T-1996-05

2007 FC 764

Chief Lloyd Chicot suing on his own behalf and on behalf of all Members of the Ka'a'Gee Tu First Nation and **the Ka'a'Gee Tu First Nation** (*Applicants*)

v.

Minister of Indian and Northern Affairs Canada, **Paramount Resources Ltd.** (*Respondents*)

INDEXED AS: KA'A'GEE TU FIRST NATION v. CANADA (MINISTER OF INDIAN AND NORTHERN AFFAIRS) (F.C.)

Federal Court, Blanchard J.—Vancouver, June 19, 20; Ottawa, July 20, 2007.

Aboriginal Peoples — Duty to consult — Judicial review of Mackenzie Valley Land and Water Board decision issuing amended land use permit to Paramount Resources Ltd. under Mackenzie Valley Resource Management Act following approval of extension to oil and gas development project — Federal Court having concurrent jurisdiction with Supreme Court of the Northwest Territories to hear application for prerogative relief from Board's decision — In related application, Crown found to have breached duty to consult, accommodate applicants with respect to approval of extension project — Crown thus not taking into account concerns of Aboriginal people as required by Act, s. 114 — As a result, Board prevented, pursuant to Act, s. 62, from issuing amended land use permit — Application allowed.

Federal Court Jurisdiction — Judicial review of Mackenzie Valley Land and Water Board decision to issue amended land use permit — Mackenzie Valley Resource Management Act, s. 32(1) granting Supreme Court of the Northwest Territories concurrent jurisdiction with Federal Court to hear applications for any prerogative relief against Board, whereas Act, s. 32(2) granting Supreme Court of the Northwest Territories exclusive jurisdiction with respect to action, proceeding concerning jurisdiction of Mackenzie Valley Land and Water Board, Mackenzie Valley Environmental Impact Review Board — "Jurisdiction" conferred by Act, s. 32(2) not including "any relief against a board", but limited to matters concerning loss, lack of statutory authority to act — S. 32 not vacating Federal Court's jurisdiction herein.

Environment — Judicial review of Mackenzie Valley Land and Water Board decision issuing amended land use permit to Paramount Resources Ltd. under Mackenzie Valley Resource Management Act following approval of extension to oil and gas development project—Board initiating investigation following environmental assessment to determine whether Crown conducted appropriate consultation, accommodation with applicants — Subsequently issuing land use permit, stating not within its authority to evaluate accuracy of Crown's consultation, accommodation — Act, s. 114 providing purpose of Act, Part 5 (pertaining to Mackenzie Valley Environmental Impact Review Board) to, inter alia, "ensure that the concerns of aboriginal people and the general public are taken into account" in process related to proposals for development—Crown not taking such concerns into account before approving project — Board thus prevented by Act, s. 62 from issuing amended land use permit.

This was an amended application for judicial review of the decision of the Mackenzie Valley Land and Water Board (the Board) to issue an amended land use permit (the permit) to Paramount Resources Ltd. (Paramount) under the *Mackenzie Valley Resource Management Act* (the Act). The permit was issued following the approval of an "extension project" representing the third phase of oil and gas development in the Mackenzie Valley. The applicants objected to this decision, alleging that it was made in breach of the federal Crown's duty to consult and accommodate. (That decision was challenged in a separate application for judicial review (docket T-1379-05) heard concurrently.) The Board considered the amended application and, after having received submissions from the interested parties (the Minister of Indian and Northern Affairs, Paramount, and the applicants), rendered the decision at issue herein, stating, *inter alia*, that it was not within its authority to evaluate the accuracy of the Crown's consultation and accommodation. The issues were: (1) whether the Court had jurisdiction to hear the application; and (2) whether the Crown's failure to consult with and accommodate the applicant First Nation constituted a failure to comply with the requirements of the Act.

Held, the application should be allowed.

(1) The question of the Court's jurisdiction engaged the interpretation of section 32 of the Act. Subsection 32(1) grants the Supreme Court of the Northwest Territories concurrent jurisdiction with the Federal Court in respect of applications for prerogative relief against the Board. But subsection 32(2) confers exclusive jurisdiction upon the Supreme Court of the Northwest Territories to hear and determine any action or proceeding "concerning the jurisdiction" of the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board. The word jurisdiction here does not include "any relief against a board by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition" as provided for in subsection 32(1). Had Parliament intended to vacate the Federal Court's jurisdiction entirely, it would have used clear language to that effect. The exclusive jurisdiction conferred in subsection 32(2) is limited to matters concerning the two boards' loss or lack of statutory authority to act. As such, section 32 of the Act does not vacate the Federal Court's concurrent jurisdiction with respect to matters involving natural justice and procedural fairness. The Court could therefore hear and decide the matters at issue in the present instance.

(2) The purpose of Part 5 of the Act, which pertains to the Mackenzie Valley Environmental Impact Review Board, is set out in section 114. It is "to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments" and, *inter alia*, "to ensure that the concerns of aboriginal people and the general public are taken into account in that process." In application T-1379-05, the Crown was found to have failed to discharge its duty to consult and accommodate before making a final decision on the approval of the extension project. Inherent in the Crown's duty to consult is the obligation to ensure that the concerns of the Aboriginal people are taken into account. By failing to meet its duty to consult and accommodate in the circumstances of this case, the Crown could not, therefore, be said to have taken into account the concerns of the Aboriginal people, as required by section 114 of the Act, before making its decision to approve the extension project. As the requirements of Part 5 were not complied with, the Board was prevented, pursuant to section 62 of the Act, from issuing the permit at issue in these proceedings. The Board's decision was therefore set aside. However, because an immediate order quashing the permit might have been counter-productive to the overall process, the parties were given an opportunity to address the question of whether the effect of such an order should be stayed for a period of time to allow for consultation.

statutes and regulations judicially considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18 (as am. by S.C.1990, c. 8, s. 5; 2002, c. 8, s. 26), 18.1 (as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27), 50.1 (as enacted by S.C. 1990, c. 8, s. 16; 2002, c. 8, s. 47).

Mackenzie Valley Land Use Regulations, SOR/98-429, s. 22(2)(*b*).

Mackenzie Valley Resource Management Act, S.C. 1998, c. 25, ss. 9, 9.1, 12, 32 (as am. by S.C. 2005, c. 1, s. 28), 62, 101.1 (as enacted *idem*, s. 58), 102 (as am. *idem*), 114.

cases judicially considered

applied:

Canada 3000 Inc. (Re); Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865; (2006), 269 D.L.R. (4th) 79; 20 C.B.R. (5th) 1; 349 N.R. 1; 212 O.A.C. 338; 10 P.P.S.A.C. (3d) 66; 2006 SCC 24.

considered:

Ka'a'Gee Tu First Nation v. Canada (Attorney General) (2007), 30 C.E.L.R. (3d) 166; 2007 FC 763; *Canada Labour Relations Board v. Transair Ltd.*, [1977] 1 S.C.R. 722; (1976), 67 D.L.R. (3d) 421; 76 CLLC 14,024; 9 N.R.

181; *Northwestern Utilities Ltd. et al. v. City of Edmonton*, [1979] 1 S.C.R. 684; (1978), 12 A.R. 449; 89 D.L.R. (3d) 161; 7 Alta. L.R. (2d) 370; 23 N.R. 565; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; (2004), 245 D.L.R. (4th) 33; [2005] 3 W.W.R. 419; 206 B.C.A.C. 52; 36 B.C.L.R. (4th) 282; 19 Admin. L.R. (4th) 195; 11 C.E.L.R. (3d) 1; [2005] 1 C.N.L.R. 72; 327 N.R. 53; 26 R.P.R. (4th) 1; 2004 SCC 73.

referred to:

R. v. McIntosh, [1995] 1 S.C.R. 686; (1995), 95 C.C.C. (3d) 481; 36 C.R. (4th) 171; 178 N.R. 161; 79 O.A.C. 81; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; (2002), 212 D.L.R. (4th) 1; [2002] 5 W.W.R. 1; 166 B.C.A.C. 1; 100 B.C.L.R. (3d) 1; 18 C.R.R. (4th) 289; 93 C.R.R. (2d) 189; 2002 SCC 42.

authors cited

Canada. Parliament. Standing Senate Committee on Aboriginal Peoples. *Proceedings*, 36th Parliament, 1st Session, No.10 (June 17, 1997).

House of Commons Debates, Vol. 135, No. 023, 36th Parliament, 1st Session (October 29, 1998).

APPLICATION for judicial review of the decision of the Mackenzie Valley Land and Water Board to issue an amended land use permit to Paramount Resources Ltd. under the *Mackenzie Valley Resource Management Act*. Application allowed.

appearances:

Timothy J. Howard for applicants.

Donna Tomljanovic and *Maria A. Mendola-Dow* for respondent Minister of Indian and Northern Affairs Canada.

Everett L. Bunnell, Q.C. and *E. Jung Lee* for respondent Paramount Resources Ltd.

Ronald M. Kruhlak for respondent Mackenzie Land and Water Board.

solicitors of record:

Mandell Pinder, Vancouver, for applicants.

Deputy Attorney General of Canada for respondent Minister of Indian and Northern Affairs Canada.

Macleod Dixon LLP, Calgary, for respondent Paramount Resources Ltd.

McLennan Ross LLP, Edmonton, for Mackenzie Land and Water Board.

The following are the reasons for order rendered in English by

BLANCHARD J.:

1. Introduction

[1] The applicants bring this amended application for judicial review in respect of the decision of the Mackenzie Valley Land and Water Board (the Land and Water Board [or the Board]) to issue an amended land use permit MV2002A0046 (the LUP) to Paramount Resources Ltd. (Paramount) on September 29, 2005 pursuant to its powers under the *Mackenzie Valley Resource Management Act* [S.C. 1998, c. 25] (the Act) and associated regulations.

2. Background Facts

[2] The LUP was issued following the approval of the "extension project." The extension project represents the third phase of oil and gas development in the Mackenzie Valley, in an area known as the Cameron Hills and signaled the beginning of production work. The applicants in a separate application for judicial review, T-1379-05, challenged the decision to approve the extension project alleging that the Crown had failed to meet its duty to consult and accommodate. That matter was scheduled to be heard at the same time as the within application. The issues raised in application T-1379-05 have now been decided and my reasons for order are filed concurrently with these reasons [(2007), 30 C.E.L.R. (3d) 166 (F.C.)]. A comprehensive review of the background facts including the history of oil and gas development in the Mackenzie Valley, a review of the regulatory process and applicable treaties is set out in my reasons in application T-1379-05. I will not repeat here all of those facts which are also material to the within application. I will limit my summary of the facts here to those circumstances not covered earlier and which bear on the issues raised in this application.

Mr. Todd Burlingame's Appointment

[3] Mr. Todd Burlingame was the chairperson of the Mackenzie Valley Environmental Impact Review Board (the Review Board) during the environmental assessment of the extension project. This appointment ended effective February 1, 2005.

[4] On January 21, 2005, the Land and Water Board provided to the Minister of Indian and Northern Affairs Canada (INAC) a list of three recommended candidates for the position of chairperson of that Board, pursuant to subsection 12(1) of the Act. Mr. Burlingame's name was not among them. On February 25, 2005, the Board again wrote to the Minister, expressing concern that he was contemplating appointing a chairperson who was not among the Board's recommended nominees. The Board stressed that it had used a fair process and requested that the Minister collaborate with it in making the appointment.

[5] The Minister did not respond to the Board's letters of January 21 and February 25. On or about March 9, 2005, the Minister appointed Mr. Burlingame as chairperson of the Land and Water Board. The Board was informed of this by a fax dated March 10, 2005.

Land Use Permit Amendment

[6] Paramount sought to amend its LUP on June 21, 2005. The Land and Water Board advised that it would not process the amended application until approval from the responsible ministers was received. The ministers issued their decision to approve the extension project subject to certain mitigation measures on July 5, 2005.

[7] By letters dated July 20 and July 28, 2005, the applicants wrote to the Land and Water Board and informed it that the ministers' decision was made in breach of the federal Crown's duty to consult and accommodate and that there had yet to be proper consultation with the applicants.

[8] On July 22, 2005, the Land and Water Board sought input on the amended application from stakeholders, including the applicants. On July 26, 2005, the Land and Water Board responded to the applicants' July 20, 2005 letter informing the applicants that Paramount's applications were the subject of an environmental assessment which was now completed. The Land and Water Board informed the applicants that it would notify the communities and parties to the permit review process of the results of the environmental assessment, and subject to comments received would then proceed to complete the licensing process.

[9] In a letter dated July 29, 2005 to the Board, the Minister provided his input on the amended application. He inquired into certain technical aspects of the project and expressed the view that all project components were consistent with the original application and that no additional operations were proposed. He also opined that the recommended measures from the environmental assessment should be maintained for the amended project.

[10] On August 10, 2005, the Land and Water Board met to consider the amended application and all of the submissions made, including letters submitted by counsel on behalf of the applicants.

[11] By letter dated August 3, 2005, and faxed on August 11, 2005 to the Regional Director General of INAC, the

Land and Water Board advised the Minister that it was exercising its powers under paragraph 22(2)(*b*) of the *Mackenzie Valley Land Use Regulations*, SOR/98-429 (the Regulations) to initiate an investi-gation into whether the federal Crown had conducted appropriate consultation and accommodation with the applicants. It further advised the Minister that it would not be issuing the amended LUP until it had received a detailed summary of the Crown's consultation efforts in relation to the applicants.

[12] On August 29, 2005, the Minister advised the Land and Water Board that it believed that the Crown's legal duty to consult had been met in these circumstances, but was unable to provide further information about the duty since the information requested was the subject of litigation.

[13] On August 31, 2005, Paramount, responding to the Minister's letter of August 29, wrote to the Board objecting to any delay in the regulatory approvals process in view of the fact that ministerial approval had already been received.

[14] On September 13, 2005, the applicants, responding to the Minister's August 29, 2005 letter, wrote to the Board indicating that INAC had not responded to the Board's request for information and asked that the Board not issue the amended LUP until assurances had been received that appropriate consultation had taken place.

[15] The Board met on September 22, 2005, to discuss Paramount's amended application. Mr. Burlingame was present at this meeting. On September 29, 2005, on behalf of the Land and Water Board, Mr. Burlingame issued land use permit No. MV2002A0046, the LUP at issue in this application, and water licence No. MV2002L1-00007 for the five wells mentioned in the application. On October 11, 2005, on behalf of the Land and Water Board, Mr. Burlingame issued reasons in support of the decision.

[16] By letter to the Land and Water Board dated October 17, 2005, the applicants expressed disagreement with the decision and requested that the Board suspend the operation of the amended permits. The Land and Water Board responded by letter on October 31, 2005. It stated that it was not "within the board's authority to evaluate the accuracy of the Crown's consultation and accommodation towards Ka'a'Gee Tu First Nation (KTFN), particularly when this issue is before the courts." The letter also confirmed that the Board had received assurances from INAC that the Crown's duty to consult with the KTFN about Paramount's proposed activities in the Cameron Hills had been met.

[17] The applicants filed the within application challenging the validity of the decision of the Land and Water Board to issue the land use permit for the five wells. The applicants have not challenged the decision to issue the water licence.

Procedural History of Application T-1996-05

[18] Application T-1996-05 was filed on November 4, 2005. Upon being informed that the respondents adopted the position that the issues raised in T-1996-05 fell outside the jurisdiction of the Federal Court by virtue of subsection 32(2) [as am. by S.C. 2005, c. 1, s. 28] of the Act, the applicants filed an identical application enjoining the same parties in the Northwest Territories Supreme Court, action No. S-0001-CV- 2005-000326. This proceeding has been adjourned *sine die* pending the disposition of the within application.

[19] The applicants then sought by motion to amend their application by deleting the request for a declaration that the Minister acted *ultra vires* his powers under subsection 12(2) of the Act in appointing Mr. Burlingame to the position of chairperson. The applicants also sought the removal of the Land and Water Board and Mr. Burlingame in his capacity as chairperson, as respondents.

[20] The respondents moved to have application T-1996-05 struck for want of jurisdiction or alternatively stayed pursuant to section 50.1 [as enacted by S.C. 1990, c. 8, s. 16; 2002, c. 8, s. 47] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. *idem*, s. 14)].

[21] The motions were heard together before Prothonotary Lafrenière on February 7, 2006.

[22] The motion to amend the notice of application was granted and the respondents' motion was dismissed. In dismissing the motion to strike and/or stay the application, the learned Prothonotary concluded that in the absence of case law dealing with the proper interpretation of subsection 32(2), the respondents had failed to establish that this proceeding was "bereft of any possibility of success" or that this was an exceptional case in which the originating notice should be struck. He concluded that the matter should be raised at the hearing of the application.

3. Issues

[23] The applicants raise the following issues in their application:

A. Does the federal Crown's failure to consult with and accommodate the Ka'a'Gee Tu First Nation constitute a failure to comply with the requirements of Part 5 of the Act?

B. Did the Minister act illegally and *ultra vires* his powers under section 12 of the Act in appointing Mr. Burlingame with the result that the decision to issue the LUP in which Mr. Burlingame participated is void?

C. Did the Land and Water Board breach the rules of procedural fairness and natural justice by permitting Mr. Burlingame to participate in the determination of the investigation initiated by the Land and Water Board under paragraph 22(2)(*b*) of the Regulations to determine whether or not the Federal Crown had fulfilled its obligation to consult and accommodate?

D. Did the Land and Water Board breach the rules of procedural fairness and natural justice by permitting Mr. Burlingame to participate in the decision to approve and issue the amended LUP?

4. Jurisdiction

[24] Before proceeding to consider the arguments of the parties with respect to the issues raised in this application, I must first be satisfied that I have jurisdiction to hear the application. It is the respondents' position that the Court does not have the jurisdiction to hear the application. They contend that jurisdiction properly rests with the Northwest Territories Supreme Court pursuant to the provisions of subsection 32(2) of the Act.

[25] In considering whether this Court has jurisdiction to entertain the application, it is necessary to consider whether the nature of the relief sought falls within the subject-matter or matters over which this Court has jurisdiction. In doing so it must be borne in mind that the Federal Court is a statutory court and its jurisdiction is dependent on that conferred by an Act of the Parliament of Canada.

[26] The within amended application is in respect of a decision of the Land and Water Board to issue a land use permit under the Act wherein the applicants seek the following relief:

[TRADUCTION]

(a) a declaration that the breach by the Responsible Ministers of their constitutional and legal obligation to consult with the Ka'a'Gee Tu First Nation (the "Ka'a'Gee Tu") and accommodate the Ka'a'Gee Tu's Aboriginal and Treaty Rights is a failure to comply with Part 5 of the Act;

(b) an order directing the Responsible Ministers to consult with the Ka'a'Gee Tu and accommodate the Ka'a'Gee Tu's Aboriginal and Treaty Rights before allowing the Extension Project, as defined below, to proceed;

(c) an order quashing and setting aside the Amended Land Use Permit;

(d) [deleted]

(e) [deleted]

(f) a declaration that Mr. Burlingame's participation in the decision to issue the Amended Land Use Permit

renders that decision contrary to law;

(g) a declaration that the issuance of the Amended Land Use Permit was made in breach of the duties of procedural fairness and natural justice;

(h) an order staying the Amended Land Use Permit and restraining Paramount from proceeding with any activities authorized pursuant to the Amended Land Use Permit pending the disposition of this application;

(i) costs; and

(j) such further and other relief as this Honourable Court may deem appropriate.

[27] The applicants essentially seek declaratory relief and an order quashing the land use permit and staying any activities permitted by the permit.

[28] It is not disputed that the applicants' claim is based on existing and applicable federal law, the *Mackenzie Valley Resource Management Act*, which is within the legislative competence of the Parliament of Canada. It follows, therefore, that the Federal Court would have jurisdiction to hear the application, unless an Act of Parliament provides otherwise.

[29] It is the respondents position that by enacting subsection 32(2) of the Act, Parliament conferred exclusive jurisdiction with respect to the relief sought in this amended application to the Supreme Court of the Northwest Territories, thereby depriving the Federal Court of any jurisdiction to hear the application.

[30] Section 32 of the Act provides as follows [s. 32(1) (as am. by S.C. 2005, c. 1, s. 28)]:

32. (1) Notwithstanding the exclusive jurisdiction referred to in section 18 of the *Federal Courts Act*, the Attorney General of Canada or anyone directly affected by the matter in respect of which relief is sought may make an application to the Supreme Court of the Northwest Territories for any relief against a board by way of an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition.

(2) Despite subsection (1) and section 18 of the *Federal Courts Act*, the Supreme Court of the Northwest Territories has exclusive original jurisdiction to hear and determine any action or proceeding, whether or not by way of an application of a type referred to in subsection (1), concerning the jurisdiction of the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board.

[31] Answering the jurisdictional question in the circumstances of this case engages an exercise in statutory interpretation of subsection 32(2) of the Act. In interpreting the above provisions I am guided by the modern principle of statutory construction restated by Mr. Justice Binnie in *Canada 3000 Inc. (Re); Inter- Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865. At paragraph 36 of his reasons, the learned Judge writes:

In a more modern and elaborate formulation, it is said that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[32] It is useful, at the outset, to consider section 18 [as am. by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 26] of the *Federal Courts Act*, which is expressly referred to in the Act. I will also consider the interplay between sections 18 and 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*; a factor relied on by the applicants.

[33] L'article 18 de la *Loi sur les Cours fédérales* donne compétence à la Cour fédérale pour accorder la réparation extraordinaire qui est sollicitée en l'espèce. Le texte de cet article est le suivant :

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(2) *The Federal Court* has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[34] By operation of section 18 of the *Federal Courts Act*, the Federal Court has exclusive jurisdiction to hear and determine any application for relief by way of prerogative remedies against a federal board, commission or other tribunal. Subsection 18(3) provides that this relief can only be obtained on application for judicial review under section 18.1. Subsection 18.1(4) sets out the grounds of review for which the Court can grant relief, namely where the Court is satisfied that the federal board, commission or other tribunal acted without or beyond its jurisdiction or failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe.

[35] In the respondents' submission, regard must be had to the relationship between sections 18 and 18.1 of the *Federal Courts Act* in considering the subject-matter of the jurisdiction conferred upon the Supreme Court of the Northwest Territories. The respondents contend that the effect of subsection 32(1) of the Act is to grant concurrent jurisdiction to the Supreme Court of the Northwest Territories in respect of prerogative relief against boards created by the Act, where the grounds pertain to excess, loss or lack of statutory authority and to allegations of failure to observe a principle of natural justice or procedural fairness. The respondents further contend that the opening word "despite" of subsection 32(2) of the Act operates to remove both the concurrent and exclusive jurisdiction of the Federal Court in respect of prerogative relief against either of the two boards where the grounds pertain to excess, loss or lack of statutory authority or allegations of failure to observe a principle of natural justice or procedural fairness.

[36] The applicants contend that the exclusive jurisdiction conferred upon the Supreme Court of the Northwest Territories by subsection 32(2) of the Act should be interpreted more narrowly. With respect to the relationship between sections 18 and 18.1 of the *Federal Courts Act*, the applicants argue that subsection 18.1(4) of the *Federal Courts Act* sets out separate and distinct grounds of review. The applicants maintain that acting without, beyond or refusing to exercise jurisdiction under paragraph 18.1(4)(*a*), is a separate ground of review than that provided for in paragraph 18.1(4)(*b*) which deals with failure to observe the principles of natural justice or procedural fairness. Since subsection 32(2) only confers exclusive jurisdiction upon the Supreme Court of the Northwest Territories to "hear and determine any action or proceeding . . . concerning the jurisdiction of the Mackenzie Valley Land and Water Board" (my emphasis), it therefore follows, according to the applicants, that the exclusive jurisdiction conferred by subsection 32(2) does not include matters involving natural justice and procedural fairness issues or for that matter any matters involving the other enumerated grounds in subsection 18.1(4) of the *Federal Courts Act*.

[37] In interpreting the exclusive jurisdiction conferred upon the Supreme Court of the Northwest Territories, the applicants contend that the Federal Court retains its jurisdiction, although concurrently with the Supreme Court of the Northwest Territories, to hear the subject-matters of the within application and grant the relief sought, since the issues raised are not strictly speaking subject-matters concerning the Land and Water Board's statutory authority.

[38] In support of their position, the applicants submit the following cases of the Supreme Court of Canada, *Canada Labour Relations Board v. Transair Ltd.*, [1977] 1 S.C.R. 722, and *Northwestern Utilities Ltd. et al. v. City of Edmonton*, [1979] 1 S.C.R. 684. Both cases involve the principle that an administrative tribunal should be made party to a *certiorari* proceeding and has the right of appeal of any other party in order to defend its jurisdiction. The issue was whether "jurisdiction" in the sense the term was used in those cases, included transgressions of the tribunal

by its failure to adhere to the rules of natural justice or procedural fairness. In *Transair* [at page 747], the Supreme Court viewed the issue as "mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of *certiorari* and . . . not a matter of the tribunal's defence of its jurisdiction." In deciding that such a breach of procedural fairness is not a matter of the tribunal's defence of its jurisdiction, Mr. Justice Estey writing for the Court in *Northwestern Utilities Ltd.*, stated at page 710:

In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions. In *Canada Labour Relations Board v. Transair Ltd. et al*., Spence J. speaking on this point, stated at pp. 746-7:

> It is true that the finding that an administrative tribunal has not acted in accord with the principles of natural justice has been used frequently to determine that the Board has declined to exercise its jurisdiction and therefore has had no jurisdiction to make the decision which it has purported to make. I am of the opinion, however, that this is a mere matter of technique in determining the jurisdiction of the Court to exercise the remedy of *certiorari* and is not a matter of the tribunal's defence of its jurisdiction. The issue of whether or not a board has acted in accordance with the principles of natural justice is surely not a matter upon which the Board, whose exercise of its function is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review. [Footnotes omitted.]

[39] While the issue before the Supreme Court was quite different than that which occupies us in this application, it is clear that the Court in the circumstances was not prepared to equate a tribunal's failure to adhere to the principles of natural justice with the Tribunal's authority or jurisdiction to act.

[40] I now turn to the principle of statutory interpretation referred to earlier in these reasons. It is necessary to first examine the words of the Act in their ordinary sense and in their entire context. The words of subsection 32(1) confer upon the Supreme Court of the Northwest Territories jurisdiction to entertain applications in respect of "any" prerogative relief against a "board". "Board" is defined by section 9 of the Act as any board established by that Act. For our purposes, this would include the Land and Water Board. This jurisdiction is conferred "notwithstanding" the Federal Court's exclusive jurisdiction in this area conferred by section 18 of the *Federal Courts Act*. Therefore, by application of subsection 32(1) of the Act, the Supreme Court of the Northwest Territories has concurrent jurisdiction with the Federal Court in respect of applications for prerogative relief against the Land and Water Board. This is not disputed by the parties.

[41] The words of subsection 32(2) of the Act confer "exclusive" jurisdiction to hear and determine any action or proceeding concerning the "jurisdiction" of the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board to the Supreme Court of the Northwest Territories.

[42] The words of the Act must be read harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[43] The recitals in the preamble of the Act refer to the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement. These agreements provide that certain boards be established as institutions of public government to address land use planning, land, water and environmental impact review. The intent of these agreements is stated to be the establishment of those boards for the purpose of regulating all land and water uses, including deposits of waste, in the settlement areas for which they are established in the Mackenzie Valley.

[44] Committee debates with respect to the composition of the boards to be set up under the Act and the role of board members help shed light on the intention of Parliament. Excerpts from the Debates (Hansard) of Wednesday, October 29, 1997, read as follows [*House of Commons Debates*, Vol. 135, No. 023, 36th Parliament, 1st Session, at page 1296]:

Bill C-6 requires that 50% of the new board members be nominated by first nations, with the other 50% by the governments of the Northwest Territories and Canada. The intent is to give aboriginal people and other northerners a stronger role in resource management decisions. This a very commendable goal.

[45] A similar view was expressed in debates regarding the draft Bill before the Standing Senate Committee on Aboriginal Peoples. The Minister responsible for INAC, the Honorable Jane Stewart, indicated that one of the intentions underlying the Bill was to decrease the involvement of INAC in decision making and devolve questions relating to land and water use in the Valley to the residents of the Region. I reproduce below, from the transcript of the *Proceedings* of the Standing Senate Committee on Aboriginal Peoples held on June 17, 1998, in Ottawa, excerpts of the Minister's remarks [36th Parliament, 1st Session, No. 10]:

. . . the bill that senators have before them now is historic. For the first time my department will be completely removed from resource management in the Mackenzie Valley. No longer will we make decisions isolated from the people who live on the land; no longer will my department alone issue land use permits and oversee environmental assessment.

With this bill, aboriginal people will have an equal partnership with government in making decisions on how resources are managed. Decisions that affect the Mackenzie Valley will be made by residents of that valley. . . .

. . .

This integrated approach will allow First Nations an important decision-making role in all lands, not just their settlement lands. This gives First Nations decision-making authority in projects that are outside their lands, but which may have an impact on their lands.

[46] The above-stated objectives are reflected in the Act. The purpose of the establishment of the boards is clearly set out in section 9.1 of the Act and is "to enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians."

[47] A careful review of the Act, the three Comprehensive Land Claim Agreements referred to in the Act and the above-cited passages from Hansard allow me to make the following observations with respect to the scheme of the Act, its object and Parlia-ment's intention. One of the central purposes of the Act was to provide an important role for Aboriginals and other residents in resource management decisions in the Mackenzie Valley. It is apparent that Parliament took great care in its enactment to ensure that Aboriginals and residents of the Mackenzie Valley are well positioned to deal with matters to be treated by the Act and the Land and Water Board and to do so in their own region. The Act repeatedly stresses the importance of providing a process which recognizes the role of the local residents and their way of life in the management of natural resources in the Mackenzie Valley. Numerous provisions are included that provide for consultation with the various affected communities. Further, the Comprehensive Land Claim Agreements provide that the Supreme Court of the Northwest Territories is to have jurisdiction over all matters which could arise under the agreements. In the case of the Tlicho Agreement, that Court is to have exclusive jurisdiction to review on a question of law or jurisdiction. The record establishes that these land claim agreements were the foundation instruments which led to the passing of the Act and are indeed expressly referred to in the preamble to the Act.

[48] The words of subsection 32(2) of the Act, in their grammatical and ordinary sense provide for exclusive jurisdiction to the Supreme Court of the Northwest Territories to hear and determine any action or proceeding "concerning the jurisdiction" of the two boards. The word jurisdiction here does not include "any relief against a board" as provided for in subsection 32(1) with respect to "an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition."

[49] In my view, had Parliament intended to vacate the Federal Court's jurisdiction entirely, it would have used clear language to that effect. Had that been the desired result, Parliament would simply have modified subsection 32(1) by providing exclusive jurisdiction to the Supreme Court of the Northwest Territories for "any relief against a board". By leaving subsection 32(1) unchanged, and by using different language in subsection 32(2), language limiting the exclusive jurisdiction to actions or proceedings "concerning the jurisdiction" of the two boards,

Parliament could only have intended, given subsection 32(1), to employ "jurisdiction" in its narrow sense. That is to say, jurisdiction on questions that relate to the authority of the boards to act.

[50] I therefore agree with the applicants that the exclusive jurisdiction conferred in subsection 32(2) is limited to matters concerning the boards' loss or lack of statutory authority to act. In my construction, section 32 of the Act does not vacate the Federal Court's concurrent jurisdiction with respect to matters involving natural justice and procedural fairness. I find this interpretation to be consistent with the words of section 32 of the Act read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[51] I therefore find that this Court has jurisdiction to hear and decide the matters at issue in this application.

[52] I will now turn to the substantive issues in the application.

A. Does the federal Crown's failure to consult with and accommodate the Ka'a'Gee Tu First Nation constitute a failure to comply with the requirements of Part 5 of the Act?

[53] In application T-1379-05, I found that the Crown in right of Canada had failed to discharge its duty to consult and, if necessary, accommodate before making a final decision on the approval of the extension project. I provided reasons for this decision.

[54] The applicants contend that the Crown's failure to meet its obligation to consult also constitutes a breach of the statutory authority under which the Crown purports to act in this case.

[55] The applicants contend that because the duty to consult owed by the Crown in right of Canada was not met, the Board did not have authority to issue the LUP and as a result the LUP must be set aside. The applicants rely on section 62 of the Act which provides:

62. A board may not issue a licence, permit or authorization for the carrying out of a proposed development within the meaning of Part 5 unless the requirements of that Part have been complied with, and every licence, permit or authorization so issued shall include any conditions that are required to be included in it pursuant to a decision made under that Part.

[56] The applicants contend that the Crown's failure to comply with the duty to consult and accommodate is a failure to comply with the requirements of Part 5 of the Act, and is, by the operation of section 62, a deficiency that must be remedied before the Land and Water Board may issue further permits and licenses.

[57] The nature of the question here involves determining whether the established breach of the duty to consult by the Federal Crown leads to the conclusion that the requirements of Part 5 of the Act have not been complied with. In my view this is a question of law reviewable on the correctness standard of review.

[58] The applicants argue that the failure to comply with the requirement of Part 5 occurs because the Act must be read in a manner that is compatible with section 35 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], that is to say, in the applicants' submission, in a manner that is consistent with the Federal Crown's constitutionally entrenched duty of consultation and accommodation. The duty to consult and accommodate must therefore be "read into" the Act and therefore, the Crown's failure to meet its duty to consult would not only breach section 35 of the *Constitution Act, 1982* but also Part 5 of the Act.

[59] The respondents submit that the applicants' argument is misplaced since the Minister's decision is not the subject of this judicial review application. They suggest that this argument would more properly have been raised in application T-1379-05.

[60] The respondents also contend that the duty to consult is not a constitutional duty, but rather a duty that is grounded in the honour of the Crown (*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at paragraph 16). In the respondents' argument, the duty to consult is best characterized as an "obligation" of the

Crown rather than a “right” in the same vein as substantive rights under the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. Indeed, in *Haida* the Supreme Court did not characterize this duty as a substantive right in spite of the fact that the First Nations sought this characterization.

[61] The respondents submit that the applicants’ argument that Parliament is presumed to have intended its law to conform to constitutional principles and accordingly the duty to consult should be read into the Act, is flawed. The respondents contend that the applicants are attempting to add a new provision into the Act. The respondents maintain that the principles of statutory construction do not permit a “reading in” or the addition of provisions. A court cannot rewrite legislation to incorporate a term that was not intended by Parliament.

[62] Further, the respondents argue that the ministers have final decision-making authority and, in this instance, the ministers recommended the land use permit be issued with modifications and advised that the duty to consult had been met. The respondents maintain that the Board has no statutory authority to review ministerial action. Sections 101.1 [as enacted by S.C. 2005, c. 1, s. 58] and 102 [as am. *idem*] of the Act set out the mandate and jurisdiction of the Land and Water Board, which does not include the power to review the decision-making process of the ministers:

101.1 (1) The objectives of the Board are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley.

(2) The objectives of a regional panel referred to in subsection 99(2) are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit for residents of its management area and of the Mackenzie Valley and for all Canadians.

(3) The objectives of the regional panel referred to in subsection 99(2.1) are to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of its management area.

102. (1) The Board has jurisdiction in respect of all uses of land or waters or deposits of waste in the Mackenzie Valley for which a permit is required under Part 3 or a licence is required under the *Northwest Territories Waters Act*, and for that purpose the Board has the powers and duties of a board established under Part 3, other than powers under sections 78, 79 and 79.2 to 80.1, as if a reference in that Part to a management area were a reference to the Mackenzie Valley, except that, with regard to subsection 61(2), the reference to management area continues to be a reference to Wekeezhii.

[63] The respondents note that the Land and Water Board in its September 22, 2005 decision acknowledged the limits of its jurisdiction:

The Responsible Ministers have advised the Board that the Crown’s legal duty to consult the KTFN has been met in these particular circumstances. The [*Mackenzie Valley Land Use Regulations*] do not provide any authority to further delay the issuance of the amendments to the land use permit, consequently the Board decided to issue the amended water license and land use permit subject to the measures approved by the federal Minister and the terms and conditions included in the license and permit.

[64] It is accepted that since the judge’s task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted and to express completely what the legislator wanted to say. See *R. v. McIntosh*, [1995] 1 S.C.R. 686, at paragraph 26. Further, the “Charter values” interpretive principle, whereby interpretations that tend to promote Charter principles and values are to be preferred over those that do not, can only receive application in circumstances of genuine ambiguity, that is to say where a statutory provision is subject to differing, but equally plausible, interpretations. See *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paragraph 62.

[65] In my view, it is not necessary to resort to the "Charter values" interpretive principle in the circumstances, nor is it necessary to decide whether the Crown's duty to consult is a constitutional duty which lends itself to the application of the said principle. Here, the language of the Act is clear and unambiguous. There is no need to rely upon interpretive principles.

[66] Section 114 of the Act sets out the purpose of Part 5 which is "to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments" to, among other objectives, "ensure that the concerns of aboriginal people and the general public are taken into account in that process." The requirements of Part 5 are not directed to a board or to the ministers. Rather, they are aimed at the process itself that must ensure the concerns of the Aboriginal people are taken into account.

[67] In T-1379-05, although the Crown in right of Canada followed the "consult to modify" process provided for under the Act, I nonetheless found that the Crown has failed to discharge its obligation to consult with the Aboriginal community. I determined that the "consult to modify" process allowed for fundamental changes to be made to important recommendations without input from the applicants. I found, as a result, that it could not be said that the "consult to modify" process was conducted with the genuine intention of allowing the KTFN's concerns to be integrated into the final decision. This is the same process referred to in section 114 of the Act.

[68] Inherent in the Crown's duty to consult is the obligation to ensure that the concerns of the Aboriginal people are taken into account. In my view this is the central purpose of the obligation. By failing to meet its duty to consult and accommodate in the circumstances of this case, the Crown cannot, therefore, be said to have taken into account the concerns of the Aboriginal people, as required by section 114 of the Act, before making its decision to approve the extension project. Any other conclusion would not be consistent with my earlier finding. Whether the duty to consult is characterized as constitutional or not is immaterial in these circumstances, since the obligation need not be read in. Section 114 of the Act expressly provides that the process must ensure that the concerns of the Aboriginal people be taken into account. It follows that this central requirement of Part 5 of the Act cannot be said to have been complied with.

[69] As noted earlier, the respondents argue that as the ministers have final decision-making authority the Board has no authority to review ministerial decision making. While this may be so, the argument cannot serve to cure a fundamental flaw in the process. The Crown's efforts with respect to the duty to consult pursuant to the process under the Act were found to be inconsistent with the honour of the Crown. It matters not, therefore, whether the Board had the authority to question the process followed by the responsible ministers. What matters is that the duty was breached and the concerns of the Aboriginal people were not taken into account.

[70] The Board's authority to issue the LUP is governed by the Act. Once it is established that the requirements of Part 5 have not been complied with, then the clear language of section 62 of the Act is engaged and the Land and Water Board "may not issue a licence, permit or authorization for the carrying out of a proposed development". In the result, the impugned LUP must be set aside.

[71] In this application the applicants essentially seek a remedy that results in the amended LUP being set aside. Since my above finding is determinative, I find it unnecessary to deal with the other issues raised by the applicants in this application.

5. Remedy

[72] Since the amended LUP was improperly issued, section 62 of the Act requires that it be set aside. This result is a consequence of the Crown's failure to meet its duty to consult. As I determined in my reasons for order in application T-1379-05, the Crown breached its duty to consult in relation to the "consult to modify" process provided for in the Act. In that decision, I ordered the parties to engage in a process of meaningful consultation, in accordance with my reasons, with a view of taking into account the concerns of the KTFN and, if necessary, address those concerns.

[73] As the Supreme Court of Canada observed in *Haida Nation* the nature of the duty to consult lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations. Given the aim of reconciliation which underlies the

duty to consult and the resulting desirability of having the outstanding issues in such a complex undertaking resolved between the parties, an immediate order quashing the LUP may be counter-productive to the overall process. The effect of such an immediate order would essentially be to bring a halt to the project. I question whether such a result is in the best interest of the parties, including the applicants.

[74] In the circumstances, I would invite the parties to address whether a stay of the order quashing the LUP for a limited period of time is desirable in order to permit them to engage in the consultation process. To that end, I will afford the parties an opportunity to submit for my consideration a draft order to give effect to my above reasons and conclusions.

[75] Failing agreement between the parties, the applicants are directed to serve and file written submissions, not exceeding 10 pages, regarding the terms of the draft order by August 15, 2007. The respondents shall serve and file responding submissions, not exceeding 10 pages, by August 31, 2007, and any reply submissions by the applicants shall be served and filed by September 7, 2007 and be limited to 5 pages.

6. Conclusion

[76] For the above reasons, this application will be allowed by reason of the Crown's failure to meet its duty to consult and to take into account the concerns of the Aboriginal people before the Extension Project was approved. In the result, the requirements of Part 5 of the Act have not been complied with. By operation of section 62 of the Act, amended land use permit MV2002A0046 should not have been issued by the Land and Water Board and will consequently be set aside.

[77] The parties will have an opportunity to address the question of whether the effect of an order quashing the LUP should be stayed for a period of time to allow for consultation and to make submissions on a draft order to give effect to my above reasons and conclusions.