

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GWICH'IN TRIBAL COUNCIL

Applicant

- and -

**THE GOVERNMENT OF THE NORTHWEST TERRITORIES, AS
REPRESENTED BY THE MINISTER OF THE DEPARTMENT OF
INFRASTRUCTURE**

Respondent

**Transcript of the Reasons for Decision by the Honourable Chief
Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest
Territories, delivered orally on the 8th day of April, 2026.**

APPEARANCES:

M. Faille: Counsel for the Applicant,
appearing via videoconference

M. Young: Counsel for the Applicant,
appearing via videoconference

L. Stanzell: Counsel for the Respondent

M. Zimmer: Counsel for the Respondent

INDEX

	PAGE
RULINGS, REASONS	
Reasons for Decision	1

1 THE COURT: All right. Good afternoon.

2 M. FAILLE: Good afternoon.

3 THE COURT: So I will proceed with the decision.

4 **REASONS FOR DECISION:**

5 THE COURT: On August 18, 2025, the Gwich'in Tribal
6 Council (GTC) filed an originating notice for judicial
7 review, challenging the decision of the Government of
8 the Northwest Territories (GNWT) to proceed with an
9 open public tender for the Inuvik Air Terminal Building
10 (ATB) replacement project, instead of negotiating with
11 the GTC for a negotiated contract.

12 This was a decision made by the Minister
13 of the Department of Infrastructure. As required by the
14 *Rules of the Supreme Court of the Northwest*
15 *Territories*, the GNWT filed its record of decision on
16 November 19, 2025. The documents in Tabs 16, 18
17 and 21 of the record contained redactions.

18 At Tab 16, there is a discussion paper
19 marked "Confidential" and entitled "Department of
20 Infrastructure's challenges with negotiated contract
21 requests." The paper is dated March 22, 2024, and is
22 signed by the then-Minister of Infrastructure.

23 At Tab 18, there is an information item
24 marked "Confidential" and entitled "Change in
25 approach for negotiated contract for Inuvik Air Terminal
26 Building." The item is dated August 15, 2024, and is
27 signed by the then-Minister of Infrastructure.

1 At Tab 21, there is a briefing note titled
2 "Inuvik Air Terminal Building." The note is dated
3 July 7, 2025.

4 The GNWT objects to the disclosure of
5 the redacted information, claiming either solicitor/client
6 privilege or public interest immunity, also known as
7 Cabinet privilege, and argues that the disclosure of the
8 information would be contrary to the public interest.

9 This matter was in civil chambers for a
10 pre-hearing conference on December 19, 2025. One of
11 the issues discussed at the pre-hearing conference
12 was the redactions made by the GNWT and which
13 party was responsible for bringing an application with
14 respect to those redactions, whether it was the party
15 claiming the privilege or the party challenging the
16 privilege.

17 The pre-hearing conference judge ruled
18 that the party asserting privilege was required to bring a
19 motion to establish the privilege. Following the ruling,
20 the GNWT brought an application to affirm the GNWT's
21 claim of public interest immunity privilege over the
22 redacted portions of the record of decision. I heard that
23 application yesterday.

24 GNWT has amended its position on the
25 public interest immunity claim and some redactions
26 have been removed on the basis that the information is
27 already in the public domain. The affidavit of

1 Tracy St. Denis sets out the solicitor-client and public
2 interest immunity privilege claims to the documents.
3 The supplemental affidavit of Ms. St. Denis details the
4 modification to the GNWT position.

5 GTC does not take a position on the
6 application. GTC argues that the process when the
7 executive seeks to withhold part of a record requires
8 the Court to perform a supervisory and gate-keeping
9 function and determine whether the claim is made out;
10 that the Court's role, regardless of whether the parties
11 take the same position, is to ensure that the public
12 interest immunity claims are not asserted too broadly
13 and to ensure that the integrity of the record on a
14 judicial review is protected. Any claims regarding
15 public interest immunity should be decided by the
16 Court.

17 There is no dispute regarding the
18 GNWT's claims of solicitor-client privilege in the
19 documents. This decision only addresses the claims of
20 public interest immunity privilege over the portions of
21 the redacted documents in Tabs 16, 18 and 21.

22 In matters of judicial review, the tribunal
23 whose decision is being challenged is required to file a
24 record which contains all of the documents relating to
25 the matter. The expectation is that all relevant and
26 material documents or records in the control of the
27 decision-maker will be produced to the Court and form

1 the record on the judicial review.

2 When the decision-maker is the
3 government or minister of a department, as in this case,
4 there can be documents which may not be required to
5 be produced. Solicitor-client privilege and public
6 interest immunity privilege are claims that commonly
7 arise when dealing with ministerial decisions.

8 Public interest immunity privilege, also
9 known as Cabinet privilege, is a common law doctrine
10 which is intended to protect the confidentiality of
11 Cabinet deliberations.

12 The Supreme Court of Canada considered
13 public interest immunity in *Ontario (Attorney General) v*
14 *Ontario (Information and Privacy Commissioner)*, 2024
15 SCC 4. Public interest immunity was recognized as
16 allowing for "responsible and efficient government by
17 enabling collective decision-making and policy
18 formation" by Cabinet: *Black Eagle Mining Corporation*
19 *v Alberta*, 2025 ABCA 22.

20 The current state of the law with respect
21 to public interest immunity privilege was addressed by
22 the Supreme Court of Canada in *Carey v Ontario*,
23 [1986] 2 SCR 637. The Supreme Court of Canada
24 confirmed that Cabinet documents must be disclosed
25 unless disclosure would interfere with the public interest
26 and set out factors to consider in making that
27 determination: paragraph 79.

1 can be summarized as follows:

2 (1) public interest immunity is not a class
3 immunity like solicitor/client privilege;

4 (2) it must be claimed by Cabinet and the
5 justification for each claim must be considered against
6 the competing interest of disclosure;

7 (3) it is not an absolute immunity and a
8 claim for public interest should be determined by the
9 Court whether the claim should be preserved or the
10 document disclosed;

11 (4) the immunity can attach to Cabinet's
12 deliberative process, which can include discussions,
13 consultation, policy formulation, and records that would
14 reveal the substance of Cabinet deliberations; and

15 (5) if the party objecting to the claim
16 establishes a threshold justification for production, the
17 Court may require the document to be produced to the
18 Court and examine the record to determine if the claim
19 for public interest immunity should be maintained.

20 In this case, there has been no argument
21 that the documents in question should be produced to
22 the Court for review.

23 Turning to a consideration of the factors
24 and the documents in question, the decision-making
25 process involved is at the Cabinet level, the highest
26 level of decision-making in the government.

27 The objectives of candour, solidarity and

1 efficiency in the operations and discussions of the
2 Cabinet require that some records and deliberations of
3 Cabinet remain confidential. This serves the public
4 interest in the proper administration of the government.

5 As mentioned, Tab 16 contains a
6 discussion paper, "Department of Infrastructure's
7 challenges with negotiated contract requests" from
8 2024; Tab 18 contains an information item, "Change in
9 approach for negotiated contract for Inuvik Air Terminal
10 Building", also from 2024; and Tab 21 contains a
11 briefing note entitled "Inuvik Air Terminal Building" from
12 2025.

13 The discussion paper does not
14 specifically relate to the ATB project or the decision
15 made by the government regarding how the contract
16 was going to be dealt with. The other two documents
17 do relate to the ATB project. The documents deal with
18 the government's procurement policy in relation to
19 infrastructure projects.

20 There is a high public interest in the
21 management of infrastructure projects, the efficient
22 administration of the budget, making meaningful and
23 reasonable policy decisions, and the proper
24 administration of the government.

25 In reviewing the redacted documents, the
26 approach of the government with respect to the
27 documents has been a tailored approach to redact

1 portions of the documents rather than to completely
2 withhold them. The unredacted portions of the
3 documents are readable and still contain meaningful
4 information. It is not apparent that the redacted
5 portions of the documents would meaningfully impact
6 on the judicial review or have a significant bearing on
7 the decision-making process.

8 The timing of the disclosure is also
9 relevant, as these documents are relatively recent and
10 relate to current policy issues. The ATB project is
11 ongoing and a final decision has not been made
12 regarding the awarding of the contract.

13 So taking into account all of these factors
14 and having reviewed the redacted documents, I
15 decided that it was not necessary for them to be
16 produced to the Court for review. And keeping in mind
17 as well the approach of the government in the
18 redactions made to the documents and the position of
19 the GTC, I am of the view that the government has
20 established the claim of public interest immunity over
21 the redacted portions of the documents in Tabs 16, 18
22 and 21. And then I also note that the supplemental
23 affidavit of Ms. St. Denis modifies the original
24 government position with respect to some of the
25 redacted portions, as those were in the public domain.

26 So that concludes the decision. Okay.

27 Mr. Stanzell, is there anything else we

1 need to address?

2 L. STANZELL: Nothing further from me, Your Honour.

3 THE COURT: Okay. Mr. Faille?

4 M. FAILLE: No. Thank you very much, Your Honour.

5 And with respect to costs, I mean, obviously, you know,
6 in our view, it's not an appropriate instance for an order
7 for costs, given the nature of what was put forward and
8 that it was not opposed, and I think but nevertheless
9 reasonable for the GTC to take the view that it was
10 incumbent on the Court to perform this function, and
11 therefore in our submission, there should be no costs or
12 that costs should simply be in the cause. Subject to
13 that, no further questions. We thank the Court.

14 THE COURT: Okay. Thank you. Mr. Stanzell, did you
15 want to address costs?

16 L. STANZELL: No, I don't have any remarks on that. I
17 think our position is similar to my friend's.

18 THE COURT: Okay. So in the circumstances, there will
19 be no order as to costs. And then so we have the May
20 11th and the afternoon of the 12th set aside. We have
21 the timelines that were established yesterday that were
22 submitted. That document is on the file.

23 So unless there is a need to have a
24 further pre-hearing conference or anything, the next
25 date will be May 11th.

26 M. FAILLE: Very good. Thank you, Your Honour.

27 THE COURT: Thank you.

1 **(PROCEEDINGS ADJOURNED TO MAY 11, 2026)**

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7 **CERTIFICATE OF TRANSCRIPT**

8 Veritext Legal Solutions, Canada, the undersigned, hereby
9 certify that the foregoing pages are a complete and accurate
10 transcript of the proceedings transcribed from the audio
11 recording to the best of our skill and ability.

12 Judicial amendments have been applied to this transcript.

13
14
15 Dated at the City of Toronto, in the Province of Ontario, this
16 29th day of April, 2026.

17
18 *Veritext Legal Solutions, Canada*

19 _____
20 Veritext Legal Solutions, Canada