Jurisdiction: Various Issues

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July 21, 2009
These materials were prepared for the conference "Administrative Law: Key Concepts and Thorny Issues", hosted by Pacific Business & Law Institute, held in Vancouver, BC on February 5, 2009

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I. INTRODUCTION

This paper addresses a number of "key concepts and thorny issues" relating to the issue of jurisdiction under administrative law.

The issues addressed include:

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B. Statutory limits on the jurisdiction of administrative tribunals;

C. Jurisdiction of administrative tribunals to consider constitutional issues;

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A. Constitutional limits on establishing the jurisdiction of administrative tribunals

The *Constitution Act, 1867*, both authorizes, and imposes limits on, the right of Parliament, and the Provincial Legislatures, to make laws – and hence to establish administrative tribunals and define their jurisdiction.

The division of legislative powers in the *Constitution Act* is found primarily in Section 91 (which lists matters within the legislative jurisdiction of Parliament), and Section 92 (which lists matters within the legislative jurisdiction of Provincial Legislatures).

Obviously, the division of powers also prescribes limits – in particular Parliament and Provincial Legislatures are restricted from making laws which exceed their authority (*ultra vires*), or encroach on the jurisdiction of the other legislative branch.

The *Constitution Act, 1982*, with the adoption of the Charter of Rights, and Section 35 respecting aboriginal rights, imposes further limitations on the legislative authority of both Parliament and the Provincial Legislatures.

The concept of Parliamentary Sovereignty supports the authority of each of Parliament, and the Provincial Legislatures to delegate authority to exercise discretion, administer laws, make decisions (adjudicate), and enact subordinate legislation (such as codes, bylaws or regulations), on matters within their respective jurisdictions.

Parliament and the Provincial Legislatures have original jurisdiction under the *Constitution Act, 1867* – in other words, their jurisdiction is founded in the Constitution and is not "delegated" to them. Accordingly, they have authority to delegate, and the common law maxim of *delegatus non potest delegare* does not apply.

The authority of Parliament to delegate administrative and adjudicative matters was confirmed in *Valin v. Langlois* (1879), 3 S.C.R. 1. The authority of Provincial Legislatures to delegate administrative and adjudicative matters was confirmed in *Hodge v. R.* (1883-84), L.R. 9 App. Cas. 117.

There exists an ultimate limitation on such delegation – neither Parliament nor Provincial Legislatures may delegate to the point where it "abdicates" its own legislative authority. (*Reference re Initiative & Referendum Act (Manitoba)* (1919), 48 D.L.R. 18).

And Parliament may not delegate its legislative powers to a Provincial Legislature (and vice versa) – see *Constitutional Validity of Bill No. 136 (Nova Scotia)*, [1951] S.C.R. 31.

However, Parliament and the Provincial Legislatures may delegate administrative authority to persons nominated by the other legislative authority or its delegate. (*Prince Edward Island (Potato Marketing Board) v. H.B. Willis Inc.*, [1952] 2 S.C.R. 392). Such interdelegation provides flexibility in addressing issues which include both federal and provincial administrative matters (see for example the joint review panel provisions under the *Canadian Environmental Assessment Act* and equivalent provincial legislation).

Further, Section 96 of the *Constitution Act, 1867* provides for the superior courts, and imposes an effective limit against both Parliament and the Provincial Legislatures delegating to other administrative decision makers, the authority and responsibility which properly belongs to the superior courts.

The test expounded by the Supreme Court of Canada for determining the constitutional validity of administrative delegation where it may infringe on the exclusive authority of Section 96 courts includes consideration of these questions:

1. Does the power conferred broadly conform to the traditional power of a Section 96 court?

2. Is the power conferred "judicial" in nature? and

3. Is the power conferred ancillary to or necessarily incidental to a predominantly administrative function?

The leading cases on this issue are *Reference re Act to Amend Chapter 401 of the Revised Statutes*, 1989; the *Residential Tenancies Act*, S.N.S. 1992, c. 31, [1996] 1 S.C.R. 186; *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714; and *Reference re Young Offenders Act (Canada)*, [1991] 1 S.C.R. 252.

Further, in *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, the Supreme Court of Canada expressly declared constitutional limitations on privative clauses with respect to issues of jurisdiction based on Section 96:

> It is true that this is the first time that this Court has declared unequivocally that a provincially constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction. In my opinion, this limitation, arising by virtue of s. 96, stands on the same footing as the well-accepted limitation on the power of provincial statutory tribunals to make unreviewable determinations of constitutionality. There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on question of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. [Emphasis added]

Administrative decision makers, or delegates of government, are also subject to the limitations on government actions imposed by the Charter (i.e. the actions and decisions of the administrative authorities must comply with the Charter). See *Eldridge v. British Columbia (Attorney General*, [1997] 3

S.C.R. 624 and *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, Corrected [2001] to S.C.R. iv.

B. Statutory limits on the jurisdiction of administrative tribunals

The "narrow" concept of jurisdiction is concerned with whether the tribunal is entitled, under its founding statute, to enter into the enquiry in question. (See *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147). This is distinguished from the "broader" concept of exceeding jurisdiction through a breach of procedural or evidentiary principles such as breach of natural justice, considering irrelevant evidence, or acting improperly.

The question of jurisdiction in the narrow sense is primarily an exercise in statutory interpretation. In *Anisminic*, for example, the Court framed the issue as follows:

> In all cases similar to the present one it becomes necessary therefore, to ascertain what was the question submitted for the determination of a tribunal. What were its terms of reference? What was its remit? What were the questions left to it or sent to it for its decision? What were the limits of its duties and powers? *Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or not the conditions precedent were satisfied? If Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists.* The decided cases illustrate the infinite variety of the situations which may exist and the variations of statutory wording which have called for consideration. Most of the cases depend, therefore, upon an examination of their own particular facts and of particular sets of words. It is, however, abundantly clear that questions of law as well as of fact can be remitted for the determination of a tribunal.

See also *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756 and *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

The doctrine of Parliamentary Sovereignty referred to above provides a broad foundation for the delegation of authority, and for establishing the mandate of an administrative decision maker, subject to constitutional authority. See for example *British Columbia (Ministry of Finance) v. Woodward Estate*, [1973] S.C.R. 120, which included a provision that a decision of the Minister had effect "as if enacted in the Act", thus providing even some degree of shielding from procedural challenges (or challenges to jurisdiction in the broader sense).

In construing the statutory jurisdiction of an administrative tribunal, the Courts will generally take a functional and "purposive" approach, taking into consideration the legislative intent, as illustrated in the following passage:

> In construing statutes such as those under consideration in this appeal, which provide far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislature intended. …[T]he courts should, wherever possible, avoid a narrow technical construction and endeavour to make effective the legislative intent as applied to the administrative scheme involved.
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> *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2

Questions of jurisdiction in the narrow sense may also be difficult as applied to administrative decision makers acting as commissioners of inquiry, or exercising broad degrees of discretion. See *Nova Scotia (A.G.) v. Nova Scotia (Royal Commission into the Donald Marshall, Jr. Prosecution)*, [1989] S.C.R. 788 (for the former), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 (for the latter).

One of the purposes of the *Administrative Tribunals Act*, [S.B.C. 2004] Ch. 45 was to provide clarity and consistency in defining the procedural authority of administrative tribunals in B.C.

C. Jurisdiction of administrative tribunals to consider constitutional questions

The courts have recently addressed the issue of whether, and the extent to which, an enabling statute can grant an administrative decision maker the authority to consider constitutional questions, including Charter claims, and the assertion of aboriginal rights under Section 35 of the *Constitution Act, 1982*. The case of *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854 served to illustrate the fundamental division (at that time) within the Supreme Court of Canada on the question of whether administrative tribunals can or should have jurisdiction to consider Charter issues (including challenges to the constitutional validity of provisions of their enabling statute).

The *Cooper* case involved a challenge that an exception (against discrimination based on age) for mandatory retirement at age 65 under the Canadian Human Rights Code, was unconstitutional by operation of Section 15 of the Charter. The majority of the Court applied principles articulated in

an earlier trilogy of cases,[1] and concluded that neither the Human Rights Commission nor the Human Rights Tribunal had jurisdiction to challenge, or to adjudicate on the validity of the legislation in the context of the Charter. The Court, in applying the principles of the trilogy, confirmed that it would apply "practical considerations" as well as "pragmatic and functional policy concerns" to determine, in any particular case, whether the enabling legislation operated as a grant of authority to the administrative decision maker, to determine questions of law, and, in particular, the question of constitutional validity, in the context of the Charter. The majority concluded that the Human Rights Commission did not have statutory jurisdiction on Charter issues.

The Court found that the Human Rights Tribunal did have jurisdiction to consider questions of law, including Charter questions. However, that jurisdiction did not extend to consideration of the constitutional validity of its own enabling Act. The Court noted that the Court had consistently rejected the authority of administrative bodies and tribunals "to question the constitutional validity of their enabling statutes". (*Cooper* at para. 55).

Strong dissenting judgments were recorded on each end of the spectrum:

- Chief Justice Lamer took the position that administrative tribunals should not have jurisdiction to decide on the validity of legislation in the context of the Charter – that such a power should be reserved exclusively to Section 96 courts;

- Madame Justice McLachlan took the position that where a tribunal had statutory authority to consider questions of law, there is no principled reason why that authority should not extend to the Charter, and "to the question of whether the Charter renders portions of its enabling statute unconstitutional". (at para. 70).

In two subsequent decisions released concurrently in 2003, the Court moved along the spectrum toward the dissenting opinion of Chief Justice McLachlan in *Cooper*.[2]

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[1] *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570.

[2] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55.

In the *Paul* case, Mr. Thomas Paul, a registered Indian, sought to challenge a finding that he had contravened Section 96 of the Forest Practices Code of British Columbia by cutting four trees on Crown land without authorization. Mr. Paul asserted that he had an aboriginal right to cut the timber for use in modifying his house, under Section 35 of the *Constitution Act, 1982*.

The Forest Appeals Commission decided as a preliminary matter of jurisdiction that it was able to hear and determine Mr. Paul's claims of aboriginal rights as an issue in the appeal. Mr. Paul sought judicial review to the Supreme Court of British Columbia for an order of prohibition preventing the Commission from considering and determining questions relative to his aboriginal rights. Mr. Justice Pitfield concluded that the Commission had the power to decide questions relating to aboriginal title and rights in the course of its adjudicative function in relation to contraventions of the Code. A majority of the Court of Appeal allowed the appeal. Mr. Justice Lambert concluded that Section 91(24) of the *Constitution Act, 1867,* which gives Parliament exclusive power to legislate in relation to Indians and lands reserved for the Indians, precluded the Legislature from conferring jurisdiction on the Commission to determine questions of aboriginal title and rights in the forestry context. Madame Justice Huddart issued dissenting reasons and held that the Commission did have capacity to hear and decide the issues in relation to Mr. Paul's aboriginal rights as a necessary extension to the exercise of its statutory authority.

The Supreme Court of Canada released its decision concurrently with the *Martin* case and noted that its decision was consistent with the reappraisal of the law respecting the jurisdiction of administrative tribunals to apply the constitution in that case:

> 8. The facts in this appeal and in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, released concurrently, have given this Court the opportunity to reappraise the law respecting the jurisdiction of administrative tribunals to apply the Constitution. The correct approach in a constitutional case such as the present appeal is the same as that in *Martin*, which concerns the *Canadian Charter of Rights and Freedoms*. That approach is to determine whether the tribunal is empowered to decide questions of law. If so, the judge must verify whether there is a clear implication arising from the statutory scheme that the power to decide questions of law was meant to exclude the legal issues under review. In this case, s. 131(8) of the Code permits a party to "make submissions as to facts, law and jurisdiction". It is therefore clear that the Commission has power to determine questions of law. The Commission is not restricted to the issues considered by the Administrative Review Panel, the decision maker appealed from. Any restriction on the Commission's remedial powers is not determinative, nor is the complexity of the questions. Nothing in the Code provides a clear implication to rebut the presumption that the Commission may decide questions of aboriginal law.

The Court rejected the first prong of the challenge to the jurisdiction of the Commission – which was based on the argument that the Provincial Legislature could not give the Commission power to adjudicate questions relating to aboriginal rights on the basis that doing so would encroach on the federal power under Section 91(24). The Court made a clear distinction between legislative jurisdiction, and the conferral of an adjudicative function within which matters within federal legislative competence can be considered:

> 21. The conclusion that a provincial board may adjudicate matters within federal legislative competence fits comfortably within the general constitutional and judicial architecture of Canada. In determining, incidentally, a question of aboriginal rights, a provincially constituted board would be applying constitutional or federal law in the same way as a provincial court, which of course is also a creature of provincial legislation. At the hearing all parties agreed that a provincial court may determine s. 35 issues. I believe that *Ontario (Attorney General) v. Pembina Exploration Canada Ltd*., [1989] 1 S.C.R. 206, is helpful. It stands for the proposition that legislative and adjudicative competence are not coterminous. In that case, this Court concluded that a small claims court, a provincially constituted inferior court, was competent to hear a case of admiralty law. Admiralty law, of course, falls within exclusive federal competence. The Court noted that, within the unitary court system in Canada, provincially constituted inferior and superior courts apply federal as well as provincial laws. There are procedural and structural differences between provincially created courts and administrative tribunals, including the judicial independence requirements bearing upon them. Nevertheless, I believe that, analogous to the result in *Pembina*, *supra*, the division of powers does not preclude a validly constituted provincial administrative tribunal, legislatively empowered to do so, from determining questions of constitutional and federal law arising in the course of its work.

In paragraphs 36 to 49, the Court considered the statutory interpretation question: Does the Forest Practices Code empower the Commission to hear and decide Section 35 questions? The Court set out the appropriate test, and addressed the progression from the Cooper decision as follows:

> 39. The facts and arguments in this appeal and those in *Martin*, *supra*, have presented this Court with an opportunity to review its jurisprudence on the power of administrative tribunals to determine questions of constitutional law. As Gonthier J. notes in *Martin*, at para. 34, the principle of constitutional supremacy in s. 52 of the *Constitution Act, 1982* leads to a presumption that all legal decisions will take into account the supreme law of the land. "In other words", as he writes, "the power to decide a question of law is the power to decide by applying only valid laws" (para. 36). One could modify that statement for the present appeal by saying that the power of an administrative board to apply valid laws is the power to apply valid laws only to those factual situations to which they are constitutionally applicable, or to the extent that they do not run afoul of s. 35 rights. This Court's decision in *Cooper*, *supra*, has too easily been taken as suggesting that practical considerations relating to a tribunal may readily overcome this presumption. I am of the view that the approach set out in *Martin*, in the context of determining a tribunal's power to apply the *Charter*, is also the

> approach to be taken in determining a tribunal's power to apply s. 35 of the *Constitution Act, 1982*. The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. This is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.

It is clear from this passage that, as distinct from the reasoning in the *Cooper* case, the Court has moved away from applying practical considerations (impediments) or policies imposing general limits on the capacity of administrative tribunals to consider Section 35 or any other relevant constitutional provision. The Court went on to confirm that the statutory mandate given to the Commission by the Code requires the Commission to determine questions of law. It noted that Section 131(8) of the Code provided that:

> 131(8) A party may . . .
>
> (d) make submissions as to facts, law and jurisdiction.

It also noted that Section 141(1) of the Code provides:

> 141(1) The minister or a party to the appeal before the commission may, within 3 weeks after being given the decision of the commission and by application to the Supreme Court, appeal the decision of the commission on a question of law or jurisdiction.

The Court concluded as follows:

> 46. For the reasons given above, I would allow the appeal. The province of British Columbia has legislative competence to endow an administrative tribunal with the capacity to consider a question of aboriginal rights in the course of carrying out its valid provincial mandate. More specifically, the Commission, by virtue of its power to determine legal questions, is competent to hear Mr. Paul's defence of his aboriginal right to harvest logs for renovation of his home.
>
> 47. My conclusions mean that the Commission has jurisdiction to continue hearing all aspects of the matter of Mr. Paul's four seized logs. Unless he moves in the Supreme Court of British Columbia for a declaration respecting his aboriginal rights, Mr. Paul must present the evidence of his ancestral right to the Commission. As yet he has merely asserted his defence. If he is unsatisfied with the Commission's determination of the relationship between his s. 35 rights and the prohibition against cutting trees in s. 96 of the Code, he can

move for judicial review in the Supreme Court of British Columbia. The standard of review for the Commission's determinations concerning aboriginal law will be correctness.

Restricted jurisdiction over constitutional issues in British Columbia tribunals

The A*dministrative Tribunals Act*, S.B.C. 2004, Chapter 45 ("ATA"), which came into force on June 30, 2004, expressly addresses the jurisdiction of particular tribunals to consider constitutional questions. Only the Labour Relations Board and the Securities Commission have jurisdiction to determine constitutional questions (s. 43). Those tribunals may state a case to the B.C. Supreme Court and request that a constitutional question be determined, (s. 43(2)), and most do so if requested by the Attorney General (s. 43(3)). Most tribunals do not have jurisdiction over constitutional questions (s. 44). Some tribunals have jurisdiction over constitutional questions concerning the division of powers between the federal and provincial government, but not over constitutional questions concerning the Charter (s. 45) – this section applies only to the Employment Standards Tribunal, the Farm Industry Review Board and the Human Rights Tribunal. These tribunals are considered more likely to face division of power issues, and to have competence with respect to those issues. Those tribunals may also refer constitutional questions to the B.C. Supreme Court by way of stated case, and must do so if requested by the Attorney General (s. 45 (2)).

The effect of the ATA is that, with respect to the specified tribunals the Supreme Court of Canada principles in Martin and in Paul will have no application – the question of statutory authority to consider constitutional issues is fully addressed in the ATA.

The ATA provisions have application when specified provisions of the ATA are adopted by reference within the enabling legislation of a tribunal. They have been incorporated into the enabling legislation of the major adjudicative tribunals in British Columbia. Not all administrative decisions makers or tribunals are subject to the restrictions of the ATA in considering constitutional issues – for these tribunals the common law, and statutory interpretations, will provide guidance on whether they have jurisdiction to consider constitutional questions. (see *Paul* and *Martin*). The ATA, for example, does not apply to the Forest Appeals Commission or the Environmental Appeal Board, and it does not apply to review panels under the B.C. *Environmental Assessment Act.*

Constitutional questions before federal tribunals

While the federal government has not adopted general restrictions (like the ATA) prohibiting federal tribunals from considering constitutional questions, Section 18.3 of the *Federal Courts Act* (see below) provides that federal tribunals may refer any question of law to the Federal Court. As well, the Attorney General of Canada may refer any question or issue of the "constitutional validity, applicability, or operability of an Act of Parliament, or of regulations made under an Act of Parliament" to the Federal Court for hearing and determination.

The Federal Court has generally restricted such stated questions to matters where the facts are not in issue and where the question is not "academic". See, for example, *Re Air Canada* (1999), 241 N.R. 157 (Fed. C.A.); *Alberta (A.G.) v. Westcoast Energy Inc.* (1997), 208 N.R. 154 (Fed. C.A.); and *Ref. re National Energy Board Act*, [1988] 81 N.R. 241 (Fed. C.A.).

D. The jurisdiction of Section 96 superior courts versus the Federal Courts with a focus on aboriginal claims

Section 101 of the *Constitution Act, 1867* provides:

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Section 18 of the *Federal Courts Act* provides as follows:

> 18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo* warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> (2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas* corpus *ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

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

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National* Defence *Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

This paper does not address s. 18(2).

Section 28 of the *Federal Courts Act* provides as follows:

28. (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(*a*) the Board of Arbitration established by the *Canada Agricultural Products Act*;

(*b*) the Review Tribunal established by the *Canada Agricultural Products Act*;

(*b.1*) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(*c*) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(*d*) the Pension Appeals Board established by the *Canada Pension Plan*;

(*e*) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(*f*) the National Energy Board established by the *National Energy Board Act*;

(*g*) [Repealed, 1992, c. 49, s. 128]

(*h*) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(*i*) the Public Service Labour Relations Board established by the *Public Service Labour Relations Act*;

(*j*) the Copyright Board established by the *Copyright Act*;

(*k*) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(*l*) [Repealed, 2002, c. 8, s. 35]

(*m*) umpires appointed under the *Employment Insurance Act*;

(*n*) the Competition Tribunal established by the *Competition Tribunal Act*;

(*o*) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(*p*) the Canadian Artists and Producers Professional Relations Tribunal established by subsection 10(1) of the *Status of the Artist Act*;

(*q*) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(*r*) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

Section 2 of the *Federal Courts Act* provides the following definition:

> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

The effect of Sections 18 and 28 of the *Federal Courts Act* is to give either the Federal Court (Trial Division) or the Federal Court of Appeal exclusive jurisdiction to hear judicial review applications and to issue administrative law remedies relating to decisions of federal boards, commissions, or other tribunals, as defined.

However, the conferral of Federal Court jurisdiction is subject to the constitutional limitations that it cannot be read in such a manner as to exclude provincial superior courts (s. 96 courts) from their jurisdiction to consider and rule on the constitutional validity and application of federal legislation. Accordingly, jurisdiction respecting constitutional validity and applicability of federal legislation is concurrent. This overlap of jurisdiction raises practical and procedural issues in relation to the choice of court in certain applications for judicial review.

The Federal Court has jurisdiction to determine the constitutional validity and application of federal legislation where it arises as a threshold question in the context of the execution and administration of federal laws (e.g. the Canada Labour Code). (*Northern Telecom Can. Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733).

However, the provincial superior courts (Section 91 courts) have concurrent jurisdiction to declare a federal statute unconstitutional. (*Canada (A.G.) v. Law Society of B.C.*, [1982] 2 S.C.R. 307 (the "*Jabour*" case); *Canada (Labour Relations Board) v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; and *Lavers v. British Columbia (Minister of Finance)* (1989), 64 D.L.R. (4th) 193 (B.C.C.A.)).

Interesting and difficult issues of jurisdiction, and of forum conviens arise in the context of a judicial review application raising a constitutional challenge based on constitutional jurisdiction (e.g. Section 91/Section 92 matters), the Charter, or aboriginal rights under Section 35 of the *Constitution Act, 1982*.

Where the claim is that a federal decision maker has breached Charter rights, or Section 35 rights, in the course of making an administrative decision the relief must be sought in Federal Court under s. 18. In these circumstances, the Federal Court is the only "court of competent jurisdiction" to provide relief under s. 24 of the Charter. (*Day Star First Nation v. Canada (A.G)*, [2003] 10 W.W.R. 539, 2003 SKQB 261; *Mousseau v. Canada (A.G.)* (1993), 107 D.L.R. (4th) 727; and *Nolan v. Canada (A.G.)* (1998), 155 D.L.R. (4th) 728).

To properly address the question of jurisdiction between Section 96 courts and the Federal Court, consideration must be given to a characterization of the relief being sought. This issue has been illustrated in particular by some recent cases involving Section 35 aboriginal rights claims.

Where the claim is that the federal government breached the duty to consult under Section 35 in the course of making an administrative decision, and therefore acted "unconstitutionally", the claim is fundamentally one of judicial review of a federal decision, and falls within the exclusive jurisdiction of the Federal Court. (*Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133).

In *Chief Joe Hall*, the plaintiffs, being the communities of the Sto:lo Nation, sought declarations, and an injunction, in the B.C. Supreme Court, against the Attorney General of Canada, for failure to consult before disposing of certain CFB lands in Chilliwack. An application had also been filed for judicial review in the Federal Court.

The plaintiffs argued that the provincial superior court had jurisdiction to hear and try any case in which there is a claim to review the conduct of the federal Crown for compliance with Section 35 of the *Constitution Act, 1982* – a constitutional obligation.

The chambers judge found that the issue was a constitutional question over which the provincial superior court retained concurrent jurisdiction.

The Court of Appeal overturned that decision and found, after considering *Jabour*, *L'Anglais* and *Lavers*:

> [40] In my opinion, the principle that emerges from *Jabour*, *L'Anglais* and *Lavers* is that whenever the validity of a federal statute is challenged either as *ultra vires* the power of Parliament (*Jabour*) or as inconsistent with the provisions of the *Charter of Rights and Freedoms*, (*Lavers*) or whenever the applicability of a federal statute is challenged as trenching on provincial jurisdiction (*L'Anglais*), a provincial superior court always has jurisdiction to hear and decide the case. The reason is that if the Court did not have jurisdiction, the provincial

superior court might be required to apply and enforce a federal statute that was invalid as beyond the powers of Parliament to enact, or invalid in a particular application as beyond Parliament's legislative competence. Such a result would be inconsistent with Canada's constitutional structure and the role of provincial superior courts within that structure.

[41] In this case, the learned chambers judge said this about the effect of *Lavers*:

> [90] However, as I mentioned earlier, the Court of Appeal in this province in *Lavers* concludes that *Paul L'Anglais* and *Law Society* applied to declarations respecting applications of the Charter and were not confined to total unconstitutionality of particular federal legislation as opposed to the unconstitutional application of otherwise constitutional legislation. Although I am bound by *Lavers*, and find that its language supports my conclusion, I find that I do not have to resolve the conflict between *Mousseau* and *Lavers* because the issue in the case at bar is not simply the manner in which the Treasury Board functioned or acted under valid federal legislation.
>
> [91] Rather the case concerns whether there has been compliance with a duty to consult and accommodate that allegedly exists in the circumstances.

[42] The learned chambers judge considered a number of other authorities, but it appears to me that those three cases are the essential foundation of his reasoning.

[43] The learned chambers judge posed this question:

> [58] In applying the principles in *Law Society* and *Paul L'Anglais* to the question of the duty to consult, the question that emerges is this: does the fulfillment of this duty, which has been described as an overarching constitutional imperative, involve the interpretation and application of the constitution or does it involve a review of the administration of a law of Canada and, in particular, the action of a federal tribunal?

[44] In answering that question, the judge held that the Crown's duty to consult with aboriginal peoples who claimed an interest in lands, before transferring the lands to others, was "…a constitutional question that goes to the heart of the tribunal's jurisdiction and to the right of the tribunal to make the decision at all." (Para. 100 quoted above at para. 19). The judge concluded that the provincial superior courts have concurrent jurisdiction with the Federal Court where "the issue is whether the Crown has satisfied the duty to consult and accommodate and thus whether the tribunal has established its jurisdiction." (Para. 101)

[45] In my respectful opinion, this is an unwarranted and insupportable extension of the decisions in *Jabour, L'Anglais* and *Lavers*. In this case, the constitutional validity or applicability of a federal statute is not an issue, nor is the jurisdiction of the B.C. Supreme Court to try such a case in issue.

[46] The fundamental question in this case as framed by the plaintiffs in their Statement of Claim is whether the August 2003 decision of the Treasury Board, on the recommendation of the Minister of Defence, was of no force or effect, and hence whether the subsequent transfer of title to CLC was unlawful or invalid. Whether the federal Crown was in breach

> of its duty to consult might well be an issue to be decided in the course of determining whether the Treasury Board's decision was made in conformity with the law. But whatever the outcome of that decision might be (assuming that it will be made by the Federal Court of Canada) the provincial superior court will never be in a position of having to enforce or to apply a federal statute that is invalid. If the Federal Court of Canada decides that the Crown is in breach of its duty to consult, it may afford whatever relief is appropriate. Such a decision will in no way impair or limit the powers of the B.C. Supreme Court to decide other cases involving the duty to consult as may appear appropriate on the law and the facts there presented.
>
> [47] The learned chambers judge held that the duty to consult was a "constitutional issue". Counsel for the Attorney General vigorously contested the constitutional nature of the duty to consult. He conceded that the duty is a "legal duty" which has as its source "the honour of the Crown" but argued that "….it is not a constitutional right or obligation."
>
> [48] I do not accept that as a sound proposition. The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed.
>
> [49] However, the constitutional nature of the duty to consult does not, in my view, have any bearing on the jurisdictional issue in this case, for the reasons expressed above.
>
> [50] I would allow the appeal, set aside the order of 23 March 2006, and order that the Writ and Statement of Claim be struck out as against the Attorney General on the ground that the relief sought lies within the exclusive jurisdiction of the Federal Court.
>
> [51] There will remain pending the claims against the other two defendants. Counsel for the Crown agreed during oral submissions that the Federal Court of Canada would also have jurisdiction over both companies, including the subsidiary that is not a Crown agent. In view of the fact that only the Federal Court has jurisdiction over the claims against the Attorney General of Canada, it would be most convenient if the claims against all three defendants were heard in the Federal Court.

Similarly, the *Day Star* case, a decision of the Saskatchewan Queen's Bench, followed the approach set out in the *Mousseau* case in finding that the Federal Court had exclusive jurisdiction to consider a claim for a declaratory judgment against the Attorney General of Canada (Department of Indian Affairs and Northern Development) with respect to a proposed change to the funding formula for post-secondary education for First Nations persons. The Day Star First Nation claimed, in Saskatchewan Queen's Bench, that the change in the post-secondary funding formula was made without consultation and was a breach of s. 35 of the *Constitution Act*.

The Court noted that:

> "As a provincial Superior Court, the Saskatchewan Court of Queen's Bench has jurisdiction over all claims against the federal crown except for claims that are with in the exclusive jurisdiction of the Federal Court of Canada (paragraph 7).

ANALYSIS

[7] As a provincial Superior Court, the Saskatchewan Court of Queen's Bench has jurisdiction over all claims against the Federal Crown except for claims that are within the exclusive jurisdiction of the Federal Court of Canada. Section 18 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as am. (the *"Federal Court Act"),* carves out an exclusive jurisdiction over federal boards, commissions or other tribunals from the superior courts of the various provinces to the Federal Court of Canada, Trial Division. *Puerto Rico (Commonwealth) v. Hernandez*, [1975] 1 S.C.R. 228 at p. 233).

The defendant Attorney General of Canada, made a motion for a declaration that the claims of the plaintiffs fell within the exclusive jurisdiction of the Federal Court, and the Saskatchewan Court of Queen's Bench had no jurisdiction.

The judgment of the Saskatchewan Court of Queen's Bench is summarized in paragraphs 15 to 17 of its decision as follows:

[15] The 1993 decision of the Nova Scotia Court of Appeal in *Mousseau v. Canada (Attorney-General),* (1993), 107 D.L.R. (4th) 727 is of assistance in considering the issue. In *Mousseau, supra,* the applicants were status Indians who had lost their status after marrying non-natives. Federal legislation was then enacted by which they, and others in their position, were granted restored status. The applicants returned to their reserves and sought housing assistance. The applicants claimed that they were not provided with the same benefits as other members of the band and brought an application in provincial superior court for an order under s. 24(1) and s. 15 of the Charter that they had been the subject of unlawful discrimination by the federal Attorney General and their band council. A preliminary issue arose as to the court's jurisdiction. In *Mousseau* there was no dispute that the band council met the statutory definition of "federal board ... or other tribunal" as, did the Attorney General. The Nova Scotia Court of Appeal held that there was no doubt that a provincial superior court possesses the necessary jurisdiction to review the validity and constitutionality of federal legislation. However, the court in *Mousseau, supra,* made the following distinction at p. 733:

> > There is, however, a distinction between jurisdiction to determine the constitutional validity or the applicability of legislation on the one hand and jurisdiction to pass upon the *manner* in which a board or a tribunal functions under such legislation on the other. [Emphasis in original]

Mr. Justice Chipman, in *Mousseau* went on to formulate the issue under consideration as follows, at p. 735:

> In my opinion, the issue in this case relates not to whether the legislation under

> which the appellants functioned infringed the Charter, but whether the *manner* in which they functioned under that legislation did so. The question is whether in such circumstances this amounts to a constitutional issue over which the [Nova Scotia] Supreme Court has jurisdiction in the face of s. 18 of the *Federal Court Act*.... [Italics in original] [My emphasis]

Justice Chipman for the Nova Scotia Court of Appeal held that s. 18(1) of the *Federal Court Act* gave to the Trial Division of the Federal Court of Canada exclusive jurisdiction to review the decisions or activities of federal boards, federal commissions or other federal tribunals. He stated at pp. 735-36:

> In my opinion, the activities of federal agencies pursuant to federal law—as distinct from the law itself—are clearly matters which can be scrutinized under the Charter only by a court which is otherwise one of competent jurisdiction within the meaning of s. 24(1) of the Charter. The [Nova Scotia] Supreme Court is not such a court.... In *Federal Court Practice 1993*, Sgayias, Kinnear, Rennin and Saunder (Toronto: Carswell, 1993), the authors say at p. 27:
>
> > The boundary between the Federal Court and the provincial superior courts is in dispute in the application of the Charter of Rights. The conflicting authorities have been noted above in discussing "Legislative Competence". The trend, if one can be identified at all is that the provincial superior courts can determine whether federal legislation conflicts with the Charter, but that remedies against the activities of federal authorities as impugning Charter rights are to be sought in the Federal Court. [My Emphasis]

[16] A similar view was held by the Ontario Court (General Division) in *Nolan v. Canada (Attorney General)* (1998), 155 D.L.R. (4th) 728. In that case, aboriginal people living off reserve brought an application in a provincial superior court for a declaration under s. 24(1) of the *Charter* that the federal government was administering an employment program in violation of their rights under ss. 6 and 15 of the *Charter*, by only providing benefits to reserve-based bands registered under the *Indian Act*, R.S.C. 1985, c. I-5. Mr. Justice Quinn, in referring to *Mousseau, supra*, held that the respondent Attorney General, Commission and Minister constituted federal boards, commissions or other tribunals as defined under s. 2 of the *Federal Court Act*. Mr. Justice Quinn went on to state at p. 733:

> The applicants and the intervenors are not challenging the constitutionality of any federal legislation under s. 52 of the *Constitution Act, 1982*. Instead, they seek a declaration that, broadly speaking, three administrative decisions made by, or on behalf of, the respondent are unconstitutional as being contrary to the *Charter*, in the manner described above....

The court went on to state at p. 734:

> When the Minister and the Commission made the decisions to implement the

> changes to the federal program in issue, to negotiate agreements with certain native organizations and, allegedly, to refuse to negotiate with the intervenors, they were exercising delegated administrative authority pursuant to valid federal legislation. [My emphasis]

The court concluded at p. 739:

> ... Accordingly, since the applicants and the intervenors are challenging administrative decisions made by entities (the Minister, the Commission and the respondent) that are federal boards, commissions or other tribunals, as defined in s. 2 of the *Federal Court Act*, and since those entities were acting pursuant to valid federal legislation, the declaratory relief sought in the application is, because of the provisions of s. 18(1) of the *Act*, available only in the Trial Division of the Federal Court of Canada....

> [17] In this case when the Minster administers support programs for the post-secondary education of the eight plaintiff First Nations, he is acting under powers given to him by the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. 1-6, combined with the general powers of the Federal Crown to expend moneys, conferred by the applicable annual appropriation statutes. Thus the Minister's actions fall within the broad statutory definition of "federal board, commission or other tribunal". *(LGS Group Inc. v. Canada (Attorney General)* [1995] 3 F.C. 474 (T.D.); *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229 (T.D.) Reversed as to costs; *Nolan, supra).* When the Minister made the decision to implement changes to the federal program of funding, he was exercising delegated administrated authority pursuant to federal legislation. The plaintiffs are in essence, challenging the manner in which a federal program of government funding is being administered. It is the actions of the Minister and the policy decisions of the Minister which is complained of. The complaint relates to the manner in which a federal official functioned under federal legislation. Accordingly, since the plaintiffs are challenging administrative decisions made by the Minister, that is a "federal board, commission or other tribunal" as defined in s. 2 of the *Federal Court Act* and, since the Minister was acting pursuant to valid federal legislation, the declaratory relief sought in the application, because of the provisions of s. 18 of the *Federal Court Act*, is available only in the Trial Division of the Federal Court of Canada. Therefore, this Court is without jurisdiction."

See also the case of *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354.

The question of whether the Federal Court has jurisdiction in an application for a declaration (simplicitor) respecting the constitutional validity of federal legislation remains unsettled. The uncertainty lies in the limitation in Section 101 of the Constitution, that the Federal Court jurisdiction must be founded in the "better administration of the laws of Canada".

A challenge respecting the constitutional validity of a "law of Canada" raises two difficulties:

(a) it involves a more fundamental question than the "administration of the laws of Canada"; and

(b) it fundamentally concerns the interpretation of the Constitution, which is arguably not a "law of Canada".

See the dicta in *Jabour* on this issue.

A potentially difficult issue of jurisdiction may arise in the context of administrative tribunals which are joint federal/provincial panels. For example, the *Canadian Environmental Assessment Act* ("CEAA"), and the B.C. *Environmental Assessment Act* contain reciprocal provisions authorizing the establishment of "joint review panels". The joint panels are required to meet the requirements of both the federal statute and the provincial statute.

In *Cdn. Restaurant & Foodservices Assn. v. Cdn. Dairy Commission*, [2001] 3 F.C. 20, it was held that a tribunal exercising powers under a federal-provincial agreement is not a federal board (importantly, in that case, the authority of the tribunal was not based on a federal statute).

There have been numerous cases where the Federal Court has heard judicial review applications relating to joint environmental review panels appointed under CEAA and equivalent provincial legislation. None of the cases appears to have addressed any question of jurisdiction – which may be particularly relevant if the application is based on failure of the panel to comply with the provincial statute in particular (rather than a "law of Canada").

See for example *Pembina Institute v. Canada (Attorney General)*, 2008 FC 302 challenging the decision of a joint review panel with respect to the Kearl Oil Sands Project.

E. Jurisdiction of the courts under modern treaties and land claims agreements

Land claims agreements often contain provisions which provide concurrent jurisdiction to Section 96 courts. The Umbrella Final Agreement in Yukon provides, for example:

> 2.11.9 The Supreme Court of the Yukon shall have jurisdiction in respect of any action or proceeding arising out of Settlement Legislation or a Settlement Agreement.
>
> 2.11.10 Nothing in a Settlement Agreement shall be construed to limit any jurisdiction the Federal Court of Canada may have from time to time.

The Final Agreement and its federal legislation expressly provide that the provisions of the Agreement take precedence over any federal law (e.g. the *Federal Courts Act).*

The *Yukon Environmental and Socio-Economic Assessment Act*, one of the main "implementation" Acts following from the Yukon Final Agreements, qualifies the exclusive jurisdiction from the Federal Court as follows:

> 116. Notwithstanding the exclusive jurisdiction referred to in section 18 of the *Federal Courts Act*, the Attorney General of Canada, the territorial minister or anyone directly affected by the matter in respect of which relief is sought may make an application to the Supreme Court of Yukon for any relief against the Board, a designated office, the executive committee, a panel of the Board, a joint panel or a decision body, by way of an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition.

The *Mackenzie Valley Resource Management Act*, R.S.C. 1998, c. 25, enacted to implement land claims agreements in the Northwest Territories, provides:

> 32. (1) Notwithstanding the exclusive jurisdiction referred to in section 18 of the *Federal Courts Act*, the Attorney General of Canada or anyone directly affected by the matter in respect of which relief is sought may make an application to the Supreme Court of the Northwest Territories for any relief against a board by way of an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition.
>
> (2) Despite subsection (1) and section 18 of the *Federal Courts Act*, the Supreme Court of the Northwest Territories has exclusive original jurisdiction to hear and determine any action or proceeding, whether or not by way of an application of a type referred to in subsection (1), concerning the jurisdiction of the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board.

The provisions of Section 32(2) of this Act do not vacate the jurisdiction of the Federal Court entirely with respect to applications concerning judicial review of the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board. In the "Chicot 2" case, the Federal Court concluded that it retained concurrent jurisdiction in respect of applications concerning natural justice and procedural fairness (citing *Canada (Labour Relations Board) v. Transair Ltd.*, [1971] 1 S.C.R. 722 for the proposition that breach of natural justice and procedural fairness are not matters going to jurisdiction). (*Ka'a'gee Tu First Nation v. Canada*, 2007 FC 764). The term

“jurisdiction” under Section 32(2) was interpreted as jurisdiction in the “narrow” sense as discussed above.

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