Federal Court Cour fédérale

Date: 20170626

Docket: T-418-16

Citation: 2017 FC 622

Ottawa, Ontario, June 26, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

NORTHERN CROSS (YUKON) LIMITED

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

and

YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT BOARD

Intervener

JUDGMENT AND REASONS

[1] Northern Cross (Yukon) Limited is a company involved in the exploration for and potential development of crude oil and natural gas in the Yukon. In July 2014, Northern Cross

submitted a proposal to a designated office of the Yukon Environmental and Socio-economic Assessment Board for a multi-well exploration project in the Eagle Plains area of the Yukon. Ultimately, the designated office determined in its evaluation report dated February 9, 2016, to refer the project to the Executive Committee of the Board for a screening because, after taking into account any mitigative measures included in the project proposal, it could not determine whether the project would likely have significant adverse socio-economic effects. Northern Cross has now applied under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, for judicial review of the decision by the designated office.

I. Statutory Overview

[2] The Yukon Environmental and Socio-economic Assessment Board [the Board] is established pursuant to section 8 of the *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7 [*YESAA*]. The Board's primary purpose is to implement the provisions of the *YESAA*, and one of its stated purposes in subsection 5(2) is "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." Significantly, section 6 of the *YESAA* provides that the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, does not apply in the Yukon; this is so because the *YESAA* establishes a comprehensive regulatory regime for assessing the environmental and socio-economic effects of projects undertaken in the Yukon and is the result of a tripartite agreement among Yukon First Nations and the federal and Yukon governments.

[3] The federal Minister of Indian Affairs and Northern Development appoints the members of the Board, three of whom comprise the Board's Executive Committee (*YESAA*, s 8). The *YESAA* establishes six contiguous assessment districts with each district having its own designated office (*YESAA*, ss 20-22). The designated offices are staffed with employees of the Board (*YESAA*, s 23). The Board is responsible for conducting comprehensive and neutral assessments for proposed projects in the Yukon. The assessment process is triggered when a proponent proposes to undertake a particular project activity. An assessment under the *YESAA* is designed to identify and predict the effects of the project activity and is required if: (1) the proposed project will be in the Yukon; (2) the project activity is listed, and not exempted, under the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, SOR/2005-379 [*Regulations*]; and (3) one of the conditions under subsection 47(2) of the *YESAA* is present (e.g., an authorization or the grant of an interest in land by a government agency, independent regulatory agency, municipal government, or First Nation is required for the activity to be undertaken) (*YESAA*, s 47). An assessment of a proposed project may be conducted by way of an evaluation by a designated office, a screening by the Executive Committee, or a review by a panel of the Board.

[4] An evaluation by a designated office is the most common type of assessment and is conducted for projects with a smaller footprint, lower complexity, or lower anticipated impacts. If a proposed project activity is listed in Schedule I of the *Regulations*, it is subject to an assessment by a designated office. Paragraph 50(1)(b) of the *YESAA* provides that a proponent of a project is required to submit their project proposal to the designated office for the assessment district where the project will be undertaken, unless the project is listed in Schedule 3 of the

Regulations (*YESAA*, s 50(1)(a); *Regulations*, s 5), in which case it is to be submitted to the Executive Committee. Pursuant to subsection 50(2) of the *YESAA*, a proponent's proposal should include any appropriate mitigative measures, and a designated office, the Executive Committee, or a panel of the Board, as the case may be, must take into consideration the matters listed in section 42 (e.g., the interests of First Nations, the interests of residents of the Yukon and of Canadian residents outside Yukon).

[5] A designated office conducts a preliminary review of a project to determine the adequacy of the submissions, the scope of the proposed project, and whether the project will be located, or might have significant environmental or socio-economic effects, in the territory of a First Nation (*YESAA*, s 55(1) (b)). The adequacy review ensures, among other things, that a project is compliant with the applicable rules (*YESAA*, s 55(1) (a)). The *Rules for Evaluations Conducted by Designated Offices* [*Rules*] established by the Board provide that a project will be adequate if, among other things, sufficient information has been provided to enable a designated office to commence an evaluation (*Rules*, s 14(b)). If the designated office believes that a proposal is not adequate because there is insufficient information, it can request supplemental information from a proponent (*Rules*, s 12(3)). A designated office can continue to request supplemental information until it determines it has sufficient information to commence an evaluation (*Rules*, s 16).

[6] Once a designated office completes an adequacy review and determines it has received sufficient information, it must then determine the scope of the project and commence its evaluation based on the stated scope (*YESAA*, s 51; *Rules*, ss 21-24). In addition to the activities

outlined in the proposal, the scope must also include any other activity the designated office "considers likely to be undertaken in relation to an activity so identified and sufficiently related to it to be included in the project" (*YESAA*, s 51). One component of the project scope is the project area. A complete and accurate scope of a project is important for several reasons. First, it allows other parties to determine whether they have an interest in the project and, if so, provide comments. Second, it facilitates a clear understanding of the potential environmental and socio-economic effects. Finally, it allows the designated office to know which parties or decision bodies must be notified of the project.

[7] A designated office is required to notify the public that an evaluation is commencing (*Rules*, ss 25-26). This evaluation assesses the potential environmental and socio-economic effects of the proposed activity by gathering and analyzing relevant information through a designated office's own research and external sources. The assessment process can include a wide-range of public participation, including participation of First Nations, government bodies, and other interested groups or individuals.

[8] A designated office can seek any information or views it believes to be relevant and, in certain circumstances, it must seek out information and views from First Nations or government agencies (*YESAA*, s 55). Designated offices routinely conduct their own research to improve their understanding of projects and submitted comments, and they sometimes retain expert technical support. The *Rules* establish a public comment period where the public and affected parties can submit their views about a project to the designated office (*Rules*, s 25(2) (b)). After the conclusion of the public comment period, a designated office must determine whether it has

sufficient information to conclude the evaluation, whether it requires supplementary information from the proponent to proceed with the evaluation, or whether to provide an additional period for the public to submit views and information (*Rules*, s 27). If a designated office requires supplementary information from a proponent, it must request and review the supplementary information from the proponent, and then make a similar determination (*Rules*, s 28). Once a designated office has sufficient information to make a recommendation or referral under section 56 of the *YESAA*, it will issue a notice to that effect and will release its decision within the time period outlined under the *Rules*.

[9] A designated office's evaluation must take into consideration a wide-range of matters which are outlined in section 42 of the *YESAA*. These matters include: the purpose of the project or existing project; all stages of the project or existing project; the significance of any environmental or socio-economic effects of the project, including the effects of malfunctions or accidents; the significance of any adverse cumulative environmental or socio-economic effects; the need for effects monitoring; alternatives to the project; mitigative or compensative measures; the need to protect Yukon Indian persons' rights, cultures, traditions, health and lifestyles, and their special relationship with the wilderness environment; and the interests of First Nations, Yukon residents, and Canadian residents outside Yukon. A designated office can also modify the project scope, including the project area, throughout its evaluation and will only finalize it upon conclusion of the evaluation process (*Rules*, s 24).

[10] A designated office can conclude its evaluation by either making a recommendation to the decision body or bodies for the project, or by referring the project to the Executive

Committee for a screening (*YESAA*, s 56(1)). A "decision body" is defined under subsection 2(1) of the *YESAA* and may, depending on the particular project and circumstances, include a First Nation, the territorial minister, a federal agency, or the federal minister. Subsection 56(1) of the *YESAA* provides that a designated office shall conclude its evaluation of a project by:

(a) recommending to the decision bodies for the project that the project be allowed to proceed, if it determines that the project will not have significant adverse environmental or socio-economic effects in or outside Yukon;	**a)** il recommande aux décisionnaires compétents de permettre la réalisation du projet de développement dans le cas où il conclut que celui-ci n'aura pas d'effets négatifs importants sur l'environnement ou la vie socioéconomique au Yukon ou à l'extérieur de ses limites;
(b) recommending to those decision bodies that the project be allowed to proceed, subject to specified terms and conditions, if it determines that the project will have, 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;	**b)** il leur recommande de permettre la réalisation du projet sous réserve de certaines conditions dans le cas où il conclut que celui-ci aura ou risque d'avoir de tels effets mais que ceux-ci peuvent être atténués grâce à ces conditions;
(c) recommending to those decision bodies that the project not be allowed to proceed, 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	**c)** il leur recommande de refuser la réalisation du projet dans le cas où il conclut que celui-ci aura ou risque d'avoir de tels effets qu'il est impossible d'atténuer;
(d) referring the project to the executive committee for a screening, if, after taking into account any mitigative	**d)** il renvoie l'affaire au comité de direction pour examen dans le cas où il est incapable d'établir, malgré les mesures

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.	d'atténuation prévues, si le projet aura ou risque d'avoir des effets négatifs importants sur l'environnement ou la vie socioéconomique.

[11] A decision body is required to give full and fair consideration to any scientific information, traditional knowledge, and other information which is provided with the recommendation (*YESAA*, s 74(1)). The decision body must then issue a decision document which either accepts, rejects, or varies the recommendation (*YESAA*, s 75).

[12] If a designated office refers the project to the Executive Committee pursuant to paragraph 56(1) (d), the Executive Committee will conduct its own assessment; this includes a preliminary screening and the collection of relevant information and views and, eventually, culminates with the Executive Committee making a recommendation to the decision bodies or requiring an additional review (*YESAA*, s 58(1)). A screening by the Executive Committee is similar to an evaluation by a designated office, but the Executive Committee is permitted more time than a designated office to make its decision, and it also has more procedural tools to assess the significance of any adverse environmental or socio-economic effects.

[13] The Board is required to maintain a register pursuant to section 118 of the *YESAA* and each designated office is required to maintain its own register pursuant to section 119 of the *YESAA*. A designated office's register includes all documents that are produced, collected or received by it in relation to assessments. The Board also maintains an online registry that includes a separate area for each designated office pursuant to section 6 of the *Rules*. The *Rules*

are otherwise silent as to when the Board, including a designated office, is required to post materials on the online registry.

II. Northern Cross's Proposal

[14] Prior to its proposal for a multi-well exploratory project, Northern Cross had previously submitted project proposals to the Board for various stages of its oil and gas exploration and development program; these projects related to drilling, construction of a work camp, a resource assessment program, and a three-dimensional seismic survey. The designated office in Dawson City [the DO] evaluated Northern Cross's three-dimensional seismic survey and recommended to the decision bodies that the survey be allowed to proceed. This project took place over 450 km^2 in a 700 km^2 area in Eagle Plains after the Yukon government had approved it on September 24, 2013.

[15] On July 20, 2014, Northern Cross submitted a project proposal to enable it to drill up to 20 exploratory wells in an area comprising approximately 320 km^2 located south of Eagle Plains. Northern Cross submitted its proposal to the DO located in Dawson City because the area where the proposed activity would occur was within the assessment area for the Dawson City DO and because the project involved activity classified in Schedule I of the *Regulations* in relation to exploration for oil or natural gas other than on an Indian Reserve. Northern Cross's proposal required an assessment because: the project was located in Yukon; the activity was listed and not exempted in Schedule I of the *Regulations*; and an authorization or the grant of an interest in land by a government agency or First Nation was required for the activity to be undertaken. Included in Northern Cross's project proposal were several appendices, including a report on

environmental conditions and operational assessments regarding impact on harvesting activities, public awareness, and a First Nations environmental monitoring plan.

[16] The DO's evaluation was undertaken by three different assessors who were assisted by four additional support assessors due to the size and complexity of the evaluation. The DO also engaged experts to provide advice in relation to oil and gas exploration. The DO made several information requests to Northern Cross relating to the adequacy of its proposal during the five months following submission of the proposal.

[17] On August 21, 2014, the DO made its first request for supplemental information to address deficiencies in the proposal, including typographical errors, incorrect and missing figures and citations, illegible figures, and a request for further information and clarification on various technical aspects of the project. The DO requested, among other things, clarification of the area over which the project would occur, to which Northern Cross replied that it would take place in an area of 380 km^2. The DO also requested a report which would provide details on monitoring of the Porcupine Caribou Herd as well as Northern Cross's interaction with the caribou herd during its three-dimensional seismic survey project, including any adaptive management strategies and procedures that had been implemented. In response to this request, Northern Cross provided the DO with its Environmental and Wildlife Monitoring Report from its three-dimensional seismic survey.

[18] After the DO made two additional information requests, Northern Cross submitted a revised project proposal which the DO deemed adequate and, on October 30, 2014, it published a

notice to that effect. The DO subsequently commenced evaluation of the proposal pursuant to Part 5 of the *Rules* and advised Northern Cross and others that it would begin seeking views and information from interested parties. On November 11, 2014, the First Nation of Na-cho Nyäk Dun requested that the Board refer the project to the Executive Committee for a screening; but in a letter dated December 2, 2014, the Acting Chair of the Board denied this request, yet reassured the Na-cho Nyäk Dun that the DO's evaluation would be thorough and comprehensive.

[19] The DO received 35 submissions during the public comment period, including submissions from the Porcupine Caribou Management Board about the potential impact on the Porcupine Caribou Herd. After the public comment period ended, the DO asked Northern Cross to respond to 35 additional questions in a request dated December 10, 2014. Specifically, the DO requested Northern Cross to provide an Access Management Plan, since the Yukon government and various First Nations had indicated that it could potentially reduce the adverse effects to wildlife, and a comprehensive and detailed Wildlife Monitoring Program containing an adaptive management framework for responding to project related effects on wildlife. The DO also requested that Northern Cross contact the three impacted First Nations to determine their current and traditional use of the project area. Northern Cross provided its responses to these requests on August 27, 2015, but the DO again found the responses deficient and afforded Northern Cross an extension of time to respond to the deficiencies. On October 30, 2015, Northern Cross submitted supplementary information to address the deficiencies, including information on how the project would impact wildlife.

[20] On November 4, 2015, the DO commenced another public comment period and provided interested persons with an opportunity to provide additional views and information. The deadline for all submissions was December 9, 2015, and the DO refused numerous requests to extend the deadline because it had already established the maximum timeframe available under the *Rules*. The DO received approximately 47 submissions from interested groups and persons such as First Nations, non-profit environmental organizations, individual citizens, and Yukon government departments. A public meeting was also held in Dawson City on December 8, 2015. The DO informed Northern Cross on December 4, 2015, that its response to the public submissions was to be received by December 10, 2015. Northern Cross provided its response to the public submissions, but it had only one day to respond to the 37 submissions that had been posted on the Board's online registry.

[21] On December 10, 2015, the DO published a notice that it had obtained sufficient information to conclude the evaluation of the proposal. Despite the December 9, 2015 deadline for public submissions, the Porcupine Caribou Management Board provided additional submissions to the DO on December 15, 2015, and the following day, the DO posted on the online registry that it would be considering the submissions from the Porcupine Caribou Management Board. Northern Cross did not provide a response to the Porcupine Caribou Management Board's submissions.

[22] On January 12, 2016, Richard Wyman, the President of Northern Cross, had a telephone conversation with Tim Smith, the Executive Director of the Board, who informed Mr. Wyman that the Board would be extending the deadline for the DO to complete its evaluation. Mr. Smith

also told Mr. Wyman that the Board had reviewed a draft of the DO's evaluation and it would not be supporting the draft. The Board assembled a new team to complete the evaluation.

III. The Designated Office Decision

[23] On February 9, 2016, the Dawson City DO released its *Designated Office Evaluation Report: Eagle Plains Multi-Well Exploration Program* [the Report] which outlined its determinations from the evaluation of the proposed project. The DO decided to refer the project to the Executive Committee for screening pursuant to paragraph 56(1) (d) of the *YESAA*. The Report noted that Northern Cross proposed to drill twenty wells for oil and gas extraction in the Eagle Plains basin over an area of up to 700 km^2, and that the project would allow extended flow test for each well for up to two years in order to test the potential productive capacity of oil and gas reservoirs. The project also proposed a number of auxiliary activities.

[24] The DO scoped the project as covering an area of 700 km^2, although Northern Cross had proposed an area of 325 km^2. The Report stated that the scoped area was defined by Northern Cross's previous seismic survey project, and in a footnote explained that:

> Project 2013-0067 resulted in a 3D seismic over a portion of the 700 km^2 assessed. The Project, 2014-0112, proposes wells within this same portion; however, roads and quarries are proposed outside of this portion but within the 700 km^2 area. The portion that was actually surveyed is greater than 325 km^2 as it is closer to 400 km^2. Further supporting a 700 km^2 assessment area, "Twenty exploratory wells program within the 3D seismic area assessed under YESAB project 2013-0067" (2014-0112-073-1). Proposal documents for the 3D seismic survey confirm that the seismic area is 700.87 km^2 (2013-0067-003-1). It is possible that the location of the camp, at km 325 of the Dempster Highway, was confused with the project area in proposal documents.

[25] The DO outlined six environmental values that were assessed in the evaluation as well as four socio-economic values. The environmental values encompassed air quality, aquatic resources, avian wildlife, climate change, water quality and quantity, and wildlife and wildlife habitat. The socio-economic values included heritage resources, human health and safety, and traditional land use "excluding access to, and use of, the Porcupine Caribou Herd, but including: trapping; fishing; harvesting of plants and animals; and traditional pursuits." With respect to these values, the Report stated that:

> The Designated Office is able to determine significance of effects to – and mitigate in the event of significant adverse effects – all of the above valued components with the exception of access to and use of the PCH [Porcupine Caribou Herd]. As the Designated Office is unable to determine the significance of adverse effects to the access to and use of the PCH, the Designated Office is required to refer the Project to the Executive Committee under section 56(1)(d) of YESAA. As this value is the only value for which the Designated Office is unable to determine significance, this evaluation report focuses on this value exclusively.

[26] The DO indicated in the Report that the way of life of First Nations and the Inuvialuit, as it related to the Porcupine Caribou Herd, was a central value in its assessment since the First Nation of Na-Cho Nyäk Dun, the Inuvialuit, the Tetlit Gwich'in Council, the Tr'ondëk Hwëch'in, and the Vuntut Gwitchin First Nation value access to the Porcupine Caribou Herd for their community health and vitality, cultural identity and continuity, food security, and traditional economy. Because the project might result in changes in access to and use of the Porcupine Caribou Herd, the evaluation focused on these potential adverse effects.

[27] The Report assessed whether the project would have significant adverse socio-economic effects to the way of life of First Nations and the Inuvialuit in relation to the Porcupine Caribou Herd by considering:

- the proposed scope of activities;
- relevant proponent mitigations;
- baseline information related to access to and use of the Porcupine Caribou Herd;
- baseline information related to the Porcupine Caribou Herd;
- the North Yukon Regional Land Use Plan;
- current Porcupine Caribou interaction with the project area;
- consequences of Porcupine Caribou interaction with the Project including an examination of the potential zones of influence of the project and the potential magnitude, probability, duration, extent and reversibility of project effects; and
- the potential significance and probability of scenarios ranging from the best to the worst-case for how this Project could affect access to and use of the Porcupine Caribou Herd.

[28] The DO concluded that it was unable to determine if the project would or would likely have significant adverse effects on the access to and use of the Porcupine Caribou Herd. Although the DO was able to determine the range of the adverse effects and the best and worst-case scenarios caused by the project, based on the information provided the DO determined that the two scenarios on each end of the range were equally probable. The DO's inability to determine the adverse social-cultural effects was based on its inability to predict the project's impact on changes in baseline movement, migration, and occupancy of the Porcupine Caribou Herd. The DO said it was "unable to determine the probability or magnitude of changes to caribou migration and seasonal distribution in relation to project activities and the associated duration, reversibility, and extent of such effects" and, consequently, it required more information to confidently predict these effects. The requirement for confidence in this regard was elevated for two reasons, the DO stated: "first, the significant importance for the First

Nation and the Inuvialuit way of life that is intrinsically linked to the PCH; and second, the unprecedented scale of the Project within this region."

[29] The DO further stated that its inability to determine whether the adverse effects would be significant prevented it from considering any potential mitigation, and because of this inability the assessment outcome was that:

> Under s. 56(1) (d) of the *Yukon Environmental and Socio-economic Assessment Act*, the Dawson City Designated Office refers the Project to the Executive Committee for a screening, as after taking into account any mitigative measures included in the project proposal, the Designated Office could not determine whether the Project will have, or is likely to have, significant adverse socio-economic effects.

[30] The DO concluded its Report by listing information that would have been helpful in its assessment:

- Access to and use of the Porcupine Caribou Herd by First Nations and the Inuvialuit in relation to the project area and potential zones of influence from project activities.
- Relationship between barren-ground caribou and land use activities, with focus on range utilization in response to surface disturbance and linear density.
- Baseline data to assess cumulative effects and developmental thresholds (e.g. cumulative surface disturbance impacts and potential effects on habitat quantity and quality).
- Cumulative impacts of exploration and development activities on access to and use of the Porcupine Caribou Herd by First Nations and the Inuvialuit.
- Development of Best Management Practices as guidance to oil and gas activities in relation to the Porcupine Caribou Herd.
- A process to establish safe operating distances and critical numbers for the Porcupine Caribou Herd.

[31] After the DO released the Report, Northern Cross retained a consulting firm of professionally registered biologists to prepare responses to the Report and to the Porcupine

Caribou Management Board's submissions. Northern Cross says, based on their consultants' advice, they would now propose the creation of a caribou stakeholder advisory committee to address the issues raised by the DO in the Report.

IV. Issues

[32] This matter raises the following issues:

1. Does this Court have jurisdiction to hear the application for judicial review?
2. Is the application for judicial review premature?
3. Was it a breach of procedural fairness for the DO to:
    i. base its evaluation on a project area of 700 km^2;
    ii. fail to request supplementary information pursuant to section 28 of the *Rules*;
    iii. fail to provide the Applicant with an opportunity to respond to undisclosed information; or
    iv. fail to provide the Applicant adequate time to respond to the public comments?
4. What is the appropriate standard of review?
5. Did the DO err by:
    i. basing its evaluation on a project area of 700 km^2; or
    ii. identifying information in its Report that would have been helpful in its evaluation?

V. Analysis

A. *Does this Court have jurisdiction to hear the application for judicial review?*

[33] The Applicant and the Respondent each submit that section 116 of the *YESAA* permits this Court to judicially review a decision of a designated office. The Board maintains that this Court's jurisdiction to review a decision of a designated office has been ousted and the jurisdiction for such review resides with the Yukon Supreme Court.

[34] Section 116 provides:

Application for judicial review	**Demande de contrôle judiciaire**
116 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.	**116** Indépendamment de la compétence exclusive accordée par l'article 18 de la *Loi sur les Cours fédérales*, le procureur général du Canada, le ministre territorial ou quiconque est directement touché par l'affaire peut présenter une demande à la Cour suprême du Yukon afin d'obtenir, contre l'Office, un bureau désigné, le comité de direction, un comité restreint ou mixte ou un décisionnaire, toute réparation par voie d'injonction, de jugement déclaratoire, de bref — *certiorari*, *mandamus*, *quo warranto* ou prohibition — ou d'ordonnance de même nature.

[35] According to the Applicant and the Respondent, because this section clearly states that decisions of a designated office are subject to judicial review by the Supreme Court of Yukon, it would be contrary to the legislative intent to prevent the Federal Court under its concurrent jurisdiction from also reviewing a decision of a designated office. The Board submits that the Federal Court has no jurisdiction to entertain any proceeding in respect of the matters referred to in section 116 of the *YESAA*.

[36] The Federal Court's jurisdiction under the *YESAA* has never been judicially considered. I agree with the Applicant and the Respondent that the supervisory power conferred upon the Supreme Court of Yukon is shared with the Federal Court. The issue of the Federal Court's jurisdiction arises because of the specific wording in section 116 of the *YESAA* and section 17(6) of the *Federal Courts Act* which states says that:

17 (6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.	**17 (6)** Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

[37] The Court's jurisdiction in this case is determined by first assessing whether this Court has jurisdiction under the *Federal Courts Act* and, if it does, whether section 116 of the *YESAA* displaces the Federal Court's jurisdiction.

[38] In *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at para 29, 185 ACWS (3d) 354, the Federal Court of Appeal stated that "a two-step enquiry must be made in order to determine whether a body or person is a 'federal board, commission or other tribunal'. First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise." The Board, here, exercises its jurisdiction and the powers conferred upon it by and under the *YESAA*, a federal statute. The Federal Court has jurisdiction over the Board, including its designated offices, since the Board clearly satisfies the definition of "federal board, commission or other tribunal" in section 2 of the *Federal Courts Act*; the Board is a "body… exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament."

[39] Furthermore, sections 18 and 18.1 of the *Federal Courts Act* provide this Court with "exclusive original jurisdiction" to issue various remedies as against the Board and the power to judicially review decisions of the Board. The Federal Court therefore has jurisdiction under the *Federal Courts Act* to judicially review a decision made by the Board, including one of its designated offices. This conclusion is supported by the words of section 116 of the *YESAA* which implicitly acknowledge that the Federal Court would otherwise have "exclusive jurisdiction" over the Board. By referring to and acknowledging section 18 of the *Federal Courts Act*, section 116 of the *YESAA* recognizes the exclusive jurisdiction of the Federal Court to review decisions made by the Board and establishes concurrent jurisdiction in the Yukon Supreme Court for applications for judicial review.

[40] In my view, section 116 of the *YESAA* was enacted to provide the Supreme Court of Yukon with concurrent jurisdiction to review actions and decisions of "the Board, a designated office, the executive committee, a panel of the Board, a joint panel or a decision body." The modern approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, [2002] 2 SCR 559). In this case, the grammatical and ordinary meaning of the words in section 116 reveal that the Federal Court no longer has *exclusive* jurisdiction to review a decision of the Board, a designated office, the Executive Committee, a panel of the Board, a joint panel or a decision body, because the Attorney General of Canada, the territorial minister or anyone directly affected by such a decision can also apply for judicial review in the Supreme Court of Yukon. This interpretation is supported by the fact that section 116 provides the Supreme Court of Yukon with the same remedial powers as the Federal Court has under subsection 18(1) of the *Federal Courts Act*; that is, the power to issue a writ of *certiorari*, prohibition, *mandamus*, or *quo warranto*, or to grant declaratory or injunctive relief.

[41] Moreover, this interpretation is consistent with the broad purpose of the *YESAA*, which emphasizes and encourages local participation in the assessment process from the residents and communities of the Yukon, including First Nations. The *YESAA* was created to provide a unique process for the people of the Yukon. In *Western Copper Corp v Yukon Water Board*, 2011 YKSC 16 at para 4, [2011] YJ No 5, the Supreme Court of Yukon stated that the *YESAA*'s purpose is to "provide a unique development assessment and water management process that

guarantees the participation of Yukoners and Yukon First Nations." This legislative purpose is carried throughout the *YESAA* as the evaluation process by a designated office creates ample opportunity for public participation and consultation in the assessment of proposed projects. Consistent with this legislative purpose, section 116 encourages local participation by permitting individuals and groups affected by a decision made under the *YESAA* to seek relief from a local court.

[42] In light of the plain words of the section, and the broader scheme and objects of the *YESAA*, including Parliament's expressed purpose, I find that section 116 is designed to provide the Supreme Court of Yukon with jurisdiction concurrent with that of the Federal Court to judicially review administrative actions of the Board, a designated office, the executive committee, a panel of the Board, a joint panel, or a decision body. Put another way, section 116 removes what would otherwise be within the exclusive jurisdiction of the Federal Court under subsection 18(1) of the *Federal Courts Act*. In practical terms, while section 116 affords affected persons with the option to apply for judicial review in either the Federal Court or the Supreme Court of Yukon, the Federal Court nonetheless retains a non-exclusive jurisdiction to hear applications for judicial review of decisions made by a designated office.

[43] My conclusion that the Federal Court retains a non-exclusive jurisdiction to hear applications for judicial review of a decision made by the Board is reinforced by this Court's decision in *Ka'a'Gee Tu First Nation v Canada (Indian Affairs and Northern Development)*, 2007 FC 764, [2007] 4 CNLR 160 [*Ka'a'Gee Tu First Nation*], where the Court determined that it had concurrent jurisdiction with the Supreme Court of the Northwest Territories under

section 32(1) of the *Mackenzie Valley Resource Management Act,* S.C. 1998, c 25 [*MVRMA*]. Before it was amended in 2014, section 32 of the *MVRMA* provided that:

32 (1) Notwithstanding the exclusive jurisdiction referred to in section 18 of the *Federal Courts Act*, the Attorney General of Canada or anyone directly affected by the matter in respect of which relief is sought may make an application to the Supreme Court of the Northwest Territories for any relief against a board by way of an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition.	**32 (1)** Indépendamment de la compétence exclusive accordée par l'article 18 de la *Loi sur les Cours fédérales*, le procureur général du Canada ou quiconque est directement touché par l'affaire peut présenter une demande à la cour suprême des Territoires du Nord-Ouest afin d'obtenir, contre l'office, toute réparation par voie d'injonction, de jugement déclaratoire, de bref – *certiorari*, *mandamus*, *quo warranto* ou prohibition – ou d'ordonnance de même nature.
(2) Despite subsection (1) and section 18 of the *Federal Courts Act*, the Supreme Court of the Northwest Territories has exclusive original jurisdiction to hear and determine any action or proceeding, whether or not by way of an application of a type referred to in subsection (1), concerning the jurisdiction of the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board.	**(2)** Malgré le paragraphe (1) et l'article 18 de la *Loi sur les Cours fédérales*, la Cour suprême des Territoires du Nord-Ouest a compétence exclusive en première instance pour connaître de toute question relative à la compétence de l'Office des terres et des eaux de la vallée du Mackenzie ou de l'Office d'examen des répercussions environnementales de la vallée du Mackenzie, qu'elle soit soulevée ou non par une demande du même type que celle visée au paragraphe (1).

[44] The wording of section 32(1) of the *MVRMA* is for all intents and purposes identical to that of section 116 of the *YESAA*. The Court in *Ka'a'Gee Tu First Nation* found that:

> 48 The words of subsection 32(2) of the Act, in their grammatical and ordinary sense provide for exclusive jurisdiction

> to the Supreme Court of the Northwest Territories to hear and determine any action or proceeding "concerning the jurisdiction" of the two Boards. The word jurisdiction here does not include "any relief against a Board" as provided for in subsection 32(1) in respect to "an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition".
>
> 49 In my view, had Parliament intended to vacate the Federal Court's jurisdiction entirely, it would have used clear language to that effect. Had that been the desired result, Parliament would simply have modified subsection 32(1) by providing exclusive jurisdiction to the Supreme Court of the Northwest Territories for "any relief against a board". By leaving subsection 32(1) unchanged, and by using different language in subsection 32(2), language limiting the exclusive jurisdiction to actions or proceedings "concerning the jurisdiction" of the two Boards, Parliament could only have intended, given subsection 32(1), to employ "jurisdiction" in its narrow sense. That is to say, jurisdiction on questions that relate to the authority of the Boards to act.

[45] In short, section 17(6) of the *Federal Courts Act* does not remove the jurisdiction of the Federal Court to hear applications for judicial review of decisions made by the Board because the wording of section 116 of the *YESAA* expressly recognizes what would otherwise be within the Federal Court's exclusive jurisdiction, and because section 116 does not expressly grant exclusive jurisdiction to the Yukon Supreme Court to hear such applications or expressly remove such jurisdiction from the Federal Court.

B. *Is this application for judicial review premature?*

(1) The Parties' Positions

[46] The Applicant says its application for judicial review is not premature and would not be "an alien input" at this time because the environmental assessment of its project has reached a

"natural break" and the DO has exhausted its statutory authority. In the Applicant's view, there is a full record of information relied upon by the DO and there is no danger of fragmenting the assessment process because the next stage or phase of the assessment has not begun and does not begin unless or until Northern Cross files a revised project description. The record is sufficient for a judicial review, the Applicant says, because the 19 month long assessment process by the DO resulted in approximately 270 documents and thousands of pages of submissions, comments, correspondence, and scientific data.

[47] Additionally, the Applicant says judicial review is required to remedy the breaches of procedural fairness and the requirement to engage in a further assessment by the Executive Committee will effectively ignore past breaches of procedural fairness. According to the Applicant, referral decisions such as that made by the DO in this case are subject to judicial review. The Applicant cites *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 33, [2012] 1 SCR 364 [*Halifax*], where Justice Cromwell stated that: "I accept *Bell* (1971) to the extent that it stands for the proposition that referral decisions such as the one at issue in this case are subject to judicial review."

[48] The Applicant maintains that courts can review referral decisions when they are an exercise of screening and administration, and that the referring body is not required to make any final determination on the merits of an issue before the decision can be judicially reviewed. The Applicant also cites *Pacific Booker Minerals Inc v British Columbia (Minister of the Environment)*, 2013 BCSC 2258 at paras 86-91, [2013] BCJ No 2694, for the proposition that a

recommendation or referral report can be subject to judicial review even though the actual approval decision rests with another body.

[49] The Respondent says, in view of *Eidsvik v Canada (Minister of Fisheries and Oceans)*, 2011 FC 940 at para 27, 205 ACWS (3d) 1, that this Court has jurisdiction to strike Northern Cross's application because it is premature. The Respondent points to *Atomic Energy of Canada Ltd v Wilson*, 2015 FCA 17, [2015] 4 FCR 467, rev'd on other grounds 2016 SCC 29, [2016] 1 SCR 770, where the Federal Court of Appeal outlined the policy considerations behind the rule against premature applications for judicial review:

> [31] The general rule against premature judicial reviews reflects at least two public law values. One is good administration -- encouraging cost savings, efficiencies, promptness and allowing administrative expertise and specialization to be fully brought to bear on the problem before reviewing courts are involved. Another is democracy -- elected legislators have vested the primary responsibility of decision-making in adjudicators, not the judiciary.

[50] The Respondent says the DO's referral of the Northern Cross proposal to the Executive Committee is an interlocutory step in an ongoing administrative assessment process, one which will not be complete until the Executive Committee makes its recommendation to the decision bodies and issues its decision or refers the proposal to a panel of the Board for review. According to the Respondent, judicial review of the DO's decision will fragment the administrative process and undermine Parliament's choice to create a coherent assessment process with various stages where assessors can make recommendations or referrals based on the materials before them.

[51] Moreover, the Respondent highlights that the Executive Committee may recommend that Northern Cross's project be allowed to proceed, thus making this application for judicial review

have no value and having caused unnecessary delays and expenses which will bring the administration of justice into disrepute. The Respondent says Northern Cross can make submissions to the Executive Committee and subsequently apply for judicial review of the Executive Committee's decision. This case does not, the Respondent further says, provide any exceptional circumstances justifying a departure from the general rule against the court interfering with premature administrative matters; nor does it decide a fundamental issue in the administrative proceeding, finally dispose of the parties' rights, raise a truly jurisdictional issue, or create significant prejudice to Northern Cross that cannot be corrected without a judicial review.

[52] The Board was granted status as an intervener in this application by an Order of the Court dated October 13, 2016. As Intervener, the Board echoes the Respondent's position that this application for judicial review is premature and should therefore be dismissed. The Board diverges from the Respondent's position concerning the prematurity of a referral decision by the Executive Committee. The Board maintains that judicial review of a decision by the Executive Committee to refer an evaluation to a panel for review would also be premature, and the Court should decline deciding this issue because it does not arise on the facts of this case and the Executive Committee has yet to make any decision about Northern Cross's project. According to the Board, the assessment process is not complete upon a referral by a designated office to the Executive Committee because it is an interlocutory step in the assessment process. The Board says the administrative process is complete only when a designated office makes a recommendation to a decision body, not when it makes a referral decision, since consideration of a project then moves from the Board's control to a decision body's control.

(2) Analysis

[53] A matter may be premature or unripe for judicial review unless it is clear that the administrative action will be inconsistent with the legislative grant of authority or contravene the requirements of procedural fairness (see: Donald JM Brown and John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf, (Toronto: Thomson Reuters), ch 3 at 64). It is well established that applications for judicial review are properly brought at the conclusion of an administrative process after all issues have been determined and the reviewing court has the benefit of the complete record.

[54] Generally speaking, courts are reluctant to review the merits of an administrative decision until it has been finalized. For example, in *Shea v Canada (Attorney General)*, 2006 FC 859, 296 FTR 81, this Court dismissed an application for judicial review of a hiring process implemented by the Canada Revenue Agency because the process was not completed. To similar effect, in *EH Industries Ltd v Canada (Minister of Public Works and Government Services)*, 2001 FCA 48, 104 ACWS (3d) 5, the Federal Court of Appeal determined, upon review of a decision of the Canadian International Trade Tribunal not to investigate a complaint, that the Tribunal should have dismissed the complaint on the ground of prematurity because it referred to criteria that had not been finalized. Likewise, in *Geophysical Service Inc v Canada (National Energy Board)*, 2011 FCA 360, 428 NR 237, the Federal Court of Appeal dismissed a statutory appeal and the applicant's applications for judicial review on the ground that they were premature since the issues raised by the appellant were not yet ripe for decision. These cases highlight the principle that a court should not review an administrative decision that has not yet been finalized.

[55] In *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61, [2011] 2 FCR 332 [*CB Powell Limited*], Justice Stratas explained the policy reasons behind this restrained approach:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; 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.
>
> [32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway… Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience… Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge…
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high…Exceptional circumstances are best illustrated by the very

> few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted...the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[56] Absent exceptional circumstances, therefore, this Court should not interfere with the ongoing administrative process involving Northern Cross's proposed project until after that process has been completed or until the available, effective remedies have been exhausted.

[57] The Applicant relies upon the Supreme Court of Canada's decision in *Halifax* for the proposition that reviewing courts can judicially review referral decisions. This reliance, however, is misplaced. Although the Supreme Court did state in *Halifax* that it accepted its earlier decision in *Bell v Ontario Human Rights Commission*, [1971] SCR 756, [1971] SCJ No 66 [*Bell*], to the extent that it "stands for the proposition that referral decisions such as the one at issue in this case are subject to judicial review," it also stated that *Bell* "should no longer be followed in relation to its approach to preliminary jurisdictional questions or when judicial intervention is justified in an ongoing administrative process" (at para 38), and that "developments in Canadian administrative law have undermined the validity of this precedent to the point that there are compelling reasons for no longer following it" (at para 33). The Supreme Court's comments in *Halifax* were tempered to the issue there at hand: when should a reviewing court interfere with a Human Rights Commission's decision to refer a complaint to a board of inquiry. The Supreme Court did not say that every referral decision by any administrative decision-maker is subject to

judicial review. On the contrary, in view of decisions such as *CB Powell Limited*, the Supreme Court noted that courts should show restraint in intervening "before an administrative process has run its course" because early judicial intervention may, among other things, "compromise carefully crafted, comprehensive legislative regimes" (*Halifax* at paras 35 and 36).

[58] A designated office's decision may be subject to judicial review. Section 116 of the *YESAA* expressly allows affected parties to apply to the Supreme Court of Yukon for relief against an administrative action by a designated office and, as determined above, the Federal Court can also provide such relief. It can only be subject to judicial review, however, where the decision of the designated office ends the administrative assessment of a project; that is, when the designated office makes a recommendation to the decision body or bodies for the project to be allowed, not allowed, or allowed with terms and conditions. A decision to refer assessment of a project to the Executive Committee for a screening does not complete or end the administrative assessment of a project before the Board. On the contrary, a referral decision is merely one to continue the assessment of a project at a higher level in the review process established under the *YESAA*. In my view, a designated office's decision to refer an assessment to the Executive Committee under paragraph 56(1) (d) is not subject to judicial review absent exceptional circumstances or a contravention of the requirements of procedural fairness.

[59] I agree with the Respondent and the Board that Northern Cross's application for judicial review is premature. An assessment under the *YESAA* is an extensive process that may involve considerable submissions and widespread consultation before a decision can be made. It is the Board that is ultimately responsible for an assessment completed under the *YESAA* by one of its

designated offices, the Executive Committee, or a panel of Board members. A designated office's decision to refer an assessment to the Executive Committee for a screening constitutes a continuation of the Board's ongoing assessment process. Although the Executive Committee can undertake its own assessment, the Board retains jurisdiction over the broader assessment process which is not completed until after the Board, through one of its delegates, exhausts its jurisdiction and makes a recommendation to a decision body or bodies.

[60] The Court's intervention is not warranted at this time because the administrative process concerning Northern Cross's project remains uncompleted. There are no exceptional circumstances to justify intervention by this Court. Moreover, Northern Cross's allegations as to breaches of procedural fairness by the DO in rendering its Report should not be addressed at this stage of the assessment process, because that process has not been completed and some or all of the alleged breaches of procedural unfairness may be rectified or otherwise corrected during the Executive Committee's assessment of Northern Cross's proposal. Northern Cross has an available and effective remedy and forum for its complaints about procedural unfairness and the DO's Report; namely, the Executive Committee of the Board, to which its proposal has been referred for screening. The assessment process created by Parliament under the *YESAA* provides proponents such as Northern Cross with an opportunity to submit additional materials and information to the Executive Committee for assessment of a proposal when a designated office has determined to refer a proposal to the Executive Committee pursuant to paragraph 56(1) (d). Northern Cross can raise its concerns before the Executive Committee which can remedy or correct any errors that arose during the DO's evaluation.

[61] The Executive Committee's screening effectively provides Northern Cross with a second opportunity to demonstrate why its project should be recommended for approval whether with or without terms and conditions. Judicial review is not appropriate at this time because the *YESAA* provides Northern Cross with an avenue to address its concerns. The Court's refusal to interfere at this stage of an ongoing administrative process respects Parliament's choice in establishing a multi-level administrative assessment process and avoids unnecessary delays and costs.

[62] In view of my determination that Northern Cross's application for judicial review is premature, it is not necessary to address the other issues as identified above.

VI. Conclusion

[63] The Applicant's application for judicial review is dismissed for the reasons stated above. Judicial review of the DO's decision to refer Northern Cross's project proposal to the Executive Committee is premature and the Court should not, and will not, interfere with the ongoing administrative process involving Northern Cross's proposed project before the Board.

[64] The Respondent has requested its costs in its memorandum of fact and law. In view of the application having been dismissed, the Respondent is entitled to its costs from the Applicant in such amount as may be agreed to by them. If they are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either the Applicant or the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

JUDGMENT in T-418-16

THIS COURT'S JUDGMENT is that: the Applicant's application for judicial review is dismissed with costs to be paid by the Applicant to the Respondent; and that the Respondent is entitled to costs in such amount as may be agreed to by the Applicant and the Respondent, provided that if they are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either the Applicant or the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

S. Bradley Armstrong, Q.C. Will Shaw	FOR THE APPLICANT
Suzanne Duncan Geneviève Chabot	FOR THE RESPONDENT
Joseph Arvay, Q.C. Alison Latimer	FOR THE INTERVENER

SOLICITORS OF RECORD:

Lawson Lundell LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Whitehorse, Yukon Territory	FOR THE RESPONDENT
Farris, Vaughan, Wills & Murphy LLP Barristers and Solicitors Vancouver, British Columbia	FOR THE INTERVENER
Underhill, Boies Parker, Gage & Latimer LLP Barristers and Solicitors Vancouver, British Columbia	