Tlicho v. *Mackenzie Valley Impact Review Board*, 2011 NWTSC 31

Date: 2011 06 02
Docket: S-1-CV 2010000157

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TLICHO GOVERNMENT

Applicant

-and -

MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD and FORTUNE MINERALS LIMITED

Respondents

Application for Judicial Review.

Heard at Yellowknife, NT on March 14 and 15, 2011.

Reasons filed: June 2, 2011

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU

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REASONS FOR JUDGMENT

[1] This is an application for judicial review of a decision of the Mackenzie Valley Environmental Impact Review Board ("the Review Board").

[2] The underlying facts are not in issue.

[3] Fortune Minerals Limited ("Fortune") has a project ("the NICO project") to develop a mine and mill on a claim block that is on lands owned by the Tlicho Government pursuant to the Tlicho Land Claim and Self-Government Agreement ("the Tlicho Agreement"). The claim block is entirely surrounded by Tlicho lands.

[4] Chapter 18 of the Tlicho Agreement vests title of Tlicho lands to the Tlicho Government, subject to specific pre-existing interests. Fortune's mineral claims and mining lease are pre-existing interests protected by the Tlicho Agreement.

[5] Chapter 7 of the Tlicho Agreement establishes the Tlicho Government. Section 7.4 gives it law making powers, including the power to enact laws in

relation to the use, management, administration and protection of Tlicho lands. The Tlicho Government has exercised that jurisdiction and has enacted the *Tlicho Lands Protection Law* ("the *Law"*), which became effective on August 4, 2005. Among other things, the *Law* contemplates the creation of a land use plan for Tlicho lands. In this respect the key provisions are Subsections 7(3) and (4) of the *Law*.

[6] Subsection 7(3) of the *Law* provides that the Chief's Executive Council is to make recommendations to the Assembly about the land use plan. Subsection 7(4) declares a moratorium on development on Tlicho lands until regulations governing the land use plan have been enacted. Originally, Subsection 7(3) stated that the recommendations were to be made to the Assembly no later than April 30, 2006.

[7] The *Law* was amended a number of times to extend this deadline. The work to develop the land use plan is ongoing. The most recent amendment to Subsection 7(3) extends the time frame for making recommendations to October 31, 2011. As a result, the moratorium on development on Tlicho lands is still in effect.

[8] For the NICO project to be viable, year-round road access to the mine site is essential. Road access is needed to allow Fortune to haul material and fuel to the site, and to transport ore out. At this time, there is no year-round road access to the site.

[9] Fortune says that the Government of the Northwest Territories (GNWT) is studying the possibility of realigning the winter road that connects the communities of Behchoko, Wha Ti and Gameti, and eventually making it a year-round road. If this happens, Fortune wants to build an access road between this new highway and the NICO project site. The new GNWT highway and Fortune's access roads would both be on Tlicho lands.

[10] In November 2007, Fortune applied to the Wek'eezhii Land and Water Board ("the Land and Water Board") for water licenses and land use permits for various components of the NICO project. These components included undertakings that would take place within the claim block, as well as a number of undertakings that would take place outside the claim block, including an all-weather access road.

[11] In April 2008, the Land and Water Board informed Fortune that it was not eligible to apply for land use permits for activities that would take place on Tlicho lands without demonstrating a right of access. In its correspondence to Fortune, the Land and Water Board stated, among other things:

> (...) Fortune minerals is not eligible to apply for land use permits for activities that are to take place wholly or partially within Tlicho owned lands without providing proof of a right of access to those Tlicho lands. (...) a proof of right to access Tlicho lands, through an existing access right provided for in the Tlicho Agreement or granted by the Tlicho Government, should be provided before a proponent be deemed eligible to apply for a land use permit.

[12] In November 2008 Fortune presented a new application to the Land and Water Board. Unlike the first application, all the components outlined in the second application were to take place inside the claim block. The application stated that a separate application would be submitted for an all-weather road to the site.

[13] The Land and Water Board accepted the application as complete. On February 27, 2009, the Department of Indian Affairs and Northern Development referred the matter to the Review Board for environmental assessment ("EA").

[14] The Review Board began consultations about what should be included in the Terms of Reference for the EA, in accordance with its usual practice. This process is known as "scoping". It is an important process because what gets scoped in the EA determines what issues will be researched, planned for and addressed by the proponent of the project and will be the subject of submissions by other parties.

[15] Submissions about the Terms of Reference were received from several parties, including the Tlicho Government. These included submissions about whether the access roads should be included for consideration in the EA. Some parties submitted that the roads should be included. The Tlicho Government raised concerns about the roads being included in the EA. When the Review Board circulated draft Terms of Reference that included considerations of the roads, the Tlicho Government requested that they be taken out. It argued that it was neither appropriate nor respectful of the Tlicho Government's authority for the Review Board to consider the environmental impact of these potential roads while the moratorium on development was in place and access issues had not been resolved.

[16] On November 30, 2009, the Review Board issued its Terms of Reference for the EA. The Terms of References included consideration for the impact of the construction of the access road. They also included consideration of the impact of Fortune's eventual use of the new GNWT highway.

[17] On May 28, 2010, the Tlicho Government filed a Request for Ruling with the Review Board, asking it to find that the EA was premature and should be postponed and placed in abeyance until all essential components of the project, including the roads, were included in applications accepted as complete by the Land and Water Board.

[18] The Review Board invited submissions from interested parties on the Request for Ruling. On August 27, 2010, the Review Board denied the Request for Ruling and decided that the EA would proceed. That is the decision that is under challenge in this application for judicial review.

B) STANDARD OF REVIEW

[19] In judicial reviews, there are two standards of review: correctness and reasonableness. The basis upon which an administrative tribunal's decision is challenged determines which standard of review applies. *Dunsmuir* v. *New Brunswick* [2008] 1 S.C.R. 190.

[20] The standard of correctness applies to jurisdictional questions and to certain questions of law. The standard of reasonableness, which is more deferential, applies to questions of fact, discretion or policy. It applies as well where the legal and factual issues are intertwined and cannot be readily separated. It may also apply to some questions of law, including questions of statutory interpretation, where the administrative tribunal is interpreting its own statute or statutes closely connected to its function. The analysis must be contextual, and is dependent on a number of factors, including the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal. *Dunsmuir* v. *New Brunswick*, *supra*, at paras 50-64.

[21] The Tlicho Government challenges the Review Board's decision on two fronts. First, it argues that the Review Board misinterpreted the limits of its powers and acted outside its jurisdiction when it refused to postpone the EA. In the alternative, the Tlicho Government argues that under all circumstances, even if it was acting within its jurisdiction, the Review Board erred in its decision not to postpone the EA. The standard of review must be determined for each of those issues.

[22] The Review Board's jurisdiction is set out in the *Mackenzie Valley Resource Management Act* ("the *MVRMA*"). The question of whether the Review Board acted within its jurisdiction or not depends on the interpretation given to that statute.

[23] As already mentioned, in certain circumstances, an administrative tribunal's interpretation of its own statute is subject to a standard of review of reasonableness. But that is not so when issue of statutory interpretation relates to true questions of jurisdiction:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*.
>
> (...)
>
> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.
>
> *Dunsmuir* v. *New Brunswick*, *supra,* at para. 59.

[24] The Tlicho Government's first line of argument is precisely that the Review Board misinterpreted the extent of its own powers and jurisdiction. On that issue, the Review Board's interpretation must be reviewed on a standard of correctness.

[25] All parties agree that if the Review Board was acting within its jurisdiction, then its decision not to postpone the EA must be reviewed on a standard of reasonableness.

C) WHETHER THE REVIEW BOARD EXCEEDED ITS JURISDICTION IN DECIDING THE REQUEST FOR RULING

[26] The Tlicho Government argues that the Review Board exceeded its jurisdiction in refusing to postpone this EA with Terms of Reference that included consideration of the two proposed roads.

[27] The Tlicho Government argues that the two access roads are "hypothetical" or "speculative", and not matters that the Review Board is permitted to examine as part of an EA. The Tlicho Government argues that this is the only interpretation of the Review Board's jurisdiction that is consistent with the overall framework of the *MVRMA*, and the only interpretation that respects the Tlicho Agreement.

1. Contextual interpretation of the *MVRMA*

[28] Under the *MVMRA*, the EA process is triggered when a regulatory agency, such as the Land and Water Board, receives an application for a permit, licence or authorization to carry out a development. The first step that is contemplated is a preliminary screening conducted by that regulatory authority. If that authority determines that the proposed development might have a significant adverse impact on the environment or might be a cause of public concern, it refers the matter to the Review Board for an EA. *MVRMA*, ss. 124 and 125.

[29] A proposal for development can also be referred to the Review Board for an EA directly by a department of the federal or territorial government without a preliminary screening being conducted. *MVMRA*, s. 126(2). It was pursuant to that provision that the Department of Indian and Northern Affairs referred the NICO project to the Review Board.

[30] The Review Board is established and regulated by Part 5 of the *Act*. Section 114 sets out the purposes of Part 5:

> 114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment, and an environmental impact review in relation to proposals for development, 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 the proposed development receives careful consideration before actions are taken in connection with them;
>
> (c) to ensure that the concerns of aboriginal people and the general public are taken into account into that process.

[31] Section 117 provides that for every EA, the Review Board must determine the scope of the development being examined, subject to Guidelines that the Review Board may establish. Guidelines have in fact been established. Section 3.8 of those Guidelines set out the criteria to be used when scoping a proposed development:

> 3.8 Scoping the Development
>
> (...)
>
> In scoping the development, the Review Board will consider what is the principal development, and what other physical works or activities are accessory to the principal development. Three criteria will be used to determine whether or not a physical work or activity is an accessory development and therefore should be included in the development. The first test is dependence: that is, if the principal development could not proceed without the undertaking of another physical work or activity, then that work or activity is considered part of the scoped development. The second test is linkage: if a decision to undertake the principal development makes the decision to undertake another physical work inevitable, then the linked or interconnected physical activity will be considered part of the scoped development. The third test is proximity: if the same developer is

> undertaking two physical works or activities in the same area, then the two may be considered in the form of one development.

[32] The Tlicho Government argues that because the filing of an application to a regulatory agency for a permit to carry out a development is what triggers the process referred to at section 114 and the eventual engagement of the Review Board in the EA process, only undertakings that have been the subject of such applications for permits constitute a "proposed development" within the terms of the *MVRMA* and can be considered in an EA. The Tlicho Government argues that the Review Board's scoping powers, which are incidental to its jurisdiction, cannot be used to expand that jurisdiction.

[33] In my view, the interpretation advanced by the Tlicho Government is an overly restrictive interpretation that is not supported by the wording of the *MVRMA*. I find, on the contrary, that a contextual interpretation of this statute suggests that the Review Board is given a broad mandate to assess the potential environmental impact of projects for development, and corresponding broad powers and discretion to carry out that mandate.

[34] There is nothing in the *MRVMA* or the Guidelines that limits the scoping powers, or the Review Board's jurisdiction generally, to undertakings that have been the subject of applications for licenses and permits. The definition of "development" at section 111 makes no reference to applications for permits.

[35] Moreover, the *MRVMA* requires the Review Board to establish the scope of a proposed development for EA purposes, and gives it the power to establish Guidelines to frame how this scoping power will be exercised. This suggests an intent to give the Review Board considerable flexibility in carrying out its mandate.

[36] Through the Guidelines, the Review Board has established, for scoping purposes, an analysis that is focused on an examination of the relationship between the development that triggered the EA process and certain activities. Nothing in those Guidelines suggests that scoping is subject to restrictions based on what stage activities have reached in the regulatory process. In suggesting that only undertakings that have been the subject of applications for permits and licences can

be scoped in a development, the Tlicho Government introduces a criterion that is not contemplated in the Guidelines, and is not requirement set out in the *MRVMA*.

[37] If the Tlicho`s interpretation is correct, the Review Board does not have jurisdiction to scope in an EA an undertaking or activity that has not been the subject of an application for a licence or permit. That, it seems to me, would limit the Review Board's ability to meaningfully scope projects and would run contrary to the purpose of the *MVRMA*.

[38] This position also appears to run contrary to the jurisprudence that has examined scoping powers in other legislative schemes. To the extent that scoping powers analogous to those given to the Review Board's have been examined by the courts, those powers have been interpreted as allowing the designated authority to expand the scope of the project to be examined. *MiningWatch Canada* v. *Canada (Fisheries and Oceans)* 2010 SCC 2.

[39] The Review Board has, on a number of occasions, scoped in undertakings and activities not specifically outlined in the applications for permits and licences that triggered the environmental assessment process. The Review Board's discretion to use its scoping powers in this way does not appear to have been questioned in any of those instances. *Ka'a'Gee Tu First Nation* v. *Paramount Resources Ltd.* 2006 NWTSC 30, at paras 10-11; *Reasons for Decision and Scoping Report for the Environmental Assessment of the Mackenzie Gas Project (Mackenzie Valley Pipeline),* Mackenzie Valley Environmental Impact Review Board, May 21, 2004; *Review Board Ruling on Scope of Development for EA0809-002, Prarie Creek Mine,* Mackenzie Valley Environmental Impact Review Board, March 5, 2009.

[40] It seems, therefore, that the position advanced by the Tlicho Government is not consistent with the manner in which scoping powers have been interpreted by the courts in the context of environmental assessment processes, nor with what has been the accepted practice of the Review Board in the Northwest Territories since the enactment of the *MVRMA*.

[41] The EA process and the regulatory process, although both provided for in the *MVRMA*, are distinct processes with distinct functions. The different bodies

created by this legislation must coexist harmoniously and carry out their respective functions without undermining each other's roles. But a broad and generous interpretation of the Review Board's jurisdiction to shape the EA process does not undermine the mandate and role of the regulatory authorities. The EA process is not a substitute for the regulatory process and does not supercede it. It is simply a planning process.

[42] For those reasons, I do not find it necessary, to advance and uphold the objectives of the *MVRMA*, to interpret the Review Board's jurisdiction as restrictively as the Tlicho Government suggests it should be. I conclude, on the contrary, that a broad interpretation of the Review Board's jurisdiction is much more consistent with the objectives of the *MVRMA*, particularly, in the words of Paragraph 114(a), the objective of establishing the Review Board as the main instrument for environmental assessment of developments in the Mackenzie Valley.

2. The importance of the Tlicho Agreement

[43] The next question is whether the interpretation advanced by the Tlicho Government is necessary to give due effect to the Tlicho Agreement, uphold its intent and achieve its objectives.

[44] I completely agree with the Tlicho Government that all the provisions in the *MVRMA*, including those that give the Review Board its jurisdiction and powers, must be interpreted in a manner that is harmonious with, and respectful of, the terms of the Tlicho Agreement. That is fundamental because of the importance of the Tlicho Agreement itself and because the *MVRMA* actually serves to implement it. All the provisions in that statute must be interpreted in a way that upholds the overarching objectives of the Tlicho Agreement, and respect the authority and power that the Tlicho Government has over Tlicho lands.

[45] But a broad interpretation of the Review Board's jurisdiction to shape the EA process does not undermine the authority of the Tlicho Government, or any of the objectives that are at the heart of the Tlicho Agreement. And it could not. The Review Board does not have any authority to give anyone access to Tlicho lands. It does not have any licensing authority whatsoever. Decisions of the Review Board cannot erode the authority that the Tlicho Government has over its lands

any more than they can erode the regulatory authority of the Land and Water Board or that of other regulatory agencies.

3. The impact of the specific context of the NICO project

[46] The Tlicho Government argues that in assessing the jurisdictional issues, the unique circumstances that led to this matter cannot be overlooked. The Tlicho Government points more specifically to the Land and Water Board's refusal to accept Fortune's first application as complete because it had not shown that it had an access agreement for activities, such as the construction of the roads, that were to take place outside its claim block. The Tlicho Government argues that the combined effect of Fortune's exclusion of the roads in its reconfigured application and of the Review Board's inclusion of the roads in the Terms of Reference undermines the Land and Water Board's original decision, and therefore must be considered in deciding the jurisdictional issue.

[47] I disagree. In my view, the circumstances of a specific case have no relevance or bearing on the jurisdictional issue. Jurisdiction is a matter of law. Here, the issue is whether the Review Board has jurisdiction to proceed with an EA that includes consideration of these proposed roads when applications for permits have not been made with respect to their construction, and in the absence of an access agreement. The answer to that question must be the same regardless of the circumstances leading up to the EA. Those circumstances are relevant to the reasonableness of the Review Board's decision, but not to its jurisdiction.

4. Hypothetical or speculative nature of the proposed roads

[48] At the heart of the Tlicho Government's position on the jurisdictional issue is the argument that the Review Board does not have jurisdiction to examine, in the EA process, undertakings or projects that are speculative or hypothetical. The Tlicho Government says that the two roads in question are very much speculative or hypothetical because no applications for permits or licences have been made for their construction; access issues have not been dealt with; and there is a moratorium in place for any development on Tlicho lands. The Tlicho Government argues that the Review Board has no jurisdiction to examine such hypothetical undertakings.

[49] The Review Board and Fortune respond that by definition, EA processes require a consideration of undertakings that, although planned, have not yet happened, and about which there remains uncertainty. They say this situation is no different.

[50] What is unique about this case is that the two roads would have to be built on Tlicho lands. The Tlicho Government's authority over those lands, the existing moratorium on development, and the unresolved access issues add layers of uncertainty of an unusual kind in this type of process.

[51] The access issues cannot be completely ignored, given the submissions made in this application for judicial review, but the parties have suggested, and I agree, that it would be unwise for this Court to delve into those issues into too much depth at this stage. With this in mind, I limit my examination of the access issues to what is necessary to deal with the submissions made about the hypothetical nature of the roads and its bearing on the issues raised in this case.

[52] Chapter 19 of the Tlicho Agreement deals with access to Tlicho lands. Sections 19.3.1 to 19.3.4 deal with access rights of holders of pre-existing interests and are relevant to Fortune's access rights. Section 19.3.1 recognizes the right of the holder of a pre-existing interest to access to Tlicho lands to exercise that pre-existing interest. Section 19.3.3 sets out how this right of access can be exercised:

> 19.3.3 Where the exercise of the right of access under 19.3.1 or 19.3.2 involves any activity of a type or in a location not authorized at the effective date, the exercise of that right of access is subject to the agreement of the Tlicho Government or, failing such agreement, to conditions established in accordance with Chapter 6 [Chapter 6 sets out a dispute resolution mechanism]. Where the person with the right of access and the Tlicho Government do not reach agreement on conditions for the exercise of that right of access, the person with the right of access may refer the dispute for resolution in accordance with chapter 6, but may not exercise it until the dispute has been resolved.

[53] Section 19.8.1 gives the GNWT a right of access for the purpose of establishing and managing the existing Gameti and Whati winter roads. There is

nothing in Chapter 19 that provides a right of access to the GNWT for the purposes of building new roads.

[54] Chapter 20 provides for the expropriation of Tlicho lands. This could be an option available to the GNWT if it wished to build a road on Tlicho lands and was unable to obtain the Tlicho Government's consent to do so. Section 20.1.1 sets out a general principle against expropriation and recognizes the fundamental importance of maintaining the quantum and integrity of Tlicho lands. The following sections go on to set out the parameters and process for expropriation. Part 20.5 addresses specifically the issue of expropriation of lands for use as a public road.

[55] Without engaging in any speculation as to what may or may not happen in terms of negotiations regarding access, this much is clear: much would have to happen, one way or another, before either the access road or the GNWT highway could become a reality. This uncertainty creates a number of practical problems as far as attempting to assess the environmental impact of the construction or use of those roads. But the question is whether that uncertainty means that the Review Board does not have jurisdiction to proceed with the EA on its existing Terms of Reference.

[56] The Tlicho Government characterizes the roads as "hypothetical", "speculative", and even "imaginary". Another way of describing the situation is to say that the coming into existence of these roads is contingent on a number of things. Obviously, the answer to the jurisdictional issue does not depend on the adjective used. The significant point, in my view, is that everyone agrees that the NICO project is only viable if there is year-round road access to the site. This means that if this project ever goes ahead, these roads, which do not currently exist, will have to be built. The uncertainties that exist about their construction, which I repeat, are significant uncertainties, do not make them irrelevant to the NICO project. In the context of the NICO project, they are not hypothetical because they are something that would necessarily have to happen for this development to occur. Given this, I conclude that consideration of those aspects of the project is not outside the jurisdiction of the Review Board.

[57] I certainly agree with the Tlicho Government that including consideration of these proposed roads in this EA presents many challenges under the circumstances, but in my view that is, again, something that goes to the reasonableness of the decision, not to the Review Board's jurisdiction to make the decision.

[58] For those reasons, I conclude that the jurisdictional arguments raised by the Tlicho Government must fail. This leads to the second issue raised in this application, namely, the reasonableness of the Review Board's decision to refuse to postpone the EA, given all the circumstances.

D) WHETHER THE REVIEW BOARD'S DECISION TO PROCEED WITH THE ENVIRONMENTAL ASSESSMENT WAS UNREASONABLE

[59] The Tlicho Government argues that the Reasons for Decision demonstrate that the Review Board made a number of errors in arriving at the conclusion that the EA should not be postponed, and that those errors made the decision unreasonable.

[60] The Ruling requested by the Tlicho Government was that the EA proposed in the Terms of Reference was premature and would be postponed until all essential components of the project have been included in applications accepted as complete by the Land and Water Board. This request was based on practical problems presented by the inclusion of the roads in the Terms of Reference and by the jurisdictional issues raised by what the Tlicho Government characterized as inconsistencies between the Terms of Reference and the *MVRMA* and the Tlicho Agreement.

[61] The Review Board considered that two issues needed to be decided: first, whether there should be an indefinite postponement of the EA, and second, whether the jurisdictional arguments raised by the Tlicho Government had merit. The Review Board concluded that an indefinite postponement of the EA would not be fair to Fortune, and decided that the jurisdictional issues should be examined. It then went on to examine those issues and concluded that it did have jurisdiction to proceed with the EA under the existing Terms of Reference.

[62] The Tlicho Government argues that one of the Review Board's errors was to conclude that the jurisdictional issues were being raised for the first time in the Request for Ruling. The Tlicho Government argues that on the contrary, it had raised its concerns about the inclusion of the roads long before the Terms of Reference were issued.

[63] The record shows that the Tlicho Government communicated a number of times with the Review Board as the Terms of Reference were being developed, and addressed, among other matters, issues related to the roads. The first two letters (dated June 1, 2009 and July 23, 2009) were sent as the Terms of Reference were being developed, and the third (dated October 22, 2009) was sent after the draft Terms of Reference were circulated for comments.

[64] The June 1st letter noted Fortune's requirement for an all weather road and the lack of any formal plans to develop or construct such a road, but also stated:

> Impacts associated from an access route to the NICO Project should be included in an environmental assessment that considers, but not limited to, traditional and current land use and Tlicho citizen's health and safety.

[65] So initially, the Tlicho Government's position appeared to be that the impacts of the construction of an access road should be included.

[66] The July 23rd letter dealt with the roads issue in more detail. It reiterated that there were no plans in place with the GNWT or any other party to build a road on Tlicho lands that would provide access to the NICO site. It underscored the Tlicho Government's authority and the role it would have to play in the development of any plan to build such a road; it also referred to the Tlicho Government's ongoing land use planning process. It noted that any examination of a specific route for roads on Tlicho lands was speculative and could be subject to drastic change. It concluded that under those circumstances, it was difficult to apply the scoping criteria.

[67] After the draft Terms of Reference were circulated, the Tlicho Government sent its October 22 letter. In that letter, it communicated its strong opposition to having consideration of the proposed roads included in this EA, and asked that the

roads be removed from the Terms of Reference. It referred to the moratorium on development on Tlicho lands, and stated that to consider a road in the face of that moratorium would be "quite disrespectful, wrong in law and would be an affront". It requested that the Terms or Reference be amended to reflect the need for any proposed development to be consistent with the Land Use Plan to be developed by the Tlicho Government.

[68] In its Reasons, the Review Board found that it should not simply postpone the process without addressing the jurisdictional issues raised in the Request for Ruling, given the stage that the process was at and the resources that had already been expended over the six months that had passed since the Terms of Reference had been issued. The Review Board noted that the Tlicho Government had provided input at the scoping stage and in the development of the Terms of Reference for the EA. It specifically referred to the three letters that were sent by the Tlicho Government during this process. The Review Board noted:

> On none of these occasions did the [Tlicho Government] raise the kinds of jurisdictional issues outlined in the Request.

[69] The Review Board concluded:

> Considering the procedural history, the Review Board is of the view that an indefinite postponement of the EA would be unfair to Fortune. The Review Board is of the view that the [Tlicho Government] has had over a year to raise the concerns set out in the Request. In fact, the [Tlicho Government] previously commented on the draft [Terms of Reference] and Work Plan without raising these concerns. It is the Review Board's opinion that an adjournment is not an appropriate remedy in these circumstances. Consequently the Review Board has decided that it must also review the jurisdictional issues raised by the [Tlicho Government] and make a ruling on those issues.

[70] There is no question that the Tlicho Government had raised concerns about the inclusion of the roads, and expressed its opposition to it in increasingly forceful terms as the consultation process about the Terms of Reference progressed. But it had not asserted, until the Request for Ruling was made, that the hypothetical nature of the roads made the NICO project itself hypothetical and hence removed it from the jurisdiction of the Review Board. Nor had it challenged the Review Board's

jurisdiction to conduct an EA on this project for other reasons. On the contrary, by providing input about what should and should not be a part of this EA, the Tlicho Government, arguably, until then, acknowledged the Review Board's jurisdiction to deal with this matter.

[71] The Review Board specifically referred to the correspondence received from the Tlicho Government while the Terms of Reference were being developed. It cannot be said, therefore, that it overlooked the fact that those positions had been conveyed. My interpretation of the Review Board's comments is that it was simply noting that its jurisdiction to hold the EA had not been called into question until the Request for Ruling was made. In that respect I think the Review Board was correct.

[72] The Tlicho Government argues that the Review Board's decision was unreasonable because it failed to address the practical problems raised by the many uncertainties that remained about the construction of the roads. I find that the Review Board did address those matters at pages 9 and 10 of its Reasons:

> The [Tlicho Government] argues that because neither access roads are built that their location and related physical characteristics are unknown and their environmental and socio-economic impacts cannot be assessed. With respect, if this argument were accepted as presented, many environmental impact assessments could never be conducted. It is not at all uncommon for EA's to include and assess activities which will not be specifically located or built until later.

[73] The Review Board then gave examples of other EAs that had included the assessment of undertakings in situations where the precise location of the undertakings was not yet known and was subject to contingencies. It referred to the possibility of there having to be a further EA depending on how events would unfold. In light of these comments, I conclude that the Review Board recognized the practical challenges posed by the inclusion of the roads in this EA, but disagreed with the Tlicho Government's position that they justified a postponement of the EA process.

[74] The Tlicho Government argues that the Review Board's decision was unreasonable because it failed to take into account the critical values and principles

that underlie the statutory framework for the exercise of its discretion, namely, the *MVRMA* and the Tlicho Agreement. The Tlicho Government relies on the cases of *C.U.P.E.* v. *Ontario (Minister of Labour)* 2003 SCC 29 and *Baker* v. *Canada (Minister of Citizenship and Immigration* [1999] 2 S.C.R. 817 in support of that proposition.

[75] In *C.U.P.E.*, what was at issue was the Minister of Labour's power to appoint persons on arbitration boards. The statute gave the Minister broad powers in this regard. The Minister had chosen to appoint individuals as chairs to various boards and in so doing, had expressly excluded from his consideration whether the individuals had expertise in labour relations and were generally accepted as such in the labour relations community. The Supreme Court of Canada found that the Minister's discretion had to be exercised in accordance with the overarching objectives of the statute, which was to create, in the arbitration boards, a neutral and credible substitute to the right to strike and lock-out. The Supreme Court concluded that the Minister's decision could not stand because it failed to uphold those overarching objectives, and was not consistent with the overall context of the statutory scheme that granted him his discretionary power.

[76] In *Baker*, the decision maker, an immigration officer, had to decide whether a woman should be granted an exemption from deportation for humanitarian and compassionate reasons. The Court found that the officer's decision was unreasonable because he had been completely dismissive of the interests of the applicant's children, and in so doing, had not given adequate weight to a value that was of key importance in the context of the legislative scheme.

[77] The Review Board did nothing of the sort in this case. It considered the provisions of the *MVRMA* and of the Guidelines. It acknowledged the importance of the Tlicho Agreement and of the ongoing land use planning process. It did not ignore the broad statutory context within which these issues were arising.

[78] The Tlicho Government argues that the Review Board's decision was unreasonable because it failed to recognize the hypothetical nature of the two roads. This is one aspect of the Review Board's Reasons for Decision that I find does raise some concerns.

[79] While both the proposed roads would have to be built on Tlicho lands, there are important distinctions to be made between the two. The access road is to be built by Fortune, whereas the highway is to be built by the GNWT. The Review Board recognized this distinction to an extent: it recognized that it could not include the impacts of the construction of the GNWT highway in the EA because Fortune would not be responsible for building that road. So the Review Board only scoped in the use of the public highway by Fortune, while it scoped in both the construction and use of the access road.

[80] But when it dealt with the submissions about the hypothetical nature of the roads, the Review Board failed to draw any distinction between the two roads. Earlier in its decision the Review Board had considered the access issue as it related to the road to be built by Fortune, and had concluded that because the Tlicho Agreement protects Fortune's access rights, the issue of access would necessarily have to be resolved, either through agreement with the Tlicho Government or through the dispute resolution mechanism. The Review Board concluded that the Tlicho Government's authority over Tlicho lands did not permit it, through its land use planning process and moratorium, to deny access rights provided for in the Tlicho Agreement.

[81] Later in the decision, when addressing the submission that the roads were hypothetical and speculative, the Review Board appeared to conclude that its findings about access disposed of that issue:

> The [Tlicho Government] says that these roads are hypothetical. That characterization is, however, mainly based on the fact that the [Tlicho Government]'s agreement to permit across over Tlicho lands has not yet been granted. As was indicated in relation to the analysis of the [Tlicho Government]'s first line of jurisdictional argument above, the [Tlicho Government] cannot refuse that approval.

[82] In my view, the Review Board erred in lumping the two roads together when dealing with this issue. It failed to address the fact that the proposed GNWT highway engaged access issues that were very different from those engaged by the other proposed road. As already mentioned, those issues are different because Chapter 19 of the Tlicho Agreement does not provide a general right of access to

the GNWT to build *new* roads. The Review Board did not address this distinction.

[83] In fact, failing agreement by the Tlicho Government to have a new public highway constructed on its lands, the GNWT's only option, if it still wanted to proceed, would be to resort to the expropriation powers set out at Chapter 20 of the Tlicho Agreement. Whether the GNWT would choose that course of action remains to be seen. There is nothing in the Review Board's Reasons that suggests that it considered these issues when it addressed the Tlicho Government's submission about the hypothetical or speculative nature of the GNWT highway.

[84] The Review Board's failure to address that issue in its Reasons is troubling. Much uncertainty remains about whether this public highway will be built. While the record suggests that the GNWT is studying this possibility, there is nothing to say whether it will decide to move forward, or when; whether the Tlicho Government will be prepared to even discuss this possibility, and when; whether the Tlicho Government will ultimately give its consent to the project; and what the GNWT will do if the Tlicho Government opposes this undertaking. Therefore, irrespective of how Fortune's own access rights are resolved, the considerable uncertainty about the public highway translates into considerable uncertainty for the project as a whole: without a public highway there is no point to the access road, and without year round road access the NICO project is not viable.

[85] The Tlicho Government also argues that the Review Board's decision is unreasonable given the unique context which gave rise to this EA, namely, Fortune's first application to the Land and Water Board, which was rejected, and its subsequent reconfiguration of the applications which excluded the roads. As I stated at Paragraphs 46 and 47, those circumstances are not relevant to the jurisdictional issues, but they are relevant to the reasonableness of the Review Board's decision to proceed with this EA.

[86] As already mentioned, the Land and Water did not consider Fortune's first applications as complete, because the access issues related to the construction of the access road had not been resolved. Fortune then reconfigured its application and deliberately excluded the roads. Yet, because of the Review Board's decision to

proceed with the EA on the existing Terms of Reference, considerable resources will now go into an examination of the environmental impact of those roads. Even though the Review Board does not have licencing authority, its decision to scope the roads in this EA has significant consequences for those involved in the EA process, and is particularly problematic for the Tlicho Government because it has not yet completed its own work and assessment to create a framework to guide how development should take place on its lands.

[87] On the other hand, the NICO project has been referred to the Review Board for an EA. The Review Board has decided that in considering the environmental impact of this proposed development, it is preferable to take into account undertakings, such as these roads, that inevitably would have to occur for the project to become a reality. From that point of view, neither the significant contingencies about the roads, particularly the GNWT highway, nor the history of the matter, make a difference, because the basis of the decision is an attempt to fully capture the potential environmental impact of the NICO project.

[88] In the face of this very unusual, unique set of circumstances, the Review Board had a few options: it could have decided to examine only the environmental impacts associated with activities that were to take place on Fortune's claim block and leave the proposed roads out of it, as the Tlicho Government was asking. It could have postponed the entire process until some of the unknowns related to the roads were resolved, one way or another. Another option was to proceed as it did.

[89] It is very important to bear in mind that the issue is not whether this Court agrees with the course of action that the Review Board chose. It is whether that course of action was reasonable. In *Dunsmuir*, the Supreme Court of Canada explained what the concept of "reasonableness" means in the context of judicial review:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness

> inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law.
>
> *Dunsmuir* v. *New Brunswick*, *supra*, at para.47.

[90] The Supreme Court also had this to say about the notion of deference:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts should show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their regard to both the facts and the law. The notion of deference is 'rooted in part in respect for governmental decisions to create administrative bodies with delegated powers' (...) We agree with David Dyzenhaus where he states that the concept of 'deference as respect' requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of the decision' (citations omitted)
>
> (...)
>
> In short, deference requires respect for the legislative choice to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
>
> *Dunsmuir* v. *New Brunswick*, *supra*, at paras. 48-49.

[91] Of the various options that the Review Board had, it decided that it ought not to postpone this EA, nor alter the Terms of Reference. The consequences of this decision are significant for all parties from the perspective of the resources that will have to be devoted to the process, especially in light of the level of uncertainty that

remains about the project as a whole. On the other hand, as the Review Board noted in its Reasons, considerable resources had already been devoted to this matter, in the development of the Terms of Reference, and after they were issued, before the Tlicho Government requested that the EA be postponed and held in abeyance.

[92] The Review Board's failure to address the significant contingencies about the proposed new public highway suggests that it overlooked that those contingencies were of a significantly different nature, and governed by different considerations, than those related to the Fortune's access road. But the Review Board, evidently, decided that if it was going to conduct an EA about the NICO project, it should attempt to include as many of the related undertakings as it could, even if there were contingencies.

[93] The Review Board was facing unique situation that was fraught with complexities. But the issues it had to resolve were at within its area of expertise, and indeed, at the heart of the mandate that Parliament has entrusted to it. It is not for this Court to substitute its view about what course of action should have been taken, provided that the one chosen fell, in the words of the Supreme Court of Canada in *Dunsmuir*, "within a range of possible, acceptable outcomes".

[94] On balance, despite the concerns I have expressed about certain aspects of the decision, I cannot say that it does not fall within a range of possible, acceptable outcomes. For that reason, I conclude that this Court's intervention is not warranted and that the application must be dismissed.

[95] Under the circumstances, I would not be inclined to make an order as to costs for this application, but I will consider any submissions the parties wish to make on that issue. If they wish to present submissions in that regard, they are to contact the Clerk of the Court within 14 days of the filing of these Reasons to make the necessary arrangements.

L.A. Charbonneau
J.S.C.

Dated this 2nd day of June, 2011.

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S-1-CV 2010000157

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

TLICHO GOVERNMENT

Applicant

-and -

MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD and FORTUNE MINERALS LIMITED

Respondents

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE L.A. CHARBONNEAU
