

SAHTU RENEWABLE RESOURCES BOARD

IN THE MATTER OF the Sahtu Renewable Resources Board
Public Hearing on Management of Bluenose East Ɂekwé (Barren-Ground Caribou).

NOTICE OF MOTION

on behalf of the

Colville Lake Renewable Resources Council

and

Ayoni Keh Land Corporation

and

Behdzi Ahda” First Nation

TAKE NOTICE that the Colville Lake Renewable Resources Council (“Colville RRC”), Ayoni Keh Land Corporation (“AKLC”) and Behdzi Ahda” First Nation (“Behdzi Ahda”) (collectively referred to as “Colville Parties” hereby apply to the Sahtu Renewable Resources Board (“Board”), pursuant to section 15 of the Sahtu Renewable Resources Board Rules for Hearings (“Board Rules”), for the following under section 4.1.3 of the Sahtu Renewable Resources Board Operating Procedures (“Board Operating Procedures”) section 16.1 of the Board Rules, and section 13.8 of the Sahtu Dene and Metis Comprehensive Land Claim Agreement (“SDMCLCA”):

- (a) a determination concerning whether the Board Members named in this Motion are in a conflict of interest on matters before the Board for decision in the *Public Hearing on Management of Bluenose East Ɂekwé (Barren-Ground Caribou)* convened by the Board on January 11, 2016 and to be held in Deline on March 1-3. (the “Deline Hearing);
- (b) relatedly, a determination concerning whether the participation of the Board Members named in this Motion on matters before the Board for decision in the Deline Hearing gives rise to a reasonable apprehension of bias;
- (c) if it is determined that the participation of Board Members named in this Motion on matters before the Board for decision in the Deline Hearing amounts to a conflict of interest and/or gives rise to a reasonable apprehension of bias, a decision by the Board on whether the Deline Hearing should be adjourned until such time as alternate Board members can be appointed to the Board in accordance with the SDMCLCA; and
- (d) such other determinations, decisions or relief as the Board may grant.

AND FURTHER TAKE NOTICE the Colville Parties are requesting the Board render a decision on this Motion by Thursday February 25, 2016 to permit adequate notice to all parties concerning the issues raised in this Motion in advance of the Deline Hearing.

STATEMENT OF FACTS:

1. The Board issued a Notice of Hearing on January 11, 2016 for a hearing to take place from March 1 to March 3, 2016 (the “Deline Hearing”) to decide on whether to adopt the Deline Caribou Conservation Plan, Belarewile Gots’e ekwe, prepared by the Deline ehdzot’ine, Deline First Nation, and Deline Land Corporation (“Deline Caribou Plan”) and/or the Department of Environment and Natural Resources, Government of the Northwest Territories Proposal on Management Actions for Bluenose east Caribou 2016-2019 (“ENR Caribou Plan”).
2. Under the SDMCLCA, the Board is intended to be constituted by seven members appointed by the Governor in Council and the Government of the Northwest Territories. Six members and six alternate members are to be appointed, of whom three members and three alternate members are to be nominated by the Sahtu Tribal Council as per section 13.8.3 of the SDMCLCA. One chair is nominated by the Board.
3. The current composition of the Board does not conform to the requirements of the SDMCLCA. It is constituted as follows:
 - i. Mr. Michael Neyelle, Chair, nominated by the Board;
 - ii. Mr. Leonard Kenny, nominated by the Sahtu Secretariat;
 - iii. Mr. Jeff Walker, nominated by the Government of the Northwest Territories;
 - iv. Ms. Lesley Allen, nominated by Department of Fisheries and Oceans;
 - v. Mr. Paul Latour, nominated by Minister of the Environment;
 - vi. Mr. George Barnaby, nominated by the Sahtu Secretariat; and
 - vii. Ms. Camilla Rabisca, nominated by the Sahtu Secretariat.
4. Alternate members are:
 - i. Mr. Patrick Bobinski, nominated by Department of Fisheries and Oceans.
5. Mr. Michael Neyelle, the Chair of the Board, was also a member of the Facilitation Team and Working Group that developed the Deline Caribou Plan. At the SRRB hearing scheduled for March 1 to 3, 2016, Mr. Neyelle is being asked to decide whether to approve that same plan.
6. Mr. Leonard Kenny, a Member of the Board, is also the Chief of the Deline First Nation and a member of the Deline Working Group that developed the Deline Caribou Plan. In addition, he is a signatory to the approval of the Deline Caribou Plan by Deline community resolution on November 4, 2015. This plan was submitted to the Board for the purposes of the Deline Hearing on or around January 8th, 2016.
7. On or about the week of February 8, 2016, Chief Leonard Kenny, in his role as Chief of the Deline First Nation, began acting to implement the Deline Caribou Plan in advance of the Board’s determination on the Deline Caribou Plan.

8. At the SRRB hearing scheduled for March 1 to 3, 2016, Chief Kenny is being asked to decide whether to approve the same plan he already helped to develop, decided to approve and started to implement.
9. The ENR Caribou Plan was submitted to the Board on December 15, 2015. Mr. Jeff Walker, Board member, is also the Regional Superintendent, Sahtu Region, Department of Environment and Natural Resources, Government of the Northwest Territories and was involved in the development and approval of the final form of the ENR Caribou Plan, including a proposed Total Allowable Harvest (TAH) and measures for allocation of quota among various groups.
10. On September 14, 2015, Mr. Jeff Walker wrote an email indicating his full support of the measures currently outlined in the ENR Caribou Plan, including the TAH and the allocation of quota to communities, as well as his belief in the need to enforce such measures.
11. The decision of whether to approve the ENR Caribou Plan, and the measures that it contains, is same decision that Mr. Walker is being asked to make at the hearing March 1 to 3, 2016.

GROUNDS FOR MOTION:

12. The Sahtu Dene and Metis Land Claim Agreement (“SDMCLCA”) states that pursuant to s. 13.8.4(a):

“Board members shall not be considered to have a conflict of interest by reason only of being public servants or employees of the organizations of the participants.”
13. The SDMCLCA does not set out a definition for conflict of interest for the Board members.
14. However, the Board has issued Conflict of Interest Guidelines (“SRRB Guidelines”) which address how to avoid the perception of bias, including those arising out of conflicts of interest. The SRRB Guidelines state:

“SRRB Board members are expected to...
 - remain open to the arguments of others and capable of being persuaded when dealing with SRRB matters; and
 - act independently from the interests of other organizations they are involved with, and in the interest of the SRRB, when making SRRB decisions”.
15. In order to protect the integrity of the Board’s decision-making process, the Board’s Operating Procedures at section 4.1.3 set out:

“When conflicts of interest arise, Board Member are to formally withdraw from the discussions. The withdrawal will be recorded in the meeting minutes.”

16. The common law test for a reasonable apprehension of bias, which the Supreme Court of Canada set out in the *Committee for Justice and Liberty v National Energy Board*, is:

What would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through conclude. Would he think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly?¹

17. The Board Chair, Mr. Michael Neyelle, is in a conflict of interest between his duty to make a decision in interests of the SRRB and his role as a key player in developing the Deline Caribou Plan. There is a real likelihood that he would be unable to consider impartially and with an open mind the merits of the Deline Caribou Plan that he, in his capacity as a member of the Facilitation Team and Working Groups, played a lead role in developing.
18. The Board Member Chief Leonard Kenny is in a conflict of interest between his duty to make a decision in the interests of the Board and his role as a key player in developing, approving and implementing the Deline Caribou Plan. There is a real likelihood that he would be unable to consider impartially and with an open mind the merits of the Deline Caribou Plan that he, in his capacity as Chief of the Deline First Nation, he not only personally helped to develop and approve as a signatory on November 6, 2015, but that he has also taken steps to implement during the week of February 8, 2016.
19. The Board member Mr. Jeff Walker is in a conflict of interest between his duty to make a decision in the interest of the Board and his stated allegiance to the ERN Caribou plan he helped to develop. There is a real likelihood that he would be unable to consider impartially and with an open mind the merits of the ENR Caribou Plan and the proposed TAH and allocation proposals that it contains. In an email thread forwarded from ENR to the Colville Parties dated September 12, 2015, Mr. Walker writes:

“...The letter is lengthy but given the defiant nature of their position and assertions by their lawyer it is important to provide details about how the regulations came to be and why they are important, even more so now given the 2015 numbers.

The letter fits with the due diligence messaging we are putting out there to inform the public about the regulations and with our message to WMAC and IGC that we will enforce the regulations.”

20. The Colville parties have no confidence in the ability of Mr. Walker to decide fairly and impartially, given his expressly stated views on the need for a TAH or the enforcement of

¹ *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at p. 394 per de Grandpré, dissenting; see also: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282, 2015 SCC 25 at para.20.

quota allocations in his role as a regional manager in the government department that is putting forward proposals for a TAH and quota allocations in the ENR Caribou Plan. This is the same ENR Caribou Plan that Mr. Walker is to expected to consider impartially and with an open mind at the Deline Hearing.

LAW AND ARGUMENT:

21. Board members are subject to two sets of duties in making decisions on wildlife management plans. First, as members of an administrative tribunal, they must be seen to be free from bias in their decision-making. Second, they have a fiduciary duty to the Board as “directors” of a not-for-profit corporation to act in the Board’s best interests.² To fulfill these duties, as the Board’s Conflict of Interest Guidelines recognize, Board members must “maintain their independence and avoid conflicts of interest or bias in the decision-making process.”
22. The SDMCLCA recognizes that “Board members shall not be considered to have a conflict of interest by reason only of being public servants or employees of the organizations of the participants.” This is an acknowledgement of the Board’s representative mandate, and policy-oriented nature. However, it does not give its members carte blanche to make decisions even where they may be seen have prejudged or have conflicting interests in a Board decision. That is why the Board’s Conflict of Interest Guidelines provide that members must avoid situations where their relationship with or duties to another organization prevents them from keeping an open mind, acting impartially, or coming to a decision in the interests of the SRRB.
23. To this end, McLachlin CJC has made the following observations about procedural fairness:

Fair procedures, equitable treatment, and responsiveness to the public are the cornerstones of a system of administrative tribunals built according to the Rule of Law. I suggest that, in many important ways, it falls to the members and support staff of those administrative boards to ensure that every person dealing with the state is treated fairly and with respect.³
24. The duty of procedural fairness applies to public office holders, including members of administrative tribunals.⁴ In *Imperial Oil v Quebec* (Minister of the Environment) the Supreme Court of Canada stated an administrative decision maker such as a member of a tribunal:

² Lorraine Land and Jessica Iveson, *Memo on Board Members’ Obligations*, (October 2014), Available online at http://www.srrb.nt.ca/index.php?option=com_docman&view=document&alias=648-board-nominee-obligations-oct-2014-1&category_slug=srrb-mandate&Itemid=645

³ Beverley McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law,” (1999) 12 *Canadian Journal of Administrative Law and Practice*, p 171 and 174.

⁴ *Dunsmuir v New Brunswick*, [2008] SCR 190, 2008 SCC 9, at para 116.

[M]ust approach the issue submitted to him or her with an open mind, not influenced by personal interests or outside pressure. It is not sufficient that the decision-maker be impartial in his or her own mind, internally, to the satisfaction of his or her own conscience. It is also necessary that the decision-maker appear impartial in the objective view of a reasonable and well-informed observer [*emphasis added*] (Committee for Justice and Liberty v National Energy Board [1978] 1 SCR 369, at p. 394, per de Grandpré J; also: Bell Canada v Canadian Telephone Employees Association, [2003] 1 SCR 884, 2003 SCC 36, at para 17, per McLachlin C.J. and Bastarache J.).⁵

25. The Board Chair, Mr. Neyelle and Board Member, Chief Kenny, do not appear impartial to a well-informed observer. Their prior involvement in the development, approval and implementation of their respective Plan creates a conflict of interest, and hinders their ability to be seen to act impartially and in the best interests of the Board.
26. The Board member, Mr. Walker, has acted, approved, implemented or supported positions in respect of the ENR Caribou Plan. His prior involvement in the ENR Caribou Plan undermines his ability to be seen to act impartially and in the best interests of the Board.
27. Where there is a conflict of interest and/or a reasonable apprehension of bias arising out of the Board members' participation in a decision, good practice in both administrative and fiduciary law is for the affected board members to recuse themselves from the decision.⁶
28. The Board's *Operating Procedures* adopt this approach, providing that a conflicted member must remove him or herself from discussion of the matter in respect of which he or she has a conflict. Since the *Operating Procedures* have the status of bylaws, this provision remains mandatory and binding on the Board in spite of the more flexible *Conflict of Interest Guidelines* released by the Board in February 2016, which do not have the status of bylaws.
29. The Board has communicated its intention to allow potentially conflicted Board members to participate in the decisions of the Board on the matters over which their potential conflict arises.⁷
30. In our view, it would be improper and in conflict with the Board's *Operating Procedures* to permit the conflicted Board members to participate in deliberations concerning the matters in which they are in conflict, or in which their participation may give rise to a

⁵ *Imperial Oil Ltd. v Quebec (Minister of the Environment)*, [2003] 2 SCR 624, 2003 SCC 58 at para 28, online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2092/index.do>>.

⁶ See, for example, *Communication, Energy and Paperworkers Union of Canada Local 60N*, 2008 NLCA 4; and, more generally, the discussion in Brown and Evans, *Judicial Review of Administrative Action in Canada*, "Overlapping Functions and Judging One's Own Case," Chapter 11, Vol. 3 at 11.4200ff.

⁷ Email from L. Land, legal counsel to the Board, to J. Duncan, legal counsel for Colville Parties, 22 February 2016.

reasonable apprehension of bias. Accordingly, Mr. Neyelle and Chief Kenny must remove themselves from considerations of the Deline Caribou Plan, and Mr. Walker must remove himself from consideration of the ENR Caribou Plan.

31. Under both the SDMCLCA and the *Operating Procedures*, the normal solution to recusals would be to replace the conflicted members with their “alternates” for the purposes of discussion and decisions on the matters in conflict.
32. However, given that that the current slate of appointments to the Board is incomplete, with one vacant Sahtu Tribal Council Member position and two vacant Sahtu Tribal Council alternate positions; and no alternate member appointed by the GNWT, there are insufficient alternates available to take the place of the conflicted members.
33. Proceeding to conduct the Deline Hearing with a reduced membership under which there would be no Chair, no GNWT appointee, and only one Sahtu Tribal Council member and one Sahtu Tribal Council Alternate Member would not be in accordance with the key objectives of the SDMCLCA to ensure that Sahtu Dene and Metis perspectives and needs are **fully integrated** into decision-making about resources in the land claims area.
34. Accordingly, we submit that the best course of action available to the Board is to adjourn the Deline Hearing until the appointment of the full slate of alternates, as required under section 13.8.3 of the SDMCLCA, who are able to stand in for the conflicted Board members.
35. We submit that this remedy best fits the purposes of the SDMCLCA and best conforms to the Operating Procedures of the Board, and is the remedy best suited to maintaining confidence in the fairness of the hearing process.

DETERMINATIONS AND DECISIONS SOUGHT:

36. The Colville Parties respectfully request determinations and decisions by the Board on the following by Thursday February 25, 2016 to permit adequate notice to all parties concerning the issues raised in this Motion in advance of the Deline Hearing:
 - (a) a determination concerning whether the Board Members named in this Motion are in or are likely to be in a conflict of interest on matters before the Board for decision in the *Public Hearing on Management of Bluenose East Ɂekwé (Barren-Ground Caribou)* convened by the Board on January 11, 2016 and to be held in Deline on March 1-3. (the “Deline Hearing”);
 - (b) relatedly, a determination concerning whether the participation of the Board Members named in this Motion on matters before the Board for decision the Deline hearing gives rise to a reasonable apprehension of bias; and

- (c) if it is determined that the participation of Board Members named in this Motion on matters before the Board for decision in the Deline Hearing amounts to a conflict of interest and/or gives rise to a reasonable apprehension of bias, a decision by the Board on whether the Deline Hearing should be adjourned until such time as alternate Board members can be appointed to the Board in accordance with the SDMCLCA, and
- (d) such other determinations, decisions or relief as the Board may grant.

Dated February 23, 2016

**COLVILLE LAKE RENEWABLE RESOURCES COUNCIL
AYONI KEH LAND CORPORATION
BEHDZI AHDA" FIRST NATION**
By its counsel



Jennifer A. Duncan
Barrister & Solicitor

The **FOLLOWING EVIDENCE** is cited for consideration on this Motion:

On the Hearing Record:

1. Deline Caribou Plan;
2. ENR Caribou Plan;
3. Deline Harvest Ends- Media Release;
4. Deline Caribou Brochure.

Attached as Exhibit A:

5. Email thread from ENR forwarded to Colville Lake dated September 12, 2015 including responses from Jeff Walker, Regional Superintendent, Sahtu Region.

This is Exhibit "A" referred to in the Notice of Motion

Filed on February 23, 2016

IN THE MATTER OF the Sahtu Renewable Resources Board
Public Hearing on Management of Bluenose East Ɂekwé (Barren-Ground Caribou).

----- Forwarded message -----

From: "Ruth Delorme-Roy" <Ruth_Delorme-Roy@gov.nt.ca>

Date: Sep 18, 2015 9:33 AM

Subject: Bluenose West Barren-Ground Caribou Tag Allocations - Attached - Supporting Documents

To: "davidcodzi@gmail.com" <davidcodzi@gmail.com>, "chief@behziahda.com" <chief@behziahda.com>, "ebamountaindene@theedge.ca" <ebamountaindene@theedge.ca>, "director@srrb.nt.ca" <director@srrb.nt.ca>

Cc: "Jeff Walker" <Jeff_Walker@gov.nt.ca>, "Marsha Branigan" <Marsha_Branigan@gov.nt.ca>, "Lynda Yonge" <Lynda_Yonge@gov.nt.ca>

Dear Chief Kochon, Sirs and Madam:

Please find attached a letter from Mr. Ernie Campbell, Deputy Minister of Environment and Natural Resources regarding the above noted subject.

Thank you and have a good day.

Marsi / Mahsi / Merci Beaucoup

Ruth Roy

Administrative Assistant

Wildlife Division

Department of Environment & Natural Resources

Government of the NWT

P.O. Box 1320 | 500, 5102-50th Avenue

Yellowknife, NT | X1A 2L9

Tel: [1-867-920-8064](tel:1-867-920-8064) | Fax: [1-867-873-0293](tel:1-867-873-0293)

www.enr.gov.nt.ca

From: Rob Gau
Sent: Tuesday, September 15, 2015 3:32 PM
To: Lynda Yonge
Cc: Jeff Walker; Roger Wah_Shee
Subject: RE: DM5268 - Revised - Updated response to Colville Lake Letter Re Tags - Non- compliance and legal process to establish regs. - Attached - supporting documents.

Lynda – one quick update.

Attached are the 4 ATTACHMENTS to the letter

- Incoming BAFN letter, April 30
- Incoming SSI letter, May 19
- Incoming SSI/SRRB letterhead letter, June 10
- Public hearing report

The letter needs to change to a DISTRIBUTION to the CVLK RRC, SSI, and SRRB to close the loop on all the incoming letters and DM5268 and the other associated DM (sorry I don't have those #s). The last

attachment – edits to the letter's distribution – reflects this. We don't have admin help so when ready I hope Lina can format expeditiously.

Rob

From: Rob Gau
Sent: Tuesday, September 15, 2015 12:06 PM
To: Lynda Yonge
Cc: Jeff Walker; Roger Wah_Shee
Subject: FW: DM5268 - Revised - Updated response to Colville Lake Letter Re Tags - Non- compliance and legal process to establish regs. - Attached - supporting documents.
Importance: High

Lynda – Jeff, Roger, and myself went through the attached and tried to dutifully address Evan's concerns. We truly feel we've accommodated and balanced/softened where required and that this letter should be good to send.

Track version attached. Copy on your chair, along with a clean version.

We recommend DM signature.

We believe the next step is for you to (please) walk it up to Evan, and ensure that we're ready for signage. We all recommend that this letter should get signed and sent by this Friday.

JEFF – reminder: when this goes for signing we will need the full package of attachments. You're in charge of ensuring those are provided.

Hope this works,

Rob

From: Jeff Walker

Sent: Tuesday, September 15, 2015 11:03 AM

To: Rob Gau

Subject: FW: DM5268 - Revised - Updated response to Colville Lake Letter Re Tags - Non-compliance and legal process to establish regs. - Attached - supporting documents.

Jeffrey L. Walker

Regional Superintendent, Sahtu Region

Environment & Natural Resources

Government of the Northwest Territories

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From: Evan Walz

Sent: Monday, 14 September, 2015 13:06

To: Jeff Walker; Roger Wah_Shee; Lynda Yonge

Cc: Jack Bird

Subject: RE: DM5268 - Revised - Updated response to Colville Lake Letter Re Tags - Non- compliance and legal process to establish regs. - Attached - supporting documents.

Thanks for the feedback... a fine balance in tone is needed; I agree.

Now let's make the edits to the letter and finalize the messaging we're delivering at the IGC and WMAC.

From: Jeff Walker

Sent: Monday, September 14, 2015 1:00 PM

To: Evan Walz; Roger Wah_Shee; Lynda Yonge

Cc: Jack Bird

Subject: RE: DM5268 - Revised - Updated response to Colville Lake Letter Re Tags - Non- compliance and legal process to establish regs. - Attached - supporting documents.

Evan,

Roger will be back in the office tomorrow morning and we are meeting on this in then. This is a due diligence letter that is intended to inform them of the regulations and requirements of hunters to be in compliance with them.

We can soften the wording, but it must be very clear that this is the legislation that is in force and effect, it applies to them and ENR will be enforcing it. There has been 5 years of soft compliance education and still we have not seen them accept the conservation measures.

We must keep to the same messages we are sending to IGC, WMAC that we will enforce the regulations in the Sahtu and also the message that we do want to work with Colville on this to find common ground.

It is a fine balance, but there must be firmness to this letter. If we do have a situation where we have to go to court on a case or a challenge not being clear and firm in our approach with compliance will not be of help to us in court.

Jeffrey L. Walker

Regional Superintendent, Sahtu Region

Environment & Natural Resources

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From: Evan Walz

Sent: Monday, 14 September, 2015 11:51

To: Jeff Walker; Roger Wah_Shee; Lynda Yonge

Cc: Jack Bird

Subject: RE: DM5268 - Revised - Updated response to Colville Lake Letter Re Tags - Non- compliance and legal process to establish regs. - Attached - supporting documents.

Better.... But I think the first three paragraphs are a little too heavy (deliberate defiance; as required by law; this is the law; it is our firm position; etc.). One other point... on page ¾ we say that “Continued decline could lead to the loss of this significant species.” I’m not sure this is accurate.

Let's soften the front end just a little and get it in to the DM for his signature. I'll also run this by Sarah Kay once we have it ready.

Evan

From: Jeff Walker

Sent: Saturday, September 12, 2015 9:52 PM

To: Evan Walz; Roger Wah_Shee; Lynda Yonge

Cc: Jack Bird

Subject: DM5268 - Revised - Updated response to Colville Lake Lettter Re Tags - Non- compliance and legal process to establish regs. - Attached - supporting documents.

Evan,

As requested last week I have updated our response to Colville Lake RRC (and their Lawyer) regarding their rejection of BNW tags.

This will still need to be reviewed by Roger W. and Lynda before the final draft is ready. I would like to have a call with them on this Monday AM if possible.

This version speaks to the concerns regarding the fall hunt at Horton Lake; it places somewhat more of a stronger emphasis on the GNWT position that caribou are in decline and compliance is necessary to the conservation efforts.

This version also more strongly denotes the current situation with WMAC , IGC and their frustration with non-compliance by Sahtu. While some of the wording is stronger in tone the underlying theme is that co-management partnerships are key to our approach and we are willing to work with them.

The letter is lengthy but given the defiant nature of their position and assertions by their lawyer it is important to provide details about how the regulations came to be and why they are important , even more so now given the 2015 numbers.

The letter fits with the due diligence messaging we are putting out there to inform the public about the regulations and with our message to WMAC and IGC that we will enforce the regulations.

Some supporting documents that need to accompany this letter are attached. There are others that I don't have on hand that may be needed as well .

Jeffrey L. Walker

Regional Superintendent, Sahtu Region

Environment & Natural Resources

Government of the Northwest Territories

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