Motion to the Gwich'in Land and Water Board

Rule 22

NWT ENERGY CORPORATION (03) LTD - G18X005 G18L8-001

Submissions Filed by Nihtat Gwich'in Council

July 30, 2020

OVERVIEW

1. This motion is made pursuant to Rule 22 of the Gwich'in Land and Water Board (the Board") Rules of Procedure. The Nihtat Gwich'in Council ("NGC") is seeking a Ruling from the Board that NWT Energy Corporation (03) Ltd. ("NTEC") has failed to establish a lawful right to occupy land in order to be eligible to receive a permit in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations*.

2. NTEC has made applications for a Type "A" Land Use Permit and a Type "B" Water Licence for water use during project construction for the purpose of constructing, operating and maintaining a wind turbine, and all season access road, powerlines, and associated electricity infrastructure at Highpoint, near Inuvik. To be eligible for these permits it must show that it has a right to occupy land in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations*.

3. NTEC has conceded that the land in question is located within a Reindeer Grazing Reserve which was withdrawn from disposition by the Commissioner in Executive Council, and set apart and appropriated as a Reindeer Grazing Reserve pursuant to the *Land Withdrawal Order (Reindeer Grazing Reserve)*. The *Reindeer Grazing Reserve Order* only exempts certain dispositions for specified purposes, which do not include construction of a wind turbine or access roads. Any dispositions of lands except for specified purposes are prohibited. Further, the lands are set apart and appropriated for reindeer grazing purposes.

4. The proposed Project is not consistent or compatible with the purposes of reindeer grazing for which the lands were set apart and appropriated by the Commissioner in Executive Council, nor does it fall into any of the exemptions in the *Reindeer Grazing Reserve Order*. The Reindeer Grazing Reserve has not been amended to exclude the area of the proposed Project.

5. Notwithstanding the *Reindeer Grazing Reserve Order,* the Government of the Northwest Territories (the "GNWT") states that it has, and has granted NTEC as its agent and contractor, a "right to occupy" land within the Reindeer Grazing Reserve in order to develop electrical generation facilities. This undermines the protective purpose of the Reindeer Reserve. It also circumvents the approval of the Commissioner in Executive Council that amending the *Reindeer Grazing Reserve Order* would require.

6. The GNWT position further disregards the terms and conditions under which the GNWT assumed responsibilities for the administration and control of public lands in the Northwest Territories through devolution, including respect for the aboriginal and treaty rights of the Nihtat Gwich'in enshrined in s. 35 of the *Constitution Act 1982* and the Gwich'in Comprehensive Land Claims Agreement (the "GCLCA").

7. For these reasons, Nihtat Gwich'in Council ("NGC") submits that NTEC's purported "right to occupy" is not lawful, as it is either:

    a. a disposition contrary to the *Reindeer Grazing Reserve Order* and the other lawful obligations of the GNWT, or

    b. a use of lands which is contrary to the purposes for which the lands have been otherwise set apart and appropriated, and for which no exemption has been provided in the *Reindeer Grazing Reserve Order* or otherwise.

8. GNWT and NTEC were given an opportunity to respond to NGC's position. GNWT submitted a document entitled *Information Request #3 Response – Inuvik Wind*. GNWT's overall position is that:

a. it has powers with respect to the land equivalent to ownership, and

b. its decision to transfer its right to occupy the land to NTEC was within those powers and does not amount to a disposition.

9. This position is fatally flawed for the following reasons:

a. The powers of administration and control that GNWT has over public lands are not those of an owner at common law, and such powers are expressly limited by:

i. The Constitution;
ii. The *Devolution Agreement*;
iii. Legislation and regulation, including the *Reindeer Grazing Reserve Order*.

b. The right to occupy and the purposes for which it was granted are contrary to the conservation purposes of the Reindeer Grazing Reserve;

c. GNWT's contractual transfer of purported right to occupy the site to NTEC is the textbook definition of a licence, which amounts to a disposition;

10. The GLWB cannot simply rely on the representations of GNWT (a) that there is a right to occupy and (b) that it is valid. Those are both determinations that the GLWB must make with reference to lawful authority in determining whether to grant the permits under the *Mackenzie Valley Land Use Regulations.* GNWT and NTEC have failed to provide any documentation of lawful authority to make a "reservation by notation", or of any contract in which the GNWT grants NTEC the right to occupy. The GNWT and NTEC are not entitled to simply assert a right to occupy public lands. The GNWT's position cannot stand scrutiny.

11. The GNWT's purported transfer of a right to occupy land to NTEC within the Reindeer Grazing Reserve in order to develop electrical generation facilities is not only patently and obviously a disposition, but it is itself an action that the GNWT has made without notice, without consultation, and without regard for the comprehensive system of land management provided for in the *Devolution Agreement*, the *Gwich'in Land Claim Settlement Act*, and the *Gwich'in Comprehensive Land Claim Agreement*.

12. The comprehensive system of land management applicable within the Gwich'in Settlement Area requires decision-makers to uphold Gwich'in cultural, social, environmental and economic well-being, and harvesting and other aboriginal and treaty rights. The occupation of land for a project of this nature is not without consequences on Gwich'in rights. Even if the GNWT's assertions that it is entitled to take up lands through "reservation by notation", taking up lands that were already set apart and appropriated for use specifically as a reindeer reserve for another purpose is not consistent with the GWNT's lawful obligations, and fails to uphold the honour of the Crown.

13. In this case, even based on the mere assertions made by GNWT and NTEC, it is clear that the right to occupy alleged is in contravention of the laws of the Northwest Territories, and cannot be valid.

14. NGC therefore asks the GLWB to determine that the GNWT and NTEC have not established a lawful right for NTEC to occupy land, and that NTEC is accordingly not eligible to receive a permit in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations*.

PART I – FACTS

15. The Commissioner in Executive Council, under paragraphs 19(a) and (e) of the *Northwest Territories Lands Act* and every enabling power, made NWT Reg 065-2014 effective as of 1 April 2014, withdrawing from disposal certain tracts of territorial lands for reindeer grazing purposes and setting apart and appropriating those tracts for use as a reindeer grazing reserve in the Northwest Territories. *(*The "*Reindeer Grazing Reserve Order"*).*[1]

16. Under s. 1 of the *Reindeer Grazing Reserve Order*, subject to very specific exemptions set out in ss. 2 and 3, the Reindeer Grazing Reserve lands (described in Schedule A to the *Order)* "*are withdrawn from disposal for reindeer grazing purposes and are set apart and appropriated for use as a reindeer grazing reserve*."[2]

17. The Project is located on Territorial Lands and Commissioner's Lands within the Reindeer Grazing Reserve.

18. NTEC has made applications for a Type "A" Land Use Permit and a Type "B" Water Licence for water use during project construction for the purpose of constructing, operating and maintaining a wind turbine, and all season access road, powerlines, and associated electricity infrastructure at High Point, near Inuvik ("the Project").

19. To be eligible to obtain a Type "A" Land Use Permit and a Type "B" Water Licence, NTEC must show that it has a right to occupy land required for the Project in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations.*

20. On December 2, 2019, NTEC submitted a letter to the Board attempting to establish that it has the requisite right to occupy lands. NTEC acknowledged that while the Project is situated in the Reindeer Grazing Reserve:

> *"The proposed Project is on Commissioner's Land reserved for NTEC use, is not considered a disposition under the Land Withdrawal and so can proceed on the proposed site*."

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1 *Land Withdrawal Order (Reindeer Grazing Reserve)* R-065-2014

2 *Land Withdrawal Order (Reindeer Grazing Reserve)* R-065-2014, s 1.

21. In light of the ambiguity around NTEC's purported right to occupy the lands, the Board requested further information from NTEC to support its claim.

22. On December 17, 2019, NTEC responded:

> "*On September 27, 2018, in preparation for building the Project, The Deputy Minister of Infrastructure requested an amended land reserve 107B/7-172-2 that included Territorial and Commissioner's Land (attached). The amended land area being requested would expand the reservation to include an access road, a transmission line and the wind turbine location for the Inuvik Wind Project. On November 2, 2018, the Deputy Minister of Lands responded in writing and concluded that "it is not a requirement to amend the current reservation to include the access road to the site (attached). Once the construction at this site is completed and the final boundaries are determined, an amendment to the reservation can be submitted to the Department of Lands, at that time*."
>
> "*On December 17, the GNWT Department of Lands clarified NTEC's eligibility for a land use permit under section 18(b) of the* Mackenzie Valley Land Use Regulations *(attached). The letter also confirms that a reservation by notation is not considered a disposition under GNWT land withdrawals, including* Land Withdrawal Order R065-2014 (Reindeer Grazing Reserve) *made pursuant to the Northwest Territories Lands Act S.N.W.T. 2014, c.13*."

23. NTEC did not, however, provide documentation showing that it, rather than the Department of Infrastructure, is the beneficiary of the "Reservation by Notation", and the Board requested further information from NTEC to establish that NTEC has been contracted to carry out the proposed Project by Information Request dated January 7, 2020.

24. GNWT responded in its Information Request #3 Response that:

> "*All lands relating to the project fall under the administration and control of the Government of the Northwest Territories. The NT Energy Corporation is the operator of the site, and will be doing so on behalf of the GNWT through a binding contractual obligation… This response confirms that NTEC will be occupying these lands under the GNWT's general right to occupy lands that are under its administration and control…*[3]
>
> *Administration and control" in this sense includes the ability to sell lands in fee simple, giving the GNWT possession of the entire estate in these lands (*Northwest

[3] Information Request #3 Response – Inuvik Wind, p 1

> Territories Devolution Act*, SC 2014, c 2, at ss. 18(1)(q) and 51). As a result, the GNWT 'owns' these lands as that word is generally understood…*[4]
>
> *As a general legal principle, a party cannot sell ("grant") land it already owns to itself or otherwise dispose of it (by lease, etc.) by contract with itself; that is no different for government. Since government cannot transfer any interest in its own land to itself, a "reservation" is legally incapable of being a "disposition"…*[5]
>
> *A contractor hired by the GNWT is acting as its agent, meaning that for the purposes for which NTEC, or any such party, has entered into a legally binding agreement, they are acting on behalf of the GNWT. Any party that occupies land pursuant to a contract between itself and the GNWT, as NTEC would do here, is occupying that land as the GNWT under the GNWT's right to occupy land. Contractors are in no way appropriating any interest in the public land they occupy as GNWT agents. In the present case, NTEC is applying for MVRMA authorizations on the basis that it is exercising the GNWT's right to occupy its own land…*[6]
>
> *The GNWT's decision to reserve land within the area of the land withdrawal order in question is not contrary to the terms of the land withdrawal order because, as detailed in our answers above, a reservation is not a disposition… Yes, the* Land Withdrawal Order (Reindeer Grazing Reserve) *R-065-2014 does bind the GNWT. However, a land withdrawal order withdraws land from disposition. As detailed in our answers above, a reservation is not a disposition. Therefore, the GNWT's decision to reserve land within the lands subject to the land withdrawal order in question is not contrary to the terms of this land withdrawal order, and thus the withdrawal and the reserve can co-exist*."[7]

25. GNWT and NTEC were given an opportunity to provide further submissions to respond to NGC's position. They declined and have relied on the answers above.

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4 Ibid, p 2
5 Ibid, p 2
6 Ibid, p 4
7 Ibid, p 5

PART II – POINTS IN ISSUE

26. The NGC submits that the issues in this motion are:

a. Is the purported "Reservation by Notation" by the GNWT and the establishment of a purported "right to occupy" for NTEC unlawful and made without authority, given that it exceeds the limits of the GNWT's powers of administration and control, and was made without regard for the GNWT's statutory obligations and constitutional duties with respect to public lands?

b. Is NTEC's purported "right to occupy" a disposition contrary to the *Reindeer Grazing Reserve Order*?

c. Is NTEC's purported "right to occupy" otherwise invalid, as the lands to which the "right to occupy" would apply are lands which the Commissioner in Executive Council has already set apart and appropriated for the purposes of the *Reindeer Grazing Reserve Order*?

27. NGC submits that the answer to each of these questions is "Yes."

PART III – LAW AND ARGUMENT

A. Granting the purported right to occupy was contrary to GNWT's duties

28. Contrary to the GNWT's bold assertion that it has all the rights of an owner with respect to public lands, the GNWT's powers of "administration and control" over public lands are not the same as ownership and are limited in several ways. As the authors of the textbook *Public Lands and Resources Law in Canada* note "*the* [Devolution] Agreement *and Act refer to the transfer of 'administration and control' and do not express the transfer of ownership of lands and resources*."[8] This is an important distinction.

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8 E Hughes et al, *Public Lands and Resources Law in Canada* (Toronto: 2016) p 69

29. Unlike the provinces, whose powers to deal with public lands arise from their ownership of those public lands, the GNWT's powers with respect to public lands arise wholly and solely from statute. The GNWT is the administrator, not the proprietor, of those lands. As leading constitutional law expert Professor Peter Hogg noted: "*while a government's proprietary powers generally confer matching legislative and executive powers…the converse proposition is not true*."[9]

30. In short, the GNWT's administrative jurisdiction over public lands does not confer general proprietary powers. The only proprietary powers the GNWT has with respect to public lands are those expressly provided for in the enabling legislation, and such powers are subject to any limitations set out in legislation.

31. The GNWT's powers of "administration and control" of public lands are expressly limited by:

    a. The *Devolution Agreement* and *Act* by which Canada granted the GNWT administration and control;
    b. Canada's Constitution, which explicitly protects Aboriginal and treaty rights;
    c. Any legislation or regulation with respect to land, including the *Reindeer Grazing Reserve Order* and other land withdrawal orders.

i. Devolution Agreement

32. The *Northwest Territories Lands and Resources Devolution Agreement* was signed on June 25, 2013 ("Devolution Agreement") and transferred responsibility for public land, water and resource management in the Northwest Territories from Canada to the GNWT on April 1, 2014.

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9 P Hogg, *Constitutional Law* (Toronto: Carswell) at p 701

33. In signing the *Devolution Agreement*, the GNWT undertook to administer public lands in accordance with the terms and conditions of the Devolution Agreement and any agreement with any Aboriginal party.

34. The preamble of the *Devolution Agreement* frames those terms and conditions as follows: "*such devolution shall be effected in a manner that establishes a framework for a* ***cooperative and coordinated management regime*** *for lands, resources and rights in respect of waters in the Northwest Territories in which the Government of the Northwest Territories and Aboriginal peoples of the Northwest Territories participate."*[10]

35. The *Devolution Agreement* specifies the following terms and commitments:

> *3.1 As of the Transfer Date the Commissioner* ***shall have the administration and control of Public Lands*** *and of rights in respect of Waters.*
>
> *3.4 The administration of Public Lands and rights in respect of Waters by the Commissioner shall be exercised in a* ***manner consistent with the terms and conditions of this Agreement*** *and* ***in a manner consistent with the terms and conditions of any agreement between the GNWT and any Aboriginal Party*** *related to the administration of Public Lands and rights in respect of Waters.*
>
> *3.6 Without limiting the generality of section 3.1, as of the Transfer Date, the Commissioner may,* ***subject to the terms and conditions of this Agreement****, use, sell or otherwise dispose of the entire or any lesser interest in Public Lands and retain the proceeds of their use, sale or disposition, and may exercise rights in respect of Waters, or sell or otherwise dispose of them and retain the proceeds of their exercise, sale or disposition.*

36. The terms and conditions of the *Devolution Agreement* require the exercise of administration and control of by the GNWT to be done in compliance with legislation, and with agreements with Aboriginal parties. These terms and conditions structure and define the GNWT's responsibilities and duties in administering public lands throughout the Northwest Territories.

37. Indeed, Schedule 5 to the *Devolution Agreement* sets out the terms of an intergovernmental agreement with the Aboriginal parties, including the Gwich'in, in detail:

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[10] Devolution Agreement, Recitals

"2.1 The purpose of this Agreement is to formalize ***government to government relationships*** *and allow the further development of agreements or other arrangements among the GNWT and Aboriginal governments for* ***cooperative and coordinated Management of Lands and Resources****, recognizing the rights, titles, jurisdiction and authority of each Party and taking into account that:*

a. ***Public Lands, Waters and resources in the Northwest Territories should be managed in accordance with Settlement Agreements, and in keeping with the honour of the Crown including any requirement for consultation and if appropriate, accommodation****;*
b. *Public Lands, Waters and resources in the Northwest Territories should be managed under a system of policies and legislation* ***that reflects regional and Aboriginal parties' approaches and decision-making****;*
c. *Settlement Lands and other lands, waters and resources subject to the jurisdiction of Aboriginal Governments should be managed in accordance with Settlement Agreements and Self-Government Agreements for the benefit of Aboriginal peoples by the applicable Aboriginal Government or other organizations;*
d. *the Management of Lands and Resources in the NWT is fundamentally important to the people of the NWT and should be carried out in an integrated manner; and*
e. *the Parties, in carrying out their responsibilities for Management of Lands and Resources, should:*
    i. ***respect Aboriginal and treaty rights****;*
    ii. *allow for* ***mutual consultation*** *in respect of the Management of Lands and Resources;*
    iii. *provide for* ***meaningful participation in decision-making*** *in the Management of Lands and Resources;*
    iv. *promote the harmonization of legislation, policy and programs in areas of common interest;*
    v. *encourage sustainable development of lands and resources;*
    vi. *build capacity of the GNWT and Aboriginal governments to carry out their jurisdictions and authorities;*
    vii. *develop employment, training and business development opportunities for Aboriginal people in resource development at the local and regional levels;*
    viii. *take into account opportunities for strategic development of lands and resources in the NWT;*
    ix. *take into account the desire for land and resource management systems to be affordable, effective, coordinated, and economically competitive; and*
    x. *consider other ways to cooperate to achieve efficiency and effectiveness.*"

38. As a condition of recieving administration and control over public lands from Canada, GNWT undertook to exercise those powers in a manner that, among other things:

a. Conforms with any settlement agreements;
b. Upholds a government-to-government relationship;
c. Respects Aboriginal and Treaty rights;
d. Allows for mutual consultation;
e. Allows for meaningful participation in decision-making.

39. Lands in the Gwich'in Settlement Area, including the lands to which this proceeding applies, are to be administered by GNWT subject to the *Gwich'in Comprehensive Land Claim Agreement* ("GCLCA"). The GCLCA requires the GNWT to do several things when it administers land in Gwich'in territory. These include consulting with Gwich'in about land use decisions generally[11] and in particular any changes to protected areas.[12] It also requires decision-makers to give special attention to Gwich'in cultural, social and economic well-being, harvesting and rights.[13] Crucially, it requires any authority granting licences or leases to do so only in accordance with all of the requirements of the GCLCA.[14]

40. In this case the GNWT and NTEC have proceeded with the Inuvik Wind Project as though the GNWT had an unrestricted right to occupy lands for the Project that were otherwise already appropriated and set apart under the *Reindeer Grazing Reserve Order* through an undisclosed "Reservation by Notation" process, and to transfer or confer that right to occupy to NTEC. As we note below, such a transfer or conferral of rights is the textbook example of a licence, which is clearly a form of disposition. Further, all of this was done without notice, much less consultation with NGC, and without otherwise conforming to the requirements of the GCLCA. In doing so, the GNWT has stepped outside of the powers of administration and control granted to it, and has flaunted the express limitations on those powers set out in the terms and conditions of the *Devolution Agreement.*

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11 GCLCA, Articles 24.2.6 and 24.2.2
12 GCLCA, Article 16.2.1
13 GCLCA, Article 24.2.4(b)
14 GCLCA, Article 24.2.10

41. On this basis alone, the GNWT does not have a lawful right to occupy those lands for the purposes of the Project.

42. Further, the GNWT could not have acquired such a lawful right to occupy those lands for the purposes of the Project, nor extended that right to NTEC without fulfilling the duty to consult and upholding the Honour of the Crown.

ii. The Constitution

43. The GNWT has a duty to consult under s.35 of the *Constitution Act 1982*. This constitutional duty to consult is rooted in the principle of reconciliation and the obligation of honourable dealing with Indigenous peoples and protection from exploitation.[15] It requires the Crown to consult and, if appropriate, accommodate Indigenous peoples whenever it contemplates actions that might adversely affect their asserted rights.

44. In the context of modern treaties like the GCLCA, the duty to consult is situated not only in the specific provisions of the treaty which must of course be honoured, but also exists independently as an aspect of the Honour of the Crown. When a treaty is silent and its drafters may not have contemplated a particular type of Crown action, the Crown still must act honourably, which means consulting where there may be adverse effects on rights. As the Supreme Court held in *Beckman v Little Salmon/Carmacks First Nation*:

> *"The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in* Haida Nation *and affirmed in* Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.*
>
> *The argument that the LSCFN Treaty is a "complete code" is untenable. For one thing, as the territorial government acknowledges, nothing in the text of the LSCFN Treaty authorizes the making of land grants on Crown lands to which the First Nation continues to have treaty access for subsistence hunting and fishing. The territorial government points out that authority to alienate Crown land exists in the general law. This is true, but the general law exists outside the treaty. The*

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15 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20 and 32; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6

> *territorial government cannot select from the general law only those elements that suit its purpose. The treaty sets out rights and obligations of the parties, but the treaty is part of a special relationship: "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (Haida Nation, at para. 17 (emphasis added)).*"[16]

45. In the *Beckman* case, the Supreme Court held that the Yukon territorial government's discretionary issuing of agricultural grants – even though not explicitly dealt with in the consultation provisions in the modern treaty – still triggered the duty to consult. The treaty could not exhaust or exclude the constitutional duty.[17]

46. So too in this case. Although there are no explicit provisions in the GCLCA that state that consultations are required when GNWT employs a system of "Reservation by Notation" to allow the GNWT or its licensees uses on public lands, that does not mean GNWT owes no duty to consult and accommodate prior to taking such actions.

47. GNWT does not admit that there was any duty to consult in this case and took no steps to discharge it.

48. However, Gwich'in have a right under 12.4.10 (a) of the GCLCA to access "all lands within the settlement area for the purpose of harvesting wildlife".

49. An action by which the GNWT authorizes the occupation of lands within the Gwich'in Settlement Area in circumstances where such an occupation could possibly affect the exercise of Gwich'in harvesting rights is a Crown action that clearly triggers the duty to consult.

50. The GNWT action of making a "Reservation by Notation" for the purposes of the Project is an action that gives rise to the duty to consult at the earliest opportunity and before any decisions are taken since the GNWT clearly contemplated future action that could impact rights.

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16 *Beckman v. Little Salmon/Carmacks First Nation* [2010] 3 SCR 103, paras 61-62

17 *Beckman v. Little Salmon/Carmacks First Nation* [2010] 3 SCR 103, paras 67-71

51. As the Yukon Court of Appeal found in *Ross River Dena v Yukon* when examining the free entry mining system:[18]

> *"Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist."*

52. GNWT's "Reservation by Notation" system does not appear to have a statutory basis, but it is clearly defective in that it does not allow for consultation, and fails to provide any equally other effective means by which Gwich'in rights could have been acknowledged or accommodated. Further, as the GNWT's action was clearly made in contemplation of further actions that were likely to affect Gwich'in rights through the construction of a wind turbine, support infrastructure and an access road through a sensitive game reserve where NGC members exercise harvesting rights, a "Reservation by Notation" is exactly the kind of Crown action that *Beckman* says attracts consultation duties in accordance with the Honour of the Crown.

53. Where the Crown has failed to discharge its constitutional duty to consult, its resulting decisions are invalid. Therefore, both the GNWT's decision to create the "Reservation by Notation" to occupy land for the purposes of the Project within the *Reindeer Grazing Reserve* without notice or consultation, and any purported extension of any right to occupy to NTEC must be invalid. It follows that any purported "right to occupy" that NTEC obtained from the GNWT or exercises by consent of the GNWT cannot be valid, and cannot support the permits it seeks from the Board.

iii. Legislation

54. It is established law that governments which exercise proprietary powers over public lands have to obey their own laws in order to exercise such powers. The authors of *Public Lands and Resources Law in Canada* note that "*it goes without saying that once a legislature has spoken with respect to a Crown's dealing with public lands and resources, Crown powers are limited to the four corners of such legislative authorization*."[19]

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18 *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, paras 36-38

19 E Hughes et al, *Public Lands and Resources Law in Canada* (Toronto: 2016) p 64

55. The *Northwest Territories Lands Act* ("*Territorial Lands Act*") is the statutory framework under which the GNWT discharges these responsibilities for administration and control of public lands (other than Commissioner's Lands) which it undertook in the *Devolution Agreement*. The *Territorial Lands Act* defines the GNWT's powers to dispose of interests in public lands and the legislative and regulatory limitations on it:

> *"Subject to this Act, the Commissioner in Executive Council may authorize the sale, lease, licensing or other disposition of territorial lands and may make regulations authorizing the Minister to sell, lease, license or otherwise dispose of territorial lands* ***subject to such limitations and conditions as the Commissioner in Executive Council may prescribe****.*[20]*"*

56. Section 19 in particular sets out how the GNWT may impose limitations on how public lands are to be used. It provides that **the Commissioner in Executive Council** may

> *(a) on setting out the reasons for withdrawal in the order, order the withdrawal of any tract or tracts of territorial lands from disposal under this Act…*
>
> *(e) set apart and appropriate territorial lands for use as game preserves, game sanctuaries, bird sanctuaries, public shooting grounds, public resorts or for any other similar public purpose…"*

57. As the terms are used in the *Northwest Territories Lands Act*, the power to order the "withdrawal of lands" from disposition under s. 19(a) requires the reasons for the withdrawal to be expressed in the order, and is clearly intended to prevent further disposition of such lands in order to achieve that purpose.

58. The powers to "set aside and appropriate" or to "authorize the acquisition" of territorial lands are to be exercised in relation to particular purposes described in s. 19. Such powers can only be exercised by the Commissioner in Executive Council through orders and regulations.

59. Land Withdrawal Orders are important legislative instruments in the management of public lands in the Northwest Territories. They often operate as interim measures, withdrawing land

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[20] *Territorial Land Act*, s 6

from disposition while land claim settlements are negotiated with Indigenous peoples. Sometimes they operate as conservation measures, removing land from disposition and protecting it from uses that would be incompatible with the conservation purpose.

60. In this case, as we discuss in more detail below, the *Reindeer Grazing Reserve Order* had two functions. According to *Reindeer Grazing Reserve Order*, the subject lands "are **withdrawn from disposal** for reindeer grazing purposes **and are set apart and appropriated for use as a reindeer grazing reserve**."[21] The effect of the *Reindeer Grazing Reserve Order* is that it withdraws those lands from any disposition but also makes it clear that the lands, even absent of any disposition, *are appropriated for use as a reindeer grazing reserve*.

61. Having enacted the *Reindeer Grazing Reserve Order*, GNWT is bound by it. GNWT admits as much. This means that GNWT must not only refrain from granting dispositions – it must also conduct itself in accordance with the purposes of the *Reindeer Grazing Reserve Order* which has **set apart and appropriated those lands for use as a reindeer grazing reserve.** It is therefore not open to the GNWT to dispose of lands contrary to the Order**, or to authorize uses of lands that are contrary to the purposes of the Reindeer Grazing Reserve**. These are not discretionary guidelines – they are statutory prohibitions.

62. As the Federal Court of Appeal held in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, once non-discretionary legal protections are put in place for habitat, it is not open to government to find the discretion to breach those protections elsewhere in the statue or in other statutes.[22] In that case the Government of Canada tried to circumvent habitat protections under the *Species At Risk Act* by issuing permits under the *Fisheries Act*. The Federal Court of Appeal held that this was unlawful because the otherwise lawful *Fisheries Act* permits breached the non-discretionary legal protections already in place under the *Species At Risk Act*.

63. Similarly, in *West Kootenay Community EcoSociety v British Columbia (Ministry of Water, Land & Air Protection)* the British Columbia Supreme Court declared invalid the decision of

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21 *Land Withdrawal Order (Reindeer Grazing Reserve)* R-065-2014, s 1

22 *Canada (Fisheries and Oceans) v David Suzuki Foundation)* 2012 FCA 40

the Minister to construct a road through a park. The Court found that the new road would disturb, if not destroy or damage a portion of the land in the park. The *Park Act* prohibited anyone – including the Minister – from disturbing, destroying or damaging land in the park, and the road did not fall into the limited specified exceptions to that prohibition.[23]

64. This is precisely what the GNWT is trying to do within the Reindeer Grazing Reserve.

65. GNWT is attempting to circumvent the non-discretionary, legally binding provisions and protections through which the lands of the *Reindeer Grazing Reserve Order* were **set apart and appropriated for use** as a reindeer grazing reserve by citing (without authority) the existence of discretionary powers it has given itself through a "Reservation by Notation". Such an instrument is not set out in any statute. The GNWT further admits that a "Reservation by Notation" is not subject to public notice or other requirements applicable to orders and regulations.

66. Accordingly, even if the right to occupy under a "reservation by notation" is not a disposition (which NGC does not accept for the reasons further set out below), the GNWT is acting without lawful authority, and does not have the power to reserve for itself or to extent to NTEC a right to use and occupy lands to construct access roads to construct and service the Project, as such an action would be contrary to the purposes for which the Commissioner in Executive Council has **set apart and appropriated those lands.**

67. Further, as described below, NTEC's purported right to occupy those lands is a disposition, and is explicitly prohibited by the *Reindeer Grazing Reserve Order*.

B. "A Reservation by Notation" does not supersede legislation

68. The Commissioner in Executive Council issued the *Land Withdrawal Order (Reindeer Grazing Reserve)*, NWT Reg 065-2014 under s. 19(a) (the withdrawal power) **and** 19(e) (the power to appropriate lands for game preserves), **and** every enabling power of the *Northwest Territories Lands Act.* According to the *Reindeer Grazing Reserve Order*, the lands "*are*

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[23] *West Kootenay Community EcoSociety v British Columbia (Ministry of Water, Land & Air Protection)* 2005 BCSC 784, paras 30, 32-36, 38 and 61

withdrawn from disposal for reindeer grazing purposes and are set apart and appropriated for use as a reindeer grazing reserve."[24]

69. The effect of the *Reindeer Grazing Reserve Order* is that the lands are both withdrawn from any further disposition under 19(a), and set apart and appropriated for use for a specific purpose – reindeer grazing.

70. Within the *Reindeer Grazing Reserve Order,* there are limited and specified exceptions to which the lands that have been set apart and appropriated for use as a reindeer grazing reserve may be put. Those permitted dispositions include the following:

    a. the disposition of substances or materials under the Quarrying Regulations (s. 2(a));

    b. interests in land to be used for public highways (s. 2(b));

    c. mineral claims and interests under the *Petroleum Resources Act* and mining regulations (s. 3);

    d. or the renewal, amendment or consolidation of an interest (s. 3(f)).

71. Except as provided in section 2 and 3, there are no provisions in the *Reindeer Grazing Reserve Order* which would authorize or enable further dispositions, or for the lands subject to the *Reindeer Grazing Reserve Order* to be otherwise set apart, appropriated for use, or to permit interests to be acquired for electrical power generation or transmission or the construction of an access road.

72. This is notable, as other Land Withdrawal Orders made by the Commissioner in Executive Council under the *Northwest Territories Lands Act* have expressly provided exemptions for electrical generation and transmission purposes. See for example the *Withdrawal from Disposal of Certain Tracts of Territorial Lands in the Northwest Territories (Central and Eastern Portions of the South Slave Region) Order* SI/2014-39, which expressly exempts disposition of "*interests in land to be used for electrical transmission lines and ancillary*

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[24] *Land Withdrawal Order (Reindeer Grazing Reserve)* R-065-2014, s 1.

facilities for power generated at any hydroelectric project on the Talston River or at the Bluefish hydro dam".[25] Other Land Withdrawal Orders expressly provide for similar provisions when such exemptions have been intended by the Commissioner in Executive Council.

73. It therefore follows that if the Commissioner-in-Executive Council had intended to allow the types of uses and activities that the NTEC is proposing on the lands subject to the *Reindeer Grazing Reserve Order*, the Commissioner-in-Executive Council would have expressly provided for such exemptions in the *Reindeer Grazing Reserve Order*.

74. The GNWT and NTEC have conceded that the *Reindeer Grazing Reserve Order* is binding on them and that the Inuvik Wind Project is within the area covered by the *Reindeer Grazing Reserve Order*. As noted above, they rely on a "Reservation by Notation" to authorize these activities. But building a wind turbine and access roads is not reindeer grazing – indeed, such activities are fundamentally at odds with the purpose of the *Reindeer Grazing Reserve Order* and the game preserve it created.

75. The *Reindeer Grazing Reserve Order* has never been amended to allow the Inuvik Wind Project to happen or to exclude the subject lands.

76. The "Reservation by Notation" was not made by the Commissioner in Executive Council and does not have the force of regulation. While non-notified administrative reservations may be expedient for the GNWT's own internal purposes, such actions cannot have the effect of modifying or displacing publicly notified regulations made under the *Territorial Lands Act* by the Commissioner in Executive Council.

77. Whatever else it may be, a Reservation by Notation" is not an instrument that can validly authorize the GNWT to ignore its own laws and act in contravention of the *Reindeer Grazing Reserve Order*. It certainly cannot permit the GNWT to authorize another person – NTEC – do to that either.

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[25] *Withdrawal from Disposal of Certain Tracts of Territorial Lands in the Northwest Territories (Central and Eastern Portions of the South Slave Region) Order* SI/2014-39, s 3.

C. Transferring the right to occupy is a disposition

78. The *Reindeer Grazing Reserve Order* withdrew the lands from any further disposition under 19(a) "*for the purposes of reindeer grazing*". As described above, certain types of dispositions were explicitly exempted – quarrying, public highways and mineral claims. Disposition for use for power generation projects or by NTEC were not exempted.

79. "Disposition" is not defined in the *Northwest Territories Lands Act*, but is used broadly and inclusively to include sale, lease, and licensing, as well as *other dispositions*. Indeed, in the Devolution Agreement the stated powers of GNWT are to "*use, sell or otherwise dispose*" which suggests that use of public land by the GNWT can itself be a disposition.

80. The GNWT has taken the position that authorizing NTEC to occupy lands for the purposes of constructing and operating the Inuvik Wind Project is not a disposition. It describes the arrangement as follows:

> *"A contractor hired by the GNWT is acting as its agent, meaning that for the purposes for which NTEC, or any such party, has entered into a legally binding agreement, they are acting on behalf of the GNWT.* ***Any party that occupies land pursuant to a contract between itself and the GNWT, as NTEC would do here, is occupying that land as the GNWT under the GNWT's right to occupy land****. Contractors are in no way appropriating any interest in the public land they occupy as GNWT agents."*[26]

81. The GNWT appears to be claiming that because it has not alienated an interest in land to NTEC there is no disposition. But that is not correct. A licence does not confer an interest in land to the licence holder, only a contractual right in relation to the land. Yet the *Territorial Land Act* makes it plain that granting a licence is a disposition.

82. The textbook *Property Law* describes leases and licences in the following way:

> "*A lease is a grant of exclusive possession giving rise to an estate in land; a lease permits a tenant to exclude all others, including the lessor. By contrast,* ***a licence is merely a contractual right to enter onto the land of another for a specified purpose****…*"[27]

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26 Information Request #3 Response, p 4

27 M Mossman, *Property Law: Cases and Commentary* (Toronto: 2019) p 410

83. Based on the GNWT's own description, the GNWT has at the very least given NTEC "*a contractual right to enter onto the land of [GNWT] for a specified purpose*" – namely building and operating the Inuvik Wind Project. That is the textbook definition of a licence.

84. The irresistible conclusion is that, contrary to whatever else the GNWT maintains in respect to its own rights to occupy land, the GNWT has made a disposition of land by granting licence under contract to NTEC to occupy land within the Reindeer Grazing Reserve. As a disposition, such a license is in direct contravention of the *Reindeer Grazing Reserve Order*, and it must therefore be invalid.

PART IV – CONCLUSION

85. Whether by claiming to have exercised its own authority to occupy the lands in question, or by extending to NTEC those rights through contract and license, the GNWT has acted outside of the scope of its powers of administration and control under devolution, breached its consultation obligations under both the GCLCA and the Constitution and the honour of the Crown, and has otherwise acted contrary to the explicit statutory protections and made a disposition of land contrary to its own legislation and the *Reindeer Grazing Reserve Order*.

86. GNWT's basic position is that because it claims to have a right to occupy, and to have extended that right to NTEC, that should be the end of the inquiry.

87. The GNWT's position cannot be sustained. As we have demonstrated, NTEC's purported right to occupy the lands is contrary to the Devolution Agreement, the GCLCA, the Constitution, and the GNWT's own legislation and regulations.

88. The Gwich'in Land and Water Board is a creation of a modern treaty and embodies the aspirations of co-management of natural resources in the GCLCA. As an instrument of public government constituted under the GCLCA and the MVRMA, the GLWB has not only the authority, but the obligation to determine whether the GNWT is acting in manner that respects

the constitutionally protected rights of the Nihtat Gwich'in and the honour of the Crown, and to determine whether the GNWT and NTEC have a valid right to occupy under legislation and other lawful authority.

89. The GLWB was entitled to a more fulsome response from the GNWT and NTEC have provided. The GNWT and NTEC have not provided evidence or authorities that establish the the purported right to occupy that they have contrived. They have urged the GLWB to simply accept their claim. They have not made out their claim, and it cannot be allowed to stand.

90. For all of the foregoing reasons, NGC is requesting a ruling from the GLWB which finds that the GNWT and NTEC's purported right to occupy cannot be valid, and there is accordingly no lawful right to occupy the lands. NTEC is not eligible to receive a permit in accordance with s 18(b) of the *Mackenzie Valley Land Use Regulations*.

All of which is respectfully submitted.

Larry D. Innes

Counsel to the Nihtat Gwich'in Council

July 30, 2020