Federal Court

Cour fédérale

**Date: 20101112**

**Docket: T-1349-09**

**Citation: 2010 FC 1139**

**BETWEEN:**

**YELLOWKNIVES DENE FIRST NATION,
LUTSEL K'E DENE FIRST NATION,
CHIEF TED TSETTA and CHIEF EDWARD SANGRIS on their own behalf and on behalf of all Members of the Yellowknives Dene First Nation, and CHIEF STEVEN NITAH on his own behalf and on behalf of all Members of the Lutsel K'e Dene First Nation**

**Applicants**

**And**

**THE ATTORNEY GENERAL OF CANADA
NORTH ARROW MINERALS INC.**

**Respondents**

**REASONS FOR JUDGMENT**

**PHELAN J.**

I. INTRODUCTION

[1] The Applicants are the Yellowknives Dene First Nation and the Lutsel K'e Dene (collectively First Nations) who seek judicial review of a July 16, 2009 decision of the Mackenzie Valley Land and Water Board (Board) to issue North Arrow Minerals Inc. (North Arrow) a land use

permit (Permit) to conduct mineral explorations. The principal issue raised is whether the Applicants were properly consulted.

While there are two Respondents, North Arrow did not participate in the case. The term "Respondent" refers to the Attorney General of Canada.

[2] The Applicants request that this Court quash the Permit because the requirements under the *Mackenzie Valley Resource Management Act* (Act) and related regulations were not met. The Applicants further seek a variety of other remedies including declaration for breach of procedural fairness and reasonable apprehension of bias; a declaration of breach of the Crown's duty to consult; an order requiring the Crown to consult and accommodate the Applicants before a permit may be issued; and an order requiring North Arrow to consult and accommodate.

[3] There was a preliminary motion by the Respondents to strike several of the Applicants' affidavits either in whole or in part. This motion was heard at the time of the judicial review and the Court reserved its decision so that the full judicial review could be argued in the time allotted for the hearing at Yellowknife.

## II. BACKGROUND

### A. *Parties and Agreements*

[4] The Applicant Yellowknives (consisting of two communities; the Dettah and the Ndilo) and the Lutsel K'e are among the Akaitcho Dene First Nations (ADFN). There is no issue that these are Aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*.

[5] On July 25, 1900, the ADFN signed "Treaty 8" with the Crown and created constitutionally protected treaty rights. However, each side has different interpretations of that treaty and this has led to over 100 years of dispute and negotiation in order to clarify the rights of the ADFN.

[6] The ADFN have since made a claim (the Akaitcho Claim) to various aboriginal and treaty rights including rights of exclusive possession and control over the land, rights of self government, cultural rights and rights to hunt, trap, travel and gather on and over the land. In 1976 the Crown accepted the claim for negotiation in the context of a larger Dene-Metis claim. In 1996 Akaitcho-specific negotiations began and are still in progress.

[7] One hundred years after signing the Treaty, the ADFN and the Crown signed a "Framework Agreement" in order to clarify the negotiation process. The Framework Agreement is a fairly basic and broad document which speaks almost entirely to procedural aspects of negotiations, states some basic principles and sets out some timelines, which have not been met. It is important to note that this Framework Agreement does acknowledge the assertion of the ADFN of traditional and current land use. Section 11 of the Framework Agreement, however, specifically states that nothing in the Agreement is to be interpreted as creating, recognizing or denying rights or obligations on the part of any of the parties.

[8] In 2001, the parties signed an "Interim Measures Agreement" (IMA) in which Canada and the Government of the Northwest Territories acknowledged that the Akaitcho DFN asserted their traditional territory as outlined in a map attached to the IMA. The IMA covers a number of activities undertaken by the Governments of Canada and of the Northwest Territories including

federal land use permits. The IMA essentially sets up a process whereby the ADFN can "pre-screen" these types of decisions upon being given the earliest possible notice of applications for various licences and the necessary information to respond. A series of schedules are attached to the IMA setting out more comprehensive means by which this brief pre-screening is to be done in relation to various permits and other government decisions.

[9] Schedule C of the IMA guides the process as it relates to Land Use Permits. It requires that the Akaitcho Screening Board be given notice of an application process as early as possible. Once an application is received, the Board has five days to notify the Akaitcho Screening Board and in the case of a "Type A permit" (such as the one at issue in this proceeding), the affected First Nations have 21 days to respond. Schedule C was implemented by Ministerial Order on February 23, 2004. The Ministerial Order does not give directions as to how the Board is to consider the First Nations' submissions, merely that it must do so "fully and impartially".

[10] The Akaitcho Screening Board operates through the IMA implementation office. This office is a support unit for First Nations, essentially a regional coordinating body. It acts as a communication link between First Nations, governments and "project proponents" (e.g. companies looking to undertake operations in the area such as North Arrow).

The Applicants submit that while the office exists to facilitate the process, it by no means guarantees adequate consultation. It is argued that the office essentially puts people in touch with each other and may act in an advisory capacity as to how communications should occur.

It is the Applicant's position that this IMA is not a substitute for consultation.

B. *MacKenzie Valley Land and Water Board*

[11] The Board is established pursuant to the *Mackenzie Valley Resource Management Act* S.C., 1998, c. 25 and the associated regulations.

[12] There is dispute between the parties as to how the Board's regime was developed. The Applicants contend that the regime was established unilaterally by the Government of Canada without the input of the ADFN. It is the position of the Respondents that the regime arose, *inter alia*, from the requirements of the Gwitch'in and Sathu Dene & Metis Comprehensive Land Claim Agreements.

[13] Justice Blanchard, in his decision *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 (*Ka'a'Gee #1*), set forth the Act and Regulations and their genesis in detail. He noted that the regime, including the Land and Water Board and the Environmental Impact Review Board, was indeed a result of these land claims. He further found that Bill C-6, which prescribed the legislation, took five years to complete and included "considerable consultation with all affected groups". The position that this regime was imposed unilaterally and without consultation simply is not in accord with Justice Blanchard's reasons.

[14] The Act is not a model of brevity, simplicity or clarity. It describes land use planning, water and land regulation and the composition of various boards making specific provisions for the First Nations whose agreements gave rise to the Act.

[15] While Part 3 outlines the duties and powers of the boards more generally, Part 4 specifically sets out the Mackenzie Valley Land and Water Board's composition and authority. Moreover, this Part 4 incorporates Part 3 by reference pursuant to s. 102(1):

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| **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. | **102.** (1) L'Office a compétence en ce qui touche toute forme d'utilisation des terres ou des eaux ou de dépôt de déchets réalisée dans la vallée du Mackenzie pour laquelle un permis est nécessaire sous le régime de la partie 3 ou aux termes de la *Loi sur les eaux des Territoires du Nord-Ouest*. Il exerce à cet égard les attributions conférées aux offices constitués en vertu de cette partie, exception faite toutefois de celles prévues aux articles 78, 79 et 79.2 à 80.1, la mention de la zone de gestion dans les dispositions pertinentes de cette partie valant mention de la vallée du Mackenzie, sauf au paragraphe 61(2) où cette mention continue de viser le Wekeezhii. |

Therefore, the considerations and requirements of Part 3 are relevant to the Board and to this litigation.

[16] The most relevant provisions of Part 3 affecting this judicial review are parts 60.1 – 65 (relevant provisions shown below):

| | |
|---|---|
| **60.1** In exercising its powers, a board shall consider<br><br>(*a*) the importance of conservation to the well-being and way of life of the | **60.1** Dans l'exercice de ses pouvoirs, l'office tient compte, d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du |

aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and

(*b*) any traditional knowledge and scientific information that is made available to it.
2005, c. 1, s. 35.

Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

**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.

**62.** L'office ne peut délivrer de permis ou d'autorisation visant à permettre la réalisation d'un projet de développement au sens de la partie 5 avant que n'aient été remplies les conditions prévues par celle-ci. Il est en outre tenu d'assortir le permis ou l'autorisation des conditions qui sont imposées par les décisions rendues sous le régime de cette partie.

**63.** (1) A board shall provide a copy of each application made to the board for a licence or permit to the owner of any land to which the application relates and to appropriate departments and agencies of the federal and territorial governments.

**63.** (1) L'office adresse une copie de toute demande de permis dont il est saisi aux ministères et organismes compétents des gouvernements fédéral et territorial, ainsi qu'au propriétaire des terres visées.

(2) A board shall notify affected communities and first nations of an application made to the board for a licence, permit or authorization and allow a reasonable period of time for them to make representations to the board with respect to the application.

(2) Il avise la collectivité et la première nation concernées de toute demande de permis ou d'autorisation dont il est saisi et leur accorde un délai suffisant pour lui présenter des observations à cet égard.

**64.** (1) A board shall seek and consider the advice of any affected first nation and, in the case of the Wekeezhii Land and Water Board, the Tlicho Government and any appropriate department or agency of the federal or territorial government respecting the presence of heritage resources that might be affected by a use of land or waters or a deposit of waste proposed in an application for a licence or permit.

(2) A board shall seek and consider the advice of the renewable resources board established by the land claim agreement applicable in its management area respecting the presence of wildlife and wildlife habitat that might be affected by a use of land or waters or a deposit of waste proposed in an application for a licence or permit.

**64.** (1) L'office doit demander et étudier l'avis de toute première nation concernée, des ministères et organismes compétents des gouvernements fédéral et territorial et, s'agissant de l'Office des terres et des eaux du Wekeezhii, du gouvernement tlicho au sujet des ressources patrimoniales susceptibles d'être touchées par l'activité visée par la demande de permis dont il est saisi.

(2) Il doit de plus demander et étudier l'avis de l'office des ressources renouvelables constitué par l'accord de revendication au sujet des ressources fauniques et de leur habitat susceptibles d'être touchés par l'activité visée par la demande de permis.

**65.** Subject to the regulations, a board may establish guidelines and policies respecting licences, permits and authorizations, including their issuance under this Part.

**65.** L'office peut, sous réserve des règlements, établir des principes directeurs et des directives concernant les permis et autorisations, notamment en ce qui touche leur délivrance sous le régime de la présente partie.

[17] In addition, in Part 5 dealing with the Mackenzie Valley Environmental Impact Review Board (Review Board), s. 118(1) specifically states that no permit required for carrying out

development can be issued unless the requirements of Part 5 have been complied with in relation to development.

[18] The separate aspects of the process are described in greater detail in Part 5 and the steps required are set forth in s. 124(1)*(a)* and *(b)* and s. 125(1)*(a)* and *(b)*:

> **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 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.
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> …
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> **125.** (1) Except as provided by subsection (2), a body that

> **124.** (1) L'autorité administrative ou l'organisme administratif désigné saisi, en vertu d'une règle de droit fédérale ou territoriale mentionnée dans les règlements pris en vertu de l'alinéa 143(1)*b*), d'une demande de permis ou d'autre autorisation relativement à un projet de développement est tenu d'en informer l'Office par écrit et d'effectuer un examen préalable du projet, sauf si celui-ci y est soustrait parce que, aux termes des règlements pris en vertu de l'alinéa 143(1)*c*) :
>
> *a*) soit ses répercussions environnementales ne sont pas importantes;
>
> *b*) soit l'examen ne serait pas indiqué pour des motifs de sécurité nationale.
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> …
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> **125.** (1) Sauf dans les cas visés au paragraphe (2), l'organe

conducts a preliminary screening of a proposal shall

(*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; and

(*b*) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

chargé de l'examen préalable indique, dans un rapport d'examen adressé à l'Office, si, à son avis, le projet est susceptible soit d'avoir des répercussions négatives importantes sur l'environnement, soit d'être la cause de préoccupations pour le public. Dans l'affirmative, il renvoie l'affaire à l'Office pour qu'il procède à une évaluation environnementale.

[19] Guiding principles and purposes for the whole process are set out in ss. 114-115 as follows:

**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 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 general public are taken into

**114.** La présente partie a pour objet d'instaurer un processus comprenant un examen préalable, une évaluation environnementale et une étude d'impact relativement aux projets de développement et, ce faisant :

*a*) de faire de l'Office l'outil primordial, dans la vallée du Mackenzie, en ce qui concerne l'évaluation environnementale et l'étude d'impact de ces projets;

*b*) de veiller à ce que la prise de mesures à l'égard de tout projet de développement découle d'un jugement éclairé quant à ses répercussions environnementales;

*c*) de veiller à ce qu'il soit tenu compte, dans le cadre du processus, des préoccupations

account in that process.

des autochtones et du public en général.

**115.** The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to

**115.** Le processus mis en place par la présente partie est suivi avec célérité, compte tenu des points suivants :

(*a*) the protection of the environment from the significant adverse impacts of proposed developments;

*a*) la protection de l'environnement contre les répercussions négatives importantes du projet de développement;

(*b*) the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley; and

*b*) le maintien du bien-être social, culturel et économique des habitants et des collectivités de la vallée du Mackenzie;

(*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 *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

*c*) l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie.

[20] Consultation is set forth in s. 123.1 and applies only to the Review Board or a review panel.

**123.1** In conducting a review or examination of the impact on the environment of a development, a review panel of the Review Board or a review panel, or a joint panel, established jointly by the Review Board and any other person or body,

(*a*) shall carry out any consultations that are required

**123.1** Au cours de l'étude d'impact ou de l'examen des répercussions environnementales d'un projet de développement, la formation de l'Office ou la formation conjointe ou la commission conjointe établie par l'Office et une autre autorité procède aux consultations exigées par les accords de revendication et, en outre, elle peut consulter toute

by any of the land claim agreements; and

(*b*) may carry out other consultations with any persons who use an area where the development might have an impact on the environment.

personne qui utilise les ressources de la région où le projet peut avoir des répercussions sur l'environnement.

[21] The Regulations set out in greater detail the process for the application for a permit. An applicant for such a permit must set out particular details of the land use in a preliminary plan. Particular quantitative and qualitative details must be given where known and an inspector may make an inspection and report back to the Board on his findings. The Board's options are found at s. 22 of the Regulations:

**22.** (1) The Board shall, within 10 days after receipt of an application for a Type A permit,

(*a*) where the application was not made in accordance with these Regulations, return the application to the applicant and advise the applicant in writing of the reasons for its return; or

**(*b*) notify the applicant in writing of the date of receipt of the application and of the fact that the Board will take, subject to sections 23.1 and 24, one of the measures referred to in subsection (2) within 42 days after its receipt.**

(2) Subject to sections 23.1 and 24, if the Board does not

**22.** (1) Dans les 10 jours suivant la réception de la demande d'un permis de type A, l'office :

*a*) dans le cas où la demande n'est pas conforme au présent règlement, la retourne au demandeur et l'informe par écrit des motifs du rejet;

***b*) dans tout autre cas, donne au demandeur un avis écrit indiquant la date de réception de la demande et précisant qu'il prendra, sous réserve des articles 23.1 et 24, l'une des mesures visées au paragraphe (2) dans les 42 jours suivant la réception de la demande.**

(2) Sous réserve des articles 23.1 et 24, lorsque l'office ne

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| return an application under paragraph (1)(*a*), it shall, within 42 days after receipt of the application, | retourne pas la demande aux termes de l'alinéa (1)*a*), il prend l'une des mesures ci-après dans les 42 jours qui suivent la réception de la demande : |
| (*a*) issue a Type A permit, subject to any conditions included pursuant to subsection 26(1); | *a*) il délivre un permis de type A assorti de toute condition prévue au paragraphe 26(1); |
| **(*b*) conduct a hearing under section 24 of the Act or require that further studies or investigations be made respecting the lands proposed to be used in the land-use operation and notify the applicant in writing of the reasons for the hearing, studies or investigations;** | ***b*) il effectue une enquête en vertu de l'article 24 de la Loi ou exige la réalisation d'études ou d'investigations supplémentaires au sujet des terres visées par le projet et en communique les raisons par écrit au demandeur;** |
| (*c*) refer the application to the Mackenzie Valley Environmental Impact Review Board under subsection 125(1) or paragraph 126(2)(*a*) of the Act for an environmental assessment and notify the applicant in writing of its referral and of the reasons for the referral; or | *c*) il renvoie, aux termes du paragraphe 125(1) ou de l'alinéa 126(2)*a*) de la Loi, la demande à l'Office d'examen des répercussions environnementales de la vallée du Mackenzie afin que celui-ci procède à une évaluation environnementale, et il en communique les raisons par écrit au demandeur; |
| (*d*) if a requirement set out in section 61 or 61.1 of the Act has not been met, refuse to issue a permit and notify the applicant in writing of its refusal and of the reasons for the refusal. | *d*) dans le cas où les exigences des articles 61 ou 61.1 de la Loi ne sont pas respectées, il refuse de délivrer le permis et en communique les raisons par écrit au demandeur. |

[Emphasis added]

Section 22(2)*(b)* has been described as a "pause" option where once a study is done, a new 42-day timeline begins.

[22] The importance of all these provisions lie in part in the Applicants' reliance on its understanding that if a First Nations send a letter expressing concerns over consultation, s. 22(2)*(b)* of the Regulations will be triggered and Indian and Northern Affairs Canada (INAC) will be alerted to these "assertion letters" and thereby open the door to consultation.

[23] In addition to the Act and Regulations, the Board has established guidelines in relation to permits and licence applications as an aid to those seeking a permit. There are more general Public Involvement Guidelines for Permit and Licence Applicants to the Mackenzie Valley Land and Water Board as well as specific guidelines in relation to the Akaitcho Dene First Nations. It is these guidelines and not the statutory scheme that explicitly outline consultation with the affected First Nations at the preliminary stage. For instance, the ADFN guidelines state that "it is important that proponents meet face to face with ADFN prior to submission of an application".

[24] These guidelines, although they do not have the force of law, are important in that the government has indicated that it will look to the consultation engaged in by proponents for permits to determine whether adequate consultation has occurred.

[25] In addition to the Board's policies regarding consultation, the Akaitcho have developed their own guidelines (Akaitcho Exploration Guidelines) and a template Exploration Agreement. The template agreement sets up a regular and ongoing consultation process, requires employment and

business opportunities (where possible, the conduct of archaeological studies and monitoring (including site visits)) and some mitigation measures. The costs of these measures are to be borne by the proponent for the permit. In return, the First Nation offers their support.

C. *North Arrow Inc. and the Phoenix Project*

[26] North Arrow, a named Respondent but non-participant in this judicial review, is a relatively small Vancouver-based exploration company with a technical office in Yellowknife. Its business is the acquisition of additional North American lithium exploration “opportunities”.

[27] The Phoenix project is located 340 kilometres northeast of Yellowknife in a remote area and on Crown land. Previous research and prospecting had indicated the presence of lithium.

[28] North Arrow wished to undertake more serious exploration and therefore was looking for a permit to allow prospecting, mapping, ground geophysics and diamond drilling of potential lithium targets on the property.

[29] North Arrow approached the Board in December 2008 about submitting an application for a Type A land use permit for mineral exploration. The company official, a Mr. Clarke, was advised to consult the affected First Nations.

[30] In early January 2009, an Akaitcho Treaty #8 screening officer at the IMA Implementation Office received information from North Arrow in the form of a lithium fact sheet and draft

application for a permit. The screening officer advised the screening board of the application later that month.

[31] On January 21, 2009, Mr. Clarke met with an official of the Yellowknives Land & Environmental Office where he provided essentially the same information he had earlier given to the screening officer.

[32] Mr. Slack of the Yellowknives Land & Environmental Office presented the information in the application later in the month of February to the Chief and Councils of the Yellowknives who decided that based on the information given, the project could potentially impact the community. He decided to work towards an agreement with North Arrow in order to identify and mitigate possible impacts.

[33] Mr. Slack subsequently informed Mr. Clarke of a proposed exploration agreement underlining the Band's understanding of a junior company's financial limitations and indicating the willingness to negotiate. The e-mail indicated that the Yellowknives had no significant concerns with the project so long as the exploration agreement was entered into.

[34] North Arrow clearly wished to deal with only one point of contact with the Aboriginal people rather than dealing with both Bands but that was not possible.

[35] Upon Mr. Clarke reviewing the proposed exploration agreement, he indicated that while he was agreeable to certain aspects of notification of activity and project updates, those aspects of the

agreement requiring archaeological study, environmental monitoring, jobs training and business opportunities were not acceptable because they had no fixed costs and could not be borne by the company. He also objected to the company being required to pay for the Chief, Council and Senate Elders to attend a meeting between the corporation and the Band.

[36] North Arrow filed its permit application with the Board on April 14, 2009, the same day as Mr. Clarke's letter indicating to the Yellowknives that the proposed agreement was unacceptable. North Arrow advised the Board on that same date that consultation with the Band was complete.

[37] A day later, Mr. Slack attempted to deal with Mr. Clarke's concerns, underlined that the agreement was in draft and that the Band was prepared to be flexible enough to deal with both large and small companies. He further indicated that certain areas were open to negotiation but concluded that in the absence of an exploration agreement, the Yellowknives could not support the proposed project. Mr. Clarke never responded to that letter.

[38] North Arrow was also in contact with Lutsel K'e but in an even less regular and structured way. A Mr. Ellis sent Mr. Clarke an e-mail explaining the overlap in territory between the two First Nations and the need to deal with both Bands. A week later Mr. Clarke e-mailed to ask about a meeting with the First Nations.

[39] While Lutsel K'e had some notice of the project, the formal contact did not begin until late February. At that time North Arrow e-mailed an information package to Lutsel K'e's Wildlife, Lands and Environment Department. Again, North Arrow rejected proposals because the costs were

too high but before Lutsel K’e could respond with a more modest budget, the permit application was filed.

[40] The evidence is that there was no actual consultation or face-to-face meetings with community members concerning the project beyond contact with Mr. Slack.

[41] Upon receiving the permit application, the Board notified the two First Nations, among others, and invited written comments by May 6, 2009. The Board sought the advice of the Screening Board and on May 4 and 6 respectively, the Yellowknives and Lutsel K’e submitted letters to the Board being “assertion letters” outlining the s. 35 rights and indicating that the applications would infringe upon those rights.

[42] The Lutsel K’e in particular expressed concern that they were not consulted. They generally outlined the traditional uses of the area particularly for hunting and their belief that there were a number of historical and burial sites in the area. The Lutsel K’e also outlined their view that the consultations were not to be “token” as they had been in this instance. They rejected the suggestion that they would not facilitate the relationship with small scale companies and contended that North Arrow simply dismissed their proposals as unreasonable and did not indicate that the company had heard the people’s concerns.

[43] The Yellowknives’ letter was similar in nature and content. The most striking difference is the assertion of the need for an exploration agreement in these terms: “Without a signed Exploration Agreement, the company and INAC must ensure due consultation and accommodation in some

other legally sufficient manner. Otherwise, the YKDFN are left with no choice but to indicate that their rights will be infringed".

[44] On receiving these two letters, the Board invoked s. 22(2)*(b)* of the Regulations to undertake "further study". That further study appears to have been nothing more than consulting INAC in order to determine whether adequate consultation had occurred.

[45] In early June Mr. Clarke, on behalf of North Arrow, wrote to the Board's staff asking whether the duty to consult was the only thing standing in the way of their application. The response was "the Board does not determine if Crown consultation has occurred, INAC does. If INAC tells the Board that consultation is complete, the Board will continue the process of issuing a land use permit".

[46] The overwhelming evidence in this case from all native affiants confirms that the Bands were never contacted by either the Board or INAC <u>at any point</u> before the Permit was issued. To underscore, the affiants stated that they were never contacted by any government department.

[47] The first contact from government, and in particular INAC, was August 2009 when a Stephanie Poole was contacted by INAC asking whether she was aware of INAC's letter to the Board and how the Band might respond to a decision they did not like.

[48] In fact, on June 29 INAC faxed to the Board a letter dated June 18 containing their answers to the confirmation request concerning the duty to consult. It was INAC's position that "the legal duty to consult in this situation had been met".

[49] The details of the letter give an indication of how INAC could have reached this conclusion that the duty to consult had been met:

- The terms and conditions recommended by other departments – so long as they are met or exceeded – will mitigate any adverse effects on wildlife and the environment. The First Nations raised issues of some adverse impacts as to cultural sites but no specifics were given. INAC will assist in accommodating this concern by working with the First Nations to identify them with the understanding the company should adapt its work program to mitigate impact on these sites.

- INAC points to the Aboriginal involvement in the regulatory process and the fact that they take into account procedural aspects of consultation which occurred in it. They note the ADFN requests that North Arrow enter into an agreement and that their response on the company's refusal was "that they would not engage in such consultative processes until an exploration agreement was signed". The letter goes on to say that it is INAC's expectation that aboriginal groups "will not frustrate reasonable attempts by companies to provide information about and discuss potential resource exploration…" and that "accommodation will be proportionate to the potential adverse impacts on their…rights".

- INAC also outlines the other processes designed to ensure input (e.g. the IMA and its related processes) and their expectation that aboriginal groups will use them.

[50] On July 16, 2009, the Board issued North Arrow the requested Type A Land Use Permit for mineral explorations at Aylmer Lake. The Permit was for five years expiring July 15, 2014.

[51] Attached to the Permit was a list of conditions, five pages in length, issued pursuant to the Regulations. Included in those conditions are specifications related to the protection of historical, archaeological and burial sites (namely, that a vehicle cannot be operated near one and that the Board must be notified on the discovery of such a site) as well as general control of refuse, fuel storage and restoration of lands. There is nothing specific listed pursuant to the wildlife and fish habitat provisions of the Regulations.

[52] It is now obvious that in August 2009 when INAC contacted Stephanie Poole, the Akaitcho Treaty #8 screening officer, the Permit had already been issued, indeed drilling had already commenced.

## III. ISSUES

[53] The Applicants raise a broad range of issues stemming from the Board's decision but their concerns are essentially the nature of the Board's duties and the delegation to INAC, the Board's failure to comply with the Act and whether the Crown breached its duty to consult.

[54] While the following issues are somewhat intertwined, they can be broken down as follows:

1. What is the nature of the Board's jurisdiction in regard to consultation?
   - (a) Is the Board required to determine whether the Crown's duty to accommodate has been met; did it err in delegating that determination to INAC?
   - (b) Did the Board's delegation to INAC result in a procedurally unfair decision (including a reasonable apprehension of bias)?

2. Did the Board fail to comply with the provisions of the Act, and in particular s. 62, by allegedly failing to comply with Part 5 and s. 60.1?
3. Was the Crown's duty to consult discharged (included in that issue is the nature and scope of that duty to consult).

## IV. ANALYSIS

### A. *Respondent's Motion to Strike*

[55] The Respondent filed a motion to strike several of the Applicants' affidavits in whole or in part. Nine of the twenty-six affidavits filed are at issue.

The principal concern is that the affidavits contain information that was not before the Board.

[56] Five of the affidavits sought to be struck in their entirety are from experts which speak to the impact of the mining on the Akaitcho Dene First Nations or on First Nations people generally.

The other affidavits, where only parts are to be struck, are statements from members of the community as to the importance of the land, the potential impacts and their own experiences.

[57] There are parts of some of the affidavits which address legal issues and express legal opinions; the Court is quite able to ignore these offending paragraphs. However, some of the affidavits address relevant issues including the interests that the First Nations have in the area, what constitutes consultation in their terms, and the impacts of the project. They address in part whether the duty to consult exists and why, as well as what adequate consultation might entail.

[58] The affidavits address the grounds of this application - the failure to consult and the Board's failure to properly exercise its jurisdiction. Given the facts of this case and how consultation was allegedly conducted, it was not possible to have this evidence before the Board because the Applicants were never given that opportunity.

[59] The Notice of Application specifically raised procedural fairness, both in respect of consultation and in respect of reasonable apprehension of bias. In such instances it is expected that additional evidence will be introduced on judicial review to support the arguments. The evidence is not received to support the merits of the Permit itself or to allow the Court to expand or contract the Permit *per se* but to show the nature of the rights and interests at issue; the real importance of the procedural rights and their scope.

[60] This Court, in *Liidlii Kue First Nation v. Canada (Attorney General)*, [2000] 4 C.N.L.R. 123, dealt with a similar case of a drilling permit and its impact on First Nations groups in the Territory. The affidavits at issue in that case were virtually the same as those in this case and in permitting them to be part of the record, the Court set forth the following rationale:

> **31** The requirement that a decision must only be reviewed on the basis of the material before the decision-maker, applies when a decision is challenged on the ground that it is based on an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the decision-maker. The challenge to the decision in this case is not based on those grounds. It is based on the allegation that there was an obligation to adequately consult the applicant, which consultation it is alleged did not occur and is not contemplated.
>
> **32** Challenges to decisions on the ground that procedural fairness has not occurred, because the affected party has not been given adequate opportunity to present its case, are likely to involve the adducing of information that was not before the decision-

> maker. In the present case, evidence relating to the status of an applicant, and whether a duty to consult exists, and the scope of that duty, is relevant, even though it may not have been before the decision-maker. To the extent that the new evidence relates to those issues, it is properly a part of the application records.

[61] Justice Rothstein in *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198, spoke of both the "jurisdictional issues exception" and the impossible position a party is in where there was an inadequate opportunity to be heard yet a suggestion that their evidence and argument cannot be before this Court because it was not before the tribunal who had precluded its receipt.

> **40** … Given that a decision of an administrative tribunal in excess of its jurisdiction "is not a decision at all", it seems paradoxical that the same "decision" would be immunized from review where jurisdiction is never raised and the tribunal's jurisdiction and/or the constitutionality of its enabling legislation is assumed. This is tantamount to saying that parties to an administrative proceeding may, by waiver or acquiesence, confer jurisdiction on a tribunal that was not, or could not be, conferred by Parliament, and that this conferral of authority by the parties is unreviewable once the decision is made. Indeed, it is not difficult to imagine a Tribunal falling into jurisdictional error simply because it did not hear arguments on that issue.

[62] In the present case, the Applicants could not have been expected to adduce this evidence to the Board regarding the failure to consult as the Applicants were never afforded that opportunity.

[63] There is no evidence of prejudice to the Respondent. It knew that the issue before the Court was the failure to consult and the existence and scope of that duty. It had an opportunity to address those issues by evidence and argument well before the hearing of this judicial review.

[64] Therefore, the evidence is allowed in for the purposes described above. Any offending paragraphs such as those dealing with legal issues can be easily ignored (and were) by this Court.

## B. *Standard of Review*

[65] The issue of the Board's jurisdiction – whether it could and should have determined the Crown's duty to consult – is a question of law and should be judged on the standard of correctness, as required by *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 59.

[66] There is no issue as to the existence of a duty to consult. The real issue is the scope of the duty and whether that duty had been discharged.

[67] With respect to the standard of review governing the scope of the duty, in this case there were no factual findings or analysis by the Board on this issue. INAC's letter to the Board deals with processes available to the Applicants and whether the duty had been discharged. The issue of scope of the duty is severable from that of discharge of that duty and is a question of law to which the correctness standard is applicable.

[68] As to whether that duty to consult has been discharged, the analysis requires a factual context determinable by the Board. This Court in *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at paragraph 93 and in *Ka'a'Gee # 1*, above, at paragraphs 91-93, concluded that reasonableness is the appropriate standard of review.

[69] Although the question of whether to issue a permit engages the Board's expertise, the question of whether the duty exists, its shape and in this case whether the duty was fulfilled does not. In the present circumstances, the Board had delegated to INAC the responsibility to determine the duty to consult requirement.

[70] Whether the Act requires the Board to consider consultation is a restatement of the jurisdiction issue earlier described. In *Ka'a'Gee Tu First Nation v. Canada (Minister of Indian and Northern Affairs)*, 2007 FC 764 (*Ka'a'Gee #2)*, the Court concluded that whether failure to consult leads to the conclusion that the requirements of Part 5 of this Act have not been met is a question of law reviewable on a correctness standard.

[71] Therefore, the question of whether the Act should be interpreted to include a duty to consult is a question of correctness and is subsumed in the jurisdictional issue. Whether the requirements of the Act were in fact carried out is one of reasonableness.

C. *Issue 1 – The Extent of the Board's Duties under the Act – Duty to Consult*

[72] The issue to determine is whether the Board was required to determine that the duty to consult existed and had been met.

[73] The Respondent's position is that the Board is required to take the Aboriginal peoples' concerns into account but it does not share the Crown's duty to consult. The Crown, it is argued, bears the duty and while it can take regulatory processes into account in deciding whether the duty

is met, it is the Crown which remains responsible for meeting that duty. Therefore, the Board can proceed separately from the Crown's duty to consult.

[74] The Respondent concedes that if the Court determines that the Board had to decide whether the Crown fulfilled its duty to consult, it delegated it away to INAC and did not have authority to do so. It, however, argues that the duty was discharged and that the decision should stand.

[75] The parties have made this issue and this litigation more complex than need be. The Court will not make general pronouncements on the process as a whole but will limit itself to those matters which are truly necessary to resolve the issue of the validity of the Board's decision to issue a permit to North Arrow.

[76] The real question is the scope of the Board's responsibilities pursuant to the statutory scheme and that issue is fairly easily resolved by considering the language of the Act and the decision of Justice Blanchard in the two Ka'a'Gee decisions. I adopt his reasoning both as a matter of judicial comity and as a result of my concurrence with the rationale.

[77] While *Ka'a'Gee #1* is relevant on the Crown's duty to consult, *Ka'a'Gee #2* is on point with respect to the Board's responsibilities. That decision concerned the Mackenzie Valley Land and Water Board's decision to issue an amended land use permit. The issue was whether the Crown's failure to consult resulted in a failure to meet the requirements of Part 5 of the Act. Justice Blanchard concluded that it did:

> **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 development,..." to, among other objectives, "ensure that the concerns of the 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.
>
> **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.

[78] Section 114 and the duty to consult applies to the process as a whole. The preliminary screening is part of the process. There is no basis, as argued by the Respondent, to conclude that in some fashion s. 62 and s. 114 do not apply to this part of the process.

[79] It is evident that the Board was also of the view that Crown consultation was a necessary consideration in determining whether a permit should be issued. The Board's decision was premised on the assurance from INAC.

[80] The argument that the Board had no jurisdiction to consider whether the duty to consult had been met, because there is no such statutory requirement, is unsound. A similar argument was

dismissed in *Ka'a'Gee #2* as irrelevant because what mattered was whether the concerns of Aboriginal people were taken into account in the process.

> **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 in 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.

[81] The Respondent's reliance on the decision in *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc.*, 2009 FCA 308, is misplaced. The decision also does not support the Applicants' position that the Board could presume to evaluate the Crown's duty to consult.

[82] *Standing Buffalo* was concerned with whether the National Energy Board (NEB) had to undertake a "Haida" type analysis of consultation in making its final determination. The Court's finding was that the NEB was exercising its powers with respect to s. 35 of the *Constitution Act, 1982*. The Board determined that it did not need to know whether the Crown had discharged its duty to consult in order to render its decision.

[83] In the present case, the Board seemingly operates in compliance with both its enabling legislation and s. 35 as its decision depends on whether the Crown's duty to consult is being discharged. *Ka'a'Gee #2* indicates that this type of determination is legally necessary. There is no suggestion that the Board would dictate to the Crown that it was required to consult but it is evident

that the Board might have decided differently or conducted its own process differently had it known the facts surrounding consultation.

[84] In light of *Standing Buffalo* and the two *Ka'a'Gee* cases which suggest that questions of adequate consultation are for the courts to determine, the issues of the Board's alleged delegation to INAC or reasonable apprehension of bias are not germane to this case.

[85] The Board was justified in inquiring of INAC whether consultation had taken place. The substantive issue is whether the Board relied on proper information as its decision was dependent on the response to that question of whether the duty had been discharged. The Board's failure to hear from the Applicants undermines the Board's information base as well as being procedurally infirmed.

D. *Issue 2 – Crown Duty to Consult and its Discharge*

[86] The law as to what engages the duty to consult and its scope has been addressed in numerous cases. At its core the duty to consult and accommodate is based upon the honour of the Crown which requires honourable participation in processes of negotiation with a view to reconciliation between the Crown and Aboriginal people with respect to the interests at stake (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69).

[87] For the duty to be engaged, there must be (i) an existing or potentially existing Aboriginal right on title that may be affected by Crown contemplated conduct; and (ii) the Crown must have knowledge (actual or implied) of these rights or title and that they may be adversely affected.

[88] As held in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, the content of the duty varies. It depends on the strength of the claim and the impact of the proposed activity on the claimed right. This has given rise to the concept of the "spectrum" from weak claim and negligible impact to strong claim and severe adverse impact. Even at the lowest end, the Crown is required to discuss issues raised without any assurance of remedy.

[89] The Respondent does not seriously argue that the duty to consult was not engaged. The assertion letters clearly point to significant interests including burial sites, trails, caribou hunting and other uses of the land. The exploration could have impact on those rights. The fact that conditions were imposed in the Permit to mitigate impacts is, at the very minimum, suggestive of some impact.

[90] This is not a case like *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, where the rights at issue were "peripheral". (In that case, the potential development was on private land already used for such development purposes – not traditional use.) In this case, the land is Crown land on which there are accepted assertions of traditional use. Further, there remains live debate as to the nature of the 1900 Treaty, the rights attached to the land and the control over it.

[91] At this stage (and the Applicants' comments that more study and consultation would show more impacts), the impacts are in the mid-range. They certainly give rise to the right to be consulted as to ways by which impacts are to be mitigated, how the people will continue to be informed of the developments in the project and how existing and new concerns will be accommodated.

[92] The Supreme Court's comments in *Mikisew*, above, where the duty was at the low end of the spectrum (whereas here it is further along the spectrum) are apt:

> **64** The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.
>
>> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>>
>> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, <u>and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action</u>. [Emphasis added.]

[93] The Respondent correctly argues that the Crown can rely on the actions of others in assessing whether the duty to consult had been discharged. It can delegate responsibility to take certain consultative steps to third parties such as North Arrow but the underlying duty remains that

of the Crown. The third parties are akin to a limited purpose agent for the Crown but not its delegate. It is the final responsibility of the Crown, not the Board or North Arrow.

[94] The problem is not that the Crown and Board looked to the "consultation" undertaken by North Arrow; the problem is that they wrongly considered it to be adequate.

[95] The Crown (INAC) and the Board effectively relied on the word of one party to the "consultations" – it accepted North Arrow's assertion that consultation was complete and that the First Nations had frustrated the process. The evidence is quite to the opposite effect. Even the Yellowknives' last reply e-mail indicated an openness to negotiation.

[96] On the other hand, North Arrow cut off negotiations at the first offer and failed to follow the Board's guidelines on consultation. This North Arrow may do with legal impunity for it is so constitutionally obligated to the First Nations. However, the Crown cannot shelter behind North Arrow or absolve itself of its obligations by having a third party undertake negotiations. The Crown and thus the Board are impacted on North Arrow's petard.

[97] In negotiations, the parties may engage in hard bargaining. First Nations run the risk of demands being rejected and third parties walking away from the table. But so long as a third party is still seeking to conduct activities on First Nations' land or in a way that impacts their interests, the Crown remains obligated to at least consult and accommodate.

[98] In this case, no federal department or Board discussed either the project with the Applicants, or the mitigating measures, nor did they confirm with the Applicants the statements of North Arrow.

[99] The Respondent's reliance on the regulatory process to cure the lack of contact with the Applicants is on weak ground. While adequate regulatory consultation may discharge the duty to consult, that does not relieve the Crown of the responsibility to assess whether the duty has been discharged.

> **121** It is not enough to rely on the process provided for in the Act. From the outset, representatives of the Crown defended the process under the Act as sufficient to discharge its duty to consult, essentially because it was provided for in the Act. I agree with the Applicants that the Crown's duty to consult cannot be boxed in by legislation. That is not to say that engaging in a statutory process may never discharge the duty to consult. In *Taku*, at paragraph 22, the Supreme Court found that the process engaged in by the Province of British Columbia under the *Environmental Protection Act* of that jurisdiction fulfilled the requirements of the Crown's duty to consult. The circumstances here are different. The powers granted to the Ministers under the Act must be exercised in a manner that fulfills the honour of the Crown. The manner in which the consult to modify process was implemented in this case, for reasons expressed herein, failed to fulfill the Crown's duty to consult and was inconsistent with the honour of the Crown.
>
> *Ka'a'Gee #1*, above, at para. 121

[100] *Ka'a'Gee #1* only goes so far in its endorsement of the regulatory scheme as assuring the discharge of the duty to consult. The facts in that case covered all three stages of the process where there were significant consultations, discussions and means by which the First Nations had input. The legislation provides for different types of consultation depending on the stage of the process.

[101] The Crown through INAC failed to evaluate whether, on the facts of this particular case, the regulatory process fulfilled its consultative duties. The scarcity of any provisions regarding consultation where the preliminary assessment is concerned is telling. There are no provisions similar to those in the *Ka'a'Gee* cases.

[102] It is only the guidelines which give specifics on consultation and even those were not followed. It is not sufficient, even if it occurred in this case, to have a process, framework or some other system to facilitate negotiation. It is still necessary to evaluate the actual implementation and processes specific to the case. It is not sufficient to set up some form of elaborate system and then put it on auto-pilot and hope for success.

[103] The Respondent argues that the First Nations' concern was not specific enough but they were sufficient enough to engage the duty to consult. Had that duty been met, either the specifics would have been developed or their inadequacy exposed or any problems settled; but without real consultation, none of these results could be obtained.

[104] The Respondent has the difficult task of arguing that on the one hand, the Board cannot evaluate whether the duty to consult has been met, and on the other, that the process which the Board follows is such that the Crown need not actually consult – because the duty is fulfilled.

[105] In this case, no one took responsibility for ensuring meaningful consultation. The duty was not met. The Applicants were not necessarily entitled to all that they would like but they were entitled to some substantial actual consultation.

E. *Issue 3 – The Board's Compliance with the Act's Requirements*

[106] Having concluded that all parts of the process are subject to the Part 5 requirements that the concerns of the Aboriginal people be taken into account, which includes whether the Crown's duty has been discharged, this issue is then dependent on the determination of Issue 2.

If the Crown did not discharge its duty, then in granting the Permit, the Board failed to comply with the requirements of the Act.

[107] Independent of Issue 1, if the Board did not take the concerns of the Aboriginal people into account or failed to act fairly, the decision is subject to being quashed for those reasons.

[108] As held in *Standing Buffalo*, a federal board must act in accordance with s. 35. This is confirmed in the Board's legislation and in its own guidelines.

[109] Taking the Aboriginal people's concerns into account entails at least serious consideration of those concerns. However, in the present case, the Applicants had no chance to comment on any of the proposed conditions. Indeed they were never given notice of them.

[110] The Board never gave the Applicants an opportunity to express their concerns – nor did any federal government department.

[111] Aside from not affording the Applicants an opportunity to address their concerns, the Board acted on North Arrow's statement as to consultation, as did INAC, without ever hearing from these

First Nations in response. They never inquired into the existence, nature or manner of the so-called consultations.

[112] The Board compounded the problem by simply accepting INAC's assurances.

[113] The facts are that North Arrow did not act in accordance with the Board's guidelines on consultation. There were no face-to-face meetings with chiefs on issues; no real meetings with the communities and no attempt to address any of the communities' or leaders' ideas into North Arrow's proposal. North Arrow simply refused to negotiate.

[114] INAC did nothing more than accept North Arrow's assurances and advise the Board that consultation had occurred. There was no independent inquiry by either body much less an "opportunity to be heard" for the Applicants. These actions (or lack thereof) were contrary to the Board's obligations and to the principles of fairness.

[115] Therefore, the Permit cannot stand.

## V. COSTS

[116] The parties were requested to either arrive at agreed costs including a lump sum amount or the method of calculating costs or otherwise make submissions to the Court. The parties were unable to agree.

[117] The Applicants proposed a lump sum amount of $80,000 covering fees and disbursements for the motion to strike affidavits or portions thereof, and the application for judicial review inclusive of both Applicants.

The Respondent's position is that each party bear its own costs.

[118] Given the result and the absence of anything to suggest that the Applicants' proposal is unreasonable, and taking account of the nature of the proceeding and its difficulties, the Applicants' lump sum proposal is reasonable.

[119] Therefore, the Applicants shall have costs as a lump sum of $80,000 inclusive of fees and disbursements.

"Michael L. Phelan"
Judge

Ottawa, Ontario
November 12, 2010

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1349-09 |
| **STYLE OF CAUSE:** | YELLOWKNIVES DENE FIRST NATION, LUTSEL K'E DENE FIRST NATION, CHIEF TED TSETTA and CHIEF EDWARD SANGRIS on their own behalf and on behalf of all Members of the Yellowknives Dene First Nation, and CHIEF STEVEN NITAH on his own behalf and on behalf of all Members of the Lutsel K'e Dene First Nation<br><br>and<br><br>THE ATTORNEY GENERAL OF CANADA<br>NORTH ARROW MINERALS INC. |
| **PLACE OF HEARING:** | Yellowknife, Northwest Territories |
| **DATE OF HEARING:** | June 24 and 25, 2010 |
| **REASONS FOR JUDGMENT:** | Phelan J. |
| **DATED:** | November 12, 2010 |

**APPEARANCES:**

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|---|---|
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| Mr. Andrew Fox<br>Mr. Jacques-Benoit Roberge | FOR THE RESPONDENT,<br>THE ATTORNEY GENERAL OF CANADA |

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