, cultural and social reasons. They argued the NAP was a "blueprint laying the foundation for establishing [Marine Protected Areas] in northern British Columbia. …is a strategic, high-level plan that the Minister accepted and leaves 'little room for interpretation'…[and] provides the framework by which future decisions will be made" (at para. 71). In determining that the application for judicial review was premature, the Federal Court held that the NAP was a non-binding report that did not create or establish new Marine Protected Areas, and did not impose activity restrictions, such as closing fishing grounds. Instead, it consisted of recommendations, subject to change, for consideration by decision-makers in legislative processes to create new protected areas (at para. 15). Additional consultation would occur at the time the statutory decision-makers decided to engage with the regulatory processes. Following *Gitxaala, Tsleil-Waututh* and *Taseko*, the Federal Court concluded the NAP carried no legal consequences and had no legal effect. Further, the endorsement of the NAP by the Minister of Fisheries and Oceans was a single step in a large process that required additional Crown/Indigenous consultation measures as well as regulatory and legislative action. The Minister's endorsement was not binding, nor did it mandate any specific legal action. It did not adversely impact Lax Kw'alaams' claimed fishing rights in northern British Columbia.

[70] These consistent findings that reports and recommendations were not amenable to judicial review did not mean that they were immune from review. As stated by the Courts in *Gitxaala, Tsleil-Waututh*, and *Taseko*, the reports and recommendations may be reviewed in the context of the judicial review of the decision of whether or not the project should proceed. The Court in *Tsleil-Waututh* said:

> [201] …The Court must be satisfied that the decision of the Governor in Council is lawful, reasonable and constitutionally valid. If the decision of the Governor in Council is based upon a materially flawed report the decision may be set aside on that basis. Put another way, under the legislation the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be reviewed to ensure that it was a "report" that the Governor in Council could rely upon… (quotations in original).

ANALYSIS

General

[71] The Project cannot proceed without a decision from the decision body. The report and recommendation from the DO assists the decision body in making a decision. That report and recommendation does not affect the legal rights of any person, impose legal obligations on any person, or cause prejudicial effects on any person, because no decision has been made. The decision of the decision body to reject, accept, or vary the DO recommendation is what affects legal rights or imposes obligations or potentially creates prejudicial effects.

[72] I am persuaded by the Federal Court of Appeal authorities. Within the legislative scheme of *YESAA*, the DO evaluation report with recommendations is of a similar nature as the reports and recommendation in those cases. In particular, in all of the referenced cases, as in this case, the reports and recommendations which were found not to be amenable to judicial review on their own, were provided to assist statutory decision makers, who were free to accept, reject, or modify the recommendations.

[73] In this case, ss. 55 and 56 of *YESAA* set out the requirements of the designated office in conducting its evaluation. It must seek views about the Project and information

it believes relevant to the evaluation. In most cases this includes views from individual members of the public, government departments, interest and advocacy groups such as, for example, the Yukon Conservation Society, or outfitters associations. The statute also requires the designated office to seek views from any First Nation in whose territory the Project is located or in whose territory the Project may have significant environmental or socio-economic effects, or who has notified the designated office of its interest, any government agency, or independent regulatory agency (s. 55(4)).

[74] Significantly, at the end of the evaluation, which is focused on whether the project will have significant adverse environmental or socio-economic effects, s. 56 of *YESAA* requires that the designated office shall recommend to the decision bodies that the project be allowed to proceed, be allowed to proceed on terms and conditions, or not be allowed to proceed. The final potential action it may take is a referral of the project to the executive committee of YESAB for a screening, if it cannot determine whether the project will have significant adverse environmental or socio-economic effects.

[75] The words “be allowed to proceed” reinforces the limitations of the designated office’s role. It does not recommend that the project proceed or not – it recommends that the project be allowed to proceed or not. Allowing the project to proceed is part of the decision body’s role as issuer of permits or licences necessary before the project goes ahead. This reinforces the role of the designated office as the first step in a multi-step assessment and decision-making process.

[76] *YESAA* also specifically provides that the decision body cannot return the designated office report and recommendation for reconsideration. Instead, s. 74

requires the decision body to give full and fair consideration to scientific information, traditional knowledge, and other information provided with the recommendation; and that it consult a First Nation without a final agreement if the project is located in their territory or may have significant adverse environmental and socio-economic effects in their territory. Section 75 requires the decision body to issue a decision document within a prescribed time period, with reasons.

[77] As the Federal Court of Appeal stated in *Taseko*, the inability of a decision-maker to refer a recommendation for reconsideration does not give that recommendation any additional robust or substantial legal effect than that of a recommendation that can be returned for reconsideration. Its essential nature remains as a report and recommendation, not a decision, and the decision-maker is free to accept, reject, or vary an original or new recommendation. The ability under *YESAA* of a screening by the executive committee or a review by a panel appointed by the executive committee to be returned for reconsideration (s.76(1)(b)) reflects instead the greater complexity of those matters than many of those assessed by a designated office (s. 50(1)(a) and the regulations).

[78] Parliament's deliberate choice to allow certain recommendations or screenings to be returned for reconsideration and others not to be so returned, underscores the inappropriateness of the relief sought by the Yukon government in this case. The absence of a statutory provision for reconsideration by a designated office of its recommendation strongly supports the argument that they are not amenable to judicial review.

Yukon government reasons for judicial review of the DO recommendation

i) No legal obligation created by statutory time limit

[79] The statutorily required timeframe for the decision body to issue a decision is not the kind of legal obligation contemplated in the jurisprudence. This statutory obligation exists independently and regardless of the content of the report and recommendation. It is created and imposed by the statute as the next procedural step in the assessment process, not by the report and recommendation.

ii) Materially flawed report can be rejected or is reviewable with decision

[80] The Yukon government's argument that a materially flawed report compromises or taints their ability to make a lawful decision; and will cause duplicative efforts contrary to the statute is not a sufficient reason to seek court intervention at this time.

[81] First, if a designated office has exceeded its authority in its recommendation, or has acted procedurally unfairly, as the Yukon government alleges here, a decision body can reject or vary the recommendation. The Federal Court of Appeal noted in *CB Powell* that concerns about procedural fairness, bias, or jurisdiction are not exceptional circumstances permitting judicial review at this stage (i.e. before the decision) of the administrative process, "as long as the process allows issues to be raised and an effective remedy to be granted" (*CB Powell* at para. 33). The process here meets both these requirements.

[82] The Yukon government brought this judicial review before engaging in any discussions with internal experts, the proponent, or stakeholders, and before any consultations with First Nations about the DO report and recommendation. The First Nations were surprised not to have been approached earlier and wrote to the Yukon

government in April 2023, more than four months after the DO report and recommendation was issued, to request consultation. These discussions and consultations inform the decision body's decision. The decision body can devise a decision that corrects errors they perceive to have been made in the report and recommendation. For example, the decision body might come to a different conclusion for different reasons than the DO that baseline data was required in advance of exploration activities. This could include their own interpretation of the PWRLUP's role in the process. The decision body could issue a permit conditional upon the provision of baseline data, or containing other terms and conditions.

[83] If the decision body accepts a recommendation from a report that is believed to be materially flawed, any entity who is affected by that decision, such as a First Nation in whose territory the project is proposed, or the proponent, can judicially review it, including a review of the report and recommendation as a basis of that decision. As noted in *Sierra Club* (at para. 68 above) and other cases following it, a report and recommendation must be reviewed as an integral part of the decision, to ensure it is a report that the decision-maker can and should rely upon.

[84] Second, the statutory requirements that the assessment process be conducted in a timely, efficient and effective manner that avoids duplication (s. 5(1)(i) and s. 40) are not ignored or undermined if a decision body rejects or varies a recommendation from a report. In every case, a decision body must consider the recommendation and give full and fair consideration to all the information provided with the recommendation (s. 74(1)). Even if a report is considered to be flawed, the underlying information collected and analysed by the designated office is available to be considered and

interpreted by the decision body. It can use the same information and arrive at a different conclusion based on its own different reasoning. The statute contemplates this approach and this step does not constitute a duplication of effort.

[85] Further, in every case, the decision body's gathering of additional information, reactions, responses, or views, is not only encouraged and expected, but is required after a designated report and recommendation is received. The decision body is required to consult with affected First Nations, either by the *Constitution* or by statute, depending on whether the First Nation has a settled or unsettled land claim. It is also required to meet with other decision bodies, if any, in order to provide decisions that are consistent. As noted above, discussions are also held with the proponent, other stakeholders and internal experts. Perceived flaws in a report form part of those discussions. This process is not duplicative as these consultations, discussions and subsequent written reasons are required or expected in every case.

iii) Yukon government has no remedy once it issues a decision document

[86] The Yukon government's argument that it has no remedy because it cannot judicially review its own decision assumes the DO report and recommendation is binding upon it and it has no choice but to accept or implement a recommendation it perceives to be flawed. However, the Yukon government can reject or modify the DO recommendation because of whatever flaws it perceives and replace it with a decision based on its own reasoning and any other information it acquires while discussing the report and recommendation with affected First Nations and other stakeholders. If any of those stakeholders believes that a flawed report and recommendation has inappropriately influenced the decision they can seek a judicial review of the decision,

including the report and recommendation. The judicial review at that stage would be of a more full record, as it would include the reasoning of the decision body, any new information it acquired, as well as the report and the underlying information. In other words, remedies exist to address flaws in the report and recommendation.

iv) Section 116 of YESAA does not authorize a judicial review of the DO report

[87] This section of *YESAA* arguably contemplates a judicial review of the DO report and recommendation. However, its wording is consistent with a forum selection clause rather than a statement of a substantive right of judicial review. Section 116 provides:

> Notwithstanding the exclusive jurisdiction referred to in section 18 of the *Federal Courts Act*, the Attorney General of Canada, the territorial minister or anyone directly affected by the matter in respect of which relief is sought may make an application to the Supreme Court of Yukon for any relief against the Board, a designated office, the executive committee, a panel of the Board, a joint panel or a decision body, by way of an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition. (emphasis in original)

[88] The focus of this section is to set out the concurrent jurisdiction of the Supreme Court of Yukon and the Federal Court on a judicial review under *YESAA*, notwithstanding *YESAA* is a federal statute and the Federal Court has exclusive jurisdiction under s. 18 of the *Federal Courts Act,* RSC 1985, c. F-7. It names all of the entities responsible for a step in the assessment process under *YESAA*, including the designated office, and against whom relief may be sought in court. This listing is not intended to be a definitive determination of the justiciability of any such application for judicial review. This choice of forum clause cannot be interpreted to preclude the application of substantive law of justiciability.

Summary of Finding of No Judicial Review of DO Report and Recommendation

[89] The Yukon government seeks a court order at this stage that the DO report and recommendation in this case be quashed and the matter be reconsidered by the DO. To do so would violate the principle of judicial respect for administrative decision-makers and an administrative process containing various steps set out by Parliament. In this case, Parliament has adopted in *YESAA* a process developed by the First Nations, and the governments of Canada and the Yukon through modern treaty negotiations. The legislation clearly provides that the DO makes a recommendation and not a decision, and this has no legal effect, nor does it create legal obligations, nor does it have a prejudicial effect on any party. The applicant for judicial review, the Yukon government, is also the decision body in this case, and by bringing the judicial review at this time it is ignoring its obligations to consult on the DO recommendation; bypassing the alternative statutory remedies to reject or modify the DO recommendation if it disagrees with the recommendation, based on its own reasoning; and failing to acknowledge the importance of following the administrative process through to its conclusion. The actions of the Yukon government also overlook the ability of the DO report and recommendation to be judicially reviewed along with any decision that relies on or refers to it. The relief sought of quashing and returning the recommendation to the DO is not supported by the legislation. The jurisprudence arising from similar fact patterns and legislation supports the lack of amenability to judicial review of the DO report and recommendation in this case.

No Decision on the Merits

[90] All parties requested guidance from this Court on the issues raised by this judicial review, and I appreciate the significant work of all parties in preparing materials for and advocating at the hearing. However, as noted above (at para. 11), the statute does not contemplate court intervention at this stage. Further, any findings I make on the substantive arguments may compromise a future decision, or a future judicial review on a different record. Declining to make findings on the report and recommendation at this stage is consistent with the policy reasons for the rule of non-interference clearly articulated in *CB Powell* and demonstrated in the other cases referenced above: specifically, preventing fragmentation of the decision, and allowing the court to do a review only when it has all of the information about the decision from every stage of the administrative process. If I am wrong in this preliminary decision, and a higher court says the DO report and recommendation on their own at this stage are justiciable, then the matter can be returned to this Court to be re-argued in an abbreviated fashion given the record already prepared and submitted. This approach was well-described in *Black v Advisory Council for the Order of Canada*, 2012 FC 1234 at para. 65:

> … justiciability only pertains to the appropriateness of a court deciding a particular issue. … the Court is not called upon to assess the substance of an argument, but rather if the argument can be made at all in a judicial proceeding.

This was in the context of a motions court decision, but the concern is equally applicable here, for the reasons I have set out above.

[91] Finally, I note that the Federal Court decisions where the courts decided on the arguments about the report and recommendation were made in contexts where the

relevant decision body (such as the Governor in Council) had made a reviewable decision after considering the report and recommendation. That is not the case here.

CONCLUSION

[92] The application for judicial review is dismissed because it is not amenable to judicial review, as explained in the above-noted reasons.

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DUNCAN C.J.