

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GWICH'IN TRIBAL COUNCIL

Applicant

-and-

KBL ENVIRONMENTAL LTD and GWICH'IN LAND AND WATER BOARD

Respondents

-and-

GOVERNMENT OF THE NORTHWEST TERRITORIES

Intervener

RULING ON APPLICATION FOR LEAVE TO INTERVENE

INTRODUCTION

[1] The Tłı̨chǫ Government seeks leave to intervene in this judicial review application. The Gwich'in Tribal Council opposes the application. The Respondents and the Government of the Northwest Territories take no position, although the Respondent KBL Environmental Ltd ("KBL") made submissions on the law relating to intervener applications, including the Court's jurisdiction to grant intervener status.

BACKGROUND

[2] The *Mackenzie Valley Resource Management Act*, SC 1998 c 25 (the "MVRMA") establishes four land and water boards: the Gwich'in Land and Water Board (s 54(1)), the Wek'èezhii Land and Water Board (s 57.1(1)), the Sahtu Land and Water Board (s 56(1)), and the Mackenzie Valley Land and Water Board (s

99(1)). Each of the Gwich'in, Wek'èezhii, and Sahtu boards has authority to regulate land and water use in their respective management areas, and the Mackenzie Valley Land and Water Board has jurisdiction to review applications which involve activities that will take place, or are likely to have an impact, in more than one management area or outside any of the management areas (s 103(1)).

[3] Without detailing the entire procedural history, the relevant context is that in 2017, the Gwich'in Land and Water Board issued a Type B water licence to KBL for a proposed soil treatment facility which would be located in Inuvik and which would receive, store, and treat petroleum hydrocarbon contaminated soil and snow. The facility began receiving soil in October of 2021. The Gwich'in Tribal Council wrote to the Board the following April, expressing concerns that contaminated soil from an area outside the Gwich'in management area was being shipped to the facility. KBL applied to renew the licence and, following a series of proceedings, its application was granted in November of 2022.

[4] The Gwich'in Tribal Council has raised several issues for judicial review. Among these, and what is of interest to the Tłıchǫ Government, is whether the Gwich'in Land and Water Board exceeded its jurisdiction by issuing a water licence for an activity spanning more than one management area. Its position is that the regulation of such activity is within the Mackenzie Valley Land and Water Board's jurisdiction. The Tłıchǫ Government is concerned this argument, if accepted, will minimize the role the Wek'èezhii Land and Water Board plays in managing land and water in Wek'èezhii, that is, Tłıchǫ lands, as well as minimize the roles of the Sahtu and Gwich'in Land and Water Boards in their respective areas.

[5] The Tłıchǫ Government provided an affidavit sworn by Bertha Rabesca Zoe, a Tłıchǫ citizen who has worked extensively with the Tłıchǫ Government including as legal counsel, serving as the Tłıchǫ Laws Guardian and as the lead representative for the Tłıchǫ Government on the Tłıchǫ Agreement Implementation Committee. Among other things, she sets out the history, constitutional, and policy considerations behind the creation of the Wek'èezhii Land and Water Board, established under Chapter 22 of the Tłıchǫ Land Claims and Self-Government Agreement (the "*Tłıchǫ Agreement*"), a constitutionally protected document. She also describes importance of the Board to Tłıchǫ citizens and the important role it plays in providing meaningful opportunity to participate in co-management of Tłıchǫ lands.

LEGAL FRAMEWORK

[6] The Court has inherent jurisdiction to grant intervener or other standing to a non-party. *5142 NWT Ltd. v Hay River (Town)*, 2007 NWTSC 51 at paras 16 and 17; *Marlowe et al v Barlas et al*, 2024 NWTSC 12 at paras 6 and 7. The purpose of intervention was stated by Sopinka, J, in *R v Morgentaler*, 1993 CanLII 158 (SCC) at para 1 as being “. . . to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal.” *Morgentaler* was decided in the context of a criminal appeal; however, this statement applies equally to applications for leave to intervene in a judicial review.

[7] The decision to grant intervener status is discretionary and is informed by the nature of the proceeding. In *Yellowknife Public Denominational District Education Authority v Euchner*, 2008 NWTCA 1 at para 5 (“*Euchner*”) the Northwest Territories Court of Appeal set out eight questions to be considered in determining whether to grant leave to intervene generally:

1. Will the intervener be directly affected by the appeal;
2. Is the presence of the intervener necessary for the court to properly decide the matter;
3. Might the intervener’s interest in the proceedings not be fully protected by the parties;
4. Will the intervener’s submission be useful and different or bring particular expertise to the subject matter of the appeal;
5. Will the intervention unduly delay the proceedings;
6. Will there possibly be prejudice to the parties if intervention is granted;
7. Will intervention widen the *lis* between the parties; and
8. Will the intervention transform the court into a political arena?

[8] The applications for leave to intervene in *Euchner* were decided in the context of an appeal; however, in my view it is appropriate to apply the foregoing factors when considering an application for leave to intervene in a judicial review. While the two processes are not the same, they share two important features: an established evidentiary and procedural record, which is not likely to change, and the ability of the Court to manage and control the length and nature of the intervener’s submissions (see: *First Nations of Saskatchewan v Canada (AG)*, 2002 FCT 1001 at para 10). Notably, the considerations articulated in *Euchner*, or substantially similar ones, have been employed in intervener applications outside of appeals by

trial courts in other Canadian jurisdictions, for example *International Forest Products v. Kern et al*, 2000 BCSC 1087 and *Saskatchewan (Environment) v Saskatchewan Government Employees Union*, 2016 SKQB 250.

ANALYSIS

[9] The first question is whether the Tłıchq Government has a direct interest in, or will be directly affected by, the Court's decision on whether the Gwich'in Land and Water Board exceeded its jurisdiction. The nature of the "interest" contemplated in an application for leave to intervene was articulated by Wilson, JA in *Re Schofield and Minister of Consumer and Commercial Relations*, 1980 CanLII 1726 (ONCA):

. . . [I]n order to obtain standing as a person "interested" in litigation between other parties, the applicant must have an interest in the actual *lis* between those parties. While I would not be prepared to construe Rule 504a so narrowly, it seems to me that the fact that the decision of that *lis* may be applied subsequently by another Court as a precedent in resolving a *lis* between other parties is not a sufficient interest to justify a grant of standing to one of those other parties.

[10] The Tłıchq Government argues the Wek'èezhii Land and Water Board is a key manifestation of its constitutionally protected right to self-government. It is the vehicle by which Tłıchq citizens participate meaningfully in land and water management on Tłıchq lands. Section 57.1(2) of the *MVRMA* provides two members of the board are appointed by the Tłıchq Government. The Court's findings on the jurisdiction of the Gwich'in Land and Water Board will have a direct effect on the Wek'èezhii Land and Water Board because they operate within the same legal framework. This will, in turn, have an effect on the Tłıchq Government and its ability to manage its lands. Specifically, it argues the interpretation of s 103(1(a)) of the *MVRMA* urged by the Gwich'in Tribal Council is too narrow and if it is accepted, it is possible applications affecting Tłıchq lands, which should be decided by the Wek'èezhii Land and Water Board, could fall under the Mackenzie Land and Water Board's jurisdiction. Ultimately, this could diminish the amount of control the Tłıchq Government has over its lands.

[11] While I appreciate the Tłıchq Government is interested in these proceedings, its interest does not rise to the level of direct interest or potential adverse effects required by law to grant it intervener status. First, although the Tłıchq Government appoints members to the Wek'èezhii Land and Water Board, it is an independent tribunal. It is not part of the Tłıchq Government and the Tłıchq Government does not exercise control over it. Second, with respect to potential effects on the Wek'èezhii Land and Water Board itself, what is before the Court on the judicial

review application is whether the Gwich'in Land and Water Board erred in determining it had jurisdiction to hear, decide, and grant KBL's application in the circumstances. In answering this question, the Court will examine what the Gwich'in Land and Water Board relied on in this particular case in deciding to exercise its authority and then determine whether it remained within in the bounds of that authority. That exercise is very specific, and it will neither expand nor reduce the authority granted to land and water boards established under the *MVRMA*.

[12] Where a proposed intervener does not have a direct interest in the outcome of the litigation, it may nevertheless be granted leave to intervene where it can offer a special perspective on an issue of constitutional or public importance which cannot be provided through the parties. *Euchner* at para 6; see also: *Gitxaala v British Columbia (Chief Gold Commissioner)* 2023 BCSC 29 at paras 23-26.

[13] The Tłıchǵ Government frames the jurisdictional question as both a constitutional issue and a matter of public importance. It says the Wek'èezhii Land and Water Board is a primary manifestation of the Tłıchǵ Government's constitutionally protected right to self-government. Further, it submits it can offer a unique perspective on the role the regional co-management boards play in advancing reconciliation. Finally, the Tłıchǵ Government says the provisions in the *MVRMA* respecting the jurisdiction of the Wek'èezhii, Gwich'in, and Sahtu Land and Water Boards must be given a broad and purposive interpretation, a perspective not defended by the only other Indigenous government in the proceedings, the Gwich'in Tribal Council.

[14] The question, whether the Gwich'in Land and Water Board exceeded its jurisdiction, is neither a constitutional issue, nor a matter of "public importance" as that term is used in *Euchner*, *Gitxaala*, and other cases considering whether to grant intervener status. While each of the Wek'èezhii, Gwich'in, and Sahtu Land and Water Boards are rooted in constitutional documents, such as the *Tłıchǵ Agreement*, what the Court is called upon to decide in this case does not engage constitutional principles. The issue is narrow and specific, to be determined based on the wording of the *MVRMA* and the facts the Gwich'in Land and Water Board relied on in exercising its authority. The question is important, but only insofar as there is a public interest in ensuring decision-making bodies operate within the boundaries of their enabling legislation.

[15] Finally, the Tłıchǵ Government's participation as an intervener would not bring a unique perspective to the Court to help it decide the issues before it. It is

true there are no other Indigenous governments involved as parties and which support the Tłıchǫ Government's position; however, the judicial review application is not unopposed. The Tłıchǫ Government's stated interest is in upholding the actions of the Gwich'in Land and Water Board in this case. This is the same position KBL takes, specifically, that there was no error in jurisdiction when the water licence was granted. The Gwich'in Land and Water Board is also a party respondent and while its role is limited, it may make submissions respecting certain jurisdictional issues. In my view, this is sufficient to provide the Court with the full spectrum of argument needed to determine the jurisdictional issue.

CONCLUSION

[16] The Tłıchǫ Government's application is dismissed. Typically, successful parties are entitled to costs and I see no reason to depart from that general rule in this case. If the parties are unable to agree on the scale of costs, they may make seek a date from the Supreme Court Registry to speak to the matter before me in Chambers.

K. M. Shaner
JSC

Dated at Yellowknife, NT, this
21st day of March, 2024

Counsel for the Tłıchǫ Government:	Alexander DeParde
Counsel for the Gwich'in Tribal Council:	G. Rangi Jeerakathil
Counsel for KBL Environmental Ltd:	Toby Kruger
Counsel for the Gwich'in Land and Water Board:	Julie Abouchar
Counsel for the Government of the Northwest Territories:	Tara Gault

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