GIANT MINE
Oversight Board

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Mackenzie Valley Land and Water Board
Attention: Shelagh Montgomery, Executive Director
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July 03, 2018

RE: Reply to Submissions on GMOB's motion to the MVLWB

On May 24, 2018, the Giant Mine Oversight Board (the "**GMOB**") sought a motion under Rule 22 of the *Mackenzie Valley Land and Water Board Rules of Procedure* (the "**Rules**"). The motion requests that the Mackenzie Valley Land and Water Board (the "**MVLWB**") order Indigenous and Northern Affairs Canada ("**INAC**") to apply for an interim water licence to regulate its ongoing discharges into Baker Creek. By June 22, 2018, both Alternatives North and INAC responded to GMOB's motion.

At this time, GMOB wishes to make four points in reply to INAC's June 22, 2018, submission to the MVLWB.

1. Standing

Rule 22 does not limit who may bring a motion to the MVLWB's attention.

However, to the extent that the MVLWB is of the view that GMOB needs to make an application to intervene pursuant to Rule 41 in order to bring the underlying application, please consider this such an application. We note that INAC stated, "If GMOB were to apply for standing under Rule 41, we believe that GMOB should be granted standing".

2. Rule 22 is the Proper Basis for the Motion Sought

INAC argues Rule 22 is not a proper basis for GMOB's motion. INAC further argues that the order sought is not something that has arisen "in the course of a proceeding" or that is required for the ongoing proceeding. We disagree. It is clear that the issue addressed in GMOB's motion is one that has arisen in the context of the licencing process that is the subject of proceeding MV2007L8-0031. The issue GMOB's motion seeks to address is INAC's continued un-licenced use of water and discharge of waste.

3. MVLWB has the Power to Order a Proponent to Apply for a Licence

INAC argues the MVLWB does not have the jurisdiction to order anyone, including the federal government, to apply for a water licence because (a) this power is not expressly conferred on the MVLWB by the MVRMA, and (b) it is not necessarily incidental to MVLWB's role under the MVRMA. We disagree.

(a) Test for Implied Powers

The *MVRMA* does not expressly grant authority to the MVLWB to order a proponent to apply for a water licence. However, in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*[1], the Supreme Court of Canada applied the doctrine of jurisdiction by necessary application to determine whether an administrative tribunal had the necessary jurisdiction to accomplish its statutory mandate[2]. Therefore, the proper question that must be asked is whether the implied power of the MVLWB to order a proponent to apply for a licence is a practical necessity for the MVLWB to accomplish its regulatory mandate.

This common law principle is supported in the federal context by section 31(2) of the federal *Interpretation Act*[3], where it states:

> Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.

(b) MVLWB jurisdiction is established by sections 60(1) and 106 of the MVRMA

In order to determine whether the MVLWB has an implied power to order INAC to apply for a licence, consideration must be given to the legislative framework set out by the MVLWB's home statute[4]. The power to order a proponent to apply for a water licence is necessarily incidental to the MVLWB's jurisdiction as stated in section 60(1) of the *MVRMA*. Section 60(1) provides:

> A board has jurisdiction in respect of all uses of waters and deposits of waste in a federal area in its management area for which a licence is required under this Part and may, in accordance with the regulations, issue, amend, renew and cancel licences and approve the assignment of licences.[5]

INAC argues that this section is not a grant of plenary jurisdiction over all matters respecting uses of waters and deposits of waste in a given area, but rather that it only gives the MVLWB the authority to exercise the listed actions of issuing, amending, renewing and cancelling licences, and approving their assignment. However, the jurisdiction of the MVLWB is broadly stated in this section: "jurisdiction in respect of all uses of waters and deposits of waste … for which a licence

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[1] 2006 SCC 4, [2006] 1 SCR 140 ("**ATCO Gas**").

[2] *Ibid.*, at para 77.

[3] RSC 1985, c I-21.

[4] *ATCO Gas,* at para 36.

[5] *MVRMA,* at s. 60(1).

is required". As a result of this broad jurisdiction, there are actions that the MVLWB "may" undertake - however, those actions are not expressly limiting of the MVLWB's jurisdiction.

INAC's limiting interpretation is only possible if one very narrowly considers the express wording of the section in isolation from the remainder of the legislative scheme, this is not the test for whether an implied power exists. Instead, the section must be read in the greater context of the legislative scheme. In order for the MVLWB to exercise the broad jurisdiction granted to it under section 60(1) of the *MVRMA*, the MVLWB must have the authority to order a proponent to apply for a licence when they are using water or discharging waste without a licence contrary to the *MVRMA*. Without this power, the legislature has created a licencing authority which is powerless to compel proponents to apply for a water licence in circumstances where a licence is clearly required. Such an interpretation of the MVLWB's regulatory powers leads to an absurd result.

In addition, the MVLWB's implied power to order a proponent to apply for a water licence can also be derived from section 106 of the *MVRMA*. Section 106 states:

> The Board may issue directions on general policy matters or on matters concerning the use of land or waters or the deposit of waste that, in the Board's opinion, require consistent application throughout the Mackenzie Valley.

INAC appears to have interpreted section 106 such that the MVLWB only has the authority to issue directions with respect to general matters that require consistent application among the MVLWB and regional panels. INAC bases this interpretation on the fact that section 106 appears in the "part of the Act that addresses the regional panels of the MVLWB, and the respective geographic and subject matter jurisdictions of the MVLWB and its regional panels". While these matters are dealt with in the relevant part of the *MVRMA*, there is nothing explicitly limiting the reference to "matters concerning the use of land or water or the deposit of waste" to general matters rather than matters pertaining to a particular undertaking or proponent. In addition, there is nothing limiting the requirement of "consistent application throughout the Mackenzie Valley" to matters of application among the regional panels as opposed to consistent application of the water licencing regime to proponents. Furthermore, the MVLWB cannot ensure consistent application throughout the Mackenzie Valley if it has no power impose its authority on proponents operating without a licence.

(c) The Implied Power is Derived from the Mandate of the MVLWB

In addition to examining specific provisions, it is also important to examine the broader legislated mandate and objectives of the MVLWB in order to determine whether an implied power to compel an application for a water licence can be established. In *Nishnawbe Aski Nation v. Eden*[6], the Ontario Court of Appeal enumerated criteria which it stated were taken from *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, for determining whether a power is necessary for a statutory body to fulfill its mandate. These include "when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling

[6] 2011 ONCA 187.

its mandate" and "when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction"[7].

Turning to the *MVRMA*, the express statutory mandate of the MVLWB is to "provide for the conservation, development and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley"[8].

In carrying out its mandate, the MVLWB is tasked with the conservation and development of water resources in the Mackenzie Valley by implementing and operating a water licencing regime. In order for the MVLWB to properly exercise these regulatory powers, the MVLWB must be able to cause proponents to comply with the licencing regime, especially where a proponent has been operating and continues to operate without a licence contrary to the *MVRMA*. The legislature has given the MVWLB responsibility and powers over the licencing regime in order to fulfill its express mandate. The implied power to order a proponent to apply for a licence is reasonable and necessary for accomplishing this mandate.

While the *MVRMA* sets out aspects of the licencing regime in more detail, the mandate of the MVLWB is defined very broadly in that its objective is to provide for the conservation, development and utilization of land and water resources in the Mackenzie Valley for the benefit of residents and Canadians. This is sufficiently broad to suggest that the legislature intended to implicitly confer the authority to order INAC to apply for a water licence. To suggest that the legislature did not intend to do so would be to argue that it did not intend to give the MVLWB the tools necessary to accomplish its regulatory mandate.

We respectfully submit that the proper interpretation of the *MVRMA* is that it confers on the MVLWB by practical necessity the authority to order a proponent to apply for a water licence. This power is derived from both sections 60(1) and 106, as well as the mandate of the MVLWB under the *MVRMA*.

4. INAC's Decision Is Not Immune From MVLWB Review

INAC argues the MVLWB does not have authority to review a decision made by the Minister under section 89 of the *MVRMA* and, further, authority to review this type of decision is allocated exclusively to the Federal Court under the *Federal Courts Act*[9]. That is not so.

INAC's decision not to apply for a water licence is in substance an operational decision made by INAC as a proponent of the Giant Mine Remediation Project. When INAC is acting as a proponent, it is acting in a private capacity, similar to any other proponent engaged in an activity regulated by the *MVRMA*.

INAC's claim that this decision was made by the Minister under section 89 of the *MVRMA* does not change the fact that its decision has been and continues to be an operational decision. This is

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[7] *Ibid.*, at para 34.

[8] *MVRMA*, at s. 101.1.

[9] RSC 1985, c F-7, ss 18 and 18.1.

evidenced by the fact that INAC has continued to operate without a water licence for over ten years.

The distinction should be thought of this way:

a) in its capacity as a private proponent, INAC may be required (like other private proponents) to get a water licence;

b) in its capacity as a public enforcement body, INAC's decision not to enforce the *MVRMA* requirement for a licence against itself could be the subject of a judicial review.

These are two separate and distinct issues that INAC has conflated.

Because the decision not to apply for a water licence is properly characterised as being made by INAC in its private capacity as a proponent, it does not necessarily fall within the purview of judicial review. In order for a decision to be susceptible to judicial review, it must be concerned with a state action of a public nature. In order for a decision to be a "public law" decision, two requirements must be met:

> 1) The power to make the decision must ultimately emanate from the government (an exercise of a statutory power or statutory power of decision); and
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> 2) The decision must be an exercise of the "public" authority conferred on the decision maker in carrying out their public mandate. It cannot be a government actor or tribunal acting in a "private" capacity (for example in its contractual relationships with other entities).[10] (emphasis added)

In attempting to determine whether a decision made by a public actor is in substance a private law decision or sufficiently public such that it is amenable to judicial review, the full context of the decision must be considered.[11] In INAC's case, the context is not one of an environmental emergency where it would be appropriate for the Minister to exercise discretion under section 89 of the *MVRMA*. INAC's decision to not apply for a licence has simply become the operational procedure of the proponent of the Giant Mine Remediation Project. As such, INAC's decision is not subject to judicial review under the *Federal Courts Act* because it is not properly characterized as state action of a public nature. Rather, it has been an ongoing operational decision made by INAC in its private capacity as the proponent of the Giant Mine Remediation Project. A proponent's operational decisions are not immune from MVLWB review. They are firmly within MVLWB's jurisdiction.

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[10] *Milberg v. North York Hockey League,* 2018 ONSC 496, at para 22.

[11] Robert W Macaulay, QC, and James LH Sprague, LLB, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2017) (loose-leaf updated 2018, release 5) vol 3 at p 28-21.

Conclusion

In conclusion, GMOB is of the view that none of INAC's issues affect the authority of the MVLWB to order INAC to apply for an interim water licence to regulate its ongoing discharges into Baker Creek.

Also, GMOB notes that none of the land-claim partners to the MVRMA (i.e., the Tłı̨chǫ, Sahtu, and Gwich'in) have submitted comments on the question of Board's authority to require INAC to obtain a water licence. It isn't clear whether these organizations had no opinion on the matter or whether they were unaware that the Board's ruling in this case may represent an interpretation of the *MVRMA* that may be general in nature instead of specific to the Giant Mine Remediation Project. GMOB respectfully suggests that the Board consider seeking the specific opinions from the other parties to the *MVRMA* prior to making a ruling on this issue.

Kindly contact the undersigned with any questions that you may have in this regard.

Yours truly,

Dr. Kathleen Racher
Chair, Giant Mine Oversight Board