

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NIHTAT GWICH'IN COUNCIL

Applicant

- and -

**GWICH'IN LAND AND WATER BOARD,
GOVERNMENT OF THE NORTHWEST TERRITORIES, and
NWT ENERGY CORPORATION (03) LTD.**

Respondents

**ORIGINATING NOTICE FOR JUDICIAL
REVIEW**

TAKE NOTICE that an application will be made on behalf of Nihtat Gwich'in Council of PO Box 2570, Inuvik, Northwest Territories, for:

1. An order in the nature of *certiorari* quashing and setting aside the decision of the Gwich'in Land and Water Board that the NWT Energy Corporation (03) Ltd. has a right to occupy the lands proposed for the Inuvik Wind Project and is eligible to receive a permit in accordance with the *Mackenzie Valley Land Use Regulations*, dated October 29, 2020;
2. A declaration that the Government of the Northwest Territories "reservation by notation" of the lands is contrary to *Land Withdrawal Order (Reindeer Grazing Reserve)* and is unlawful;
3. A declaration that NWT Energy Corporation (03) Ltd. does not have a lawful right to occupy the lands;
4. A declaration that the Government of the Northwest Territories owed a duty to consult and accommodate when creating a "reservation by notation" with respect to the lands, and that it failed to discharge that duty;

5. A declaration that the Government of the Northwest Territories owed a duty to consult and accommodate when contemplating granting a right to occupy the lands to the NWT Energy Corporation (03) Ltd., and that it failed to discharge that duty;
6. A declaration that the Government of the Northwest Territories failed to uphold the honour of the Crown and the *Gwich'in Comprehensive Land Claim Agreement*;
7. Costs; and
8. Such further and other relief as this Honourable Court may deem just.

AND FURTHER TAKE NOTICE that in support of this application the Applicant intends to rely on the following:

9. *Mackenzie Valley Natural Resources Management Act*, S.C. 1998, c. 25;
10. *Mackenzie Valley Land Use Regulations*, SOR/98-429;
11. *Northwest Territories Lands Act* S.N.W.T. 2014, c.13;
12. *Northwest Territories Land and Resources Devolution Agreement*, 25 June 2013;
13. *Gwich'in Land Claim Settlement Act*, S.C. 1992, c. 53;
14. *Gwich'in Comprehensive Land Claim Agreement*, 22 April 1992;
15. *Land Withdrawal Order (Reindeer Grazing Reserve)* R-065-2014;
16. *United Nations Declaration on the Rights of Indigenous People*, GA Res 61/295, UN Doc A/61/49 (2007);
17. *Mackenzie Valley Land and Water Board Rules of Procedure*; and
18. Such further and other material as counsel may advise and this Honourable Court permits.

AND FURTHER TAKE NOTICE that the appeal will be before the presiding Judge in Chambers at the Courthouse in Yellowknife, Northwest Territories, on Friday, the 8th day of January, 2021, at 10:00 in the forenoon or so soon after that time as the appeal may be heard.

5. A declaration that the Government of the Northwest Territories owed a duty to consult and accommodate when contemplating granting a right to occupy the lands to the NWT Energy Corporation (03) Ltd., and that it failed to discharge that duty;
6. A declaration that the Government of the Northwest Territories failed to uphold the honour of the Crown and the *Gwich'in Comprehensive Land Claim Agreement*;
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AND FURTHER TAKE NOTICE that in support of this application will be read an affidavit or affidavits, to be sworn.

AND FURTHER TAKE NOTICE that the Applicant intends to rely on the following grounds in support of this application:

Overview

19. Nihtat Gwich'in Council ("NGC") brings this Application to challenge a decision by the Gwich'in Land and Water Board ("the Board") which sets a worrying precedent for the management of public lands in the Northwest Territories, especially those lands covered by modern treaties. On October 29, 2020, the Board decided that the NWT Energy Corporation (03) Ltd. ("NTEC") had a right to occupy lands for the purpose of developing the Inuvik Wind Project, despite those lands being withdrawn from disposition and set aside for sole purpose of reindeer grazing by regulation under the *Land Withdrawal Order (Reindeer Grazing Reserve)*.
20. The *Land Withdrawal Order (Reindeer Grazing Reserve)* has been in place in one form or another since 1933, protecting the land for wildlife grazing purposes and prohibiting any dispositions of land in that area, other than enumerated exceptions. None of these exceptions include electricity generation. Yet the Government of the Northwest Territories ("GNWT") decided unilaterally and without amending the Order to grant a right to occupy to NTEC and to allow the lands to be used to build wind turbines.
21. The lands in question are also subject to the *Gwich'in Comprehensive Land Claim Agreement*, a modern treaty within the meaning of s. 35 of the *Constitution Act*, 1982. Yet no effort was made to consult or accommodate the Gwich'in or uphold the Honour of the Crown in respect to the right to occupy the land that GNWT purported to grant to NTEC.
22. In determining that NTEC did have a lawful right to occupy the lands, the Board made several errors and its decision is therefore unreasonable:
 - (a) It considered GNWT/NTEC to be the "owners" of public lands, instead of having limited and constrained administration and control over them;

- (b) It determined that there was no disposition of land because (i) no interest in or control over the land passed from GNWT and (ii) as an agent and related entity, NTEC could exercise GNWT's right to occupy as "owner" of the lands without any disposition;
 - (c) It declined to determine whether the right to occupy granted and the development of wind turbines was contrary to the purposes of the Reindeer Grazing Reserve;
 - (d) It determined that no duty to consult was owed.
23. These are demonstrable errors:
- (a) *The GNWT is not the owner of public lands.* It has only "administration and control" which is defined and constrained by the Devolution Agreement, statute and the Constitution.
 - (b) *Dispositions include licences to occupy land.* The Board adopted an incorrect interpretation of "disposition" by limiting it to granting of interests in land. According to the common law and the GNWT's own statutes, granting a bare right to occupy to a third party under contract is a licence, and licences are dispositions. Moreover, NTEC is a separate legal entity. For the GNWT to grant a right to occupy to a third party – whether or not it is a wholly owned subsidiary of a publicly owned company – amounts to a disposition in the nature of a licence.
 - (c) *The Board is able to determine lawfulness.* When a party is seeking a permit on the basis of a purported right to occupy that appears to offend valid legislation, the Board should be able to decide that issue. The Board determined that it has jurisdiction to decide whether NTEC had a lawful right to occupy and whether or not its right to occupy was a disposition contrary to the *Land Withdrawal Order*. The Board's decision not to determine the lawfulness of the right to occupy vis-à-vis the express terms and conditions of the *Land Withdrawal Order* is unreasonable.
 - (d) *The duty to consult is owed about land use decisions.* The "reservation by notation" had the purported effect of granting a third party a right to occupy and develop an area of land where such occupancy and development would otherwise be prohibited. That is a decision about the management of the resource which changes the nature of the protection of it. Consultation over such land use decisions are contemplated in the *Gwich'in Comprehensive Land Claims Agreement*. Proceeding with such decisions without consultation is not consistent with the honour of the Crown.
24. The result of the Board's decision is that the GNWT and GNWT-owned companies may now exercise unfettered rights to occupy public lands, without consultation, even when those lands are subject to land withdrawal orders and modern treaties. Such a result is not in keeping with the Devolution Agreement or the GNWT's constitutional obligations.

25. The NGC therefore seeks to have the Board's decision set aside as unreasonable. The NGC also seeks declarations clarifying the unlawfulness of NTEC's purported right to occupy and the consultation duties owed by the GNWT in making these types of decisions.

FACTS

a. The Parties

26. The Applicant Nihtat Gwich'in Council ("NGC") is a not-for-profit society organized under the Canada Not-for-profit Corporations Act and a Designated Gwich'in Organization representing the Nihtat Gwich'in under the *Gwich'in Comprehensive Land Claim Agreement*.
27. The Respondent Gwich'in Land and Water Board ("the Board") is a regulatory authority established under the *Gwich'in Comprehensive Land Claim Agreement* and given effect by the *Mackenzie Valley Resource Management Act* to provide for an integrated and coordinated system of land management in the Mackenzie Valley of the Northwest Territories.
28. The Respondent NWT Energy Corporation (03) Ltd. ("NTEC") is a subsidiary of Northwest Territories Hydro Corporation, a corporation wholly owned by the Government of the Northwest Territories ("GNWT").
29. The Respondent GNWT is the territorial government vested with administration and control of public lands in the Northwest Territories under the Devolution Agreement, and a party to the *Gwich'in Comprehensive Land Claim Agreement*.

b. The Reindeer Grazing Reserve

30. In 1933 a Reindeer Grazing Reserve was created by a federal Order in Council, setting aside 17,094 square kilometers of land east of the Mackenzie Delta. The Order was amended several times and the most recent federal Order in Council was Order SI/2014-38 *Withdrawal from Disposal, Setting Apart and Appropriation of Certain Tracts of Territorial Lands in the Northwest Territories (Reindeer Reserve)*. The purpose of the Reindeer Grazing Reserve was to protect this area from various activities that would interfere with the reindeer herd. To do this,

the lands were withdrawn from disposition and set aside for this single conservation purpose. Government could only dispose of lands within the area for certain enumerated exemptions.

31. On April 1, 2014, the Devolution Agreement came into force and the GNWT gained the administration and control of public lands. According to the Devolution Agreement, the 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.

32. As part of Devolution, the Commissioner in Executive Council, was required to “mirror” existing federal legislation and regulations. Under paragraphs 19(a) and (e) of the *Northwest Territories Lands Act* and every enabling power, the Commissioner in Executive Council accordingly made NWT Reg 065-2014, 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 (“the Land Withdrawal Order”).

33. The Land Withdrawal Order is still in force. It prohibits dispositions of land within the Reindeer Grazing Reserve, with a few enumerated exceptions. Unlike other land withdrawal Orders in the Northwest Territories, these exceptions do not include electricity generation.

c. The Inuvik Wind Turbine Project

34. The proposed Inuvik Wind Turbine Project (“the Project”) is located on Territorial Lands and Commissioner’s Lands within the Reindeer Grazing Reserve. NTEC intends to build the Project and transfer the completed Project to Northwest Territories Hydro, its parent company, to own and operate.

35. In accordance with the *Mackenzie Valley Resource Management Act*, NTEC made applications to the Gwich’in Land and Water Board 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, an access road, powerlines, and associated electricity infrastructure at High Point, near Inuvik.

36. 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*.
37. On December 2, 2019, NTEC submitted a letter to the Board attempting to establish that it has the requisite right to occupy lands. NTEC stated 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.*”
38. The Board requested further information from NTEC to support its claim.
39. On December 17, 2019, NTEC responded providing a letter from the GNWT Deputy Minister of Lands stating that that a 50 metre by 50 metre parcel of land had been set aside by Reserve 107B07-172 (Wind Reserve) for the GNWT Department of Infrastructure. According to the Deputy Minister’s letter this “reservation by notation” was the basis for NTEC’s right to occupy the lands and was not considered a disposition under land withdrawals, including the Land Withdrawal Order.
40. NTEC did not provide documentation showing that it was the beneficiary of the “reservation by notation”. The Board requested further information from NTEC to establish that NTEC has been contracted to carry out the proposed Project.
41. GNWT responded to this information request, rather than NTEC. GNWT’s position to the Board was that: “*NTEC will be occupying these lands under the GNWT’s general right to occupy lands that are under its administration and control...*” GNWT position was that:

“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... As a result, the GNWT 'owns' these lands as that word is generally understood...

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" ...

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...

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."

d. NGC's Request for a Ruling

42. On January 9, 2020, NGC requested a ruling from the Board on whether or not NTEC had a right to occupy the lands. NGC took the position that NTEC could not have a lawful right to occupy the lands as required by paragraph 18(b) of the *Mackenzie Valley Land Use Regulations*. NGC's position was that:
- (a) The powers of administration and control that GNWT over public lands are not those of an owner at common law, and such powers are expressly limited by the Devolution Agreement, the Constitution, and other legislation and regulation, including the Land Withdrawal 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 the purported right to occupy the site to NTEC is the textbook definition of a licence, which amounts to a disposition contrary to the Land Withdrawal Order.

- (d) The GNWT and NTEC owed a duty to consult about the “reservation by notation” or the granting of the right to occupy the lands, and failed to discharge it.
43. GNWT and NTEC were given an opportunity to provide further submissions to respond to NGC’s position. They declined and relied on their answers to the requests for information.

e. The Board’s Decision

44. The Board ruled that “*NTEC has a right to occupy the lands proposed for the Inuvik Wind Project and is thus eligible to receive a Permit...*”
45. In reaching this conclusion, the Board held that:
- (a) Because GNWT has contracted with NTEC to carry out the Project, if GNWT has a right to occupy the land, NTEC is eligible for a Permit (p. 7);
 - (b) While the Board has the jurisdiction to consider whether NTEC as a lawful right to occupy the land (pp 9-10), it does not have the jurisdiction to consider whether that occupancy is contrary to the purposes of the Reindeer Grazing Reserve (p. 13);
 - (c) “NTEC/GNWT” having administration and control of public lands amounts to being the “landowner” with “the right to enter onto and occupy such land” (p. 10-11). “GNWT has title, in effect, and can give it away” (p. 11);
 - (d) NTEC is GNWT’s contractor and can apply for the Permit under GNWT’s right to occupy (p. 11).
 - (e) NTEC and GNWT are related entities. “In any event, NTEC is not a typical contractor. NTEC is a wholly owned subsidiary of NT Hydro...[which] is an agent of the GNWT. Therefore, GNWT, NT Hydro, and NTEC are all related entities. Because NTEC is GNWT’s contractor and agent, and GNWT has a right to occupy the land, the Board has determined that NTEC is eligible for a permit” (p. 11);
 - (f) “A right to occupy is not a disposition. Neither is a reservation by notation” (p. 12);
 - (g) “GNWT has not granted NTEC a license to or an interest in the land for the Project. NTEC is GNWT’s contractor and agent. The lands remain under the administration and control of the GNWT. As discussed above, GNWT and NTEC are related legal entities. Therefore, a legal contract between NTEC and a department of GNWT cannot constitute a disposition of GNWT interests” (p. 13);

- (h) “The Board’s role does not extend to ruling whether the Project is a lawful use of the Reserve...This is a GNWT Order and the Board is of the opinion that determining whether a proposed activity in the Reindeer Reserve is lawful is a decision that should be made by the GNWT” (p 14);
- (i) “GNWT is not required by either the Devolution Agreement, the GCLCA, or the common law, to consult about the making of a reservation by notation” (p. 14).

GROUNDINGS OF REVIEW

46. The Board’s decision was unreasonable for the following reasons:

- (a) It erred in its determination that the GNWT’s rights with respect to public lands amounted to ownership;
- (b) It erred in its determination that granting a right to occupy the lands to NTEC was not a disposition. This involved two related errors:
 - (i) The Board erred in determining that allowing NTEC to occupy the lands and develop the wind turbines was not a disposition, because no interest or control over the land was alienated;
 - (ii) The Board erred in determining that NTEC could occupy the lands and develop the wind turbines as the agent of GNWT and as a related entity.
- (c) The Board erred in declining to consider whether the purposed activities were a lawful use of the Reindeer Grazing Reserve;
- (d) The Board erred in determining that the reservation by notation and granting of the right to occupy did not trigger the duty to consult and accommodate.

Ground #1: The GNWT is not the owner of public lands

47. The Board's first error was treating the Government of the Northwest Territories ("GNWT") as though it had full rights of ownership over the lands in question. The Board found that "as landowner" the GNWT was entitled to make a "reservation by notation" with respect to those lands and had a right to occupy them despite the lands being subject to a land withdrawal order.
48. This is not correct. The GNWT is not the owner of public lands. The GNWT has administration and control over public lands, which is limited to the powers conferred under statute and further limited by modern treaties and the Devolution Agreement. Its decisions about land use and disposition – including making a "reservation by notation" – are constrained by these agreements, by statute, and by GNWT's constitutional and honourable obligations. In this case it was constrained by Land Withdrawal Order and the *Gwich'in Comprehensive Land Claim Agreement*.

Ground #2: Granting NTEC a right to occupy the lands is a disposition

49. The Board's second error was determining that NTEC's right to occupy the lands was not a "disposition" contrary to the Land Withdrawal Order. The Board considered that no interest in the land was alienated to NTEC. Instead, the Board considered that NTEC was exercising GNWT's right to occupy as its agent in accordance with a contract.
50. In determining that NTEC's right to occupy was not a disposition, the Board heavily relied on NTEC being a "related entity" to GNWT, as a wholly owned subsidiary of Northwest Territories Hydro Corporation, which is a statutory agent of the GNWT. NTEC itself, however, is not a statutory agent.
51. This involved two related errors:
 - (a) The Board adopted an incorrect interpretation of "disposition". According to the common law and according to the GNWT's own statutes, a disposition can include the granting of a licence. A licence can include a right to occupy conferred by contract.

Granting a right to occupy to a third party – namely NTEC – under contract is therefore a licence and also therefore a disposition.

- (b) The Board's failed to appreciate the separate legal personality of NTEC and GNWT. This was an incorrect application of corporate and agency law. NTEC is a separate legal entity. It is not an internal department of the GNWT. It is also not a statutory agent of GNWT. NTEC cannot therefore exercise GNWT's right to occupy the lands as of right. Instead, NTEC's right to occupy arose from contract. Granting that right to occupy to a third party – whether or not it is a wholly owned subsidiary of a publicly owned company – amounts to a disposition in the nature of a licence.
52. The Board also failed to consider the fact that NTEC would be building the Project to be transferred to Northwest Territories Hydro to own and operate, not the GNWT. GNWT was granting a right to a third party, NTEC, to build wind turbines on public land, which would be transferred to another separate legal entity Northwest Territories Hydro that is also not the GNWT.
53. This is not in the nature of an internal GNWT land use decision. The Project will be owned and operated by Northwest Territories Hydro, which is a separate legal entity with all of the powers of a natural person, and which can dispose of property even in ways contrary to its own statutory objects (ss 6-7 of the *Northwest Territories Hydro Corporation Act*). Granting NTEC, its subsidiary, the right to build the Project on public land transforms the use of and control over those lands in perpetuity.

Ground #3: The Board has jurisdiction to decide if the Project is contrary to the purposes of the Reindeer Grazing Reserve

54. The Board's third error was to decline to determine whether the proposed Project and the rights of occupancy granted to NTEC were contrary to the purposes of the Reindeer Grazing Reserve. As the Board noted, administrative tribunals have a wide jurisdiction to determine legal issues that have a bearing on the matter before them.

55. In particular, the Board an entity empowered by the *Gwich'in Comprehensive Land Claim Agreement* and the *Mackenzie Valley Resource Management Act*, which were intended to provide integrated and comprehensive co-management of lands and waters in the Settlement Area. In order for the Board to meaningfully execute this role, it must have the necessarily incidental power of determining the meaning and application of other land use laws in the Northwest Territories and their intersection with and relevance to the matters that come before it. The Land Withdrawal Order is one such law.
56. In the present case, the terms of the Land Withdrawal Order are clearly directed towards prohibiting dispositions of the type sought by NTEC. Those prohibitions clearly conflict with the “right to occupy” that was under consideration by the Board. Yet while the Board determined that it has jurisdiction to decide whether NTEC had a lawful right to occupy and whether or not its right to occupy was a disposition contrary to the Land Withdrawal Order, it also determined that it does not have jurisdiction to consider whether the right to occupy would be lawful under the Land Withdrawal Order.
57. This is internally inconsistent and illogical. The Board asserted jurisdiction over the question of whether the right to occupy offended the Land Withdrawal Order’s prohibition against dispositions, but it was unwilling to assert jurisdiction over whether the right to occupy offended the Land Withdrawal Order’s conservation purposes. There is no principled reason why the Board would have the ability to determine one issue and not the other. It is an illogical result if the Board has jurisdiction to determine lawfulness vis-à-vis a prohibition against disposition under a law but does not also the ability to determine lawfulness vis-à-vis the conservation purposes *of the same law*. When a party is seeking a permit on the basis of a purported right to occupy that appears to offend valid legislation, the Board should be able to decide that issue.

Ground #4: The GNWT owed a duty to consult

58. Finally, the Board determined that no duty to consult and accommodate was owed in the GNWT’s decision making the “reservation by notation” and granting the right to occupy to NTEC. The Board determined that neither the modern treaty nor the common law required

consultation because the “reservation by notation” was an internal administrative decision that did not affect rights.

59. This is incorrect and illogical. The “reservation by notation” had the purported effect of granting a third party a right to occupy and develop an area of land where such occupancy and development would otherwise be prohibited by the Land Withdrawal Order. That is a decision about the management of the resource which changes the nature of the protection of it. In short, the decision enables a corporation to build, own and operate electricity generating infrastructure on lands withdrawn for the purposes of a wildlife reserve that are also subject to obligations under a modern treaty. Proceeding with such decisions on lands without consultation is not consistent with the honour of the Crown.
60. The Board erred in focusing too narrowly on the express consultation provisions in the *Gwich'in Comprehensive Lands Claims Agreement*. These are not exhaustive of the GNWT's honourable obligations nor its duty to consult. Indeed, the prospect of the GNWT employing an internal “reservation by notation” to grant to a third party a right to occupy legally protected lands and to develop, own and operate infrastructure on them – in a way contrary to that legal protection and without consulting the Gwich'in – was not contemplated when the Agreement was negotiated and signed. Indeed, it appears to be an end-run around the express consultation provisions in the Agreement.
61. In any event, the “reservation by notation” and the right to occupy that it purports to grant changes the status and transforms the purpose of lands that are the subject of a modern treaty. It is therefore a decision that attracts the duty to consult and engages the GNWT's honourable obligations to faithfully implement that treaty.
62. The NGC therefore seeks to have the Board's decision set aside as unreasonable.

Other Relief

63. The NGC also seeks declarations clarifying the unlawfulness of NTEC's purported right to occupy, and that it is a disposition contrary to the Land Withdrawal Order. This is important

guidance from this Court, as it will clarify that the GNWT is not permitted to unilaterally grant occupancy rights to third parties on lands that have been withdrawn from disposition.

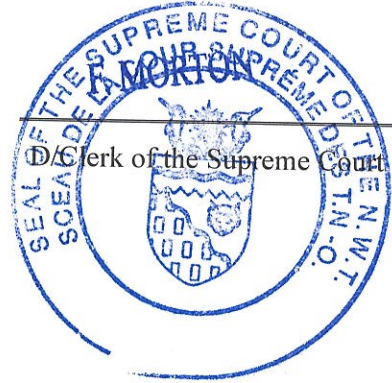
64. The NGC also seeks a declaration that the Project is contrary to the purposes of the Reindeer Grazing Reserve. The Board declined to determine this issue. In effect, the GNWT has permitted an industrial development on lands that have been set aside by law for wildlife conservation. While it is open to the GNWT to amend the Land Withdrawal Order to allow this activity – and several other land withdrawal orders do allow electrical generation infrastructure – it may not do so through purely internal administrative processes without consultation. To do so offends the rule of law.
65. Finally, NGC seeks a declaration clarifying the honourable obligations and duty to consult requirements when the GNWT is allowing activities and granting rights of occupancy on lands covered by a modern treaty. The Gwich'in were entitled to be notified of this decision-making process and to have input into it, as it fundamentally changed the purposes to which these lands were to be put and potentially impacted wildlife harvesting and other rights. To rely solely on the permitting process to discharge these duties ignores the co-management and joint-planning relationship under the modern treaty and defeats the purpose of consultation in high-level strategic planning for a resource.

DATED at the City of Yellowknife in the Northwest Territories on November 27, 2020 and taken out by Olthuis Kler Townshend LLP, solicitors for the Applicant, whose address for service is 4902 49th Street, 3rd Floor, PO Box 1470, Yellowknife, NT X1A 2P1.



Larry D. Innes

ISSUED out of the office of the Clerk of the Supreme Court of the Northwest Territories,
at Yellowknife, Northwest Territories, on November 27, 2020.



TO: Clerk of the Court
AND TO: Gwich'in Land and Water Board
Government of the Northwest Territories
NWT Energy Corporation (03) Ltd.

I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.


CLERK OF THE SUPREME COURT

Rule 601 of the Rules of Court

601 (1) On being served with an originating notice, the tribunal in respect of whose order relief is claimed shall return to the Clerk

- (a) the formal order and any reasons;
- (b) the process commencing the proceeding;
- (c) the evidence and all exhibits filed, if any;
- (d) the originating notice served on the tribunal; and
- (e) a certificate in the following form:

"As required by the accompanying originating notice, I hereby return to the Honourable Supreme Court the following papers and documents:

- (a) the order and the reasons for it;
- (b) the process commencing the proceeding;
- (c) the evidence taken at the hearing and all exhibits filed.

And I hereby certify to the Honourable Supreme Court that I have enclosed in this return all the papers and documents in my custody relating to the matter set forth in the originating notice.

Date:

.....
Clerk (or Chairperson) of the Tribunal".

(2) All items required to be returned to the Clerk under subrule (1) constitute the record.

(3) A person who is not in possession or is not in partial possession of those items required under subrule (1), shall file a certificate

(a) listing what items, if any, he or she is returning to the Clerk; and

(b) listing what items he or she is not returning to the Clerk with an explanation of why those items are not being returned.

(4) Where those items required under subrule (1) have not been received by the Clerk before the application for judicial review or appeal is heard, he or she shall file a certificate stating that fact.

(5) All things required by subrule (1) to be returned to the Clerk shall, for the purpose of the application for judicial review, constitute part of the record.

(5) All things required by subrule (1) to be returned to the Clerk shall, for the purpose of the application for judicial review, constitute part of the record.

(6) The Court may dispense with the return of the evidence or exhibits or part of the evidence or exhibits.

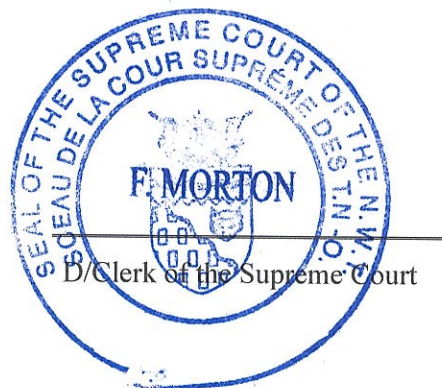
(7) Notwithstanding this rule, the parties may agree on what constitutes the record.

Notice Pursuant to Rule 594(6)(b)

You are required without delay after service of this notice to return to the Clerk of the Supreme Court at Yellowknife the judgment, order or decision (*or as the case may be*) to which this notice refers and reasons, if any, together with the process commencing the proceeding, the evidence and all exhibits filed, if any, and all things touching the matter as fully and entirely as they remain in your custody and power, together with this notice.

Date: November 27, 2020

To: Gwich'in Land and Water Board



I hereby certify that the foregoing is a true copy of the original of which it purports to be a copy.


D
CLERK OF THE SUPREME COURT

No. S.C. S-1-CY-2020-000297, 2020

NOTICE TO RESPONDENTS:

You are hereby notified that the Applicant may enter judgment in accordance with this Notice, or such judgment as the Applicant may be entitled to in accordance with the practice of the Supreme Court of the Northwest Territories, without any further notice to you unless you or your agent or solicitor appear at the place and on the date and time specified.

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

NIHTAT GWICH'IN COUNCIL

- and -

**GWICH'IN LAND AND WATER
BOARD, GOVERNMENT OF THE
NORTHWEST TERRITORIES and
NWT ENERGY CORPORATION (03)
LTD.**

**ORIGINATING NOTICE
FOR JUDICIAL REVIEW**

This Application is filed by Larry D. Innes, solicitor for the Applicant, whose address for service is:

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