



**Mackenzie Valley Land and Water Board**  
**7th Floor - 4922 48th Street**  
**P.O. Box 2130**  
**YELLOWKNIFE NT XIA 2P6**  
**Phone (867) 669-0506**  
**FAX (867) 873-6610**

**Reasons for Decision on Motion**

Issued pursuant to  
 Section 72.25 of the *Mackenzie Valley Resource Management Act* (MVRMA)

<b>Water Licence Application – Motion to the Board</b>	
<b>Reference/File Number</b>	MV2007L8-0031
<b>Applicant</b>	Department of Indian and Northern Affairs Canada (INAC)
<b>Project</b>	Remediation work at the former Giant Mine, Yellowknife, NT
<b>Motion</b>	Made by the Giant Mine Oversight Board (GMOB) To request that INAC be ordered to apply for an interim water licence to regulate its ongoing discharges until the parameters of its type A water licence have been finalized.

**Decision from Mackenzie Valley Land and Water Board  
 Meeting of**

September 20, 2018

These Reasons for Decision set out the Mackenzie Valley Land and Water Board’s (MVLWB or Board) process and decisions on a Motion made by the Giant Mine Oversight Board (GMOB) to the Board on May 24, 2018 for Water Licence MV2007L8-0031 (Licence) for the Giant Mine Remediation Project.

A summary of the GMOB Motion and the regulatory process to address the Motion is provided in Section 1.0 below, followed by a summary of the legal argument provided by both GMOB and the Department of Justice Canada on behalf of the Government of Canada (Canada), including the Board’s rulings in Section 2.0. Section 3.0 provides a summary of the Board’s conclusions.

**Table of Contents**

**1.0 Background and Regulatory Process .....2**

    1.1 The Facts Provided by GMOB ..... 2

    1.2 Elements of the GMOB Motion and Responses ..... 3

**2.0 GMOB Legal Argument and Canada Response.....3**

    2.1 GMOB Standing..... 3

    2.2 Rule 22 and the Nature of the GMOB Motion ..... 4

    2.3 MVLWB Jurisdiction to determine whether INAC needs a Type “B” Licence ..... 5

    2.4 MVLWB Jurisdiction by Necessary Implication ..... 6

    2.5 Section 89 of the MVRMA..... 10

    2.6 Whether an EA might be needed if a “B” Licence were applied for ..... 11

**3.0 Summary and Conclusions.....11**

## **1.0 Background and Regulatory Process**

On May 24, 2018 the Giant Mine Oversight Board (GMOB or Oversight Board), established pursuant to the *Giant Mine Remediation Project Environmental Agreement*, filed a motion with the MVLWB requesting an order in the proceeding currently underway for a type “A” water licence MV2007L8-0031 (Licence) for remediation work at the former Giant Mine site in Yellowknife, NT. The proposed order would require the Department of Indian and Northern Affairs Canada (INAC) to apply for an interim “B” water licence to authorize periodic discharges of waste into Baker Creek at the Giant Mine site.

The Board notified the Giant Mine distribution list for this proceeding of the GMOB Motion and set out a process to respond. The specific wording of the GMOB Motion is set out below:

Pursuant to Rule 22 of the Rules, the Oversight Board submits this letter as a motion to request that INAC be ordered to apply for an interim water licence to regulate its ongoing discharges until the parameters of its type A water licence for the Project have been finalized (the Motion).

The Oversight Board respectfully submits that a narrowly-focused five-year type B water licence that addresses effluent discharge would be appropriate.

Submissions in response to the GMOB Motion were received from Alternatives North, the Yellowknives Dene First Nation (YKDFN)<sup>1</sup> and the Department of Justice Canada on behalf of the Government of Canada (Canada), all via the Online Review System. GMOB replied to these submissions on July 3, 2018.

Below, the facts and legal arguments provided in response to this Motion are reviewed and the MVLWB sets out its decisions and reasons.

### **1.1 The Facts Provided by GMOB**

GMOB indicated that Canada assumed responsibility for the Giant Mine Site (the Site) in 1999 when Royal Oak Mines went bankrupt. Water Licence MV2007L8-0031 (the Licence) is being sought to carry out remediation of the Giant Mine Site (the Project). Since 2005, Canada, through INAC has managed the Project.

INAC applied for the Licence in 2007. This application was subject to an Environmental Assessment (EA) pursuant to Part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA or Act). The Mackenzie Valley Environmental Impact Review Board (MVEIRB) released its report of EA in 2013<sup>2</sup> and the Federal and responsible Ministers approved that report in August of 2014.

The report the Ministers approved included 26 measures and work is ongoing to satisfy them. The establishment of GMOB in 2015 was the result of one of the approved measures from the Giant Mine report of EA. Consequently, the water licensing process which resulted in the referral to EA has not yet formally resumed.<sup>3</sup>

---

<sup>1</sup> The YKDFN submission was received after the June 22, 2018 deadline, but was still be considered by the Board.

<sup>2</sup> MVEIRB Report of Environmental Assessment (EA 0809-001) for the Giant Mine Remediation Project.

<sup>3</sup> The Board has been advised that the licensing process will be reinitiated in early 2019.

In its 2016 Annual Report, GMOB expressed concerns about INAC's routine multi-year discharges of treated effluent into Baker Creek in the absence of a water licence. INAC is operating the Site in reliance on authorities set out in section 89 of the MVRMA, has not applied for an interim water licence, and continues to discharge water into Baker Creek. GMOB repeated its concerns about this situation in its 2017 Annual Report.

None of the other parties to this Motion process added additional facts or commented on any of the specific facts raised by GMOB.

## **1.2 Elements of the GMOB Motion and Responses**

The Board notes that neither Alternatives North nor the YKDFN submissions offered any legal analysis or argument in this matter. These parties simply corresponded with the Board expressing their support for the GMOB Motion. The Canada response was entirely legal argument.

Given the nature of their submissions, the reasons below will make no further specific references to the Alternatives North or YKDFN submissions. Their submissions stand or fall with those of GMOB.

GMOB's argument was divided into five components:

1. INAC's 2007 Application is an ongoing regulatory process and the Oversight Board has standing to intervene (the Standing Question);
2. The MVLWB has jurisdiction to decide whether INAC requires a water licence;
3. INAC requires a water licence to discharge water into Baker Creek;
4. INAC's reliance on section 89 [of the MVRMA] is unreasonable; and
5. An application for an interim water licence would not trigger an environmental assessment.

Canada responded to the Standing Question and then in detail to the jurisdictional questions related to MVLWB authority to make the kind of order requested by GMOB under the MVRMA. GMOB replied specifically to Canada's legal argument on July 3, 2018. Below the Board's reasons are set out using the framework set out by GMOB.

## **2.0 GMOB Legal Argument and Canada Response**

### **2.1 GMOB Standing**

GMOB argues that the proceeding for the Licence is current and ongoing and that all Board proceedings are subject to its Rules of Procedure (Rules). The EA has been completed and in August 2014, the MVLWB advised INAC of the information required to "reinitiate" the water licence application. The GMOB Agreement provides that it can participate in Giant Mine regulatory processes. The GMOB Motion is made pursuant to Rule 22 as a "request for ruling" (Motion).

Canada notes that GMOB is not yet formally a party to the MV2007L8-0031 proceeding, but indicates that if it were to apply that “GMOB should be granted standing...”.<sup>4</sup> The GMOB reply of July 3, 2018 includes a request for standing.

**The Board’s Ruling:**

The MVLWB recognizes that the GMOB Agreement is the outcome of the Giant EA and that GMOB has been actively involved in matters related to the Project for several years. Board practice in relation to standing requests made in advance of public hearings has generally been to encourage participation in the interests of engagement and consultation. It is unusual for an organization to request party status after making a request to the Board, but we note that Canada supports this request for status.

In the circumstances, the MVLWB has decided to grant GMOB standing and party status. It is likely in any event that GMOB will seek to play its mandated role once the Licensing process is reinitiated. In addition, this grant of standing will enable the Board to move on and address the more substantive jurisdictional questions raised by the GMOB Motion. In the Board’s view its rulings on these questions will address important matters and will contribute to shaping the framework for the Licensing proceeding.

**2.2 Rule 22 and the Nature of the GMOB Motion**

This issue was raised in response by Canada. It argued that the wording of Rule 22 could not provide a basis for the GMOB Motion. Rule 22 reads as follows:

Any issue that arises in the course of a proceeding that requires a decision or ruling from the Board shall be brought to the Board’s attention by way of a written motion. The motion shall include a clear, concise statement of the relevant facts, an indication of the decision or ruling being sought from the Board and the reasons why the decision or ruling should be granted. (emphasis in Canada’s argument)

Canada argued that the question about the need for an interim licence did not come up “in the course of the Licence proceeding”. They say the order requested is not required to resolve an issue in the MV2007L8-0031 proceeding which is in relation to an “A” licence. The ruling will not advance any material issue in that proceeding and it is solely in pursuit of a separate interim “B” licence. Canada characterizes the Motion as being “collateral to the proceeding in which it is made”.

The GMOB reply simply asserts that this Motion has arisen in the context of the “A” licensing process and results from INAC’s continued unlicensed use of water.

**The Board’s Ruling:**

The GMOB reply is not compelling. The issuance of a “B” licence does not seem to the Board to advance the “A” licensing process. The MVLWB is also of the view that an application for an interim “B” licence would require a separate proceeding and be subject to section 62 of the MVRMA.

The Board’s engagement and consultation processes are important elements of the way it conducts its proceedings and meets its legal obligations. Conducting a process for the interim licence within an

---

<sup>4</sup> Justice Canada submission June 22, 2018 page 2.

ongoing proceeding would lead to confusion and duplication. In the Board's reading of the MVRMA there is no provision for the MVLWB to issue two licences in a single proceeding. In addition, the MVRMA does not provide explicit authority for a Land and Water Board (LWB) to issue an "interim" licence.

So far in this proceeding INAC has not indicated a need for such an interim licence. Changing the nature of the ongoing proceeding could raise fairness concerns for INAC and other parties. The MVLWB is not convinced that it has the authority to issue an interim "B" licence in the manner requested by GMOB. The Board agrees with Canada's interpretation of Rule 22 and that the Motion for an interim "B" licence is collateral to the Licence proceeding. In the Board's view a separate proceeding would be required to secure a "B" licence for the Project. The Motion can be dismissed on this basis alone.

Despite this finding, the Board considered all of the GMOB arguments and Canada responses, as set out below. We consider the jurisdictional issues they raise to be important and the Board's rulings on them to be precedents for future proceedings.

### **2.3 MVLWB Jurisdiction to determine whether INAC needs a Type "B" Licence**

GMOB refers to subsection 60(1) of the MVRMA which states that a board has jurisdiction "in respect of all uses of water..." and to the MVLWB authority to issue directions on general policy matters and matters concerning the use of land or waters that require consistent application throughout the Mackenzie Valley found in section 106 of the MVRMA. GMOB argues that the MVLWB has authority under the *Mackenzie Valley Federal Areas Waters Regulations* (MVFAWR) to issue a "B" licence for the kind of activity going on at Giant and more specifically for the deposits of waste going into Baker Creek.<sup>5</sup> GMOB also argues that the MVRMA applies to and binds Canada and INAC. Canada takes no issue with this specific point.

Canada responds, however, that section 60 simply sets out the geographic area in which the MVLWB may undertake the actions listed in that section, that is to, "issue, amend, renew, and cancel licences ...." and argues that this section is not a grant of plenary jurisdiction over all matters respecting the use of waters and deposits of waste in a given area. Canada points out that neither subsection 60(1) nor section 72.12 which deals with licensing in federal areas gives the Board authority to compel an application for a licence.

Canada then turns to section 106 of the MVRMA arguing that it does not provide authority to issue the order sought either. That section authorizes "directions on general policy matters" not a direction aimed at a specific undertaking or a specific water user.

Canada goes on to argue that there is no specific provision in the MVRMA which authorizes the MVLWB to order a person to apply for a water licence.

Canada's basic argument is that there is no explicit grant of power to the Board in the MVRMA to do what GMOB asks for and that a review of the whole Act does not lead to the conclusion that such authority is necessarily incidental to the MVLWB's role.

---

<sup>5</sup> Page 4 GMOB May 24, 2018 letter.

The GMOB response is framed around the question of whether the MVRMA can be interpreted to imply that the Board has the power to compel INAC to apply for a “B” water licence

#### **The Board’s Ruling:**

Neither GMOB nor Canada suggest there is explicit power in the MVRMA for the Board to order INAC to apply for a water licence. So, unless such power can be implied from a review of the Act as a whole, the Board does not have jurisdiction to order INAC to apply for a licence. In that case, the GMOB Motion should fail because the MVLWB does not have the power to order INAC to apply for a “B” water licence for its releases of effluent into Baker Creek.

The issue of implied jurisdiction based on the doctrine of jurisdiction by necessary implication is discussed in more detail in part 4.5, below.

GMOB did not argue in its reply that jurisdiction to issue the order was explicit.

In the Board’s view, section 106 is about “directions on general policy matters” and a plain reading of the section indicates that it is not intended to give authority to the MVLWB in specific instances or proceedings. It does not contemplate the MVLWB issuing an “order” or that kind of “direction” at all. Section 60 of the MVRMA may not be as narrow a base of authority as argued by Canada, but on its face, it restricts the Board to licensing “in accordance with the regulations”.

Review of these statutory provisions does not provide any clear authority for the Board to approve the GMOB Motion. Indeed, the GMOB argument depends entirely on the doctrine of jurisdiction by necessary implication. The Board review and analysis of argument related to this kind of jurisdiction are set out below.

### **2.4 MVLWB Jurisdiction by Necessary Implication**

#### **Legal Background:**

Administrative tribunals are statutory creations.<sup>6</sup> They cannot exceed the powers that are granted to them by their enabling statute.<sup>7</sup> They must adhere to the confines of their statutory authority, or jurisdiction, and cannot trespass in areas where the legislature has not assigned them authority.<sup>8</sup> The powers of any administrative tribunal may also exist by necessary implication from the wording of the Act, its structure and its purpose.<sup>9</sup>

Tribunals and boards obtain their jurisdiction over matters from two sources:

1. express grants of jurisdiction under various statutes (express powers), and
2. the common law, by application of the doctrine of jurisdiction by necessary implication (implicit powers).<sup>10</sup>

---

<sup>6</sup> *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 35 [ATCO Gas].

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Bell Canada v Canadian Radio-Television & Telecommunications Commission*, [1989] 1 SCR 1722 at para 51 [Bell Canada].

<sup>10</sup> *ATCO Gas*, *supra* note 6 at para 38.

The doctrine of jurisdiction by necessary implication holds that the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, the powers which are practically necessary for the accomplishment of the purposes of the statutory regime created by the legislature.<sup>11</sup>

To apply the doctrine, the Courts engage in a statutory interpretation exercise to determine whether the entire statutory scheme of an enabling statute implies jurisdiction on a board.<sup>12</sup> Although Courts must refrain from unduly broadening the powers of regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.<sup>13</sup>

“When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.”<sup>14</sup>

The Ontario Energy Board in *Re Consumers’ Gas Co*<sup>15</sup> listed the circumstances in which the doctrine of jurisdiction by necessary implication may be applied:

1. When the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
2. When the enabling act fails to explicitly grant the power to accomplish the legislative objective;
3. When the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
4. When the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
5. When the legislature did not address its mind to the issue and decide against conferring the power to the Board.<sup>16</sup>

This is the legal backdrop against which the GMOB and Canada’s arguments about implied jurisdiction must be addressed.

### **The Parties’ Arguments and Reply:**

The initial GMOB argument in its May 24, 2018 letter did not specifically argue that the MVLWB had jurisdiction by necessary implication. GMOB specifically relied on “implied powers” in its July reply.

Canada argues that the MVRMA does not grant the Board jurisdiction to make the order requested either expressly or by implication.

---

<sup>11</sup> *Ibid* at para 51.

<sup>12</sup> *Ibid* at para 49.

<sup>13</sup> *Bell Canada*, *supra* note 9 at para 51.

<sup>14</sup> *Dow Chemical Canada Inc v Union Gas Ltd*, 1982 CarswellOnt 753 (Ont Div Ct) at para 60 [*Dow Chemical*].

<sup>15</sup> (1987), EBRO 410-II/411-II/412-II.

<sup>16</sup> *ATCO Gas*, *supra* note 1 at para 73, citing *Re Consumers’ Gas Co*, (1987), EBRO 410-II/411-II/412-II at para 4.73.

The GMOB reply relies on the *Atco Gas* case and admits that: “The MVRMA does not expressly grant authority to the MVLWB to order a proponent to apply for a water licence.”<sup>17</sup> The question, GMOB argues, 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”.<sup>18</sup>

GMOB quotes subsection 60(1) of the MVRMA which is broadly worded. It says that the list of actions set out in this section must be interpreted in the context of the rest of the statute and that Canada does not do this. GMOB does not, however, point to any other specific sections of the MVRMA which support its assertion that the jurisdiction to make an order to apply for a water licence must be implied in the MVLWB. GMOB asserts: “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 licensing authority which is powerless to compel proponents to apply for a water licence in circumstances where a licence is clearly required.”<sup>19</sup>

GMOB makes a similar argument against the interpretation of section 106 advanced by Canada, again based on simple textual analysis. GMOB argues that the MVLWB cannot ensure consistent application of the legislation throughout the Mackenzie Valley in the absence of the jurisdiction to order an application for a licence.<sup>20</sup>

GMOB also argues that the MVLWB power can and must be found from a review of the full mandate of the Board as set out in section 58 of the MVRMA. The argument around section 58 is similar to that made in respect of subsection 60(1).

#### **The Board’s Ruling:**

GMOB clearly identifies the relevant cases but only makes partial use of these authorities. The GMOB argument could have been more systematic in working through the circumstances which must be present for the doctrine of jurisdiction by necessary implication to apply. Below we do so using the criteria set out above:

1. When the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;

The legislative scheme is intended to achieve the conservation, development and utilization of land and water resources, and the LWBs role in this scheme is set out in sections 58, 60 and 60.1 of the MVRMA. The key question in this regard is determining the proper scope of the Board’s mandate in light of the role set out in the MVRMA. Review of Parts 3 and 4 of the MVRMA indicates that (in respect of water) this role is restricted to licensing the use of water and deposit of waste into water – when such activities are above regulatory thresholds. Once a licence is issued and in force, the LWBs have an encompassing role in regulating licensed activities. In respect of the licensing process the LWBs have a broad role in management of water resources, including limited enforcement powers.

---

<sup>17</sup> GMOB Reply July 3, 2018, page 2 paragraph 2.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* page 3at paragraph 1.

<sup>20</sup> *Ibid.* at paragraph 3.

Is it necessary, however, for the Board to have the jurisdiction to force a non-licensed user of water or depositor of waste to get a licence in order to conserve and develop water resources? The Board is of the view that the government's enforcement and punitive powers and roles supersede those of the Board in such circumstances. Will the water resources of the Mackenzie Valley be degraded or destroyed without implying the power to order a water licence application as part of MVLWB jurisdiction? We suggest this would only be the case if the broad authorities reserved to government – enforcement in particular – did not exist or were not being exercised. Those powers do exist and there is no evidence of serious problems resulting from INAC activities at the Site before the Board.

The Board's mandate is integral to but does not encompass the whole of the scheme for water management established by government. The preamble to the MVRMA makes it clear that the system for water management is intended to be "integrated" and thus the MVLWB operates as a co-manager. Review of the Act as a whole makes it clear that distinct roles are set out for the LWBs and governments in relation to water management. It seems to the Board that the legislative scheme and the land claims which underlie it do not anticipate an overarching enforcement role for the MVLWB.

2. When the enabling act fails to explicitly grant the power to accomplish the legislative objective;

The parties agree that the MVRMA does not explicitly grant the power to the Board to order a person who is using water or discharging waste above regulatory threshold to apply for a water licence.

3. When the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

The analysis above suggests that the Board's mandate is limited to licensing and that government also plays an important role in water resource management, particularly in respect of enforcement (i.e. the requirement to obtain a licence).

4. When the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity;

The Board, in fact no LWB to our knowledge, has attempted to exercise the power to order an application for a licence.

5. When the legislature did not address its mind to the issue and decide against conferring the power to the Board.

Review of the MVRMA as a whole is required and once completed it indicates a statutory framework in which the MVLWB plays a limited but important part. Until the advent of land claims, water boards had no role in enforcement. Even after the MVRMA was enacted the role of the LWBs in enforcement is limited as set out in subsection 60(2) of the Act. The Boards are primarily licensing authorities. Enforcement is primarily the job of government and Inspectors appointed by the Minister. The LWBs play no direct role in enforcement or prosecutions when they take place.

If a violation of the Act is taking place the primary responsibility to act falls on the Inspectors and the government. Note that subsection 60(2) only empowers a LWB when a licence is already in place. The MVRMA does not grant any other explicit enforcement authority to the LWBs.

On review of the MVRMA it appears that government clearly set its mind to the role of the Boards and to the approach it wanted to take to enforcement. It did not choose to make the MVLWB the primary authority in such instances. It may also be in the public interest, when waste is being discharged without a licence, to have a broader range of enforcement and punitive powers available than are set out in subsection 60(2). A scheme which depended on the LWBs to step in and order an application for a licence could be less protective of the environment.

The scope of the water resource management framework set out in the MVRMA is very broad. The powers granted to the LWBs are driven by land claims requirements and co-management commitments. The role assigned to the Board is limited. Simply put, there is more to water resource management in the Mackenzie Valley than the role assigned to the LWBs. Governments are major players and it is reasonable for the Board to conclude that the limits on LWB roles and authorities were considered carefully when the MVRMA was drafted and deliberately crafted. In conclusion, it is not clear that Parliament intended the MVLWB to have the power to order an application for a licence and not clear that such authority needs to be implied in the MVRMA. As a consequence, the MVLWB finds that it does not have jurisdiction by necessary implication or otherwise to order Canada to apply for a “B” water licence for the Project.

## **2.5 Section 89 of the MVRMA**

### **The Board’s Ruling:**

Given its conclusion about implied jurisdiction, the Board does not need to address in detail the section 89 arguments advanced by GMOB. The Board does, however, agree with and accept the position advanced by Canada in relation to the GMOB arguments about section 89 of the MVRMA.

The primary basis of the GMOB argument rests on its suggestion that it is unreasonable for INAC to continue to rely on section 89 of the MVRMA when there is no emergency, and more than a decade has passed since INAC took control of the Site. Review of section 89 indicates, however, that the section sets out no requirement for an emergency for the Minister to act or for INAC to continue to be active at the Site. In addition, the Board notes that since 2005 there has been considerable activity on behalf of INAC and Canada at the Site as well as a comprehensive EA and follow up. INAC has made considerable efforts and clean up expenditures to improve and stabilize the Site. Moreover, INAC has applied for a Licence and has been working to meet the requirements of the EA measures since 2014 so that it can reinstate the licensing proceeding.

This is not a case where there is simply an unlicensed and potentially illegal deposit of waste. GMOB simply disagrees with INAC that section 89 is proper legal authority for Canada’s actions at the Site. But the Site was abandoned and deemed that it constituted a significant risk to the environment, health and property of Yellowknife residents. Finally, GMOB has provided no evidence that the INAC releases of effluent are a risk that can only be managed by licensing.

In relation to the question of whether the MVLWB has implied jurisdiction to review the Minister’s action under section 89 of the MVRMA, the same five criteria listed above apply to the GMOB argument about MVLWB authority to require a licence. Based on a review of the MVRMA provisions related to the

MVLWB it is difficult to see how the legislative scheme could be interpreted to imply that the Board has the jurisdiction to determine whether the Minister's reliance on section 89 is reasonable. Arguing that INAC has made operational decisions since the Minister invoked section 89 does not change the fact that GMOB is asking the Board to imply that it has jurisdiction to review and essentially overrule the Minister's reliance on that section of the MVRMA.

On application of the five criteria the Board finds that this analysis does not support the GMOB argument. In the absence of implied jurisdiction the MVLWB has neither the authority nor the need to consider whether continued reliance on section 89 is reasonable.

## **2.6 Whether an EA might be needed if a "B" Licence was applied for**

### **The Board's Ruling:**

GMOB raised the question of whether an application for a "B" licence would "trigger an environmental assessment". Having raised the issue GMOB then argues that the application would be exempt from Part 5 of the MVRMA because of section 157.1 of the Act. Canada does not respond to this argument because of their view that the MVLWB has no jurisdiction to deal with the GMOB Motion. The basic question is thus whether an application for a "B" licence made by INAC would be subject to screening. The MVLWB has held that it lacks jurisdiction to order Canada to apply for an interim "B" licence and that it lacks jurisdiction to review and override the INAC Minister's reliance on section 89 of the MVRMA as a basis for the ongoing management of the Site. Consequently, the question of whether an environmental assessment of the issuance of a "B" licence might be required does not need to be answered by the Board.

## **3.0 Summary and Conclusions**

The submission and reply of GMOB and the responses of Canada, Alternatives North and YKDFN have been carefully reviewed and considered by the Board.

1. The Board has granted GMOB standing in the proceeding for MV2007L8-0031. This allows the Board to deal with all the GMOB submissions on their merits.
2. On the question of whether the GMOB use of Rule 22 of the MVLWB Rules of Procedure is appropriate, the Board held that the GMOB Motion is collateral to the main proceeding in MV2007L8-0031.
3. On the two main jurisdictional questions – authority to order an application for a water licence and authority to review the Minister's decision under section 89 of the MVRMA – the Board finds that it is without jurisdiction to address these matters.

SIGNATURE

Mackenzie Valley Land and Water Board



---

Mavis Cli-Michaud, Chair

October 3, 2018

---

Date