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February 7, 2012

DELIVERED

Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre
Box 938, 5102-50th Ave
Yellowknife, NT X1A 2N6

Dear Sirs/Mesdames:

Re: Service of Notice of Application in Yellowknives Dene First Nation v The Attorney General of Canada and Alex Debogorski-Court File No. T-294-12

Please find enclosed a copy of the Notice of Application issued this matter, which is served on you pursuant to the *Federal Court Rules*, SOR/98-106.

Yours truly,

Rolando E. Aguilera

REA/rea

Enclosure

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Court File No. T-294-12

FEDERAL COURT

YELLOWKNIVES DENE FIRST NATION

Applicant

AND:

THE ATTORNEY GENERAL OF CANADA

and

ALEX DEBOGORSKI

Respondents

APPLICATION UNDER sections 17, 18, 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and Part 5 of the *Federal Court Rules, 1998*

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicants. The applicants request that this application be heard at **Yellowknife, Northwest Territories.**

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the

Federal Courts Rules and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

February 6, 2012

JAKE SCHUTZ
REGISTRY OFFICER
AGENT DU GREFFE

Issued by: _____
(Registry Officer)

Address of local office:

Federal Court of Canada
180 Queen Street West, Suite 200
Toronto, ON M5V 3L6

TO:

Attorney General of Canada
Department of Justice Canada
Justice Building, 4th Floor
284 Wellington Street
Ottawa, ON K1A 0H8
Served c/o the Federal Court Registry

Mr. Alex Debogorski
76 Curry Drive
PO Box 1932
Yellowknife, NT X1A 2P5

AND ON NOTICE TO:

Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre
Box 938. 5102-50th Ave
Yellowknife, NT X1A 2N7
Attn: Richard Edjericon, Chair

The Minister of Aboriginal Affairs and Northern Development Canada
c/o Attorney General of Canada
Department of Justice Canada
Justice Building, 4th Floor
284 Wellington Street
Ottawa, ON K1A 0H8
Served c/o the Federal Court Registry

APPLICATION

A. THE MATTER UNDER REVIEW

1. The applicant, Yellowknives Dene First Nation ("Yellowknives Dene"), makes this application for judicial review in respect of the decision of January 6, 2012 of the Mackenzie Valley Environmental Impact Review Board (the "Review Board").

2. The Review Board determined, pursuant to s.128(1)(a) of the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 (the "Act"), that the mineral exploration project of Alex Debogorski (the "Project"), being the subject of Environmental Assessment EA1112-001, is not likely have any significant adverse impact on the environment or be a cause of significant public concern.

3. The Project is to take place in the Drybones Bay area, within the mineral claim SMITSKI #1 (K03016) which includes shoreline, part of Great Slave Lake, and part of Burnt Island. Drybones Bay is an area of unparalleled cultural significance to the Yellowknives Dene, rich with archaeological sites, and is relied on extensively by the Yellowknives Dene for land uses such as hunting, trapping, fishing, gathering, travel, camping, spiritual and ceremonial use.

4. The protection of the Drybones Bay area is critical to the exercise of Treaty and Aboriginal rights by the Yellowknives Dene. Indeed, it is essential to their livelihood, well-being and culture, and to their ability to pass on their traditions to future generations.

5. There have been six previous environmental assessments dealing with proposed developments in the Drybones Bay area. This was the seventh.

6. In 2003-04 the first projects in Drybones Bay came before the Review Board. At that time, the Review Board advised the Government of Canada, represented by the Minister and department of Aboriginal Affairs and Northern Development Canada (formerly Indian and Northern Affairs Canada) among others (together, "the Crown"), that it should develop a land use plan for the Drybones Bay area in collaboration with Yellowknives Dene and other Aboriginal peoples before further development is approved. The Review Board repeated this direction, with similar substance, several times in cases dealing with Drybones Bay.

7. The Crown has not developed or attempted to develop such a plan for the Drybones Bay area.

8. The Review Board approved the Project without a single mitigation measure.

9. The Review Board's approval of this Project is contrary to the Constitution of Canada and otherwise contrary to law. The Yellowknives Dene turn to this Court to safeguard their rights.

B. RELIEF

10. The Yellowknives Dene make application for:

    (a) an order quashing and setting aside the determination of the Review Board;

(b) a declaration that the Crown's duty to consult and accommodate the Yellowknives Dene in respect of the Project has not been met;

(c) a declaration that the Review Board's determination was unreasonable;

(d) a declaration that the Review Board acted contrary to s. 114 and s. 115 of the Act;

(e) a declaration that the Review Board erred in failing to adequately consider and accord due weight to the evidence, in particular the evidence demonstrating that further development in the Drybones Bay area will have a significant adverse impact on the environment and will be a cause of significant public concern;

(f) a declaration that the Crown's failure to negotiate in good faith with the Yellowknives Dene towards the development of an enforceable land use plan for the Drybones Bay area is in breach of the Crown's duty to consult and accommodate;

(g) a declaration that without an enforceable land use plan for the Drybones Bay area developed through good faith negotiations with the Yellowknives Dene, the significant adverse impacts on the environment and significant causes of public concern associated with the Project cannot be mitigated;

(h) a declaration that without an enforceable land use plan for the Drybones Bay area having been developed through good faith negotiations with the Yellowknives Dene, the rights and concerns of the Yellowknives Dene will not have been reasonably accommodated in accordance with the Crown's duty to consult and accommodate;

(i) an order directing the Crown to develop an enforceable land use plan for the Drybones Bay area, through good faith negotiations with the Yellowknives Dene;

(j) an order prohibiting the issuance of further licences and permits under the Act in the Drybones Bay area until an enforceable land use plan for the area developed through good faith negotiations with the Yellowknives Dene is in place;

(k) costs;

(l) such further and other relief as this Honourable Court may determine appropriate.

C. GROUNDS

11. The grounds for the application are:

(a) The Crown has breached its constitutional duty to consult and accommodate the Yellowknives Dene;

(b) The Review Board erred when it failed to adequately consider and accord due weight to the evidence;

(c) The Review Board acted contrary to ss. 114 , 115 and 117(2) of the Act; and

(d) The Review Board's decision was unreasonable.

YELLOWKNIVES DENE FIRST NATION

12. The Yellowknives Dene are Aboriginal peoples within the meaning of section 35(1) of the *Constitution Act, 1982*, and hold constitutional rights protected under that section.

13. The Yellowknives Dene First Nation is among the Akaitcho Dene First Nations ("Akaitcho Dene").

14. On July 25, 1900, the Akaitcho Dene entered into treaty relations with the Crown as the result of a treaty council at Deninu K'ue, also known as Fort Resolution (the "1900 Treaty").

15. There are different understandings between the Akaitcho Dene and the Crown concerning the nature and effect of the 1900 Treaty:

(a) The Crown regards the result of the July 25, 1900 treaty council as an adhesion by Akaitcho Dene to Treaty No. 8, which had been negotiated during the summer months of 1899, a conclusion that is disputed by Akaitcho Dene.

(b) The Akaitcho Dene consider the 1900 Treaty to be a treaty of peace, friendship, and coexistence, separate and unique from other treaties. Akaitcho Dene maintain that the terms and geographic scope of the 1900 Treaty were determined by the exchange of oral representations and promises by the Chiefs and the representatives of the Crown then present. Akaitcho Dene consider the provisions, representations and promises made in the 1900 Treaty to be existing treaty rights within the meaning of the *Constitution Act, 1982.*

16. The Yellowknives Dene, with the other Akaitcho Dene, are pursuing a process to implement the spirit and intent of the oral version of the 1900 Treaty.

17. To clarify the respective rights of Akaitcho Dene and the Crown, and in recognition of the ongoing and evolving relationship between the Akaitcho Dene and the Crown, the Akaitcho Dene entered into a Framework Agreement with the Government of Canada and the Government of the Northwest Territories on July 25, 2000, the one hundredth anniversary of the 1900 Treaty ("the Akaitcho Framework Agreement").

18. The Akaitcho Framework Agreement establishes a process among the parties to negotiate towards an Akaitcho Agreement in Principle and eventually an Akaitcho Agreement that will bring clarity to the constitutionally-protected Aboriginal and Treaty rights of Akaitcho Dene ("the Akaitcho Process").

19. The Akaitcho Process deals with, among other things, governance arrangements and the lands and resources within the Akaitcho territory. The asserted Akaitcho territory is set out in Appendix A of the Akaitcho Framework Agreement and includes the Drybones Bay area.

20. The parties to the Akaitcho Process concluded an Interim Measures Agreement on June 28, 2001. The aim of the Interim Measures Agreement is to advance the treaty negotiations and to address, so far as could be agreed at that time, the manner in which some of the outstanding issues between the parties will be dealt with pending the negotiation of an Akaitcho Agreement. The Interim Measures Agreement is not a comprehensive arrangement on outstanding issues pending the conclusion of an Akaitcho Agreement, nor was it intended to reflect the Crown's duty to consult and accommodate the Akaitcho Dene.

21. The parties to the Akaitcho Process concluded an Interim Land Withdrawal Protocol on November 21, 2005. Pursuant to that Protocol, certain lands in the Akaitcho territory were withdrawn from disposal for 5 years under s. 23(a) of the *Territorial Lands Act*, R.S.C. 1985, c. T-7. However, the withdrawal was subject to existing rights and interests. These third party interests covered part of Drybones Bay including the location of the Project, thus the Project location was not withdrawn. Except as specified in the Protocol, the Interim Land Withdrawal Protocol does not affect the Crown's duty to consult and accommodate.

22. The Akaitcho Process is ongoing.

THE RESPONDENTS

23. The Crown holds special obligations in respect of its relationship with the Yellowknives Dene pursuant to, among other things, s. 35 of the *Constitution Act, 1982*, s. 91(24) of the *Constitution Act, 1867*, and the legal principle of the honour of the Crown.

24. The Crown has long recognized, since at least the 1970s, that the Yellowknives Dene and other Akaitcho Dene have existing and asserted rights, and it has entered into comprehensive land claim and self-government negotiations with Akaitcho Dene.

25. The Crown asserts rights and powers in respect of, among other things, the governance, ownership, management and use of the Akaitcho territory. These rights and powers, relative to Akaitcho Dene rights and powers, are among the subjects of ongoing negotiations with Akaitcho Dene through the Akaitcho Process as outlined above.

26. In 1998 the Crown passed the Act and its regulations. The Act provides for the issuance of Land Use Permits in the Akaitcho territory and other areas of the Mackenzie Valley, and sets up various boards, including the Review Board, to support that regulatory process.

27. Alex Debogorski applied for a Type A Land Use Permit under the Act in February 2011. The Project is a ten-hole diamond drilling mineral exploration program in the Drybones Bay area. It is located within the mineral claim SMITSKI #1 (K03016) which is held by Mr. Debogorski under the *Northwest Territories and Nunavut Mining Regulations*, C.R.C., c. 1516 ("Mining Regulations").

28. To maintain his mineral claim, Mr. Debogorski must fulfil work requirements on the claim according to the Mining Regulations. He had previously received relief from work requirements under s. 81 of the Mining Regulations. Section 81 relief has been issued to numerous mineral claim holders in the Drybones Bay area.

29. Mr. Debogorski applied for the Land Use Permit after he was informed by the Crown that he would need to apply for (and be denied) a Land Use Permit in order to obtain further s. 81 relief.

BRIEF CASE HISTORY

30. In February 2011, Mr. Debogorski applied to the Mackenzie Valley Land and Water Board ("MVLWB") for a Land Use Permit. On April 14, 2011, the MVLWB, acting under s. 125 of the Act, referred the Project to the Review Board for environmental assessment. The MVLWB's referral decision was based on its finding of "significant public concern regarding the integrity of the cultural and spiritual values associated with the Drybones Bay area" and related findings.

31. The Review Board conducted an environmental assessment ("EA") pursuant to the Act. On January 6, 2012, the Review Board released its Report of Environmental Assessment indicating its decision to approve the project under s. 128(1)(a) of the Act, having determined that the Project is "not likely to have any significant adverse impact on the environment or to be a cause of significant public concern". This is the decision under review.

32. Section 130 of the Act permits the Minister of Aboriginal Affairs and Northern Development to order an environmental impact review, notwithstanding the determination of the Review Board. The Minister took no action under s. 130. Ten days after the Review Board's determination, as per s. 129 of the Act the Project returned to the MVLWB for permit issuance. At the time of filing of this Application, the MVLWB had not yet issued a permit.

33. The Crown took part in the EA process, but otherwise conducted no further consultation or accommodation with the Yellowknives Dene.

GROUND 1: BREACH OF THE DUTY TO CONSULT & ACCOMMODATE

34. The Crown's duty of consultation and accommodation "preserves the Aboriginal interest pending claims resolution".[1] In other words, "While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation".[2]

35. The Yellowknives Dene are participating in a treaty claims process, the Akaitcho Process, in which they hope to achieve reconciliation with the Crown. Yet their rights and interests are being infringed and diminished before that process is complete.

36. The Crown is aware of the existing and asserted Aboriginal and Treaty rights of the Yellowknives Dene in the Drybones Bay area, through among other things its participation in the Akaitcho Process, participation in this particular EA process, and participation in previous EA processes relating to the Drybones Bay area.

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[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 38.
[2] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 32, referring also to *Haida Nation* at para. 20.

37. The area in which the Project is proposed has become subject to increasing impacts and degradation throughout the past decade, over the most strenuous objections of the Yellowknives Dene community and the other Akaitcho Dene First Nations. The Drybones Bay area is the area the Yellowknives Dene rely on most heavily, that is most accessible to community members, that is among the richest with wildlife and cultural heritage, and that has the greatest significance for the Yellowknives Dene.

38. The Crown's duty in this case is one of deep consultation and accommodation, at the high end of the spectrum.

39. The Yellowknives Dene are not against development. Indeed, since the 1990s they have accepted three mines in their territory, and have supported several exploration projects. This support of development has not extended to projects proposed at Drybones Bay.

40. While so much of the Akaitcho territory has been deeply affected by development (some with, and much without, their consent), fewer and fewer places are left available and suitable for the exercise of Aboriginal and Treaty rights. The best of them is Drybones Bay. It is a small part of the Akaitcho territory that the Yellowknives Dene need to protect.

41. The Review Board began to recognize this need for protection in a series of EAs it considered in 2003-2004. It suggested the following with respect to the Drybones Bay area:

> No new land use permits should be issued for new developments within the Shoreline Zone, and within Drybones Bay and Wool Bay proper, until a plan has been developed to identify the vision, objectives and management goals based on the resource and cultural values for the area. This plan should be drafted and implemented with substantive input from Aboriginal parties. The plan should specifically address future development direction and include provisions for protecting sensitive environmental, cultural, and spiritual sites. This exercise should be completed within 5 years and provide clear management prescriptions for greater certainty of all parties in the future development.[3]

42. In 2007, and again only slightly re-worded in 2011, the Review Board repeated the substance of this direction in reviewing another Drybones Bay project (EA0506-005) but this time in the form of a binding mitigation measure. It stated: "To mitigate the identified significant cumulative impacts, the Government of Canada, with AANDC as the lead department, will work with the YKDFN [Yellowknives Dene] and other Aboriginal land users of the subject area to produce a plan for the Shoreline Zone [the Shoreline Zone refers to part of the Drybones Bay area that includes the Project]. ...The plan will provide clear recommendations for managing development...".

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[3] EA03-002, EA03-003, EA03-006.

43. The accommodation of the Yellowknives Dene's concerns and Aboriginal and Treaty rights that is required In this case has been known to all parties, and repeated by both the Yellowknives Dene and the independent Review Board, for nearly a decade. The accommodation required is that the Crown must negotiate a land use plan for this area in good faith with the Yellowknives Dene and other affected Aboriginal parties. The plan will set out specific parameters for development in this place of immense, unparalleled significance for the Yellowknives Dene, pending conclusion of the Akaitcho Agreement.

44. No other measure can provide meaningful and adequate accommodation.

45. *Ad hoc* development in Drybones Bay is causing cumulative and serious adverse impacts on the environment and on thé Yellowknives Dene's Aboriginal and Treaty rlghts.

46. *Ad hoc* development is also forcing the Yellowknives Dene through repeated regulatory processes, where they repeat the same concerns, to regulatory bodies that cannot meaningfully help them.

47. The Review Board is not able to develop land use plans. Development of a land use plan requires the Crown to take action.

48. In its decision on this Project, the Review Board found that "there has been no action on the development of a plan for the Drybones Bay area" (p. 37).

49. Until that happens, the consultation in this case has not been meaningful and there has been no accommodation of Yellowknives Dene existing and asserted Aboriginal and Treaty rights.

50. The Review Board erred in law in approving the Project despite the ongoing breach of the Crown's legal and constitutional duty to consult and accommodate.

GROUND 2: FAILING TO GIVE DUE CONSIDERATION AND WEIGHT TO THE EVIDENCE

51. The Review Board erred when it failed to give adequate consideration and due weight to the evidence before it. The failure occurred both with evidence about significant environmental impacts, and evidence about significant public concern.

52. Despite citing much relevant evidence in its report, the Review Board repeatedly makes illogical conclusions that either mischaracterize the evidence or do not realistically flow from the evidence.

53. The only reasonable interpretation is that the Review Board failed to meaningfully consider much of the evidence and/or failed to give it proper weight.

GROUND 3: ACTING CONTRARY TO SS. 114, 115 AND 117(2) OF THE ACT

54. Part 5 of the Act sets out a process of preliminary screening, environmental assessment and environmental impact review through which proposed developments are reviewed.

55. Section 114 sets out the purpose of Part 5. Among other things, it requires the Review Board to ensure that the concerns of Aboriginal peoples are taken into account.

56. Previous court cases have been clear that if the Crown's duty to consult and accommodate has not been met, the concerns of Aboriginal peoples have not been taken into account within the meaning of s. 114. The Review Board acted contrary to s. 114 in approving the Project despite the Crown's failure to meet its duty to consult and accommodate the Yellowknives Dene.

57. In addition to condoning the Crown's failure, the Review Board itself failed to take the First Nation's concerns into account, contrary to s. 114, when it determined there was no significant adverse environmental impact and no cause of significant public concern despite overwhelming evidence to the contrary from the Yellowknives Dene.

58. Sectoin 115 sets out guiding principles for Part 5. Among other things, it requires the Review Board to have regard to the importance of conservation to the well-being and way of life of the Aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

59. Contrary to s. 115, the Review Board failed to protect and conserve the Drybones Bay area where to do so was important, indeed central, to the well-being and way of life of the Yellowknives Dene.

60. Section 117(2) sets out factors the Review Board must consider in an environmental assessment. These factors include, among other things, the impact of the development on the environment, including but not limited to cumulative impacts and the impact of malfunctions or accidents; the significance of any impacts; and comments from the public. In addition, the Review Board is to consider the need for mitigative or remedial measures, and any other matter it determines to be relevant.

61. The Review Board's analysis and conclusions run contrary to s. 117(2). The Review Board mischaracterized and/or misunderstood the required factors and evidence related to them, and/or did not give them appropriate meaning, weight and significance. Ultimately the Review Board did not adequately consider the factors as required by the Act.

GROUND 4: UNREASONABLENESS

62. In the face of all the evidence, the Review Board's conclusion under s. 128(1)(a) was unreasonable.

63. The decision of the Review Board has left the environmental impacts of this Project – including, as defined under Part 5 of the Act, direct and cumulative impacts on not only the physical environment but also on heritage resources, wildlife harvesting, and the social and cultural environment – entirely unmitigated.

64. Despite its own previous findings that cumulative impacts in the Drybones Bay area are at a "critical threshold", and despite its own recognition in previous EAs on Drybones Bay that mitigation in the form of land use planning is urgently required, and despite its recognition in this EA that its previous measures and suggestions have not been implemented, and despite evidence that there were significant environmental impacts and causes for public concern from this Project – the Review Board chose to approve this project with no mitigation.

65. The Review Board used only "suggestions", which are not binding and not enforceable. The Review Board adopted no binding measures under s. 128(b)(ii) to recommend to the Minister for mitigation.

66. The conclusion of no significant environmental impacts is simply, in all the circumstances of this case and in the face of the evidence presented, unreasonable.

67. The concern of the Yellowknives Dene First Nation is overflowing. It was thoroughly demonstrated to the Review Board.

68. The conclusion that the Project is not a cause of significant public concern is, In all the circumstances of this case and in the face of the evidence presented, unreasonable.

D. STATUTES AND RULES RELIED ON

69. The applicants rely on the following statutes and rules:

(a) Section 35 of the *Constitution Act, 1982*;

(b) Section 91(24) of the *Constitution Act, 1867*;

(c) The legal principle of the honour of the Crown;

(d) The *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, as amended;

(e) The *Mackenzie Valley Land Use Regulations*, SOR/98-429, as amended;

(f) The *Federal Courts Act*, RSC 1985, c F-7, as amended;

(g) The *Federal Court Rules, 1998*, as amended.

E. EVIDENCE

70. The applicant requests the Review Board to send a certified copy of the record before the Review Board in EA1112-001, including all documents transferred to this file from other files, to the applicants and to the Registry pursuant to Rule 317 of the *Federal Courts Rules*. Due to the volume and complexity of the record, the applicant requests it be provided in hard copy and electronic forms.

71. This application will be supported by the following material:

(a) the record before the Review Board; and

(b) such other affidavit and other material as counsel shall advise and this Honourable Court shall permit.

Date: February 6, 2012

N. Kate Kempton, Maggie Wente & Judith Rae
OLTHUIS KLEER TOWNSHEND LLP
229 College Street, 3rd Flr.
Toronto, ON M5T 1R4
Tel: (416) 981-9330 Fax: (416) 981-9350
Counsel for the Applicant

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the

FEV FEB 07 2012

day of _____ A.D. 20____

Dated this 7 day of FEV FEB 07 2012 20____

_____