

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NORTHWEST TERRITORIES AND NUNAVUT CHAMBER OF MINES

Applicant

- and -

MACKENZIE VALLEY LAND AND WATER BOARD

Respondent

ORIGINATING NOTICE FOR JUDICIAL REVIEW

TAKE NOTICE that an application for judicial review will be made on behalf of the Northwest Territories and Nunavut Chamber of Mines, of 4-5120 49 Street, Yellowknife, Northwest Territories, X1A 1P8, on a date to be fixed by the Clerk of the Supreme Court, for:

1. An order in the nature of *certiorari* quashing the respondent's April 22, 2021 decision "Interpretation of Subsection 26(6) of the *Mackenzie Valley Land Use Regulations*";
2. A declaration that a land use permit issued under the *Mackenzie Valley Land Use Regulations* may be extended more than once;
3. Costs; and
4. Such further and other relief as this Honourable Court may deem just.

AND FURTHER TAKE NOTICE that the applicant relies on the following grounds in support of this application:

The Parties

1. The applicant Northwest Territories and Nunavut Chamber of Mines (the "**Chamber**") is a society incorporated under the *Societies Act*, RSNWT 1998, c S-11. The Chamber was founded in 1967.

2. The Chamber’s vision is a strong minerals industry that benefits the residents of the North and all Canadians by extension. Key elements of the vision include:
 - (a) The minerals industry encompasses all phases of the industry including prospecting, exploration, construction, operations and remediation and closure.
 - (b) Benefits include: socio-economic and participation/impact benefits agreements; training and employment opportunities; business development; community development; social programs; royalty payments; and taxation.
 - (c) The North includes all peoples of the NWT and Nunavut, and is inclusive of Indigenous peoples including First Nations, Inuit, Inuvialuit and Métis peoples.
3. The Chamber’s mission is to provide leadership on, and to advocate for, responsible and sustainable mineral exploration and development in the NWT and Nunavut. The Chamber’s 196 members represent all aspects of the minerals industry, including junior and senior exploration and mining companies, Indigenous-owned development corporations, the transportation sector and materials suppliers, among many others.
4. The respondent Mackenzie Valley Land and Water Board (“**Board**”) is established under section 99 of the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 (“**MVRMA**”).
5. The objectives of the Board under section 101.1(1) of the MVRMA are “to provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley.”

Land Use Permits under the MVRMA

6. Sections 4 and 5 of the *Mackenzie Valley Land Use Regulations*, SOR/98-429 (“**MVLUR**”), issued under the MVRMA, contain prohibitions on carrying out certain land use activities in the Mackenzie Valley without a land use permit.
7. Land use permits are required to conduct land use operations across many different sectors of society, including by governments, municipalities, Indigenous communities,

construction, energy, and the minerals industry. As of August 2020, there were 232 active land use permits issued in the Mackenzie Valley.

8. Pursuant to section 26(5) of the MVLUR, the term of a land use permit must be based on the estimated dates of commencement and completion of a land use operation, for a period not exceeding five years.
9. Section 26(6) of the MVLUR states that “the Board may extend the term of the permit for an additional period not exceeding two years”. The MVLUR do not limit the amount of times a permit may be extended for an additional period.
10. By contrast, both the *Territorial Land Use Regulations*, CRC, c 1524, at section 31(6), and the *Northwest Territories Land Use Regulations*, NWT Reg 012-2014, at section 30(6), expressly state that a land use permit may only be extended once. Neither of these regulations or their enabling statutes share the same purpose as the MVRMA.

The Chamber seeks to confirm interpretation of the MVLUR

11. On July 14 2020, the Chamber wrote to the Board advising that COVID-19 travel restrictions were constraining the ability of land use permittees to access their project sites and conduct their operations. The Chamber’s request at the time was that the Board alleviate these challenges by extending existing land use permits by a two-year term. The Board responded on August 10, 2020, indicating that it could not grant a blanket extension of land use permits on its own initiative, and that any extension would need to be made by application from the permittee. The Chamber accepts that position.
12. However, in its response, the Board also indicated that it cannot extend a land use permit issued under the MVLUR more than once. The Chamber responded on August 24, 2020, indicating that may be true of the *Territorial Land Use Regulations*, but not of the MVLUR. The Board has the jurisdiction to evaluate each successive land use permit extension application on its own merits. This does not mean that multiple extensions should automatically be permitted in perpetuity and without any regulatory oversight or engagement at all.

13. The Board responded on August 27, 2020, acknowledging that the MVLUR do not explicitly state a land use permit may only be extended once. Significantly, the Board indicated that:

While it might be possible to initiate a process for securing a binding interpretation of the meaning of s. 26(6), it is clear that such a process would take time and financial resources. In the absence of a ready mechanism to generate an answer to this statutory interpretation question, the LWBs suggest that the Chamber and the LWBs would benefit from guidance from the department of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).

The MVLUR are federal legislation and as such it would be more appropriate to seek federal input on this matter. While the LWBs will follow-up with CIRNAC about this, we suggest the Chamber doing the same might result in a more timely response.

14. Following the Board's advice, the Chamber on September 2, 2020 wrote to CIRNAC seeking guidance on its interpretation of the MVLUR, so that the Board "will have the statutory interpretation tools they need to evaluate each land use permit extension application on its own merits". CIRNAC responded on September 18, 2020, stating:

After review and consideration of these provisions, it is our view that there is nothing in the ordinary meaning of the words of subsection (6) that would lead one to definitively conclude that the intent as expressed in the regulations was to limit the number of extensions to be granted to one single extension. If the intent was to limit the term of a permit, such intention would have been expressed clearly and directly, as has been done in other statutes such as the *Territorial Land Use Regulations*. As such, we believe it would be reasonable for the land and water boards to conclude that the boards could consider multiple term extension requests from permit holders. It is important to also note that Parliament has given the discretion to the boards to determine whether or not a permit ought to be granted in any particular case and to lead the regulatory process to guide that determination.

15. On September 21 the Board responded to CIRNAC with two additional interpretation questions, to which CIRNAC responded on October 6, in part as follows:

CIRNAC's position that "it would be reasonable for the land and water boards to conclude that the boards could consider multiple term extension requests from permit holders" is meant to refer to multiple extensions beyond a total of two years. This interpretation does not

suggest that such extensions should be automatic. Instead, the assumption is that the board would run their process to gather evidence and consult with rights holders prior to making determinations on a case-by-case basis.

16. Neither CIRNAC, nor the Chamber, ever suggested that requests for multiple extensions be granted without regulatory oversight or engagement.

The Board reaches the opposite conclusion

17. Subsequently, on November 24, 2020, the Board commenced a proceeding “Inviting Recommendations on the Interpretation of subsection 26(6) of the MVLUR” (the “**Proceeding**”). In initiating the Proceeding, the Board stated to the public its long-standing position that multiple land use permit extensions are not permitted. The Board did not identify any statutory authority granting it jurisdiction to commence the Proceeding, on its own motion, seeking public consultation on a statutory interpretation question posed in the abstract.
18. The record of the Proceeding closed on January 18, 2021. The Board provided public notice of its April, 22, 2021 reasons for decision on April 27. The Board concluded that the MVLUR do not allow multiple permit extensions, reasoning as follows:
 - (a) the grammatical and ordinary sense of section 26(6) of the MVLUR is ambiguous;
 - (b) following the Board’s *Guide to the Land Use Permitting Process* (which was released *after* the Chamber initiated correspondence on this issue), allowing multiple permit extensions would enable proponents to “circumvent” a more rigorous renewal process;
 - (c) despite the difference in wording, the MVLUR should be read the same as the *Territorial Land Use Regulations* because they are to be read as forming one system;
 - (d) there is no evidence that Canada or the legislature intended different permit terms to apply in the MVLUR; and
 - (e) the Board has interpreted the MVLUR this way for 20 years.

Grounds of Review

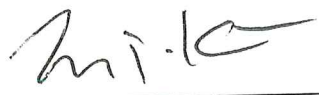
19. The Board commenced the Proceeding on its own accord without any statutory authority giving it jurisdiction to do so.
20. The Board fettered its discretion, relying on its own *Guidelines*, released after the Chamber first raised the issue, to conclude that multiple land use permit extensions would result in a lack of regulatory oversight.
21. The Board contravened the principles of procedural fairness and natural justice by:
 - (a) breaching the doctrine of legitimate expectations by commencing the Proceeding after the Board had already advised the Chamber of a process to resolve the issue by obtaining guidance from CIRNAC; and
 - (b) prejudging the outcome of the process, by stating its bias at the commencement of the Proceeding, and by at least one Board member stating that she believed the Chamber's position was just about circumventing the regulatory process.
22. The Board erred in law by:
 - (a) misconstruing the purpose of the MVRMA and the objectives of the Board, which include not only conservation but also development and utilization of resources;
 - (b) ignoring or misapprehending the principles of statutory interpretation, including the implied exclusion rule; and
 - (c) incorrectly interpreting section 26(6) of the *Mackenzie Valley Land Use Regulations*.
23. The Board's decision was unreasonable.
24. Such other and further grounds as the Applicant may submit and this Honourable Court permits.

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

1. Mackenzie Valley Resource Management Act, SC 1998, c 25;
2. Mackenzie Valley Land Use Regulations, SOR/98-429;
3. Northwest Territories Land Use Regulations, R-012-2014;
4. Territorial Land Use Regulations, CRC, c 1524; and
5. Such further and other material as counsel may advise and this Honourable Court permits.

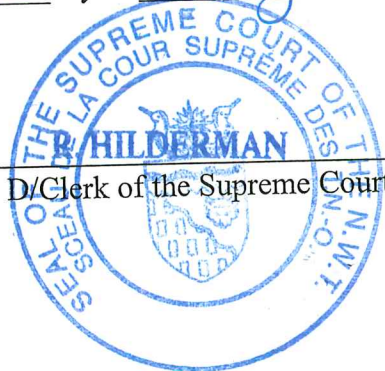
AND FURTHER TAKE NOTICE that in support of the application will be read an affidavit or affidavits, to be sworn and filed.

DATED at the City of Yellowknife in the Northwest Territories, on the 26th day of May, 2021 and taken out by Lawson Lundell LLP, solicitors for the Applicant, whose address for service is: PO Box 818, Unit 200, 4915-48th Street, YK Centre East, Yellowknife, Northwest Territories, X1A 2N6.



Toby Kruger
Counsel for the Applicant

ISSUED out of the office of the Clerk of the Supreme Court of the Northwest Territories at Yellowknife, Northwest Territories on the 26th day of May, 2021.



D/Clerk of the Supreme Court

TO: Clerk of the Supreme Court
AND TO: Mackenzie Valley 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.

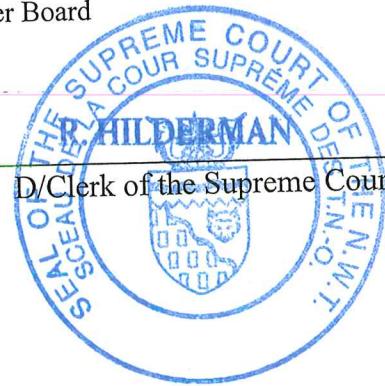

D/Clerk of the Supreme Court

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: May 26, 2021

To: Mackenzie Valley Land and Water Board



D/Clerk of the Supreme Court

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

R. Hilderman
CLERK OF THE SUPREME COURT

Tribunal's
actions on
being served

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.

(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. R-066-2012,s.68.

601. (1) Sur signification d'un avis introductif d'instance, le tribunal administratif dont l'ordonnance fait l'objet du redressement demandé rapporte au greffier ce qui suit :

- a) l'ordonnance formelle et les motifs;
- b) l'acte de procédure introductif d'instance;
- c) les dépositions et toutes les pièces déposées, s'il y a lieu;
- d) l'avis introductif d'instance qui lui a été signifié;
- e) une attestation en la forme suivante :

«Comme l'exige l'avis introductif d'instance ci-joint, je rapporte à l'honorable Cour suprême les papiers et documents suivants, à savoir :

- a) l'ordonnance et les motifs à l'appui;
- b) l'acte de procédure introductif d'instance;
- c) la preuve recueillie à l'audience et toutes les pièces déposées.

Je certifie à l'honorable Cour suprême que j'ai inclus dans le présent rapport tous les papiers et documents dont j'ai la garde et qui concernent l'affaire mentionnée dans l'avis introductif d'instance.

Date :

.....
Greffier (ou président) du tribunal administratif».

(2) Tous les articles qui doivent être rapportés au greffier en application du paragraphe (1) constituent le dossier.

(3) La personne qui n'a pas en sa possession les articles exigés au paragraphe (1), ou qui en une possession partielle, dépose une attestation qui :

- a) d'une part, énumère les articles qu'elle rapporte au greffier, le cas échéant;
- b) d'autre part, énumère les articles qu'elle ne rapporte pas au greffier et donne les raisons de son défaut de les rapporter.

(4) Le greffier qui n'a pas reçu les articles prévus au paragraphe (1) avant l'audition de la demande de révision judiciaire ou d'appel dépose une attestation énonçant ce fait.

(5) Toutes les choses qui doivent être rapportées au greffier en application du paragraphe (1), aux fins de la demande de révision judiciaire, constituent une partie du dossier.

(6) Le tribunal peut passer outre à l'obligation de rapporter la preuve recueillie ou les pièces, ou une partie de la preuve et des pièces.

(7) Malgré la présente règle, les parties peuvent s'entendre sur la constitution du dossier. R-066-2012, art. 68.

Actions du
tribunal
administratif
lors de la
signification

S-1-W-2021-000140

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- and -

**MACKENZIE VALLEY LAND
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Respondent

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