Chicot v. Paramount Res. Ltd. et al, 2006 NWT SC 30 Date: 2006 06 29
Docket: S-001-CV2006000008

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

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

-AND-

PARAMOUNT RESOURCES LTD., and the MACKENZIE VALLEY LAND AND WATER BOARD

RESPONDENTS

Judicial review of decision of the Mackenzie Valley Land and Water Board.

Heard at Yellowknife, NT on June 5, 2006

Reasons filed: June 29, 2006

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A.SCHULER

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Counsel for the Respondent Mackenzie Valley Land and Water Board: Ron Kruhlak

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REASONS FOR JUDGEMENT

[1] The Respondent Paramount Resources Ltd. ("Paramount") has been involved in oil and gas exploration in the Cameron Hills area of the Mackenzie Valley since 2001. In November 2005, Paramount applied to the Mackenzie Valley Land and Water Board (the "MVLWB") for a land use permit and water licence to build six well sites in the Cameron Hills area, on traditional territory of the Ka'a'Gee Tu First Nation (the "First Nation"). Paramount asked that its application be exempt from the preliminary screening process under the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 (the "*Act*"). The MVLWB decided that Part 5 of the *Act*, which contains the requirement for a preliminary screening, had been satisfied and subsequently issued the permit and licence on January 25, 2006. The First Nation seeks judicial review of these decisions. It submits that the MVLWB had no jurisdiction to issue the permit and licence without conducting a preliminary screening and that it, the First Nation, was denied natural justice in the proceedings before the MVLWB.

[2] The issues that arise on this application are as follows:

1. To what extent should the MVLWB be permittedto make submissionson the judicial review application?

2. What is the standard of review?

3. Did the MVLWB have jurisdiction to issue the permit and licence without conducting a preliminary screening?

4. Was the First Nation denied natural justice in the proceedings before the MVLWB?

1. To what extent should the MVLWB be permitted to make submissions on the application?

[3] This issue was raised in the pre-hearing briefs, although it was not fully argued at the hearing. Since counsel for the MVLWB confined his oral argument to the standard of review and the jurisdictional issue, I need make no ruling on this issue. I simply note that generally a tribunal whose decision is the subject of judicial review is restricted to arguments on jurisdictional issues and explanation of the record of the proceedings, if that is sought by the Court: *Baffin Plumbing & Heating Ltd. v. Northwest Territories (Labour Standards Board)*, [1993] N.W.T.R. 301 (S.C.).

2. What is the standard of review?

[4] Because the standard of review depends on how one characterizes what the MVLWB did, further detail as to the facts is required. To put them in context, I will start with the applicable statutory provisions.

[5] The *Mackenzie Valley Resource Management Act* is designed to implement the Gwich'in and Sahtu land claims agreements by providing for an integrated system of land and water management in the Mackenzie Valley. The *Act* provides for the establishment of an environmental impact review board and a land and water board, which are charged with the regulation of land and water use in certain areas of the Mackenzie Valley. The purpose of the boards, including the MVLWB, is to "enable residents of the Mackenzie Valley to participate in the management of its resourcesfor

the benefit of the residents and of other Canadians": s. 9.1 of the *Act*; *North American Tungsten CorporationLtd. v. MackenzieValley Land and Water Board*, 2003 NWTCA 5.

[6] The procedure for assessing the environmental impact on resources of developments in the Mackenzie Valley is set out in Part 5 of the *Act*. Section 114 provides:

> 114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impactreview in relation to proposals for developments, and
>
> > (a) to establish the Review Board as the main instrument in the Mackenzie Valley for the environmental assessment and environmental impact review of developments;
> >
> > (b) to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them; and
> >
> > (c) to ensure that the concerns of aboriginal people and the generalpublic are taken into account in that process.

[7] Section 111(1) defines "development"to include any undertaking,or any part or extension of an undertaking, carried out on land or water within the MackenzieValley.

Section 115 provides:

> 115. The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to
>
> > (a) the protection of the environmentfrom the significantadverse impacts of proposed developments;
> >
> > (b) the protection of the social, cultural and economic well-being of the residents and communities in the Mackenzie Valley; and

> (c) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *ConstitutionAct, 1982* applies and who use an area of the Mackenzie Valley.

[8] Section 118(1) provides that no licence, permit or other authorization required for the carrying out of a development may be issued unless the requirements of Part 5 have been complied with in relation to the development.

[9] The process that applies when an application is made for a land use permit or water licence is set out in s. 124(1), which provides:

> 124. (1) Where, pursuant to any federal or territorial law specified in the regulations made under paragraph 143(1)(b), an application is made to a regulatory authority or designated regulatory agency for a licence, permit or other authorization required for the carrying out of a development, the authority or agency shall notify the Review Board in writing of the application and conduct a preliminary screening of the proposal for the development unless the development is exempted from the preliminary screening because
>
> > (a) its impact on the environment is declared to be insignificant by regulations made under paragraph 143(1)(c); or
> >
> > (b) an examination of the proposal is declared to be inappropriate for reasons of national security by those regulations.

[10] In 2003, Paramount had applied for a land use permit and a water licence for five oil and gas wells in the Cameron Hills area. The MVLWB conducted a preliminary screening of that application and referred it to the Mackenzie Valley Environmental Impact Review Board (the "MVEIRB") for an environmental assessment. The MVEIRB expanded the scope of the assessment pursuant to s. 117 of the *Act*, which provides that every environmental assessment of a proposal for a development shall include a determination by the Review Board of the scope of the development.

[11] The MVEIRB's report of its environmental assessment, dated June 1, 2004, which I will refer to as the "2004 EA", stated that its scope focused on the cumulative effects of drilling, testing and tie-in of up to 50 additional wells over a period of 10

years, production of oil and gas over 15 to 20 years, and abandonment and reclamation of the entire development. This was based on Paramount's stated plan to drill about 48 new well sites over the next 10 years. The ultimate conclusion of the 2004 EA was that a number of measures were required to prevent significant adverse impacts on the environment and that with the implementation of those measures the proposed development would not likely have a significant environmental impact or be cause for significant public concern and should proceed to the regulatory phase of approvals.

[12] In September 2005, the MVLWB issued the land use permit and water licence for the five well sites sought by Paramount in its 2003 application.

[13] In its November 16, 2005 letter, Paramount applied for a land use permit and water licence for another six well sites within the Cameron Hills area. Paramount asked that its application proceed directly through the regulatory phase and be exempt from preliminary screening. It based this request on the ground that:

> ... the components have already been assessed pursuant to the Exemption Regulations under the Mackenzie Valley Resource Management Act ("MVRMA"), Schedule 1, Part 2(b) "having fulfilled the requirements of the environmental assessment ...". Part 5 of the MVRMA has been met. The Cameron Hills Project area has been the subject of three environmental assessments ... . The most recent ... was scoped to include five sites plus an additional 48 wellsites and all associated activities and infrastructure, and the environmental assessment concluded " ... the proposed development will not likely have a significant environmental impact or be cause for significant public concern and should proceed to the regulatory phase of approvals".

[14] The reference to "the most recent" environmental assessment is a reference to the 2004 EA.

[15] The MVLWB then sent Paramount's application to the First Nation and other parties. In its cover letter of November 28, 2005, the MVLWB asked for comments on Paramount's request that the application proceed directly to licensing and be exempt from preliminary screening. The MVLWB stated that Paramount's request would be broken into two components: "1) determining if Paramount is exempt from Preliminary Screening, 2) licensing the application".

[16] The first component is imprecisely stated. The question was not whether Paramount itself was exempt from preliminary screening but whether the proposal for development in its application was exempt.

[17] The MVLWB received comments from a number of parties, many of whom said that the question whether the application should be exempt from a preliminary screening should be left to the MVLWB. In its response, the First Nation stated that there was no legal basis for an exemption. It pointed out that Schedule 1, Part 2(b) of the *Exemption List Regulations*, SOR/99-13, cited by Paramount, applies to renewal applications only and Paramount's application was not for a renewal. I note here that all counsel agreed on the judicial review application that the *Exemption List Regulations* are not applicable to Paramount's application. The First Nation also stated in its response to the MVLWB that since the subject matter of the current application was never before submitted as a proposal for development, it cannot be said that Part 5 of the *Act* has been met.

[18] The First Nation then suggested that Paramount might be relying on the 2004 EA and said that the First Nation considered that assessment irrelevant in light of the statutory provisions. It stated that if the MVLWB were to entertain that suggestion, "we would respectfully ask for an opportunity to fully address that question as it involves a detailed analysis of both the content and process in the previous [environmental assessment]. As you are aware, the content and process of the previous [environmental assessment] is subject to a legal challenge.... In our view, the *MVRMA* requires Paramount's application be subject to a preliminary screening."

[19] The MVLWB did not respond or invite further comment on the applicability of the 2004 EA, but by letter of December 21, 2005, stated that it had determined that Paramount's application fell within the development considered in the 2004 EA and that Part 5 of the *Act* had been satisfied in respect to the application. The MVLWB stated it was proceeding directly to licensing of the proposed development. It subsequently issued the land use permit and water licence for the six well sites.

[20] On January 24, 2006, the MVLWB released reasons for its decisions on the preliminary screening exemption and issuance of the permit and licence. In the section of its reasons entitled "The Need for a Preliminary Screening", the MVLWB referred to Paramount's 2003 application involving the five well sites as the "Application Case"

and the planned 48 to 50 more wells and associated activities as the "Development Case". The relevant parts of the reasons follow:

> It appears to the Board that the question of the applicability of the *Exemption List Regulations* does not have to be decidedat this time. That is because the MVEIRB clearly considered the Development Case in its environmental assessment of the Paramount application. The MVEIRB has the obligation under section 117(1) of the MVRMA to set the scope for any development it considers in the context of an environmental assessment. This involves a separate step in the MVEIRB decision-making process. The Review Board is not bound by the scope of a development in a preliminary screening. The MVRMA requires that the MVEIRB set its mind to this question independent of the preliminary screening and this is exactly what happened.
>
> ...
>
> ... The result is that the [2004] EA includes an environmentalassessment of both the Application Case and the Development Case and that the mitigation measures approved by the Federal Minister address not just the 5 wells in the Application Case but the activities including up to 50 additional wells in the Development Case.
>
> It is the Board's conclusion that the development considered by the MVEIRB included both the Application and Development Cases. That is in our opinion the most accurate reading of the [2004] EA and the rest of the evidence from that proceeding. Consequently,the Board concludesthat the 6 wells which form the basis for [the 2005 application] have already been subjected to an environmental assessment and that no further assessment by way of a preliminary screening is required.
>
> The requirements of Part 5 of the *MVRMA* have in our opinion been satisfied and subject to section 62 of the Act, the Board may proceed to consider the appropriate terms and conditions for the permit and licence.
>
> ...

[21] The MVLWB then went on to give reasons for approving and issuing the land use permit and water licence.

[22] The First Nation argues that the preliminary screening under s. 124 is a prerequisite to the MVLWB's power to issue the permit and licenceand the questionis therefore one of jurisdiction. The standard of review should accordingly be correctness.

[23] The MVLWB submits that it made a factualdecision that in the circumstances of Paramount's application, because of the 2004 EA, the requirement for a preliminary screening had been fulfilled. This, the MVLWB says, is not a matter of jurisdiction, but one involving fact for which the standard of review should be reasonableness. The MVLWB says that the question should be whether it was reasonable for it to conclude that the preliminary screening requirement had been fulfilled. In connection with this argument, the MVLWB submits that in effect it did conduct a preliminary screening.

[24] Paramount also characterizes the MVLWB's decision as a factual one. Paramount says that the six wellsites which were the subject of the 2005 application are within the area that was reviewed in the 2004 EA and therefore Part 5 of the *Act* was satisfied. Paramount submits that the standard of review is reasonableness or patent unreasonableness.

[25] It is now well established that a pragmatic and functional approach must be taken to determine the appropriate standard of review for a decision of an administrative tribunal. In *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, the Supreme Court said this approach requires consideration of four contextualfactors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purpose of the legislation and the specific provision; (4) the nature of the question - whether law, fact or mixed law and fact. After consideration of all the listed factors, the reviewing court must determine the degree of deference, if any, to be accorded the tribunal's decisionand whetherthe correspondingstandard is correctness, reasonableness or patent unreasonableness.

[26] The first factor to consider is the presence or absence of a privative clause. Section 67 of the *Act*, which provides that every decision or order of a board is final and binding, is explicitly stated to be subject to s. 32, which provides for judicial

review. In my view, s. 67 is not the full privative clause described in *Pushpanathan.* That and the absence of any appeal mechanism in the *Act* leads to the conclusionthat s. 67 is best described as a partial privative clause, meaning that some level of deference to the MVLWB is likely appropriate depending on whether the issue is one of law or fact or both, and the interplay of the other *Pushpanathan* factors.

[27] On the question of expertise, it has already been held that there is nothing in the *Act* that suggests that the MVLWB has any particular expertise in the area of statutory interpretation: *North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board*, *supra* . Nor is there anything in the *Act* indicating that Parliament recognized the need for any particular factual expertise for appointment to the MVLWB. While the complexity of the land use permitting scheme under the *Act* and the experience gained by the MVLWB in its work will mean that the MVLWB will have developed some expertise in assessing and determining licence and permit applications, statutory interpretationis not somethingabout which the MVLWB can be said to have more expertise relative to a court. Therefore, with regard to the latter, little or no deference is due.

[28] I have referred to the purpose of the statute above and noted that the *Act* is designed to implement the Gwich'in and Sahtu land claims agreements by providing for an integrated system of land and water management in the MackenzieValley of the Northwest Territories. The purpose of the boards established under the *Act*, including the MVLWB, is to enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and other Canadians.

[29] While some of the functions of the MVLWB can be said to involve consideration of polycentric issues, i.e. a balancing of interests, the question of jurisdiction is not such an issue. It does not involve the MVLWB's discretion. To the extent that the nature of the problem in this case is one of jurisdiction, very little deference is due on the basis of this factor.

[30] The nature of the problem is the final factor. Generally, deference is due to a tribunal on questions of fact, but less so on questions of law. Sometimes the distinction between the two is not clear. In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the SupremeCourt of Canadasaid that with regard to questions of mixed fact and law, more deference is called for if the question is fact-intensive and less deference if it is law-intensive.

[31] The nature of the problem in this case depends on how the MVLWB's decision is characterized. If the MVLWB declined to conduct a preliminary screening under s. 124, then the issue is the MVLWB's jurisdiction to issue the permit and licence. This is a matter of law on which little or no deference is due and indicates a correctness standard. If, on the other hand, the MVLWB decided that a preliminaryscreening had, in effect, already been conducted or if what the MVLWB did do in this case can be called a preliminary screening, then its decision becomes somewhat more fact-based, although in the end it still involves the MVLWB's jurisdiction to issue the licence and permit in the circumstances.

[32] In my view, the MVLWB made it clear in its reasons that it was of the view that the 2004 EA of Paramount's long-term plans in the Cameron Hills area covered or included the six wells which were the subject of Paramount's November 16, 2005 application. Therefore, in the MVLWB's view, the requirements of Part 5 had been satisfied and there was no need to conduct a preliminary screening of the application relating specifically to those six well sites.

[33] In light of the clear statement in the MVLWB's reasons for its decision that "no further assessment by way of a preliminary screening is required", it cannot be said, as counsel for the MVLWB argued before me, that in effect the MVLWB conducted a preliminary screening. In reality, it declined to conduct a preliminary screening. Therefore, in my view the question is whether the MVLWB had the power or jurisdiction to issue the licence and permitwithout conductinga preliminaryscreening. That is a matter of statutory interpretation, a question of law, which must be reviewed on a standard of correctness.

3. Did the MVLWB have jurisdiction to grant Paramount's application without conducting a preliminary screening?

[34] As I have indicated, in my view it is clear that the MVLWB decided it did not need to conduct a preliminary screening of Paramount's application in relation to the six new well sites.

[35] The Respondents put forward two grounds upon which they say the MVLWB has jurisdiction to issue the permit and licenceat issue withouta preliminaryscreening. The first ground is that the MVLWB has the jurisdiction to decide whether Part 5 of

the *Act* has been complied with and that it was reasonable for the MVLWB to find, in the circumstances of this case, that Part 5 had been complied with and that where an environmental assessment had already been done it would not make sense to do a preliminary screening. The second is the doctrine of reading in by necessary implication.

[36] The problem with the first ground is that it treats sections 118 and 124 as if they are separate requirements instead of components of an integratedprocess. In my view, reading Part 5 of the *Act* as a whole, one cannot say that Part 5 has been satisfied unless the steps in Part 5 have been completed. This is reflected in s. 114, which states that the purpose of Part 5 is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments. "Development"is definedas any undertaking,or any part or extension of an undertaking [s. 111(1)]. Returning to s. 114, subsection(b) includes as a purpose of Part 5 "to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them".

[37] Section 118(1) provides that no licence, permit or other authorization required for the carrying out of a development may be issued unless the requirements of Part 5 have been complied with in relation to the development. One of those requirements is found in s. 124(1), which provides for the preliminary screening when application is made to a regulatory authority, in this case the MVLWB, for a licence or permit required for the carrying out of a development.

[38] Thus, it seems to me that unless the MVLWB has taken the steps set out in s. 124, it cannot be said that Part 5 has been satisfied.

[39] Can the MVLWB "deem" the steps in s. 124 to have been taken because there was an earlier environmental assessment? While this argument holds a certain attraction from the point of view of efficiency and expense saving, in my view it cannot succeed. The definition of "development" makes it clear that a preliminary screening is required for any part of an undertaking where application for a licence, permit or other authorization is made. Where, as here, an environmental assessment has been conducted for a planned development, one would expect that when specific parts of that development are presented for permitting or licensing a determination would be made as to whether, by reason of, for example, changes to the planned

development or changes in the environment or wildlife or the lapse of time, the conclusions in the assessment are still valid. These are issues that could be canvassed in a preliminary screening and could form the basis upon which the MVLWB would, as mandated by s. 125(1)(a), "determine and report to the Review Board whether,in its opinion, the development might have a significant adverse impact on the environment or might be a cause of public concern", in which case the proposal for that part of the undertaking would be referred to the Review Board for an environmental assessment under s. 125(1)(b).

[40] In this case, the application for the permit and licence for the six well sites was made over a year after the June 1, 2004 EA report. Further well sites and other parts of the planned development might be another one or more years away. The requirement for a preliminary screening as each of those comes forward for permitting or licensing ensures that the careful consideration that s. 114(b) requires will be given before actions are taken, some of which may not occur until many years after the 2004 EA was done.

[41] In arguing that the MVLWB can deem a preliminary screening to be unnecessary, the Respondents rely on the fact that the 2004 EA looked at the big picture of Paramount's proposed development. They say it does not make sense to conduct a preliminary screening on part of a development when the entire proposed development has undergone an environmental assessment. They point to the 2004 EA having included in its scope the development of up to 48 or 50 additional wells.

[42] However, the 2004 EA itself contains the rationale for not dispensing with a preliminary screening when permits or licences are sought for site-specific parts of a development, even when there has been a broad environmental assessment. At page 36, the 2004 EA Report states:

> The challenge facing proponents in any CEA [Cumulative Effects Assessment] is to provide a realistic projection that reflects the most likely development scenario. The challenge facing regulators and reviewers is to understand the uncertainty surrounding the development scenario, and the potential risk activities and associated impacts might ultimately exceed those documented in the CEA. Ideally, CEA projections should include a range of realistic forecasts that help describe best case, most likely and worst-case scenarios so that forecasting risk can be explicitly evaluated. The Paramount DAR [Developer's

> Assessment Report] assesses only a 'most likely' scenario, although Paramount did provide a range of how many new wells might be drilling in the SDL [Cameron Hills Significant Discovery Licence] ...
>
> The spatially-explicit future development projections provided by Paramount are an accepted CEA method, particularly for projects such as mines that have a well-defined footprint. Nonetheless, a fundamental concern with spatially-explicit forecasts of oil and gas development activities is that they imply levels of accuracy and certainty that do not exist. As Paramount notes: "As more seismic and drilling results are acquired,changes, most of which are unforeseen, are inevitable." ... This is not a criticism of Paramount or other operators, rather it reflects the reality that the exact location and sequence of petroleum development activities cannot be accurately predicted. In all probability therefore, the predicted locations of future well sites *will* be wrong.
>
> Unfortunately, comparatively small changes in spatial orientation can cause dramatic changes in indirect footprint and potential impacts. Provision of a single 'snapshot of the future' therefore carries a high risk of being wrong, however well informed. To address this uncertainty, Paramount has committed to siting and routing measures to reduce the overall development footprint and indicated that 50% of future development (e.g., access roads) will take place on existing or approved disturbed areas.

[43] Based on the foregoing, one would expect that a purpose of a preliminary screening would be to determine whether any changes since the "most likely"scenario posited by Paramount at the time of the 2004 EA might have a significant adverse impact on the environment or be a cause of public concern: s. 125(1)(a).

[44] In the 2004 EA the MVEIRB also made a number of recommendations for steps to be taken by Paramount and others in relation to protection of the environment. Whether these recommendations have been adhered to could also be relevant at a preliminary screening in terms of assessing the factors in s. 125(1)(a).

[45] The *Act* does not say how a preliminary screening is to be conducted or what material is to be considered, and counsel for the First Nation conceded that the 2004 EA could be considered at the preliminary screening. The point is that the preliminary screening need not revisit everything that was done at the time of the 2004 EA. It may

be a much more brief or streamlined process. But to dispense with the preliminary screening does not serve the purpose of the *Act*, even though it may save costs and resources. Nor is there any provision in the *Act* that allows the MVLWB to dispense with a preliminary screening in these circumstances.

[46] Paramount also invokes the doctrine of reading in by necessary implication as supporting the MVLWB's decision not to conduct a preliminary screening and to consider Part 5 of the *Act* satisfied by the 2004 EA. Paramount cites *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* [2006] S.C.J. No. 4, in which it was said that in the area of administrative law, tribunals and boards obtain their jurisdiction over matters from two sources: 1) express grants of jurisdiction under various statutes (explicit powers); and 2) the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers). *ATCO* described the doctrine of jurisdiction by necessary implication as meaning that the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutoryregime createdby the legislature. There must be evidence that the exercise of the power is a practical necessity for the regulatory body to accomplish the acts prescribed by the legislature.

[47] In this case there is no evidence that the exercise of a power to deem Part 5 satisfied is a practical necessity for the MVLWB to accomplishits duties under the *Act.* While such a power may contribute to efficiency, it is not necessarily compatiblewith the purpose of the *Act* as set out in subsections (b) and (c) of s. 114, to ensure that the environmental impact of proposed developments receivescareful consideration before actions are taken in connection with them and to ensure that the concerns of aboriginal people and the general public are taken into account in the process.

[48] Nor is there any evidence that the power in question is a <u>necessity</u>. Even where an environmental assessment has been conducted of the broad plan of a proposed development, the preliminary screening can serve a useful purpose in ensuring that no concerns arise from those parts of that development which were not specifically identified or located at the time of the environmental assessment, or have changed since that assessment was done.

[49] In my view, the doctrine of reading in by necessary implication cannot be relied upon to give the MVLWB jurisdiction to dispense with the preliminary screening which is an integral step in the process mandated by Part 5 of the *Act*.

[50] For all the above reasons, I conclude that the MVLWB had no jurisdiction to deem that a preliminary screening had already taken place or was unnecessary and it erred in making that determination. Since the facts before the MVLWB did not fall within the exemptions in s. 124(1), a preliminary screening was required. Without it, the MVLWB had no jurisdiction to issue the permit and licence for which Paramount applied. The permit and licence must therefore be quashed and Paramount's application remitted to the MVLWB for further action in accordance with these reasons for judgment.

4. Was the First Nation denied natural justice in the proceedings before the MVLWB?

[51] The parties asked that I rule on this issue even if I were to find that the MVLWB lacked jurisdiction to issue the permit and licence.

[52] The MVLWB had a duty under ss. 61(2) and 102 of the *Act* to notify affected communities and first nations of an application made to it for a licence, permit or authorization and allow a reasonableperiod of time for them to make representations to the MVLWB with respect to the application.

[53] I will not go over again the facts which I have set out above. The record indicates that the MVLWB began by stating to the First Nation and other interested parties that it would consider the issue of exemption. However, from its reasons it is clear that the MVLWB examined a different issue, that being whether a preliminary screening was not required and Part 5 had been satisfied because of the 2004 EA. The fact that some of the interested parties who responded to the application set out their position on the effect of the earlier environmental assessmentis not relevant. The First Nation specifically noted the problems with Paramount's application and asked for clarification as to whether the MVLWB was going to consider that the 2004 EA had already assessed the environmental impact of the six well sites. The MVLWB did not provide the requested clarification and so did not give the First Nation the opportunity to address the decisive issue.

[54] The duty to give interested parties an opportunity to be heard is part of the duty of fairness described in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817. In *Baker*, the Supreme Court set out a number of factors relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. These include the nature of the decision being made and the process followed in making it, the nature of the statutory scheme and the terms of the statute under which the tribunal operates and the importance of the decision to the individual affected, the legitimate expectations of the person challenging the decision or procedure and the choices of procedure made by the agency itself.

[55] In this case, the statute itself sets out the duty: to notify the First Nation as an affected party and to allow it reasonable time to make representations about Paramount's application. Since the MVLWB decided to divide the application into what it called components and since it used for the first component the term "exempt" which has specific meaning under the governing *Act*, the First Nation was entitled to assume that was the issue to be addressed or, if not, that its request for clarification would be answered so that it could make submissions relative to the significance of the 2004 EA.

[56] The nature and importance of the decision are significant because of the importance of the regulatory scheme for development in the Mackenzie Valley and the importance of the preliminary screening as a component of that scheme.

[57] In connection with the choices of procedure made by the MVLWB, the First Nation points out that the MVLWB did not comply with the Draft Rules of Procedure for the land and water boards established under the *Act.* These Rules are dated November 2005 and there was no evidence before me as to whether they came into effect before or after Paramount's November 16, 2005 application or what status they have as "Draft" Rules. In any event, the Draft Rules require that a written motion be placed before the MVLWB for any issue that arises in the course of a proceeding that requires a decision or ruling. Rule 22 requires that the motion include a concise statement of the relevant facts, an indication of the decision or ruling being sought and the reasons why the decision or ruling should be granted. A copy is to be provided to all parties, which would include an affected first nation.

[58] Had this procedure been used, it might well have clarified the grounds on which Paramount sought the exemption and the MVLWB was being asked to consider same. However, in the absence of evidence as to the status of these Draft Rules, I put very little weight on the failure to follow them.

[59] I do find that the notice that was given by the MVLWB as to what it would consider in connection with Paramount's application was not adequate because it failed to identify the issue and then failed again to clarify it in response to the request for clarification. Inadequate notice in these circumstances really amounts to no notice at all and means that natural justice is denied.

[60] For all of the above reasons, the application for judicial review is granted, the permit and licence are quashed and Paramount's application is remitted to the MVLWB for further action in accordance with these reasons for judgment.

Costs

[61] The First Nation seeks costs of this application as against both Paramount and the MVLWB. Costs are generally not awarded to or against an administrative decision-maker that, on judicial review of its decision, limits its submissions to issues of its jurisdiction and makes no submissions on the merits. Although costs may be awarded against administrative decision-makers, they are to be awarded only in unusual or exceptional cases and then only with caution: *Court v. Alberta (Environmental Appeal Board),* [2003] A.J. No. 1376 (Q.B.) and cases cited therein.

[62] Although the MVLWB's written submissions went beyond the issue of jurisdiction and addressed the natural justice issue, in my view these circumstances are not such as to warrant an award of costs against it.

[63] I see no reason, however, not to award costs against Paramount as the opposing and unsuccessful party on this application. The First Nation will, therefore, have its taxed costs of this application against Paramount.

V.A. Schuler
J.S.C.

Dated at Yellowknife NT, this
29th day of June, 2006.

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Counsel for the Respondent Mackenzie Valley Land and Water Board: Ron Kruhlak