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Mackenzie Valley Land and Water Board
via Shelagh Montgomery, Executive Director

**Re: MVLWB's Request for Comments on Board Jurisdiction, relating to the
GMOB Motion in MV2007L8-0031**

The Mackenzie Valley Land and Water Board requested submissions on whether it has the jurisdiction to grant the order sought in a motion by the Giant Mine Oversight Board. This letter responds for the Government of Canada.

We respectfully submit that the order sought in the motion would be outside the MVLWB's jurisdiction, and should be dismissed on that basis. As a statutory tribunal, the MVLWB has the jurisdiction established by its enabling legislation, the *Mackenzie Valley Resource Management Act*. The Act does not authorize the MVLWB to adjudicate this motion or to grant the order sought.

There is no provision in the Act that authorizes the MVLWB to compel anybody to apply for a water licence. This is also true specifically in respect of the federal Minister, who has specific statutory authorities under the Act. As with the general public, there is no authority to compel her to apply for a water licence. Nor is it within the authorities of the MVLWB to review or override the federal Minister's decision-making on how to conduct her role under section 89 of the Act.

Background

The Giant Mine Oversight Board filed a motion under Rule 22 of the *Mackenzie Valley Land and Water Board Rules of Procedure*.

That motion was filed within matter MV2007L8-0031, which is the MVLWB's proceeding to consider INAC's application for a type A water licence in relation to the Giant Mine Remediation Project. That proceeding began by a water licence application filed in 2007.

The motion seeks to have the MVLWB to order INAC "to apply for an interim water licence to regulate its ongoing discharges until the parameters of its type A water licence for the Project [applied for in MV2007L8-0031] have been finalized."

The MVLWB has asked reviewers to "provide comments on whether the MVLWB has jurisdiction or authority to order INAC to apply for a water licence" (MVLWB's Online Review System). It is our understanding that jurisdiction is being addressed as a preliminary matter, and Rule 24 would apply if required, allowing further submissions on the merits of the motion if the matter proceeds.

Preliminary Matters

Standing of GMOB

As a preliminary matter, we observe that GMOB has not – at least to our knowledge – applied to the MVLWB for standing in MV2007L8-0031. We suggest that standing should be addressed by the MVLWB as a preliminary matter.

If GMOB were to apply for standing under Rule 41, we believe that GMOB should be granted standing, subject to the MVLWB's discretion and ordinary procedures. It is consistent with the *Giant Mine Remediation Project Environmental Agreement* that GMOB should have the ability to intervene appropriately in regulatory proceedings.

Rule 22 Is Not a Basis for this Motion

In our view, MVLWB Rule 22 is not a proper basis for the motion. That rule states:

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 [underlining added].

The order sought is not something that has arisen “in the course of a proceeding”, nor is a decision required for the ongoing proceeding. The order sought:

- (i) is not required in order to resolve an issue that has arisen within MV2007L8-0031, which is the application for a type A water licence; and
- (ii) does not advance any material issue within that proceeding.

The motion is manifestly not for the purpose of affecting the type A licence that is under consideration in MV2007L8-0031. It is solely in pursuit of a separate, interim license meant to last until the type A licence can issue.

This motion is collateral to the proceeding in which it is made. It is a motion in one proceeding to compel the commencement of another proceeding, and it is made on a basis and with objectives that are external to the original proceeding. It is therefore not something to which Rule 22 properly applies, and the MVLWB could dismiss the motion on this basis alone.

**Submissions on Jurisdiction:
The Order Sought is Not Authorized by the Act**

The Cited Provisions Do Not Establish Jurisdiction

The MVLWB is a statutory administrative tribunal. As such, it has no inherent powers to adjudicate issues or make orders that affect substantive rights or obligations. All of its authority must flow directly and expressly from its enabling legislation, in this case the *Mackenzie Valley Resource Management Act*, or must be necessarily incidental to the role it is expressly given by its enabling legislation.¹

In our respectful submission, the jurisdiction to adjudicate this motion is neither expressly granted by the *Mackenzie Valley Resource Management Act*, nor is it necessarily incidental to MVLWB's role under the Act.

Neither of the two provisions cited by the motion applicant authorize the MVLWB to compel somebody to apply for a water licence. The first is section 60 of the Act, which reads in full:

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| <p>60 (1) 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 <u>and may, in accordance with the regulations, issue, amend, renew and cancel licences and approve the assignment of licences</u> [underlining added].</p> | <p>60 (1) L'office a compétence, dans sa zone de gestion, en ce qui touche toute forme d'utilisation des eaux ou de dépôt de déchets dans des zones fédérales pour laquelle un permis d'utilisation des eaux est nécessaire sous le régime de la présente partie. <u>Il peut, à cet égard et en conformité avec les règlements, délivrer, modifier, renouveler ou annuler un tel permis d'utilisation des eaux ou en autoriser la cession</u> [underlining added].</p> |
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Paragraph 60(1) is not a grant of plenary jurisdiction over all matters respecting uses of waters and deposits of waste in a given area. The opening words of paragraph 60(1) provide the geographic area and subject matter in which the board will exercise the listed actions of issuing, amending, renewing and cancelling licenses, and approving their assignment. Those authorities are further elaborated and particularized throughout Part 3 of the Act. Section 72.12 deals with initiating licensing proceedings in a federal area, and neither that section nor any other includes the authority for a board to compel an application for a license.

¹ *Interpretation Act*, R.S.C. 1985, c., I-21, s. 31(2).

The second provision cited by the motion applicant deals with the MVLWB's authority to give policy direction for the purposes of creating consistency throughout the Mackenzie Valley (section 106). That provision reads:

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| <p>106 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.</p> | <p>106 L'Office peut établir des lignes directrices concernant soit des orientations générales, soit des questions relatives à l'utilisation des terres ou des eaux ou au dépôt de déchets dont la solution nécessite, à son avis, une application uniforme dans la vallée du Mackenzie.</p> |
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Respectfully, this is not an authority to issue the order sought. It is not a grant of plenary authority to give directions; it has a narrower scope. Section 106 is located 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 the regional panels (section 101.1 through 106). The express purpose of any section 106 direction is that the MVLWB considers a matter to require consistency throughout the Mackenzie Valley. Read in context, section 106 enables the MVLWB to give direction on matters of general application that require an appropriate degree of uniformity, in particular within the licensing proceedings and practices of the MVLWB and its regional panels. In any case, section 106 does not authorize the MVLWB to issue a direction aimed at a specific undertaking or specific water user.

No Other Provisions of the Act Establish the Necessary Jurisdiction

There is no provision of the *Mackenzie Valley Resource Management Act* that authorizes the MVLWB to order a person to apply for a license. Nor is there is any provision in the Act that authorizes the MVLWB to give such an order to the federal Minister exercising her own specific jurisdiction under the Act.

There is also no provision of the Act that would authorize the MVLWB to control, review or override a decision of the federal Minister pursuant to her own statutory authority under the Act, which this motion would require:

- On pages 5 and 6 of the motion application, the applicants directly argue that the federal Minister has “misconstrued the purpose of the *MVRMA*”, section 89 in particular, stating that the federal Minister’s “interpretation of section 89 is unreasonable.”
- The motion application’s Conclusion section restates the view that the federal Minister has “misinterpreted the legal effect of section 89” and that the “Motion sought by the Oversight Board would serve to correct this error...”

The *Mackenzie Valley Resource Management Act* does not expressly grant the MVLWB the jurisdiction to review the federal Minister’s decision-making, nor does it imply any such jurisdiction. A suggestion of implied authority would have to overcome the explicit

allocation of that function to the Federal Court under the *Federal Courts Act*.² This jurisdiction should only be found on the basis of clear statutory expression, and there is no such language in the *Mackenzie Valley Resource Management Act*.

There is no indication in the *Mackenzie Valley Resource Management Act* that the statutory powers of the MVLWB extend to:

- issuing orders in the nature of the one sought in this motion, whether to the federal Minister or to any other person;
- answering reference questions about the lawfulness or reasonableness of the conduct of water users in general, or the federal Minister under the *Mackenzie Valley Resource Management Act* in particular; or
- sitting in appeal or in a judicial review capacity regarding the decisions of the federal Minister under the *Mackenzie Valley Resource Management Act*.

Adjudicating this motion would require the MVLWB to exceed its statutory jurisdiction.

Conclusion

We respectfully submit that adjudicating this motion would require the MVLWB to exceed its jurisdiction under the *Mackenzie Valley Resource Management Act*. The requested order is not within the authorities established by the Act, and the motion should be dismissed on that basis.

Those are our submissions on the preliminary question of jurisdiction that was highlighted by the MVLWB.

The federal Minister has her own specific jurisdiction and powers under section 89 of the *Mackenzie Valley Resource Management Act* to take reasonable measures to prevent, counteract, mitigate and remediate potential adverse effects at abandoned sites to protect people and the environment. As indicated above, if the matter proceeds, we will make further submissions explaining why the measures taken at the Giant Mine site are in compliance with the law, and why the order sought by the GMOB is neither necessary nor in the public interest.

Thank you for the opportunity to be heard in this matter.


Ken Landa
Legal Counsel
Northern Region

² With respect to the federal Minister acting under the *MVRMA*, Parliament has made these powers to be within the exclusive jurisdiction of the Federal Court of Canada (*Federal Courts Act*, R.S.C., 1985, c. F-7, ss. 18 and 18.1).