Date: 20131104

Docket: T-294-12

Citation: 2013 FC 1118

Ottawa, Ontario, November 4, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YELLOWKNIVES DENE FIRST NATION

Applicant

and

THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, THE MACKENZIE VALLEY LAND AND WATER BOARD,

and

ALEX DEBOGORSKI

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Yellowknives Dene First Nation [Yellowknives Dene] seeks to set aside a decision of the Mackenzie Valley Environmental Impact Review Board [the Review Board]. The Review Board concluded, pursuant to paragraph 128(1)(a) of the *Mackenzie Valley Resource Management Act*, SC 1998, c 25 [the Act], that the proposed Debogorski Diamond Exploration Project [the Debogorski Project] "is not likely to have any significant adverse impact on the environment or to be a cause of significant public concern." As a result, the Review Board

concluded that an environmental impact review of the Debogorski Project was not necessary and that it should proceed to the regulatory phase for permitting and licensing.

[2] The Yellowknives Dene submit that this is an unreasonable decision, or alternatively was made contrary to the Act because the Review Board failed "to ensure that the concerns of aboriginal people and the general public are taken into account in that process" as is required by paragraph 114(c) of Act. It is submitted that where there is a failure by the Crown to consult and accommodate the concerns of the First Nations, then the requirements under paragraph 114(c) of the Act have not been met: *Ka'a'Gee Tu First Nation v Canada (Minister of Indian and Northern Affairs)*, 2007 FC 764 [*Ka'a'Gee Tu*] and *Yellowknives Dene First Nation v Canada (Attorney General)*, 2010 FC 1139 [*Yellowknives Dene First Nation*]. The question of whether there was a failure to comply with the Act requires a finding that the Crown's duty to the Yellowknives Dene was not met. If it was met, then there is no breach of the Act.

[3] The Minister of Aboriginal Affairs and Northern Development [the Minister] was the only respondent that participated in the application and only to the Yellowknives Dene's submission that the Crown failed to consult and accommodate on this project. Notwithstanding the focus of that submission, some of what was offered by the Minister was also relevant to the issue of the reasonableness of the decision under review.

[4] After careful review of the more than 20 volumes of the record, and consideration of the written and oral submissions of the parties and the jurisprudence, I am unable to agree with the position of the Yellowknives Dene. For the reasons that follow, I must dismiss this application.

GENERAL BACKGROUND

The Yellowknives Dene First Nation, the Land Claim Process, and Drybones Bay

[5] The Yellowknives Dene is a band within the meaning of the *Indian Act*, RSC 1985, c I-5. It is also a part of the Akaitcho Dene First Nations [the Akaitcho Dene]. They are aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, reprinted RSC 1985, App II, No 44.

[6] On July 25, 1900, the Akaitcho Dene entered into a treaty with the Crown at Deninu K'ue (Fort Resolution) [the 1900 Treaty]. The Crown and the Akaitcho Dene have differing views of the 1900 Treaty: the Crown regards it as an adhesion to Treaty No. 8, whereas the Akaitcho Dene consider it to be a treaty of peace, friendship, and co-existence. Further, the Akaitcho Dene consider the geographic scope of the 1900 Treaty to have been determined by the exchange of oral representations and promises by the Chiefs and the representatives of the Crown present at the treaty council. Despite these differing views, on the 100th anniversary of the 1900 Treaty, the Akaitcho Dene and the Crown entered into a framework agreement as a key step in a comprehensive land claim process initiated in the 1970s. That land claim process is ongoing.

[7] The Minister accepts that "although a strong *prima facie* claim has never been proven in court or officially accepted by Canada, it is fair to characterize the Yellowknives Dene's claim to section 35 rights in the Drybones Bay area as reasonably arguable."

[8] Drybones Bay proper is a bay on the north shore of Great Slave Lake, Northwest Territories, and is about 50 kms from Yellowknife. There is no consensus on the geographic boundaries of the "Drybones Bay area" as that term is used by the parties. According to the Review Board, "[t]hroughout the hearings of [the] environmental assessment [for the Debogorski Project] and previous environmental assessments dealing with the same area, the Yellowknives Dene First Nation frequently used the term "Drybones Bay" to refer to a much larger area than the bay itself, but also referring to a length of surrounding shoreline and points inland." During the environmental assessment process, legal counsel for the Yellowknives Dene "identified the challenge of providing a detailed boundary to the area, and explained that Elders are 'looking at a broad perspective of a land they've used for generations'."

[9] In its decision, the Review Board included a map of the area, which showed "Drybones Bay proper" and a previous claim area – the Smitski claim area – within which the Debogorski Project is to take place. That map is annexed as Annex A to these Reasons. The small island that falls within part of the Smitski claim area is Burnt Island. When one examines the understanding of the Yellowknives Dene of the Drybones Bay area as shown on Annex B (a map with English Place names, a copy of which (with Traditional Place names) was attached as an exhibit to the affidavit of Chief Edward Sangris, Chief of the Dettah community of the Yellowknives), one immediately sees that the area of the Debogorski Project is a very small part of the Drybones Bay area.

[10] The Yellowknives Dene submit that while the area of the Debogorski Project is only a small part of the Drybones Bay area, the Board, when considering the impact of the project, had

to consider the cumulative cultural impacts of the projects in the Drybones Bay area which the Yellowknives Dene characterized as constituting a "death by a thousand cuts."

[11] Whatever its precise boundaries, there is no doubt that the Drybones Bay area is an area of critical significance to the Yellowknives Dene. The Minister agrees that the Yellowknives Dene "have used the area in and around Drybones Bay for harvesting and other cultural practices for generations, and recognize[s] the importance of the area to the Yellowknives Dene." The Review Board also accepted the significance of the area in its decision:

> The Review Board accepts that the shoreline zone [of the proposed project, in Drybones Bay] is historically important to the Aboriginal peoples who have used it for hundreds if not thousands of years, and continue to use the area today. The archaeological record demonstrates the importance of the area. Oral testimony on the public record from this environmental assessment proceeding, and other shoreline zone environmental assessments also confirms the importance of the area. The sites include archaeological sites spanning from prehistoric times to more recent heritage resource sites of historical relevance to Aboriginal peoples.

[12] The Yellowknives Dene asserted throughout the environmental assessment process and in this application that the Drybones Bay area is a place without parallel and that "they need to preserve this incredibly special area for [their] survival as a people, to maintain [their] culture and way of life." In short, the Drybones Bay area is incredibly important to the Yellowknives Dene for many reasons.

Previous Development in the Drybones Bay Area

[13] The Yellowknives Dene describe the previous development in the Drybones Bay area as follows:

> In the past decade, the Drybones Bay has come under intense and accelerating development pressure, mainly from mineral exploration. The Debogorski project is the 7th mineral exploration project proposed in the area in this short time. Secondary uses like snowmobiling are increasing due to the access created by exploration companies' infrastructure, trails and camps, adding to the development pressure in the area."

They say that "[t]he evidence on the record is clear and convincing: Drybones Bay Area is under grave threat from development." They note that "nearly six years ago the Review Board found [in relation to another project]" that "cumulative cultural impacts are at a critical threshold… [and] that without land management planning by the Crown and Aboriginal peoples, particularly the Yellowknives Dene, 'this threshold will be surpassed'." These previous mineral exploration projects were the subject of prior Review Board decisions.

[14] On the other hand, the Minister points out that:

> To protect lands in a proposed Akaitcho settlement area from disposition or development while negotiations are ongoing, there has been an interim withdrawal of lands. Those lands selected for interim withdrawal cannot be the subject of new mineral claim registrations. The majority of the land in the larger region referred to as the Drybones Bay area / Shoreline Zone has already been withdrawn and therefore cannot be developed (however, the relatively small Debogorski claim area itself, along with some other lands where there were existing third-party interests registered, were not withdrawn).

[15] An overview map of the withdrawn lands and a close-up map focusing on the Drybones Bay area were attached as Exhibits to the affidavit of Chief Edward Sangris. They are attached to these Reasons as Annex C and Annex D, respectively. Annex D and the handwritten general indication of the location of the Debogorski Project area shows that it is excluded from the

withdrawn land area. Nevertheless, the Minister submits that when considering the submissions of the Yellowknives Dene, one must not loose sight of the fact that much of the Drybones Bay area has been withdrawn from development, pending the land claim settlement.

The Debogorski Diamond Exploration Project and its Procedural History

[16] On February 9, 2011, Mr. Alex Debogorski submitted a land use permit application to the Mackenzie Valley Land and Water Board [the Land and Water Board] to conduct a ten drill-hole diamond exploration project in the Drybones Bay area. More specifically, the project would take place in the Smitski #1 claim area along the shoreline of Great Slave Lake, to the east of Drybones Bay proper.

[17] Mr. Debogorski's claim is mostly over water. The proposed mineral exploration project would consist of drilling up to ten holes over a five-year period and the support activities needed to conduct the drilling, such as transporting equipment to and from the site, setting up camps, drawing water from the lake, and so on. The drilling would be conducted to a maximum depth of 300 feet and would require 10,000 gallons of water per day, per running drill. Each drill hole is expected to take one week.

[18] Only two drilling sites were specifically located by Mr. Debogorski in his application. These sites are located on or adjacent to previously-disturbed land. Although one of the drilling sites is only 38 meters from an archaeological site, according to Prince of Wales Northern Heritage Centre archaeologist Tom Andrews, both drill holes "will be located in areas that most likely [have] been previously disturbed by the Snowfield camp and access roads. In addition,

previous archaeological work in the area seems to have checked [the drill hole] areas to some extent. In [Mr. Andrews' opinion], impacts to unrecorded archaeological sites are unlikely in the context of the first two drill sites."

[19] It was stated in the application, and noted by the Review Board, that Mr. Debogorski intends to make decisions about the locations of the remaining eight drill-sites, which could be on land or ice, or both, based in part on the information generated from the first two drill holes.

[20] On April 14, 2011, pursuant to subsection 125(1) of the Act, the Land and Water Board referred Mr. Debogorski's land use permit application to the Review Board for an environmental assessment. That provision requires such a referral where, "in its opinion, the development might have a significant adverse impact on the environment or might be a cause of public concern" (emphasis added). The basis for the Land and Water Board's referral was the "contentious history of other applications in the Drybones Bay area; … the [Review Board's] previous suggestion that no new land use permits be issued for proposed developments … within Drybones Bay … until a plan has been developed; the Review Board's previous and most recent statement that the 'cumulative cultural impacts [in the Drybones Bay area are] at a critical threshold;' … [and the] significant public concern regarding the integrity of the cultural and spiritual values associated with the Drybones Bay area with continued development."

[21] The environmental assessment process that eventually led to the decision under review took place over some eight months. It included a community information session (July 20, 2011); a public hearing (September 12-13, 2011); and a second community hearing (October 12,

2011). The Yellowknives Dene were active throughout the process, participating in and making submissions at the hearings, as did other First Nations and interested groups, such as the Prince of Wales Northern Heritage Centre.

[22] At the public hearing, Mr. Andrews, an archaeologist from the Prince of Wales Northern Heritage Centre, and the Yellowknives Dene expressed particular concern about the uncertain location of future drill sites and the impact these may have on undiscovered or undocumented heritage sites. It was noted by the Review Board that at a public hearing, Todd Slack, Research and Regulatory Specialist with the Yellowknives Dene, said:

> There's a fair amount of project uncertainty associated with this proposal. [Yellowknives Dene] have identified two particular areas of uncertainty: the location of the balance of the drill holes…and the long-term camp location. Without knowing where these drill holes are, it is very difficult to properly evaluate the impacts associated with this program.

[23] To prevent the unintended disruption of archaeological sites, Mr. Andrews recommended that:

> Once the locations of the next eight drill holes have been determined, the proponent must hire an archaeologist to conduct an archaeological impact assessment of the drill holes and surrounding areas, access routes, and other areas of anticipated ground disturbance.

[24] Throughout the process, the Yellowknives Dene strongly opposed the project until a land use plan for the Drybones Bay area is in place. However, and in the alternative, it was submitted that should the project proceed, both it and the North Slave Métis Alliance should be involved in Mr. Debogorski's future drill site selection to avoid impacts to heritage resources.

THE REVIEW BOARD DECISION

[25] The Review Board, as noted previously, concluded that the proposed Debogorski Project is not likely to have any significant adverse impact on the environment or to be a cause of significant public concern and that an environmental impact review of it is not necessary.

[26] The Act provides that:

128. (1) On completing an environmental assessment of a proposal for a development, the Review Board shall,	128. (1) Au terme de l'évaluation environnementale, l'Office :
(a) where the development is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern, determine that an environmental impact review of the proposal need not be conducted;	a) s'il conclut que le projet n'aura vraisemblablement pas de répercussions négatives importantes sur l'environnement ou ne sera vraisemblablement pas la cause de préoccupations importantes pour le public, déclare que l'étude d'impact n'est pas nécessaire;
(b) where the development is likely in its opinion to have a significant adverse impact on the environment,	b) s'il conclut que le projet aura vraisemblablement des répercussions négatives importantes sur l'environnement :
(i) order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(c), or	(i) soit ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)c), la réalisation d'une étude d'impact,
(ii) recommend that the approval of the proposal be made subject to the imposition of such measures as it considers necessary to prevent	(ii) soit recommande que le projet ne soit approuvé que si la prise de mesures de nature, à son avis, à éviter ces répercussions est ordonnée;

the significant adverse impact;	
(c) where the development is likely in its opinion to be a cause of significant public concern, order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(c); And	c) s'il conclut que le projet sera vraisemblablement la cause de préoccupations importantes pour le public, ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)c), la réalisation d'une étude d'impact;
(d) where the development is likely in its opinion to cause an adverse impact on the environment so significant that it cannot be justified, recommend that the proposal be rejected without an environmental impact review.	d) s'il conclut que le projet aura vraisemblablement des répercussions négatives si importantes sur l'environnement qu'il est injustifiable, en recommande le rejet, sans étude d'impact.
[emphasis added]	[non souligné dans l'original]

[27] The Review Board's decision was that the project fell within paragraph 128(1)(a) of the Act because it was "not likely… to have any significant adverse impact on the environment or be the cause of significant public concern." Accordingly, there was no need to proceed to an environmental impact review, the more extensive process provided for under sections 132 to 137.3 of the Act.

ANALYSIS

Standard of Review

[28] The Yellowknives Dene at the hearing submitted that the question of the reasonableness of the decision under review, being a question of mixed law and fact, is reviewable on the reasonableness standard. I agree.

[29] I also agree with the Yellowknives Dene that the Supreme Court in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] held that questions regarding the existence and content of the Crown's duty to consult and accommodate are to be reviewed on the correctness standard. However, as was pointed out in *Ka'a'Gee Tu* there is a significant factual element in such determinations such that a decision whether the Crown has met its duty in any particular case involves "assessing the facts of the case against the content of the duty:" *Ka'a'Gee Tu* at para 91.

1. Was the Decision of the Review Board Unreasonable?

[30] The Yellowknives Dene submit that the decision under review "is unreasonable in substance, so much so that the conclusions bear little rational connection to the evidence and factual findings." They particularize those submissions at paragraphs 92 to 102 of their memorandum which I summarize as follows:

1. The Review Board relies on the measures contained in decision ES0506-005 to address the issue of the cumulative impacts in the Drybones Bay area, when it knew that those measures had not been implemented;
2. The Review Board uses its faulty characterization of the Debogorski Project as "small scale" and "of short duration" and being "located in a previously disturbed area" to conclude that "[p]ublic concern about cumulative effects are [*sic*] therefore not relevant."
3. The Review Board decision on cumulative impacts is contrary to the finding, some six years earlier, that the Drybones Bay area was at a "critical threshold"

and, it is submitted, this project is "the last straw [pushing] the Drybones Bay Area beyond the tipping point;" and

4. The Review Board failed to include any mitigation measures in its decision.

[31] I am unable to accept the submission of the Yellowknives Dene that the decision was unreasonable. In my view, their fundamental dispute with the Review Board is that they do not agree with the conclusions it reached on the evidence before it. In the view of the Yellowknives Dene, as expressed in the decision and elsewhere, any project within the greater Drybones Bay area ought not to be approved because the area is at risk; any further development is the "straw that breaks the camel's back." The Review Board, on the other hand, as it is required to do, carefully examined the detail of the proposed project, the risks and sensitivities of the area, and reached a contrary conclusion.

[32] The issues raised in this application relating to its previous suggestion that no new land use permits be issued for proposed developments within the Drybones Bay area until a plan has been developed, and its previous statement that the "cumulative cultural impacts are at a critical threshold" in the area were front and center before the Review Board. Indeed, it notes that these were two of the reasons given by the Land and Water Board for referring the land use permit application for the Debogorski Project to environmental assessment.

[33] The Review Board further notes, when describing the scope of its assessment, the very issues the Yellowknives Dene now focus on:

> The scope of the environmental assessment focused on the following key issues:

- social and cultural issues:
    - project specific impacts to heritage and burial grounds;
    - cumulative impacts on traditional land use and culture; and
- public concern about unimplemented mitigation measures and outstanding issues from previous environmental assessments conducted for proposed projects in the shoreline zone of Drybones Bay.

Impact to Known and Unknown Archaeological Resources

[34] With respect to project specific impacts to heritage and burial grounds, the Review Board reasonably relied on the evidence of the Prince of Wales Northern Heritage Centre that there were five archaeological sites within the claim block. These consisted of "tent rings, hide drying racks, and birch bark or toboggan presses." The expert from the Prince of Wales Northern Heritage Centre testified that only one of the five archaeological sites was in "close proximity" to the two proposed drill holes. It was 38 metres away. He offered his recommendation that drilling must be a minimum of 30 metres from "all known archaeological sites" and further opined that "impacts to unrecorded archaeological sites are unlikely in the context of the first two drill sites." In short, his evidence supports the conclusion reached by the Review Board that the first two drill holes would have little or no impact to heritage and burial grounds.

[35] The Review Board considered the concern raised by the Yellowknives Dene that as yet undiscovered or undocumented heritage resources could be impacted by the project's eight remaining unidentified drill holes. It noted that the development area, with limited exceptions, is "predominately water" and that if subsequent drill holes are located off shore on ice during the winter, "it is unlikely that those sites would cause impacts to archaeological resources." Further,

it found that any impact such drilling would have on traditional travel routes over the ice "would be of short duration, without lasting impacts."

[36] The Review Board also considered the possibility that some of the remaining drill holes might be on Burnt Island. It noted that a report in 2004 "identified no sites on the island within the claim." The report did identify one site that bordered on the claim and recommended that the "island should be more thoroughly surveyed to find any other structures and evidence of previous occupation." As a consequence, the Review Board made the following suggestion:

> For any activities planned by the developer on Burnt Island, the Mackenzie Valley Land and Water Board should require the developer to conduct further archaeological survey work on the development footprint of any planned drill sites or accesses roads, if the Prince of Wales Northern Heritage Centre can provide sufficient justification to the Mackenzie Valley Land and Water Board for its need.

[37] One of the complaints of the Yellowknives Dene is that the Review Board only made suggestions when mandatory orders would have been more appropriate. Given that the preliminary assessment of Burnt Island located no archaeological sites within the claim area, it was not unreasonable, in my view, that the Review Board addressed the Burnt Island concerns as a suggestion. It reasonably put the burden on the Prince of Wales Northern Heritage Centre to provide "sufficient justification" to the Mackenzie Valley Land and Water Board for the need for further archaeological survey work by the developer around the proposed drill sites.

[38] Lastly, the Review Board turned to the possibility that future drill holes might be located on land on "the small portion of the developer's claim block that includes the shoreline." It

noted that the shoreline area of the developer's claim was "already significantly disturbed" by previous exploration. Accordingly, it reasonably found that "it is unlikely that unidentified archaeological resources exist within most of the developer's claim block, and if they do, the standard terms and conditions included in a land use permit will prevent any significant adverse impacts to them."

[39] The Review Board is entitled to considerable deference from this Court in making decisions fully within its mandated expertise. The Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] instructs reviewing courts that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process [and] it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[40] In this case, the Review Board provided justification for its decision. Its decision and the reasons it provides with respect to the two located and eight not-as-yet located drill-holes are transparent and intelligible. Accordingly, given the unique characteristics of the Debogorski Project, it was not unreasonable for the Review Board to find that there was unlikely to be a significant adverse impact on the environment or a cause of significant public concern as a consequence of eight of the possible future drill holes not yet being identified by the developer.

Cumulative Impact

[41] The Yellowknives Dene point to previous decisions of the Review Board in which it suggested that no more land use permits should be issued until a plan for the area had been

developed. In the Snowfield Development Corporation's Diamond Exploration Program decision, dated February 25, 2004 (EA-03-006), and the North American General Resources Corporation Preliminary Diamond Exploration in Wool Bay, dated February 10, 2004 (EA-03-003), the Review Board suggested that:

> No new land use permits should be issued for new developments within the Shoreline Zone, and within Drybones Bay and Wool Bay proper, until a plan has been developed to identify the vision, objectives, and management goals based on the resource and cultural values for the area. This plan should be drafted and implemented with substantive input from Aboriginal parties. The plan should specifically address future development direction and include provisions for protecting sensitive environmental, cultural, and spiritual sites. This exercise should be completed within 5 years and provide clear management prescriptions for greater certainty of all parties in the future development of this region.

[42] In the Consolidated Goldwin Ventures Inc. Mineral Exploration Program decision, dated November 30, 2007 (EA0506-005), as amended by subsequent decision, dated November 16, 2011, the Review Board included in its decision the following measure:

> To mitigate the identified significant cumulative cultural impacts, the Government of Canada, with AANDC as the lead department, will work with the YKDFN and other Aboriginal land users of the subject area to produce a plan for the Shoreline Zone. This will be a collaborative stakeholder-driven planning process similar in nature to a regional Plan of Action, but focused on a smaller area. This plan, at a minimum, will be drafted and implemented with substantive input from Aboriginal parties familiar with the area, including input on cultural values and sites. The plan will provide clear recommendations for managing development and recreational activity in the Shoreline Zone.
>
> <u>The Mackenzie Valley Land and Water Board will consider the results of this plan and its implementation before reaching any determinations regarding preliminary screenings of new applications for developments in the Shoreline Zone</u>.
> Until this plan is implemented, AANDC will offer appropriate relief to mineral claim and lease holders in the Drybones Bay area

> from fulfilling the requirements of the *NWT and Nunavut Mining Regulations*. (emphasis added)

[43] The Review Board referenced this decision in the decision under review and found that if its measures were approved and implemented they "will address the issue of cumulative impacts in the Drybones Bay area." The Yellowknives Dene submit that because the measures have not been approved and implemented, "it is not logically possible for the measures … to address the impacts of the Debogorski project because those measures do not yet exist in the real world."

[44] This measure has not yet been approved and implemented. However, it appears that this plan will not apply to the Debogorski Project as it is not a "new application for development" because it was filed on February 9, 2011, before this amended measure was issued by the Review Board.

[45] One must question the value of the Review Board reiterating a measure it has previously proposed that would not have application to the Debogorski Project. In any event, the Review Board, in addressing the issue of the cumulative impact, does not restrict its consideration to its earlier recommendation in EA0506-005. The Review Board in the decision under review goes on and describes the project as "a small exploration project, on a claim which [is] approximately 90% water" and it forms the opinion that any disturbance to travel routes during the winter would be of short duration and would not create significant impacts. Further, it finds that any disturbance of the shoreline would be on an already disturbed area and that the "proposed development will not add to this disturbance in any significant way," and that any disturbance on Burnt Island would be of short duration. The Review Board concludes, based on these

considerations that the project, if it contributes at all to the cumulative impact in the area, will only do so minimally:

> Considering the evidence set out above, and noting the anomalous nature of the small scale of the project, and its location within an area where the land is previously disturbed, and well-used, and the predominance of water within the developer's claim, the Review Board concludes that the proposed project is not likely to significantly contribute to the previously identified cumulative adverse impacts on land use and culture. [emphasis added]

[46] In my view, the Review Board's decision respecting cumulative impact is reasonable and falls within the description given in *Dunsmuir*.

[47] Although not mentioned by the Review Board, it is also relevant that its record discloses that a very significant portion of the Drybones Bay area and the Shoreline area were withdrawn from new development after the Review Board's decision in EA0506-005. This withdrawal appears to have largely implemented the suggestions in EA-03-006 and EA-03-003 over much of the area.

[48] Accordingly, in assessing whether there is any cumulative impact on the larger Drybones Bay area, as alleged by the Yellowknives Dene, one must consider not only the detail of the project under consideration but also more limited area now subject to possible future development.

2. Was There a Failure to Consult and Accommodate?

[49] In an email dated July 26, 2011, the Yellowknives Dene, with reference to the Debogorski Project and the Drybones Bay area, informed the Crown that it was looking "forward to future discussions with the Crown on developing an engagement plan and meaningful accommodations to the continuing infringements in this area."

[50] The Crown responded that it was relying on the Land and Water Board and the Review Board processes established by the Act, to fulfill the Crown's duty to consult:

> Aboriginal Affairs and Northern Development Canada (AANDC) is of the view that where a reasonable and consultative process already exists, such as that provided for in the Mackenzie Valley Resource Management Act (MVRMA) – i.e. the Mackenzie Valley Environmental Impact Review Board (MVEIRB) and the accompanying regulatory processes – the Crown may take such consultation into account and rely on these processes to fulfill its duty to consult where appropriate.
> …
> Therefore, AANDC urges the [Yellowknives First Nation] to avail itself of the consultative processes provided through this MVRMA-mandated [environmental assessment], especially if you anticipate specific concerns about the proposed Debogorski project that have not been raised in previous [environmental assessments] in this area.

[51] As noted earlier, the Yellowknives Dene actively participated in the processes mandated by the Act.

[52] The Yellowknives Dene submit that the Crown has failed to meet its duty to consult and accommodate them. They summarize this submission in their Memorandum, as follows:

> The Crown has failed to meet its duty to consult and accommodate in this case. The Crown relied entirely on a statutory scheme that cannot meaningfully address the First Nation's concerns about cumulative cultural impacts. Addressing these concerns requires,

> at a minimum, some form of landscape-level land use planning for the Drybones Bay Area. Since the Crown has refused to engage in such planning, despite clear urging over a decade from both the first Nation and the Review Board, and has taken no other steps to address the issues, it stands in clear breach of its constitutional duty.

[53] "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown," which is "always at stake in its dealings with Aboriginal peoples:" *Haida* at para 16. The "duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it:" *Haida* at para 35.

[54] The Minister does not dispute that the duty to consult arose "in respect of the issuance of the Debogorski land use permit, including during the [environmental assessment] process before the Review Board."

[55] *Haida* at paragraphs 43 and 44 confirmed that the content of the duty to consult and accommodate varies with the circumstances:

> … At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep

> consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[56] The Yellowknives Dene submit that in this case the scope of the Crown's duty is at the high end of the spectrum, requiring "deep" consultation and accommodation because its interest in the Drybones Bay area is clearly strong and the cumulative impacts of the development projects is high. It is clear to the Court from the record and the submissions that the Yellowknives Dene are saying, in large part, that the Crown's duty of consultation and accommodation in this case required the good faith negotiation of a land use plan for the Drybones Bay area.

[57] The Crown submits that only mid-range consultation is required, as the Yellowknives Dene have only a reasonably arguable claim to the Drybones Bay area, the seriousness of any potential impact is relatively low, as the project is small in scope over previously disturbed sites and over water, and any contribution to cumulative impacts in the area would be negligible, given the scope and location of the claim. As a mid-range claim, more than notice and information sharing is required, but there is no need for "deep" consultation. The Crown specifically opposes a land use plan, calling it discretionary public policy response, and notes that such a response may delay development for years.

[58] The Crown submits, as stated earlier, that the duty is discharged in this case by the administrative procedures and hearings provided for in the Act. I agree with the Crown that the claim to title in this area is reasonably arguable; however, I accept that the claim of the Yellowknives Dene to the exercise of rights in this area is strong. Nonetheless, the potential for adverse impact from the Debogorski Project was reasonably found by the Review Board to be quite low – in fact, almost negligible. Both factors must be considered when placing the duty along the spectrum: *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 36; *Haida* at paras 43-45; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 32.

[59] I conclude the duty to consult in this case is on the mid-range of the spectrum because of the low adverse impact of the project. The adverse impact is low because the two known drilling locations are on previously disturbed sites, the location of the small camp site is known, it is a two to three man operation, it is estimated that drilling will take at most one week per hole (or ten weeks in total), spread out over winter and summer, depending on initial drilling results, and drilling in undisclosed locations will either be over water, with minimal disruption to travel routes, or on land where no known archaeological sites have yet been located. Further, there is no proposal to cut any exploration lines or disturb anything not already disturbed: transportation suggested was float plane (with a dock near the proposed drill sites), snow machine and ice road.

[60] The question that requires addressing next is whether, at that point in the spectrum of consultation, the processes in place under the Act satisfied the Crown's duty to consult in this case.

[61] The Review Board in this case was entrusted with the duty to consult, arising from subsection 117(2), and the definition for "impact on the environment" in subsection 111(1) of the Act:

117.(2) Every environmental assessment and environmental impact review of a proposal for a development shall include a consideration of	117. (2) (2) L'évaluation environnementale et l'étude d'impact portent notamment sur les éléments suivants :
(a) the impact of the development on the environment, including the impact of malfunctions or accidents that may occur in connection with the development and any cumulative impact that is likely to result from the development in combination with other developments;	a) les répercussions du projet de développement en cause sur l'environnement, y compris celles causées par les accidents ou défaillances pouvant en découler et les répercussions cumulatives que sa réalisation, combinée à celle d'autres projets, entraînera vraisemblablement;
(b) the significance of any such impact;	b) l'importance de ces répercussions;
(c) any comments submitted by members of the public in accordance with the regulations or the rules of practice and procedure of the Review Board;	c) les observations présentées par le public en conformité avec les règlements ou les règles de pratique de l'Office;
(d) where the development is likely to have a significant adverse impact on the environment, the need for mitigative or remedial measures; and	d) dans les cas où le projet de développement aura vraisemblablement des répercussions négatives importantes sur l'environnement, la nécessité de prendre des mesures correctives ou d'atténuation;
(e) any other matter, such as the need for the development and any available alternatives to it, that the Review Board or any responsible minister, after consulting the Review Board, determines to be relevant.	e) tout autre élément — y compris l'utilité du projet et les solutions de rechange — que l'Office ou, après consultation de celui-ci, tout ministre compétent estime pertinent.

111. (1) The following definitions apply in this Part. …	111. (1) Les définitions qui suivent s'appliquent à la présente partie..
"impact on the environment" means any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources.	« répercussions sur l'environnement » Les répercussions sur le sol, l'eau et l'air et toute autre composante de l'environnement, ainsi que sur l'exploitation des ressources fauniques. Y sont assimilées les répercussions sur l'environnement social et culturel et sur les ressources patrimoniales.

[62] What the Yellowknives Dene would like is for the Crown to consult with them about a plan for the Drybones Bay area, as has been previously recommended by the Review Board. The Yellowknives Dene submit that there is a residual duty on the Crown, over and above any duty to consult that may have been discharged by the Review Board.

[63] The focus of consultation is the specific proposal in issue: To drill 10 exploratory holes in previously disturbed ground, or in areas where there is unlikely any archeological or historic site. Cumulative impacts were expressly considered by the Review Board, and it was determined this particular exploration operation would not cause any adverse effects that would affect the exercise of rights or title while negotiations were underway between the Yellowknives Dene and the Crown.

[64] In the face of the Review Board's reasonable finding that the project is not likely to have any significant adverse impact (a finding based on the evidence specific to the Debogorski Project as well as cumulative impacts), I find that the Review Board adequately discharged the

duty to consult with regard to this particular issue and there is no residual duty on the Crown currently to consult further with the Yellowknives Dene. However, this is not to say that there will never be a residual duty on the Crown to consult in the future.

[65] If resources are discovered in the claim area, or if the claim is sold as Mr. Debogorski proposes to do if resources are found, a new duty to consult may arise. The circumstances then may render the Review Board's prior consultation through this process inadequate. Further, a resource discovery may lead to a mine in this sensitive and culturally important area—a potential adverse impact warranting a higher level of consultation and accommodation. Those are some of the situations where a residual duty may arise, and where the duty to accommodate will be higher. But this does not mean a land use plan will necessarily be appropriate.

[66] The Board expressly considered this possibility:

> The Review Board acknowledges the Yellowknives Dene First Nation's concerns that a mine in the heart of the Drybones Bay area would cause serious cultural impacts. However, in the event that this small exploration project leads to additional development, there will be a subsequent opportunity to review any larger projects that are proposed.

[67] For these reasons, I find that the consultation process provided under the Act adequately met the Crown's duty to consult and accommodate in this case. The concerns of the Yellowknives Dene were taken into account by the Review Board, which made a decision on a very small scale project within a sensitive area.

COSTS

[68] Both parties sought costs at the higher end of the Tariff if successful because of the complexity, novelty, and importance of the issues raised. I agree that a higher scale is appropriate.

[69] The Crown seeks costs of $18,920 against the Yellowknives Dene pursuant to Column V of Tariff B. Having reviewed the Crown's calculation of those costs, I find that this is a reasonable amount and in the exercise of my discretion will award it because of the complexity of the issues raised, the volume of materials that were required to be reviewed, and the one specific but very important issue the Crown addressed in the application.

JUDGMENT

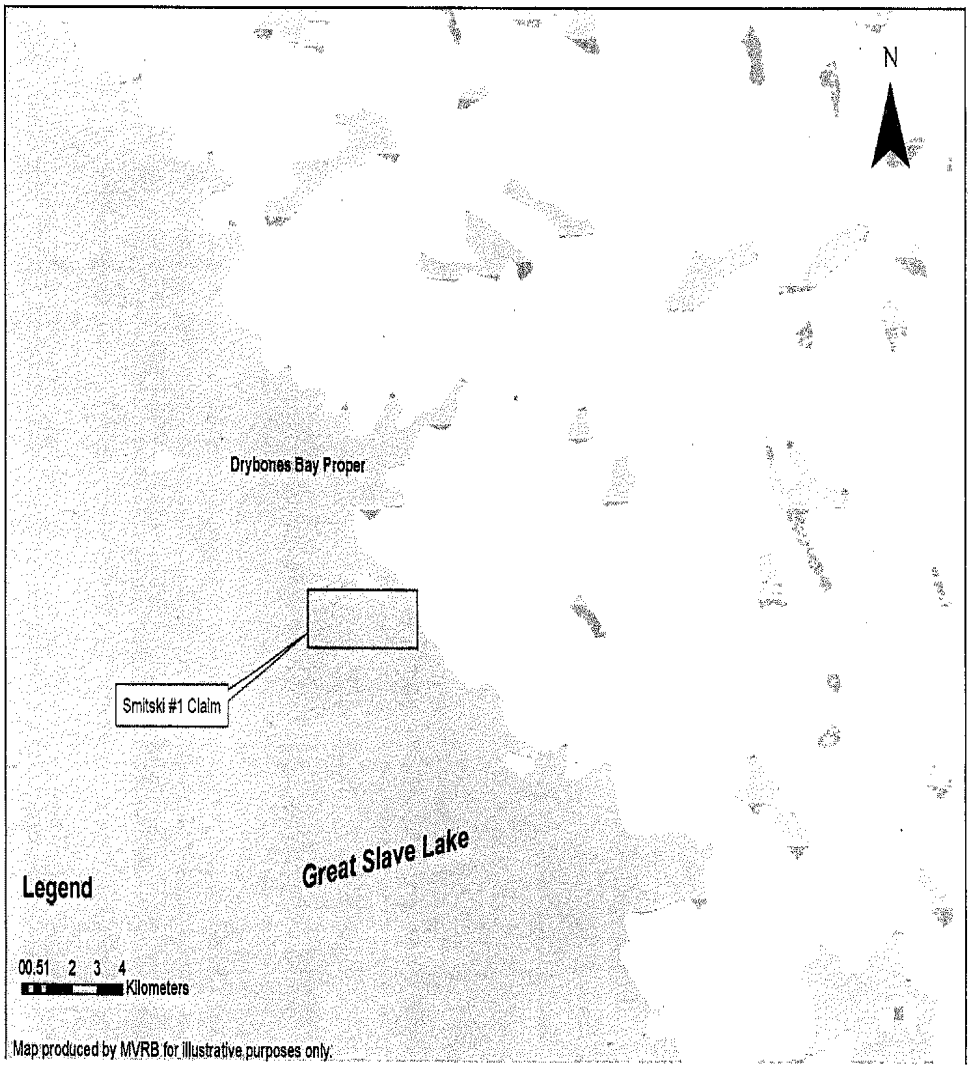
THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed; and

2. Costs are awarded to The Minister of Aboriginal Affairs and Northern Development against the Yellowknives Dene First Nation in the amount of $18,920.

"Russel W. Zinn"
Judge

ANNEX "A"


N
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Smitski #1 Claim
Great Slave Lake
Legend
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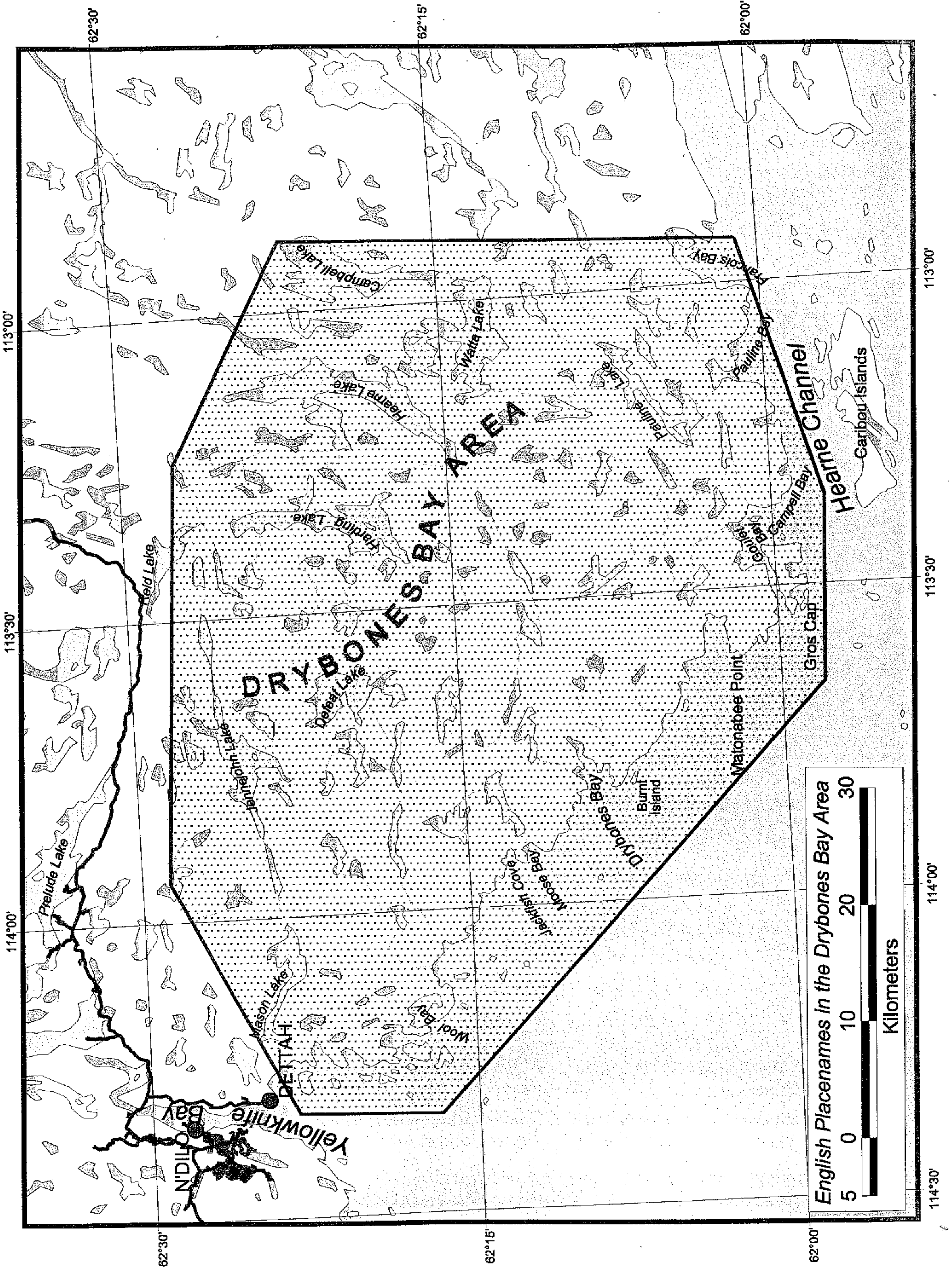
Kilometers
Map produced by MVRB for illustrative purposes only.

ANNEX "B"


English Placenames in the Drybones Bay Area
5 0 10 20 30
Kilometers
DRYBONES BAY AREA
Yellowknife Bay
N'DILO
DETTAH
Hearne Channel
Caribou Islands
Gros Cap
Matonabee Point
Drybones Bay
Burnt Island
Jackfish Cove
Moose Bay
Wool Bay
Mason Lake
Jennejohn Lake
Defeat Lake
Harding Lake
Hearne Lake
Watta Lake
Campbell Lake
Pauline Lake
Pauline Bay
Francois Bay
Campell Bay
Goulet Bay
Reid Lake
Prelude Lake
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62°15'
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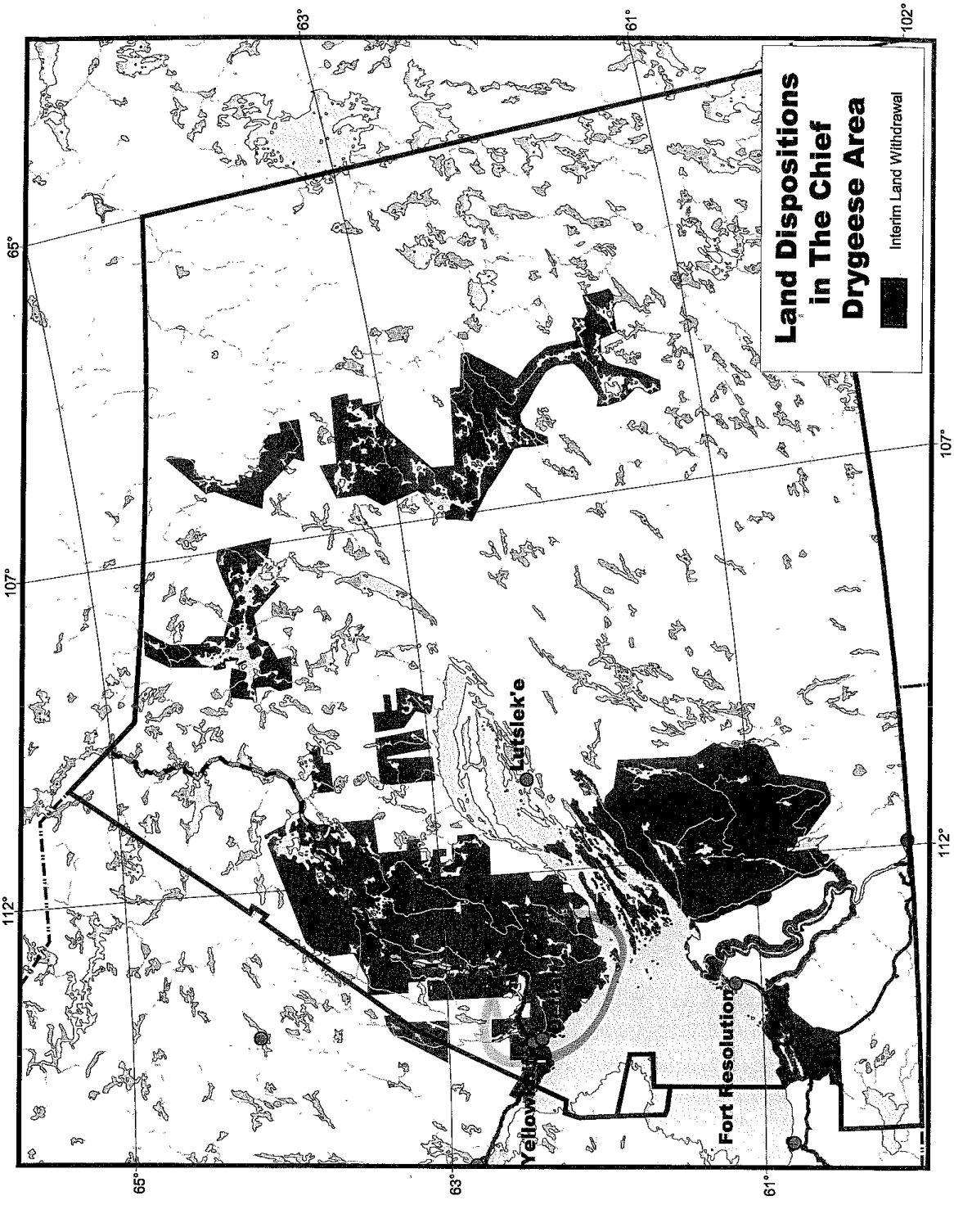
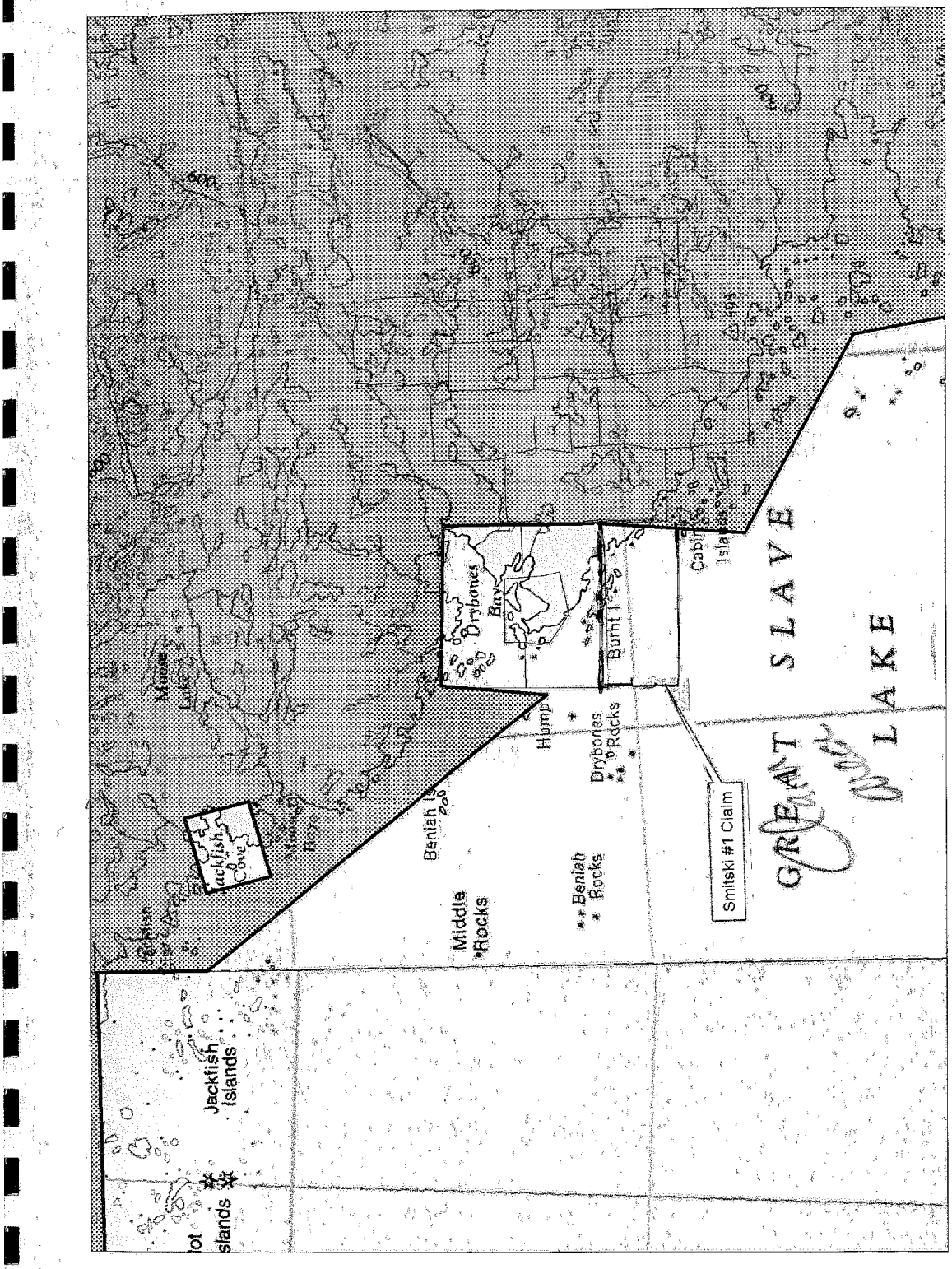
113°30'
114°00'
114°30'

ANNEX "C"


Land Dispositions
in The Chief
Drygeese Area
Interim Land Withdrawal
Lutsiek'e
Fort Resolution
Yellowknife
65°
63°
61°
112°
107°
102°

ANNEX "D"


Jackfish Cove
Jackfish Islands
Middle Rocks
Benlah Rocks
Drybones Rocks
Hump
Drybones Bay
Burnt I.
Smitski #1 Claim
GREAT SLAVE LAKE

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-294-12
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
DATES OF HEARING:	April 3, 4, and 5, 2013
REASONS FOR JUDGMENT:	ZINN J.
DATED:	November 4, 2013

APPEARANCES:

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