

12 - A0090
S.C. No. _____

SUPREME COURT OF YUKON

Between:

**CHIEF EIKLAND JR. on his own behalf and on behalf of all other members of
WHITE RIVER FIRST NATION and WHITE RIVER FIRST NATION**

PETITIONERS

And:

**THE MINISTER OF ENERGY, MINES AND RESOURCES, and THE YUKON
GOVERNMENT, and ROBERT HOLMES, in his capacity as Director of Mineral
Resources Branch, Ministry of Energy, Mines and Resources and TARSIS
RESOURCES LTD.**

RESPONDENTS

PETITION

THIS IS THE PETITION OF:

**CHIEF EIKLAND JR. on his own behalf and on behalf of all other members of WHITE
RIVER FIRST NATION and WHITE RIVER FIRST NATION**

c/o Janes Freedman Kyle Law Corporation
Suite 340 - 1122 Mainland Street
Vancouver, BC V6B 5L1

ON NOTICE TO:

Minister of Energy, Mines and Resources, Yukon Territory
The Honourable Brad Cathers, M.L.A.
Yukon Government Administration Building
2071 Second Avenue
Whitehorse, Yukon, Y1A 2C6

Yukon Government
c/o The Honourable Darrell Pasloski, M.L.A.
Premier of Yukon
Yukon Government Administration Building
2071 Second Avenue
Whitehorse, Yukon, Y1A 2C6

Robert Holmes, Director Mineral Resources Branch
Energy, Mines and Resources
400 – 211 Main Street (Shoppers Plaza)
Whitehorse, Yukon, Y1A 2C6

Tarsis Resources Ltd.
c/o William J. Worrall, Q.C. Law Corp.
950 – 1199 West Hastings Street
Vancouver, BC V6E 3T5

Let all persons whose interests may be affected by the order sought TAKE NOTICE that the petitioner applies to court for the relief set out in this petition.

APPEARANCE REQUIRED

IF YOU WISH TO BE NOTIFIED of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing an APPEARANCE in Form 9 in this court within the time for appearance and YOU MUST ALSO DELIVER a copy of the Appearance to the petitioner's address for delivery, which is set out in this petition.

YOU OR YOUR LAWYER may file the APPEARANCE. You may obtain an APPEARANCE form at the registry.

IF YOU FAIL to file the Appearance within the proper time for appearance, the petitioner may continue this application without further notice to you.

TIME FOR APPEARANCE

Where this Petition is served on a person in Yukon, the time for appearance by that person is 7 days from the service (not including the day of service).

Where this Petition is served on a person outside Yukon, the time for appearance by that person after service is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

[or, where the time for appearance has been set by order of the court, within that time.]

TIME FOR RESPONSE

IF YOU WISH TO RESPOND to the Petition, you must, on or before 8 days from the end of the time for appearance provided for above,

- (a) deliver to the petitioner
 - (i) 2 copies of a Response in Form 11, and
 - (ii) 2 copies of each affidavit on which you intend to rely at the hearing, and
- (b) deliver to every other party of record
 - (i) one copy of a Response in Form 11, and

(ii) one copy of each affidavit on which you intend to rely at the hearing.

(1)	The address of the registry is: The Law Courts 2134 Second Avenue Whitehorse, Yukon Y1A 5H6 Telephone: (867) 667-5937 Fax: (867) 393-6212
(2)	The petitioner's ADDRESS FOR DELIVERY (Required : Residential address or business address AND postal address in Yukon) is: Janes Freedman Kyle Law Corporation c/o Search North #20 - 1114 First Avenue Whitehorse, Yukon 11A 1A3 <u>Optional</u> : Telephone: 1-867-668-4425
(3)	The name and office address of the petitioner's lawyer is: Janes Freedman Kyle Law Corporation Suite 340 – 1122 Mainland Street Vancouver, BC V6B 5L1 Fax number for delivery: 604.687.2696 Email address: kbrooks@jfkllaw.ca Telephone: 604.687.0549 Fax: 604-687-2696

ENDORSEMENT FOR SERVICE OUTSIDE YUKON
(if applicable)

The petitioners claim the right to serve this Petition on the Respondent Tarsis Resources Ltd. outside Yukon on the ground that

1. The whole subject matter of the proceeding is land in Yukon or the perpetuation of testimony relating to land in Yukon; and
2. Any act, deed, will, contract, obligation or liability affecting land or hereditaments in Yukon is sought to be construed, rectified, set aside or enforced (Rule 13(1)(a) and (b)).

PETITION

The Petitioners apply for:

1. A declaration that Yukon Government (“Yukon”), and its representatives, has a duty to consult and, if indicated, accommodate White River First Nation (“White River”) before making decisions that relate to the Tarsis Resources Ltd. (“Tarsis”) White River – Quartz Exploration, YESAA File No. 2012-0080 (the “Tarsis Project”) that could potentially impact White River’s constitutionally protected Aboriginal rights and title;
2. A declaration that Yukon and its representatives breached its procedural and constitutional duty to consult with White River;
3. A declaration that the Director of Mineral Resources, Robert Holmes (the “Director”) erred in law under the *Yukon Environmental and Socio-Economic Assessment Act* (“YESAA”) in issuing his decision document (the “Decision Document”) for the Tarsis Project, which rejected the recommendation of the Yukon Environmental and Socio-Economic Assessment Board (“YESAB”), by:
 - a. failing to consult with White River, for which no final agreement is in effect, in accordance with the Crown’s constitutional duty and as required by s.74(2) of YESAA;
 - b. failing to give full and fair consideration to traditional knowledge and in particular the evidence and submissions of White River as required by s.74(1) of YESAA; and
 - c. failing to act in accordance with the purpose of YESAA by failing to ensure that the Tarsis Project was assessed and considered with particular recognition of the traditional economy of White River and their special relationship with the wilderness environment as well as their well-being generally, as set out in ss.5(2)(d) and (f).
4. An order quashing the Decision Document;

5. In the alternative, an order suspending or staying the Decision Document and prohibiting further steps being taken in respect of or in reliance on the Decision Document, including but not limited to authorizations, permits and licenses until the deficiencies described above are remedied and an order of the Court to that effect has been made;
6. A declaration that Yukon and its representatives are under a continuing procedural and constitutional duty to consult with White River in respect of the Tarsis Project, including a duty in respect of the following matters:
 - a. the scope and extent of White River's Aboriginal rights, title and interests;
 - b. the potential adverse impacts and effects, including cumulative impacts and effects, of the development of the Tarsis Project itself and in relating to other mining developments in White River traditional territory;
 - c. the appropriate management of these adverse impacts and effects, in the context of other existing and reasonably contemplated developments that are affected, or will effect, White River traditional territory;
 - d. terms and conditions that may be attached to any permits, decisions or authorizations relating to the Tarsis Project;
 - e. compensation for impacts and infringements of White River's Aboriginal rights and title by development activities related to the Tarsis Project;
 - f. the manner in which White River will be meaningfully integrated into the continuing approval process or into other processes providing for the management of activities in White River traditional territory; and
 - g. capacity funding to permit White River to engage in meaningful consultation;

7. An order that any party may apply to this Court for further directions, advice, or orders in respect of the conduct of consultation or appropriate accommodation relating to the Tarsis Project;
8. Costs of this proceeding; and
9. Such further and other relief as this Honourable Court may order and deem just.

The petitioners will rely on:

1. *Constitution Act*, 1982, ss.35 and 52 as amended;
2. *Quartz Mining Act*, S.Y. 2002, Ch. 14, ss.132, 135 and 149, as amended;
3. *Quartz Mining Land Use Regulations*, O.I.C. 2004/64, as amended;
4. *Yukon Rules of Court*, Rules 10(1)(i), 34, 54 and 60;
5. *Yukon Environmental and Socio-Economic Assessment Act*, S.C. 2003, C.7, ss.2, 3, 5(2), 42(1), (2) and (4), 55(1), (3) and (4), 56(1)74(1) and (2), 75(1), 83(2) as amended; and
6. such further and other materials as this Honourable Court may deem just.

The affidavits of Janet Vander Meer #1, to be sworn, will be relied on at the hearing, copies of which will be served.

The facts upon which this Petition is based are as follows:

The Petitioners

10. The Petitioner, Chief Charlie Eikland Jr., is the elected Chief and a member of the White River First Nation ("White River"). Chief Eikland Jr. brings this judicial review on his own behalf and on behalf of all other members of White River First Nation.
11. The Petitioner White River First Nation is a body of Indians constituting a "band" as defined by the *Indian Act*, R.S.C. 1985, c. I-5, as amended, and are an "Aboriginal people" within

the meaning of s. 35 of the *Constitution Act, 1982* (U.K.), 1982, c.11.

12. Before and at the time of contact as well as at the time of the assertion of Crown sovereignty, the lands and waters within the traditional territory of White River, and in particular the lands and waters which are the subject of this application, have been integral to the culture, economy and survival of the White River First Nation. White River First Nation members have relied upon those lands and waters to supply them with a wide variety of foods and other resources for domestic, ceremonial and trade purposes.

13. No final land claims agreement is in effect for White River.

The Respondents

14. The Respondent Yukon Government ("Yukon") is the Executive Council for Her Majesty the Queen in Right of Canada and claims administrative powers with respect to lands in the Yukon Territory.

15. The Respondent Minister of Energy, Mines and Resources ("EMR") is a member of the Executive Council and is responsible for administering and authorizing hard rock mining activities in Yukon including the Tarsis Project.

16. The Respondent Director of the Mineral Resources Branch, on behalf of Yukon, is responsible for issuing a decision document accepting, rejecting or varying the recommendation of the Haines Junction Yukon Environmental and Socio-Economic Assessment Board (the "Board") Designated Office (the "Designated Office") under s.75(1) of the YESAA.

17. The Respondent Tarsis is a mining exploration company incorporated in accordance with the laws of the Province of British Columbia and is registered as an extra-territorial corporation under Yukon's *Business Corporations Act*. Tarsis staked the lands at issue in June of 2010 and has been carrying out Class 1 exploration activities since that time. Tarsis is now seeking a five-year Class 3 mining land use approval for mineral exploration under the

Quartz Mining Act.

The Aboriginal Rights and Title of White River

18. White River has and asserts Aboriginal rights and Aboriginal title, including economic rights as part of their Aboriginal title, to all lands and waters within their Traditional Territory, including in the Tarsis Project area. White River exercises at least the following rights in the Tarsis Project area:
- a. Hunting for food, socio-cultural, ceremonial and economic purposes;
 - b. Fishing for food, socio-cultural, ceremonial and economic purposes;
 - c. Trapping food, socio-cultural, ceremonial and economic purposes;
 - d. Gathering plants and botanical resources for food, socio-cultural, and ceremonial purposes;
 - e. Bartering or exchanging the products of resources harvested or fished
 - f. The right to self-government and self governance; and
 - g. Conducting ceremonial, cultural and spiritual practices and traditions.
19. The rights above also encompass incidental rights which include, but are not limited to: the right to build shelters, the right to teach and pass on traditional practices, and the right to access White River's traditional and preferred areas for hunting, trapping, gathering, fishing and harvesting. Having a meaningful "sense of place" is critical to White River's exercise of rights; practice of culture; and to White River's self-identification.
20. For the rights to remain meaningful within White River's Traditional Territory, including in the Tarsis Project area, there must be, among other things, a supply of animals, fish and plants sufficient to meet the needs of White River's members now and in the future, for both domestic and economic uses; and sufficiently large and intact tracts of lands to exercise these rights to meet the needs of White River's members over time and into the future to ensure that White River can meet its food, social, ceremonial, economic, cultural and spiritual needs.

The Tarsis Project

21. On March 3, 2012 Tarsis applied for a five-year Class 3 Mining Land Use Approval for mineral exploration in White River's traditional territory from the Yukon EMR.

22. The Tarsis Project is located within White River's traditional territory, approximately 60 km south-east of Beaver Creek. The Tarsis Project encompasses an area of approximately 70 sq km and is located in the boreal forest eco-region. The Property is only accessible via helicopter.
23. The Tarsis Project area is in a pristine area of deep cultural significance to White River and the Tarsis Project has the potential to adversely affect and infringe the Aboriginal rights and title and the way of life of White River.
24. The Tarsis Project was staked in June of 2010. Class 1 exploring activities have been ongoing since staking. Permitted activities pursuant to a Class 1 Approval include: clearing of lands; construction of lines, corridors and trenches, construction of above ground and underground structures, camps and the use of explosive and storage of fuel.
25. Yukon did not consult with White River with respect to any Class 1 related activities.
26. The scope of activities permitted pursuant to a Class 3 approval are extensive and include: prospecting, geological mapping, soil sampling, ground geophysical surveying, trenching and drilling. Specific exploration activities include:
- The construction of structures with foundations
 - More than 10 persons in a camp and more than 250 person-days per camp
 - Storage of fuel exceeding 40,000 L
 - Construction of lines that are more than 1.5 m
 - Construction of corridors that are more than 0.5 km in length
 - Trenching up to a maximum of 5,000 m³ per year (to a maximum of 10,000 m³ in total)
 - More than 8 clearings of trees, bush and vegetation *per claim*,
 - These clearings may be up to more than 1000m² in size
 - More than 8 clearings for purposes such as helicopter pads or camps

- These clearings may be more than 500m² per clearing in size
- Construction of roads up to 15 km
- Upgrading of access roads up to 30 km
- Establishment of trails up to 15 m wide and 40 km long
- Establishment of temporary trails up to 15 m wide and 40 km long
- Use of vehicles on existing roads or trails
- Use of off-road vehicles in summer and winter
- Use of more than 1,000 kg of explosives in any 30 day period
- Construction of underground structures, with removal of up to 100,000 t of rock per year and up to 200,000t for the duration of the program.

27. Further, subsection 131(2) of the *Quartz Mining Act* SY 2003, c 14 permits certain exploration, production or development activities in addition to the exploration program so long as that activity does not involve disturbance of more than 10,000 tonnes of earth, soil and rock in one year.

28. The Tarsis Project includes the following activities:

- Use of heavy machinery including 2 excavators and 2 diamond drill rigs
- Developing new trails on claim (up to 10km, 5m wide)
- Helicopter access (maximum of 10 flights per day)
- Drilling (100 holds, 20,000m total)
- Water use: up to 20,000 l/day
- Clearings: up to 10/claim, 25m²
- Line cutting and IP surveying (1m wide, 60,000m total)
- Trenching by hand and mechanized equipment (up to 100 trenches, total of 10,000m³)
- Fuel handling and storage (4,100L diesel and 820L Jet A in 205L drums)
- On-going and final reclamation and decommissioning activities

29. Tarsis proposes to undertake these activities annually between May 1 and October 31 for up

to five years.

The Regulatory Regime

30. To obtain a Class 3 Mining Land Use Approval the proposed project must undergo an independent environmental and socio-economic assessment process, a government decision process and a regulatory (licensing) process. These processes are governed primarily by YESAA and the *Quartz Mining Act* ("QMA").

The Assessment Process: The Statutory Requirements

31. Under s.2 of YESAA *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, an assessment by a designated office is required for the Tarsis Project.
32. The scope of the assessment is determined by considering the activities described in the scope of the project and based on consideration of the matters set out in Section 42(1) of YESAA and identifying the valued environmental and socio-economic components that may be affected by those project activities.
33. Under section 51 of YESAA, the assessment is limited to proposed activities and not potential future activities.
34. Under section 39 of YESAA, a designated office is required to "give full and fair consideration to scientific information, traditional knowledge and other information provided to it or obtained by it under this Act."
35. Under section 55 of YESAA, a designated office is required to evaluate the project and, before making any recommendation, seek views about the project and information relevant to the evaluation, including from any First Nation that has notified the designated office of its interest.
36. Under section 56 of YESAA, at the conclusion of its evaluation, a designated office must recommend to the decision bodies for the project whether the project should be allowed to proceed or not, or if allowed, whether any terms and conditions should be attached.

The Assessment Process: The Facts

37. In January 2012, Tarsis advised White River that the 2011 mineral exploration had been successful and that it was applying for a Class 3 Mining Land Use Approval.
38. White River and Tarsis attempted to reach a formal agreement in respect of consultation that would include, among other things, capacity funding to carry out the necessary land use studies. No agreement was reached and Tarsis refused to provide funding for a project specific traditional land use study. White River provided comments to Tarsis on its application.
39. On March 19, 2012, Tarsis submitted its application to YESAB. The comments provided by White River were not referenced or included in the application.
40. On March 28, 2012, White River notified the Haines Junction Designated Office (the “Designated Office”) that it was aware of that an application had been submitted by Tarsis, that Tarsis had not addressed White River’s concerns, and that White River wished to participate in the assessment process.
41. On March 29, 2012, White River submitted detailed comments on the Tarsis application to YESAB.
42. On March 29, 2012, YESAB notified White River that it received White River’s comments and advised them of further opportunities to make further submissions.
43. The period for seeking views and information spanned from April 20, 2012 to June 22, 2012, which included two extensions at the request of White River.
44. During this period White River filed extensive comments about its concerns about the assessment process, and the adequacy of consultation, and the Tarsis Project. White River also expressed its concerns at meetings with representatives of YESAB, held on June 22 and

June 29, 2012. Yukon, EMR and Tarsis were also made aware of White River's concerns through correspondence or by filings in the public registry.

White River's Concerns about the Assessment Process

45. White River emphasized that its participation in the assessment process was restricted by the extremely short timeframe and its limited financial and human resource capacity. It raised the concerns about consultation generally and in particular stated:

- a. there was inadequate information gathering and consultation with respect to traditional use data;
- b. there was inadequate information gathering and consultation on the valued environmental and socio-economic components related to White River's Aboriginal rights and culture;
- c. there was inadequate information gathering and consultation with respect to the need for effects monitoring and the capacity of any renewable resources to meet present and future needs of White River pursuant to ss.42(1) and 110 of YESAA;
- d. there was inadequate information gathering and consultation with respect to the consideration of cumulative effects pursuant to s.42(1)(d)(i) of YESAA;
- e. there was inadequate consultation with respect to the methodologies used to assess:
 - i. the values related to Aboriginal rights and culture;
 - ii. the present and future needs of White River in exercising their Aboriginal rights and culture; and
 - iii. the socio-economic impacts or benefits of the Tarsis Project.

White River's Concerns about the Tarsis Project

46. White River submitted to the Designated Office that it opposed the Tarsis Project on the basis that the Tarsis Project would adversely impact, both on its own and together with other planned activities, White River's section 35 rights, title and culture. In support of its concerns, and in addition the information provided at meetings (held on June 22 and June 29, 2012) and in correspondence, White River provided the Designated Office with a copy of its Traditional Land Use Study for the TransCanada Pipeline Alaska Pipeline Project ("APP TLUS") completed in October, 2011 as well as a min-traditional land use study ("MTLUS")

completed by Calliou Group with respect to the Tarsis Project.

47. Both the MTLUS and the APP TLUS show White River's use of lands and resources on, and in the vicinity of, the Tarsis Project. However, White River made it plain that the MTLUS was far from comprehensive and that a full TLUS was required to properly assess the impacts of the Tarsis Project. White River informed the Designated Office it lacked the resources to carry out such comprehensive study.

48. White River's concerns, as summarized by the Designated Office in its Evaluations Report are as follows

a. Spatial scope of assessment and project scope:

- i. Spatial scope should include helicopter routes and entire areas leading up to claim-block, given that routes are likely to be deviated from
- ii. The assessment should consider the effects of a potential "build-out" of the proposed project into a mine

b. Consideration of Cumulative effects

- i. Cumulative effects assessment should consider Class 1 activities and Teck's Wolf Property
- ii. The assessment should include consideration of a build-out of the project into a mine, and the potential for the development of a rationale for continued exploration, etc., based on Proponent investment

c. Assessment Process and Methodology

- i. YESAB should require the Proponent to collect TLU information via a TLUS funded by Proponent
- ii. White River should be consulted by YESAB regarding appropriate VESECs related to Aboriginal rights and culture
- iii. White River should be engaged before the commencement of the formal seeking views and information period under YESAA
- iv. YESAB's approach to assessments does not conform to environmental

assessment standards. YESAB is doing the effects assessment for the Proponent at the public's expense. The Proponent should be doing a complete Effects Assessment (e.g. environmental impact statements) that YESAB should be reviewing for adequacy and accuracy in the determinations

d. Proponent/Crown Obligations

- i. White River should be consulted regarding Class 1 activities and the project prior to its submission
- ii. The Proponent should be required to collect baseline information with respect to traditional land use in the form a Traditional Land Use Study funded at their expense
- iii. The Proponent should be required to collect baseline information with respect to values components for small projects (those that do not require an assessment) in anticipation of a potential "build-out" of activities
- iv. Land Use Planning should occur prior to any approval of activities in this area

e. Traditional Land Use and Traditional Ecological Knowledge

- i. Hunting areas are identified within the Tarsis Project area and areas leading up to the Tarsis Project area for big and small game, including fur-bearers and waterfowl
- ii. Fishing areas and camps identified
- iii. Important habitat and migration routes for caribou, moose, sheep and bears identified
- iv. Berry-picking areas identified
- v. Traditional trails and travel routes identified
- vi. Cultural significance of area described as "red zone." WRFN also noted the proximity of Pickhandle Lake area which is being negotiated as a Special Management Area
- vii. White River is concerned about displacement/access from hunting areas

f. Helicopter Disturbance

- i. Helicopter disturbance may impact wildlife, particularly calving animals in the spring
 - ii. Disruption of hunting and fishing activities including engagement in cultural activities such as use of trails and adjacent fish camps
- g. Surface disturbance
 - i. Surface disturbance will be noticeable and result in long-term impacts to the land (aesthetic, environmental)
 - ii. Soil stability will be impacted, erosion and sedimentation may occur
 - iii. Local vegetation and associated ecology will be affected, which may impact wildlife use of the area
 - iv. Clearing may impact traditional uses such as berry-picking
 - v. Concerned about ancestral use of region and potential heritage resources
- h. Water Quality/ Fisheries
 - i. Drilling may result in contamination of water sources as a result of drilling mud, spill, use of heavy equipment, etc.
 - ii. Sedimentation of water may occur as a result of project activities
 - iii. Downstream aquatic environments are likely to be affected, including fish habitat of White River, Koidern River, Long's Creek, Pickhandle Lake
 - iv. Water is very important to White River. Tarsis Project assessment should consider potential effects of a mine on water quality and fisheries

EMR Participation in the Assessment Process

- 49. As permitted by section 55(4) of YESAA, Yukon EMR participated in the process conducted by the Designated Office.
- 50. In its April 30, 2012 submission to the Designated Office, the Client and Inspections Branch of Yukon EMR stated: "It appears the environmental impacts of this operation can be mitigated if activities are conducted in accordance with regulations and permitted operating conditions."

51. In its May 20, 2012 submission (incorrectly dated May 20, 2011) to the Designated Office, the Minerals Resources Branch of Yukon EMR stated: “Commitments made by the proponent along with the Standard Operating Conditions as outlined in Schedule 1 of the Quartz Mining Land Use Regulations will mitigate any Mining Land Use concerns.”
52. Yukon EMR did not consult with White River before filing its submissions.

Issuance of the Evaluation Report

53. On July 30, 2012, the Designated Office recommended that the Tarsis Project not proceed (“Evaluation Report”). The Designated Office rejected the Tarsis Project on two grounds:
- a. the significant effects to the endangered Chisana caribou herd (“CCH”), which use the Property as a calving ground, could not be mitigated; and,
 - b. the effects on First Nations’ (including White River) traditional land use and culture could not be mitigated.
54. The Designated Office did not consider all of the issues raised by White River in the Evaluation Report. For example, it did not consider:
- a. the potential adverse impacts to White River’s rights or title from the Tarsis Project that were less than “significant”; or
 - b. the cumulative effects on wildlife and wildlife habitat or traditional land use and culture (since the Designated Office determined that the Project effects could not be mitigated with respect to these values cumulative effects were not considered).

(the “Outstanding Issues”)

The Decision Process: The Statutory Requirements

55. Subsection 75(1) of YESAA requires a Decision Body issue a Decision Document accepting, rejecting or varying the recommendation of the Designated Office, within the prescribed period.

56. Section 74 of YESAA requires that the Decision Body “considering a recommendation in respect of a project shall give full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation.”

57. Under s.74(2) of YESAA, a Decision Body is required to consult with a First Nation for which no final agreement is in effect if the project might have significant adverse environmental or socio-economic effects in the First Nation’s territory. Consultation is defined in s.3:

Where, in relation to any matter, a reference is made in this Act to consultation, the duty to consult shall be exercised

- (a) by providing, to the party to be consulted,
 - (i) Notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,
 - (ii) A reasonable period for the party to prepare its view, and
 - (iii) An opportunity to present its views to the party having the duty to consult; and
- (b) by considering, fully and fairly, any views so presented.

The Decision Process: The Constitutional Duty to Consult

58. In addition to its statutory duty to consult under YESAA, there is an ongoing constitutional duty on the Crown to consult with White River about potential impacts on its asserted aboriginal rights and title from the Tarsis Project.

The Decision Process: The Facts

59. By letter dated August 2, 2012, the Decision Body wrote to White River and incorrectly stated the Designated Office had recommended that the Tarsis Project proceed. The letter was intended to initiate consultation with White River pursuant to subsection 74(2) of YESAA.

60. On August 2, 2012 Ms. Vander Meer, Lands Manager for White River, contacted the Decision Body to correct that the Designated Office recommended the Tarsis Project not proceed due, *inter alia*, to adverse effects on White River Aboriginal rights and culture that could not be mitigated.

61. By letter dated August 3, 2012, the Decision Body wrote to White River in the same form as the letter dated August 2, 2012 but stated that the Designated Office had recommended that the Tarsis Project not proceed and stated the letter dated August 2 was issued by 'clerical error.'
62. By letter dated August 13, 2012, Mr. Freedman, legal counsel for White River, wrote on behalf of White River to the Decision Body to confirm a meeting on August 21, 2012 to discuss the Project. A list of questions to discuss at the meeting was provided.
63. By letter dated August 15, 2012, Mr. Blythe, President and CEO of Tarsis, wrote on behalf of Tarsis to the Designated Office to set out Tarsis' concerns with the Designated Office's assessment. In particular, Tarsis disputed the finding of the Designated Office that telemetry data indicated critical calving range in both the main and east work areas of the Tarsis Project. Tarsis asserted that a more appropriately scale map of telemetry data indicates calving activity only in the east work area, and only post calving activity in the main work area.
64. By letter dated August 16, 2012, Mr. Freedman, on behalf of White River, wrote a detailed letter to the Decision Body that set out its expectations for the consultation process and its concerns with consultation to date. In particular, he noted that although the Evaluation Report focused in large part on potential significant adverse impacts to the CCH, consultation between Yukon and White River must be deeper and focus on the potential for any of the Class 3 activities, directly and cumulatively, to adversely affect all of White River's rights, title, culture and well-being.
65. On August 21, 2012 a meeting was held between representatives of Yukon and White River to discuss, among other things, the Evaluation Report and White River's views about what the Decision Body should consider in its decision making process. It was noted that while White River agreed with the recommendation of the Designated Office, the Evaluation Report did not address all of White River's concerns. In particular, although the Designated Office's main finding was that the Tarsis Project would result in significant adverse affects to

CCH (and therefore to White River's Traditional Land Use and Culture) due to the direct displacement and loss of key calving ground overlapping with portions of the Tarsis Project site, White River's concerns were not limited to CCH. It was noted that consultation needed to be deeper.

66. By letter dated August 30, 2012, Ms. Chislett, Mining Lands Officer, wrote to White River and attached a table summarizing its review and consideration of representations made to both Yukon and the Designated Office with respect to White River's interests relative to the Project and invited comments. On the matter of White River's concerns about caribou harvesting, the table noted the Designated Office's finding that the Project would result in significant adverse effects to the CCH that could not be mitigated. The table indicated the following "additional observations" of the Decision Body:

- a. that the Designated Office suggested a broader distribution of caribou within the Project area than was borne out by the telemetry data, given that telemetry data only indicated the presence of caribou in the eastern work area;
- b. that in respect of post-calving presence, the telemetry data confirms no presence beyond mid-September, contrary to the Designated Office's finding that of a post-calving presence through the summer and fall period;
- c. according to the Management Plan for the CCH 2010 -2015, the CCH now appears to be stable at approximately 700 animals; and
- d. the foregoing suggests that the project effects on the CCH could be mitigated.

67. By letter dated August 31, 2012, Mr. Freedman, on behalf of White River, wrote to Ms. Chislett, and stated that White River did not agree the chart accurately reflected its concerns and was concerned the Decision Body appeared to be of the view the Tarsis Project should proceed to the approvals stage. Mr. Freedman stated that White River had fundamental concerns about Yukon's approach to consultation with White River on the Tarsis Project and that the integrity and role of the YESAA process was being called into question.

68. On September 5, 2012, the Decision Body issued the Decision Document and rejected the Board's recommendation. The Decision Body concluded that potential significant adverse

effects associated with the Tarsis Project could be mitigated. In making that conclusion, the Decision Body stated its disagreement with the findings of the Evaluation Report of a distribution of CCH in the main work area, and substituted its own finding that that Tarsis Project effects on the CCH could be mitigated by restricting project activities spatially and temporally. The Decision Document further stated that the Designated Office's determination that the Tarsis Project would result in significant adverse effects on traditional land use and culture that cannot be mitigated, was made only in relation to the assessor's determination of adverse effects on the CCH, and that the Evaluation Report did not conclude that potential effects on other values associated with traditional land use and culture cannot be mitigated.

69. Having approved the Tarsis Project, under s.9 of the *Quartz Mining Act* regulation, the Chief of Mining Land Use must decide whether to approve the Operating Plan with any terms and conditions.
70. Section 83(2) of YESAA states the Decision Document "shall be implemented" by a territorial agency taking any action that enables a project to be undertaken. Although the Chief of Mining Land Use has direction to refuse the license, pursuant to s. 86(b) of YESAA, the terms of a license cannot conflict with a decision document.

The Grounds for Review

71. In reaching its determination under s.75(1) of YESAA to accept, reject or vary the recommendation in the Evaluation Report, the Director erred in law by:
 - a. failing to properly assess or consider the nature and scope of White River's rights;
 - b. failing to adequately or meaningfully consult with White River with respect to potential adverse impacts and infringements on White River's rights, title, culture and well-being arising from the Tarsis Project, in accordance with section 35 of the *Constitution Act, 1982*, the honour of the Crown, and the statutory requirements under YESAA;

- c. rejecting the recommendation of the Designated Office without sufficient, credible information on which to base its decision, in particular:
 - i. placing disproportionate weight on the fact that telemetry data did not demonstrate calving ground in the main work area relative to the east work area, and disregarding telemetry data indicating post calving presence in the main work area;
 - ii. misinterpreting, or misrepresenting the findings of the Evaluation Report that significant adverse impacts on White River traditional use are limited to adverse effects on caribou, when in fact the Evaluation Report concluded that the Tarsis Project will have broader significant adverse impacts on White River's Aboriginal rights that cannot be mitigated; and
 - iii. placing disproportionate weight on the current "stable" population of CCH while neglecting the unexplained 80-90% decline in CCH's population over the last two decades;
- d. failing to give full and fair consideration to traditional knowledge and the submissions of White River as required under ss.5(2)(g), 74(1) and (2) of YESAA and in particular with respect to CCH, he placed a disproportionate weight on science-based information such as telemetry data, over other data derived from users of the land;
- e. failing to consider all of the potential adverse impacts of the Tarsis Project on White River's rights, title, culture and well-being, adequately or at all and making his decision only on those concerns identified in the Evaluation Report, in particular given that:
 - i. the Designated Office did not consult with respect to all the potential activities resulting from a Class 3 Approval permitted by the legislation and regulations, but only on those activities proposed by Tarsis;
 - ii. the Designated Office applied a higher standard of impact than required by the

duty to consult;

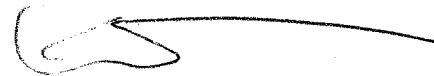
- iii. the Designated Office was unable to consider all of the potential impacts to White River due to the limited capacity White River had to provide all of the required information.
- f. failing to consider the potential cumulative impacts of the Tarsis Project, including the potential impacts from other proposed and existing Projects, on White River's rights, title and culture and well-being, adequately or at all; and
- g. improperly deferring the consideration of the above issues to later stages of the Tarsis Project review or monitoring, and in particular as a result of the fact the more exploratory work Tarsis is allowed to undertake, the more momentum there will be to approve an eventual mine.

72. More generally the Director's conduct and decision suggest that the Director failed to enter into consultation with White River with a genuine intention to listen to, consider and take into account the concerns and interests of White River with an open mind and with a willingness to alter the Director's proposed course of conduct.

73. As a result of the foregoing, the Decision Document should be set aside and the matter remitted for the purpose of consulting with and if necessary accommodating the asserted Aboriginal rights and title of White River.

The petitioners estimate that the application will take 2 days.

Dated October 17, 2012



Petitioners [*or petitioners' lawyer*]

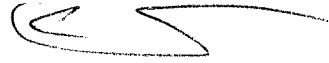
Krista Robertson
Barrister & Solicitor
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Victoria, BC V8W 2E1

NOTICE OF CASE MANAGEMENT CONFERENCE

Take notice that a Case Management Conference will be held at the Law Courts, 2134 2nd Avenue, Whitehorse, Yukon pursuant to Rule 1 (7) on Monday December 3rd, 2012 at 4:00.

If you fail to attend, orders may be made in your absence.

Dated Oct 17, 2012



Petitioners [*or petitioners' lawyer*]

Krista Robertson
Barrister & Solicitor
816 – 1175 Douglas Street
Victoria, BC V8W 2E1

S.C. No. _____

SUPREME COURT OF YUKON

Between:

CHIEF EIKLAND JR. on his own behalf and on behalf of all other members of WHITE RIVER FIRST NATION and
WHITE RIVER FIRST NATION

PETITIONERS

And:

THE MINISTER OF ENERGY, MINES AND RESOURCES, and THE YUKON GOVERNMENT, and ROBERT
HOLMES, in his capacity as Director of Mineral Resources Branch, Ministry of Energy, Mines and Resources and
TARSIS RESOURCES LTD.

RESPONDENTS

PETITION

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