Federal Court of Appeal Cour d'appel fédérale

**Date: 20150619**

**Docket: A-411-13**

**Citation: 2015 FCA 148**

**CORAM:** **PELLETIER J.A.**
**DAWSON J.A.**
**TRUDEL J.A.**

**BETWEEN:**

**YELLOWKNIVES DENE FIRST NATION**

**Appellant**

**and**

**THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, THE MACKENZIE VALLEY LAND AND WATER BOARD, and ALEX DEBOGORSKI**

**Respondents**

Heard at Yellowknife, Northwest Territories, on May 12, 2015.

Judgment delivered at Ottawa, Ontario, on June 19, 2015.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

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**REASONS FOR JUDGMENT**

**DAWSON J.A.**

I. Introduction

[1] The Yellowknives Dene First Nation are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982*. They claim treaty rights as well as rights under

section 35 of the *Constitution Act, 1982* in the Drybones Bay area. Drybones Bay itself is located on the north shore of Great Slave Lake, about 50 km south-east of Yellowknife in the Northwest Territories.

[2] Without doubt, the Drybones Bay area is of critical significance to the Yellowknives Dene. The Yellowknives Dene and other Aboriginal groups have occupied the area for hundreds, perhaps thousands, of years. To the Yellowknives Dene, the area is without parallel in terms of its importance to their culture. It is unique and irreplaceable; the First Nation's historic and continued presence on the land is fundamental to its identity and well-being.

[3] The respondent, Alex Debogorski (Proponent), holds a mineral claim in the Drybones Bay area. He submitted a land use permit application to the Mackenzie Valley Land and Water Board (Land and Water Board) to conduct a diamond exploration project that includes up to 10 drill-holes over a five year period in the Drybones Bay area (Proposed Development).

[4] The Land and Water Board is established pursuant to subsection 99(1) of the *MacKenzie Valley Resource Management Act*, S.C. 1998, c. 25 (Act). The objectives of the Land and Water Board are to provide for the conservation, development and utilization of land and water resources in a manner that will provide Canadians in general, and residents of the Mackenzie Valley in particular, with the optimum benefit (subsection 101.1(1)).

[5] The Mackenzie Valley Environmental Impact Review Board (Review Board) is established pursuant to subsection 112(1) of the Act. The Review Board is mandated to conduct

an environmental assessment of any proposal for a development that is referred to it (subsection 126(1)). The Land and Water Board referred the Proposed Development to the Review Board for an environmental assessment.

[6] Briefly stated, in a "Report of Environmental Assessment & Reasons for Decision" issued on January 6, 2012 (EA1112-001) (Decision), the Review Board concluded that the Proposed Development was not likely to have any significant adverse impact on the environment or to be a cause of significant public concern. Therefore, an environmental impact review of the Proposed Development was not required. In consequence, the Review Board was of the view that the Proposed Development should proceed to the regulatory phase for permitting and licensing. The Decision was then required to be forwarded to the responsible minister.

[7] The Yellowknives Dene brought an application in the Federal Court for judicial review of the Decision. For reasons cited as 2013 FC 1118, a judge of the Federal Court dismissed the application for judicial review and awarded costs in favour of the Minister of Aboriginal Affairs and Northern Development in the amount of $18,920. This is an appeal from the judgment of the Federal Court. For completeness, I note that the Proponent, while a named respondent here and below, did not enter an appearance in either proceeding.

## II. The Issues

[8] The issues raised on this appeal are:

1. Was the decision that the Proposed Development was unlikely to have any significant adverse impact on the environment reasonable?

2. Was the decision that the Proposed Development was not a cause of significant public concern reasonable?

3. Did the Crown meet its duty to consult and, if required, accommodate the Yellowknives Dene?

## III. Consideration of the Issues

1. Was the decision that the Proposed Development was unlikely to have any significant adverse impact on the environment reasonable?

### A. *Standard of Review*

[9] This is an appeal of an application for judicial review. This Court is therefore required to consider whether the Federal Court identified the appropriate standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45-46).

[10] The parties agree that the Review Board's assessment of environmental impact is to be reviewed on the standard of reasonableness. I too agree. The Review Board is a specialized tribunal. Primarily at issue are its findings of fact, or its findings of mixed fact and law, where legal issues cannot be separated easily from the factual issues. Such issues generally attract reasonableness review (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraphs 51-55).

B. *Application of the standard of review*

[11] In order to appreciate the First Nation's assertion that it was unreasonable for the Review Board to find that the Proposed Development would not likely have any significant adverse impact on the environment, it is necessary to have an understanding of the history of development in the Drybones Bay area.

[12] On November 30, 2007, in an environmental assessment of an unrelated proposed development (CGV Development) in the Drybones Bay area, the Review Board found that the proposed development there at issue, in combination with the cumulative effects of other present and reasonably foreseeable activities, was likely to cause significant adverse cultural impacts of a cumulative nature (EA0506-005) (CGV Decision).

[13] More specifically, the Review Board expressed the view that:

> Based on the evidence on the record, the testimony of parties and the above considerations, the Review Board is of the view that cultural impacts are being caused by incrementally increasing development in this important area, including the proposed development. The Review Board is of the opinion that these cumulative cultural impacts are at a critical threshold. Unless certain management actions are taken, this threshold will be surpassed.
>
> If this threshold were surpassed, it would result in a significantly diminished cultural value of this particular area to Aboriginal peoples. This would be an unacceptable cultural cumulative impact on Aboriginal land users. The Review Board views the cumulative cultural impacts described by the parties, and particularly the [Yellowknives Dene First Nation] as likely, significant, and adverse. Most of these are caused by disturbance from human activities from development and recreational access. These are most acute in the Shoreline Zone. [Emphasis added.]

[14] The relevance of the finding of a likelihood of significant adverse “cultural impacts” was that section 111 of the Act defines “impact on the environment” to include “any effect on the social and cultural environment or on heritage resources”.

[15] The relevance of the reference to the “Shoreline Zone” is that the Proposed Development is to occur in this part of the Drybones Bay area. The further relevance of this is that the Shoreline Zone is an area with the highest levels of traditional use and highest density of heritage sites.

[16] Because of its conclusion that the CGV Development was likely to cause significant adverse cultural impacts of cumulative nature, the Review Board prescribed six measures to reduce or avoid the adverse impacts.

[17] One measure was of particular importance. It required the federal and territorial governments to work with the Yellowknives Dene and other Aboriginal land users to produce a local “Plan of Action” for the shoreline zone within a specified time frame. At a minimum, the Plan of Action was, among other things, to be drafted and implemented with substantial input from Aboriginal parties, address future development in the shoreline zone (including provisions to protect sensitive environmental, cultured and spiritual sites) and provide clear recommendations for managing development and recreational activity in the shoreline zone. Once the responsible minister accepted the Review Board’s decision, he was to provide a policy direction to the Land and Water Board requiring it to consider the Plan of Action before reaching

any determinations regarding preliminary screening of all new applications for developments in the shoreline zone.

[18] The Review Board recommended that the CGV Development could proceed only if the six measures were implemented.

[19] The measures prescribed by the Review Board were never implemented. Instead, on April 13, 2010, pursuant to section 130 of the Act, the Minister of Indian Affairs and Northern Development requested that the Review Board further consider some of the measures proposed by it. Specifically, the Minister took the position that "the proposed 'Plan of Action' and long-term monitoring program are considered excessive for a proposed small-scale exploration project".

[20] The Review Board did further consider its proposed measures, issuing its reconsideration decision on November 15, 2011 (CGV Reconsideration Decision). In response to the Minister's concern it noted that the measures complained of were intended to mitigate cumulative cultural impacts, and not the impacts of the proposed project in isolation. In result, I think that counsel for the Yellowknives Dene accurately characterized the result of the request for further consideration to be that the Review Board essentially "stuck to its guns".

[21] The public hearing that led to the CGV Reconsideration Decision was held on September 12 and 13, 2011, in N'Dilo, one of two Yellowknives Dene communities. The Yellowknives Dene attended that public hearing to give evidence. That evidence was then

incorporated into the record of the Review Board that led to the Decision at issue in this appeal. The Decision was issued by the Review Board on January 6, 2012; it refers to both the CGV Decision and CGV Reconsideration Decision.

[22] With this historic context in mind, I move to consider the submission of the First Nation that it was unreasonable for the Review Board to find that the Proposed Development is not likely to have any significant adverse impact on the environment.

[23] The First Nation argues that the Review Board relied upon the measures it recommended in the CGV Decision as reconsidered to "fix the context — to resolve the cumulative impacts crisis in the Drybones Bay area. Having thus 'addressed' the systemic problem, the [Proposed Development] itself was deemed small enough to pass".

[24] This is characterized by the First Nation to be a serious legal error because the measures relied upon have not been accepted by the relevant minister and so have not been implemented. By relying on the effectiveness of those measures, the Review Board's conclusions about the Proposed Development were reached in a false context. Put another way in oral argument, having accepted that "impacts from various human activities have reached a critical threshold in the Drybones Bay area" (Decision at page 29), the Review Board ought to have recognized that even a small project would add to the cumulative impact. Its failure to do so renders the Decision illogical and unreasonable.

[25] In my view, the First Nation's submission must be rejected for the following reasons.

[26] First, I do not accept that the Review Board relied upon measures set out in its CGV Decision and CGV Reconsideration Decision to "resolve" the cumulative impacts crisis in the Drybones Bay Area. Paragraph 117(2)(*a*) of the Act requires every environmental assessment to include consideration of, among other things, "any cumulative impact that is likely to result from the development in combination with other developments". The Yellowknives Dene raised the cumulative impacts previously identified by the Review Board in the CGV Decision. It was in this context that the Review Board referred to measures it had previously recommended. However, the Review Board explicitly stated, at page 31 of the Decision, that those measures were not in place. Thus, it referred to the measures "[i]f approved and implemented". It had previously expressed the view that there was "little evidence that any real steps or substantive progress [had] been made by the appropriate government agencies to address the issues raised by the Yellowknives Dene First Nation." This was "despite the numerous recommendations and suggestions" made by the Review Board in the environmental assessments conducted since 2003 relating to the Drybones Bay area.

[27] Moreover, as explained above, the Review Board had recently released its CGV Reconsideration Decision. It thus well knew it had been asked to further consider its earlier recommended measures and they had not, therefore, been implemented. It is unreasonable in this context to suggest that the Review Board relied on those measures as having effected some result.

[28] Second, the Review Board gave detailed reasons for its conclusion that the Proposed Development was not likely to have any significant adverse impact on the environment.

[29] Section 3 of the Decision dealt with the potential environmental impact of the Proposed Development. The Review Board began by noting that paragraph 115(1)(*b*) of the Act required it to have regard to the protection of the social, cultural and economic well-being of residents and communities of the Mackenzie Valley. Concerns about social and cultural issues could be divided into two categories: heritage and archaeological resources, and the cumulative impacts on traditional practices, land use and culture.

[30] The Review Board first considered the Proposed Development's likely impacts on heritage and cultural resources. After canvassing the evidence, it made the following findings of fact:

- Because heritage resources were known with a high degree of accuracy within the claim block, the regulated 30 meter buffer zone would protect the known archeological sites from the first two drill sites and the proposed camp location. Therefore, significant adverse effects to archaeological and heritage sites were unlikely in the context of the first two drill sites (Decision at pages 23- 24).
- There was considerable uncertainty associated with identifying drill locations in an exploration project because the results of initial drilling lead to decisions about the locations of the next drill sites (Decision at page 24).
- The Proponent's claim block is predominantly located over water (90%). If subsequent drill sites were located offshore on ice during winter, it was unlikely those sites would impact upon archaeological resources (Decision at page 24).
- Only a small portion of the Proponent's claim block included the shoreline. This area was already significantly disturbed by an earlier camp, roads, access routes and other

exploration activities. It was therefore unlikely that unidentified archaeological resources existed within most of the claim block. If they did, the standard terms and conditions included in a land-use permit would prevent any significant adverse impacts to them (Decision at page 25).

- It followed from the small-scale of the Proposed Development that the eight unidentified drill holes would not have any significant adverse impact on the environment (Decision at page 25).

[31] The Review Board then turned to consider impacts on traditional land use and culture. The Review Board began by recognizing that paragraph 117(2)(*a*) of the Act requires every environmental assessment to include consideration of "any cumulative impact that is likely to result from the development in combination with other developments". After reviewing the evidence, the Review Board made the following findings of fact:

- The Drybones Bay area was of high importance to the Yellowknives Dene and other Aboriginal groups who use the area (Decision at page 30).
- The Proposed Development was a small exploration project on a claim block which was 90% over water. While the Yellowknives Dene and other Aboriginal land users have traditional travel routes over this portion of Great Slave Lake, any disturbance to the routes would be of short duration and not create significant impacts (Decision at page 31).
- The small claim block that includes the shoreline had already been substantially affected by prior use of a camp, roads, access routes and other exploration activities. The

Proposed Development would not add to this disturbance in a significant way (Decision at page 31).

- Any drilling in the Burnt Island areas would impact the Yellowknives Dene's ability to access and use the islands only for a short period of time (Decision at page 31).
- If the project led to additional development, there would be a substantial opportunity to review any proposed larger project (Decision at page 31).
- Considering all of the above, the Proposed Development would not likely contribute significantly to the previously identified cumulative adverse effects on land use and culture. (Decision at page 32).

[32] The First Nation has not seriously challenged the Review Board's findings of fact and has not shown that they were not reasonably open to the Review Board on the evidentiary record before it. These findings provide an intelligible, transparent and justifiable basis for the Review Board's conclusion about adverse impacts on the environment. That decision was within the range of possible, acceptable outcomes defensible in respect of the fact and law. It was, therefore, reasonable.

[33] Before leaving this issue, I wish to address briefly the First Nation's submissions that the Federal Court erred by concluding that the measures previously recommended by the Review Board would not affect the Proposed Development (Federal Court reasons at paragraph 45) and by relying upon the Interim Land Withdrawal to conclude that a significant portion of the Drybones Bay area and the shoreline zone were withdrawn from new development (Federal

Court reasons at paragraphs 47 and 48). In my view, these submissions do not assist the First Nation for the following reasons.

[34] First, and most importantly, in concluding whether the Federal Court applied the reasonableness standard correctly, this Court in effect stands in the shoes of the Federal Court. In conducting this essentially *de novo* review, I have proceeded on the basis that the 2007 measures proposed by the Review Board in the CGV Decision, if implemented, would apply to the Proposed Development and that the Interim Land Withdrawal has no relevance to the Proposed Development.

[35] Second, when the Federal Court decision is read fairly, I do not believe the impugned comments were material to the Court's decision.

2. Was the decision that the Proposed Development was not a cause of significant public concern reasonable?

A. *Standard of Review*

[36] The nature of this decision was similar to the nature of the decision about adverse impacts on the environment. It was fact based and any legal issue cannot be easily separated from the factual issues. This aspect of the Decision is to be reviewed on the reasonableness standard.

B. *Application of the standard of review*

[37] The First Nation argues, correctly, that public concern is a separate ground to be considered on its own merits; a proposed project cannot be approved under paragraph 128(1)(*a*) of the Act unless it is not likely to have any significant adverse impact on the environment and is not likely to be a cause of significant public concern.

[38] The First Nation then argues that the Review Board made the same error when considering whether the Proposed Development would be a cause of significant public concern: it relied upon the measures it had proposed in the CGV Decision to address the public's concerns.

[39] In my view, the Review Board did not rely upon the measures it had previously recommended in order to conclude that there was no basis for significant public concern. I reach this conclusion on the following basis.

[40] The Review Board did begin its analysis of this issue by noting that it had "previously recommended measures and made suggestions for planning, monitoring and management of cumulative effects in the shoreline zone, including the area where the project is proposed" (Decision at page 36 (footnote omitted)). It went on to note that very little progress had been made on resolving the underlying land-use management issues in the shoreline zone in the area affected by the Proposed Development (Decision at page 37).

[41] This said, the Review Board found the evidence tendered by the Yellowknives Dene in previous assessments, which was taken into the evidence in the assessment of the Proposed Development, to be regional in nature and more focused on the need for regional level land-use management. Because this previously expressed concern about ongoing competing land uses within the Drybones Bay area was regional in nature, and the Proposed Development would not significantly contribute to that underlying concern, the public concern was less relevant to the environmental assessment of the Proposed Development.

[42] On this basis, the Review Board's reasons cannot be said to have relied on mitigation measures it had previously recommended.

[43] The Review Board went on to note that it had already concluded in this environmental assessment that the Proposed Development would not contribute significantly to the cumulative impacts because it was of small-scale and short duration, and because it was located in a previously disturbed area (Decision at page 37). It followed that the public concern about cumulative effects did not apply to the Proposed Development (Decision at page 37).

[44] On the basis of this analysis, the Review Board found the effects of the Proposed Development would not be material, and so did not provide a basis for significant public concern.

[45] In my view, the First Nation has not demonstrated the findings of the Review Board were not reasonably open to it on the evidentiary record before it. The findings provide an intelligible,

transparent and justified basis for the Review Board's conclusion about public concern. This decision was in the range of possible, acceptable outcomes defensible in respect to the facts and the law. It follows that the decision was reasonable.

3. Did the Crown meet its duty to consult and, if required, accommodate the Yellowknives Dene?

A. *Standard of Review*

[46] The parties are in agreement as to the standards of review to be applied to this issue. The existence and the extent or content of the duty to consult are legal questions, reviewable on the standard of correctness. The adequacy of the consultation is reviewable on the reasonableness standard.

[47] I agree that this articulation of the standards is consistent with the jurisprudence of the Supreme Court of Canada: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paragraphs 61-62; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paragraph 48.

B. *Application of the standard of review*

[48] The duty to consult is grounded in the honour of the Crown. The duty arises when the Crown has actual or constructive knowledge of the potential existence of Aboriginal rights or

title and contemplates conduct that might adversely affect those rights or title (*Haida Nation* at paragraph 35).

[49] In the present case, the Minister acknowledges that the duty to consult arose in respect of the environmental assessment process. This is so because environmental assessment reports prepared by the Review Board are sent to the responsible minister who may, among other things, adopt the recommendations, reject them or request further consideration by the Review Board (section 130 of the Act). The minister relies upon the Review Board and accompanying regulatory processes to discharge the Crown's duty to consult (see e-mail from Aboriginal Affairs and Northern Development Canada to a representative of the Yellowknives Dene sent August 10, 2011, Appeal Book volume 2, Tab 14).

[50] The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, at paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at paragraph 36).

[51] In the present case, the Federal Court found the duty to consult to be in the mid-range of the consultation spectrum. The Federal Court reached this conclusion on the basis that the Yellowknives Dene have a strong claim to the exercise of rights in the Drybones Bay area, but the Review Board had found the potential for adverse impact from the Proposed Development to be low (Federal Court reasons at paragraphs 58-59).

[52] During oral argument, counsel for the First Nation agreed that in the present case little significance flows from whether the duty is characterized to be at the mid or high end of the *Haida Nation* range because, in the circumstances of this case, the content of the duty would not vary. The First Nation says that the Review Board process was, in any event, not capable of providing the required remedy: land-use planning. Therefore, the duty to consult was not met. As well, there was no accommodation afforded to the Yellowknives Dene.

[53] I agree that little turns on the terminology used to describe the nature of consultation that was required. What is important is the determination of whether the level of consultation afforded was proportionate to the preliminary assessment of the strength of the claimed rights and the seriousness of the potential for adverse effects of the Proposed Development on those rights (*Haida Nation* at paragraph 35).

[54] For the reasons that follow, I am of the view that the duty to consult was discharged through the Review Board process. I will begin my analysis by reviewing the applicable legal principles, and then, will turn to the application of those principles to the facts of this case.

[55] It is now settled law that Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal. Tribunals considering resource issues that impinge on Aboriginal interests may be given: the duty to consult; the duty to determine whether adequate consultation has taken place; both duties; or, no duty at all. In order to determine the mandate of a tribunal, it is relevant to consider whether the tribunal is empowered to consider questions of law and what remedial powers the tribunal possesses (*Rio Tinto* at paragraphs 55-65).

[56] The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim. Nor does consultation equate to a duty to agree; what is required is a commitment to a meaningful process of consultation. Put another way, perfect satisfaction is not required. The question to be answered is whether the regulatory scheme, when viewed as a whole, accommodates the Aboriginal right in question (*Haida Nation* at paragraphs 42, 48, and 62).

[57] Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation* at paragraph 47).

[58] I now turn to the application of these principles, beginning with consideration of the role of the Review Board.

[59] As Justice Blanchard observed in *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178, at paragraph 118, the Act provides for a comprehensive consultation process, which in turn allows for significant consultation between a developer and affected Aboriginal groups. Illustrative of this are the following provisions of the Act:

- Part V of the Act establishes the Review Board. The purpose of Part 5 includes ensuring that the concerns of Aboriginal people are taken into account in the environmental assessment process (subsection 114(*c*)).

- The process is required to have regard to the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley and the importance of conservation to the well-being and way of life of the Aboriginal peoples to whom section 35 of the *Constitution Act, 1982* applies, and who use an area of the Mackenzie Valley (paragraphs 115(1)(*b*) and (*c*)).

- Every environmental assessment of a proposal for development must include consideration of the impact of the development on the environment (paragraph 117(2)(*a*)). Impact on the environment is defined to include any effect on the social and cultural environment and or heritage resources (subsection 111(1)).

- In conducting a review, the Review Board may carry out consultations with any persons who use an area where the development might have an impact on the environment (paragraph 123.1(*b*)).

- The Review Board is required to issue public, written reasons (section 121).

- The Review Board is given broad powers. After completing an environmental assessment it may, for example, recommend approval of a proposal for development subject to the imposition of measures it considers necessary to prevent significant adverse impacts, or it may recommend that the proposal be rejected (section 128).

[60] In my view, this regime reflects Parliament's intent that the Review Board engage in the required consultation process as part of and prior to completing an environmental assessment. I agree with Justice Blanchard that the process allows formal participation in the decision-making

process. I also agree that the product of the consultative process is reflected in the Review Board's Environmental Assessment Reports (*Ka'a'Gee Tu First Nation* at paragraph 118).

[61] While not in any way dispositive, it is useful to note that this interpretation of the Act appears to be consistent with the Review Board's understanding of its mandate. Part 5 of the Decision is entitled "Treaty and Aboriginal rights issues". In this portion of its reasons the Review Board recites the evidence adduced by the Yellowknives Dene relevant to potential impacts to treaty and asserted Aboriginal rights.

[62] The Review Board observed under the heading "Consultation and accommodation" that federal officials confirmed that no consultation had taken place with the Yellowknives Dene outside the environmental assessment process.

[63] The Review Board then concluded at page 45 of the Decision that:

- The environmental assessment process had provided an opportunity for Aboriginal groups to identify the specific adverse environmental impacts in the areas where they assert Aboriginal or treaty rights.
- Any adverse impacts could affect traditional land-use.
- This said, significant adverse impacts to the environment were unlikely.

[64] It is necessary to next consider whether the consultation provided by the Review Board process was adequate.

[65] The Federal Court found that the claim of the Yellowknives Dene to the exercise of rights in the Drybones Bay area was strong. However, the Federal Court went on to note that the

Review Board had concluded that the Proposed Development was unlikely to have a significant adverse impact on the environment, and it was unlikely to significantly contribute to the previously identified cumulative adverse impacts on land-use and culture. I have found those findings of the Review Board to be reasonable.

[66] In order to assess the depth of consultation required as a result of these factors it is helpful to consider the process afforded to the First Nation. The environmental assessment process afforded the Yellowknives Dene the opportunity to adduce evidence and make submissions to the Review Board — an impartial and expert decision-maker. The Review Board provided comprehensive written reasons which demonstrated that the concerns of the Yellowknives Dene were considered and how those concerns factored into the decision of the Review Board. In *Haida Nation* at paragraph 44, these factors were suggested to be non-exhaustive exemplars of deep consultation. In my view, this level of consultation was proportionate to the nature and extent that the Proposed Development was likely to infringe Aboriginal or treaty rights claim by the Yellowknives Dene. The consultation was, therefore, adequate.

[67] As noted above, the First Nation submits that the duty of consultation was not met because the Review Board could not mandate any land-use planning over the Drybones Bay area. This submission must fail for the following reason.

[68] As set out above, the duty of consultation does not equate to a duty to agree, provide a veto on land-use, or lead to a single outcome. In the view of the Review Board, the Proposed

Development was unlikely to negatively affect the environment. Therefore, it was not necessary for it to recommend measures similar to the land-use measures recommended in the CGV Decision. This finding of fact is fatal to the submission of the First Nation that land-use planning was the only outcome that could result from meaningful consultation.

[69] The First Nation argues in the alternative that the absence of any accommodation was inappropriate and rendered the consultation process flawed. This is said to be particularly so when Canada could have relieved the Proponent from the requirement to pursue his claim at this time, or the Review Board could have recommended measures similar to those recommended in the CGV Decision. Instead, the Decision provides no mitigation measures.

[70] Again, in my view, this submission does not have proper regard to the findings of fact of the Review Board about the Proposed Development's likely impact on the environment, including its impact on the previously identified cumulative effects. On the basis of those findings there was, at law, no need for accommodation measures to avoid irreparable harm or to minimize the effects of the Proposed Development. The duty of consultation does not always require substantive, as opposed to procedural, consultation (*Beckman* at paragraph 81).

## IV. Conclusion

[71] For the above reasons, I would dismiss the appeal without costs. However, before concluding these reasons it is important to deal with counsel's closing submission in which the position of the Federal Crown was characterized to be "asking for escalation of the conflict" and

to “push the area past the brink”. Counsel further submitted that this is a “conflict” the Review Board “has tried to de-escalate” in the CGV Decision and Reconsideration Decision.

[72] In my respectful view, this submission is unhelpful. The Review Board found the Proposed Development to be distinguishable from that proposed by CGV: the Review Board decided the Proposed Development should proceed to the regulatory phase for permitting and licensing, without the imposition of any mitigation measures. Upholding this decision cannot fairly be characterized as an escalation or an inconsistency with the Review Board’s earlier decisions involving the Drybones Bay area.

“Eleanor R. Dawson”

J.A.

“I agree.
J.D. Denis Pelletier J.A.”

“I agree.
Johanne Trudel J.A.”

## FEDERAL COURT OF APPEAL

## NAMES OF COUNSEL AND SOLICITORS OF RECORD

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|---|---|
| **DOCKET:** | A-411-13 |
| **STYLE OF CAUSE:** | YELLOWKNIVES DENE FIRST NATION v. THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, THE MACKENZIE VALLEY LAND AND WATER BOARD, and ALEX DEBOGORSKI |
| **PLACE OF HEARING:** | YELLOWKNIFE, NORTHWEST TERRITORIES |
| **DATE OF HEARING:** | MAY 12, 2015 |
| **REASONS FOR JUDGMENT BY:** | DAWSON J.A. |
| **CONCURRED IN BY:** | PELLETIER J.A.<br>TRUDEL J.A. |
| **DATED:** | JUNE 19, 2015 |

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