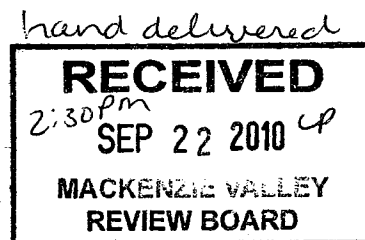


Mackenzie Valley Environmental Impact Review Board

200 Scotia Centre

5102-50th Avenue

Yellowknife, NT X1A 2N7



FORM 4

No. S.C.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

TLICHO GOVERNMENT

APPLICANT

- and -

MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD

RESPONDENT

**ORIGINATING NOTICE
APPLICATION FOR JUDICIAL REVIEW**

TAKE NOTICE that an application will be made before the presiding Judge in Chambers at the Courthouse in the City of Yellowknife in the Northwest Territories on Friday the 1st day of October, 2010, at 10:00 in the morning or so soon thereafter as counsel may be heard on the matter, for an order:

1. For directions on whether any other party needs to be given notice of the application and served with this Originating Notice, and for directions respecting setting down the Application for Judicial Review for a Special Chambers hearing and the filing of pre-hearing briefs;
2. An Order in the nature of *certiorari* quashing the decision of the Respondent, the Mackenzie Valley Environmental Impact Review Board (the "Review Board") published August 27, 2010, denying the Request submitted by Tlicho Government on May 28, 2010, for a Ruling that environmental assessment EA0809-004 respecting Fortune Minerals Limited, NICO Project (the "Proposal") is premature and will therefore be postponed and placed in abeyance until all essential components of the Proposal are included in applications accepted as complete by the Wek'eezhii Land and Water Board ("WLWB");
3. A Declaration that the Review Board does not have jurisdiction to conduct the environmental assessment of the Proposal ("EA0809-004") in accordance with the Terms of Reference that it issued on November 30, 2009 ("TOR");
4. An Order remitting to the Review Board, for reconsideration on the basis of the Court's Reasons, its decision to not exercise its administrative discretion to

adjourn EA0809-004 until all essential components of the Proposal are included in applications accepted as complete by the WLWB;

5. An interlocutory injunction requiring the Review Board to suspend EA0809-004 until the Court decides this application;
6. Costs; and
7. Such further and other relief as this Honourable Court may deem just.

AND FURTHER TAKE NOTICE that the following are a concise statement of the grounds on which relief is claimed in this proceeding:

1. The Proposal is for a cobalt-gold-bismuth mine and mill, for which Fortune Minerals Limited ("Fortune") holds mineral claims and mining leases, which pre-existed the Tliche Agreement and are located on Tliche Lands, approximately 50 km northeast of Whati and 90 km north of Behchoko.
2. Fortune acknowledges that the Proposal could not be viable without year-round road access from the mine site to Highway 3. Fortune proposes to meet those access requirements by two different roads (the "access roads"): (1) a spur road that it would construct, to connect the mine site to (2) a year-round industrial highway to connect to Highway 3, that it anticipates that the Government of the Northwest Territories ("GNWT") would construct, by relocating the existing winter road to Whati and Gameti to an all-land route, and then constructing a new year-round, industrial highway on that route.
3. There is no access agreement for either road, and no discussions have been entered into for such agreements.
4. There is currently a moratorium on developments on Tliche Lands, pursuant to the *Tliche Lands Protection Law*. The Tliche Government is currently engaged in the development of its Land Use Plan for Tliche Lands.
5. In order to proceed with its Proposal, Fortune requires water licences and land use permits for the components of the Proposal. Fortune's original applications to the WLWB for such authorizations included the access roads as components of the Proposal. The WLWB ruled those applications incomplete on April 24, 2008, because Fortune did not have access agreements with Tliche Government for various components that would be built on Tliche Lands off the mine site, including the access roads.
6. Fortune then reconfigured its applications in November, 2008, bringing some components of the Proposal onto its site, and entirely eliminating the access roads from the Proposal. The WLWB accepted the new applications as complete, which were then referred by the Department of Indian Affairs and Northern

Development, ("DIAND") to the Review Board for environmental assessment under the *Mackenzie Valley Resource Management Act* ("MVRMA").

7. During consultations by the Review Board respecting the Terms of Reference for the environmental assessment, Tlicho Government advised the Review Board of the facts in paragraphs 3 and 4 above, commented that the proposed access roads were speculative, and recommended that these should therefore be excluded from consideration in the environmental assessment.
8. The TOR were issued by the Review Board on November 30, 2009, and included the access roads in the matters for assessment, as follows:

Fortune has stated that the NICO Project requires all-season road access from the NICO mine site to Highway 3. Fortune **anticipates** that the Government of the Northwest Territories **will apply** to build an all-land road from Highway 3 to Whati and Gameti in the near future (**referred to in this document as the "potential realignment of the winter road through the Wek'eezhii Settlement Area"**). This road would be used in part for the NICO Project. A short stretch of road (approximately 25 km) from the NICO mine site to this **anticipated road** would be constructed and maintained by Fortune and is **within** the scope of this development.

The scope of development for this EA does not include the construction or general operation of the potential realignment of the winter road through the Wek'eezhii Settlement Area, **which has not been proposed at this time, and which is not expected to be proposed, constructed or primarily operated by Fortune. The Review Board expects that the potential realignment of the winter road through the Wek'eezhii Settlement Area will undergo appropriate environmental scrutiny once applications for that road have been received.** However, Fortune's use of the potential realignment of the winter road through the Wek'eezhii Settlement Area is **required** for the NICO Project, and **is included in the scope of development.** (emphasis added)

9. On May 28, 2010, Tlicho Government filed a Request for a Ruling by the Review Board that EA0809-004 is premature and would therefore be postponed and placed in abeyance until all essential components of the Proposal are included in applications accepted as complete by the WLWB.
10. The Review Board denied the Tlicho Government's Request for Ruling and published its Decision and Reasons on August 27, 2010.
11. In deciding not to administratively suspend EA0809-004 as requested, the Review Board exercised its discretion improperly, because:
 - a. It did not consider all relevant factors, including earlier submissions by Tlicho Government respecting the hypothetical nature of the access roads,

the practical problems that would undermine the effectiveness of assessing impacts from the Proposal because of the hypothetical nature of the access roads, and the submission of DIAND that a temporary administrative suspension was an acceptable option for the Review Board; and

- b. It considered irrelevant or improper factors, including fairness to Fortune instead of fairness to all affected parties including Tlicho Government, and it wrongly assumed that the requested adjournment would mean an indefinite rather than a temporary postponement.

12. In deciding that the Review Board has jurisdiction to conduct EA0809-004 in accordance with the TOR, the Review Board erred in law, because:

- a. It relied on the definition of **development** - (“any undertaking or part or extension of an undertaking...”) –to conclude that the *MVRMA* authorizes the environmental assessment of a **hypothetical** project;
- b. It failed to conduct a purposive analysis of the *MVRMA*;
- c. It failed to conclude that the *MVRMA* does **not** authorize the environmental assessment of a hypothetical development;
- d. It relied on Fortune’s access rights under chapter 19 of the Tlicho Agreement, including related dispute resolution mechanisms, to conclude that the proposed spur road is **not** hypothetical;
- e. It failed to recognize the speculative and hypothetical nature of the industrial highway that Fortune anticipates the GNWT will build to connect the spur road to Highway 3, because a relocated winter road and that highway would **not** be authorized under whatever access rights Fortune may have, and could not be built without agreement of the Tlicho Government;
- f. It failed to recognize that the moratorium on development on Tlicho Lands and the ongoing Tlicho Land Use Planning Process are legally effective measures authorized for the use, management and protection of Tlicho Lands under the Tlicho Agreement, and therefore the *MVRMA* does not authorize an environmental assessment based on TOR that **assume** that the access roads will be built as anticipated or required by Fortune;
- g. It included the access roads in the scope of Fortune’s “proposed development” after Fortune intentionally eliminated them from its Proposal;
- h. It included the access roads in the scope of the development although neither of them is an existing or reasonably foreseeable development; and
- i. It included the access roads in the environmental assessment although it recognized that if applications for such roads are filed in the future that would modify or expand the scope of the development, those applications would be subject to screening and a possible new environmental assessment.

AND FURTHER TAKE NOTICE that in support of the application will be read the Affidavit of Dr. John B. Zee, sworn September 21, 2010, copies of which are served with this Originating Notice.

Dated at Toronto, Ontario, on September 20, 2010 and taken out by Arthur Pape, Solicitor for Tlicho Government, whose address for service is:

Arthur Pape,
c/o Sheldon Toner, Dragon Toner Law Office
5016-50th Avenue, P.O. Box 996
Yellowknife, NT X1A 2N7

Pape Salter Teillet,
Barristers and Solicitors

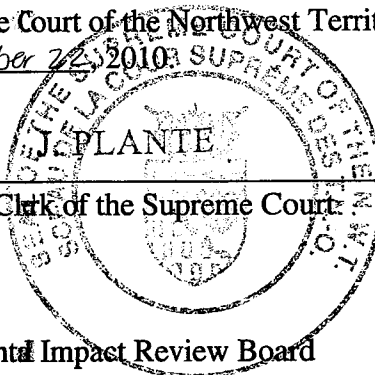
Per: 

Agent for Solicitors for the Applicant, Tlicho Government

ISSUED out of the office of the Clerk of the Supreme Court of the Northwest Territories, at Yellowknife, Northwest Territories, on September 24, 2010.

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Clerk of the Supreme Court



TO: Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre
5102 - 50th Avenue, P.O. Box 933
Yellowknife, NT X1A 2N7

AND TO: Fortune Minerals Limited
140 Fullarton Street, Suite 1902
London, ON N6A 5P2

AND TO: Attorney General for the Northwest Territories
Minister of Justice,
4904-49th Street,
Courthouse 6th Floor,
Yellowknife, NT

AND TO: Department of Justice Canada
Northwest Territories Regional Office
2nd Floor, Joe Tobie Building
5020 – 48th Street, P.O. Box 8
Yellowknife, NT X1A 2N1

AND TO: North Slave Métis Alliance
P.O. Box 2301
Yellowknife, NT Z1A 2P7

AND FURTHER TAKE NOTICE that the Rules of the Supreme Court of the Northwest Territories contains the following rule:

598.(1) On receiving an originating notice endorsed in accordance with rule 595, the person in respect of whose decision or act relief is claimed shall return forthwith to the Clerk

- (a) the judgment, order or decision, as the case may be;
- (b) the process commencing the proceeding;
- (c) the evidence and all exhibits filed, if any;
- (d) all things touching the matter;
- (e) the originating notice served on the person; and
- (f) a certificate in the following form:

“Pursuant to the accompanying originating notice, I hereby return to the Honourable Supreme Court the following papers and documents;

- (a) the judgment, order or decision, as the case may be, and the reasons for it;
- (b) the process commencing the proceeding;
- (c) the evidence taken at the hearing and all exhibits filed;

(d) all other papers or documents touching the matter.

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".

(2) The certificate required by subrule (1) has the same effect as a return to a writ of *certiorari*.

(3) Where the proceedings are not in the possession of the person required to transmit them, that person shall, in lieu of the certificate required by subrule (1), so state and explain the circumstances.

(4) Where the proceedings have not been received by the Clerk before the application for judicial review is heard, the Clerk shall return a certificate stating that fact.

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

(6) Notwithstanding the requirements of this rule, the parties may agree on what constitutes the record for the purpose of the application for judicial review.

SICW2010 000157
S.C. No.

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

NOTICES 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 time and date specified.

Between:

TLICHO GOVERNMENT
Applicant

- and -

**MACKENZIE VALLEY
ENVIRONMENTAL IMPACT
REVIEW BOARD**
Respondent

ORIGINATING NOTICE

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- and -

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Arthur Pape

