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IN THE MATTER OF:	**An application for the renewal of a Type "A" Licence S13L1-007 for its Norman Wells Operations by Imperial Oil Resources N.W.T. Limited;**
AND IN THE MATTER OF:	**A request for the Sahtu Land and Water Board to clarify its jurisdiction over the closure and reclamation of the Norman Wells Operations;**
AND IN THE MATTER OF:	**A request for the Sahtu Land and Water Board to clarify its jurisdiction over financial security for the closure and reclamation of the Imperial Oil Resources N.W.T. Limited Norman Wells Operations:**

RULING OF THE SAHTU LAND AND WATER BOARD

After careful review of the arguments and reply filed by the parties participating in this ruling, the Sahtu Land and Water Board (the Board or the SLWB) has decided that its jurisdiction extends to all licensed activities involving the use of water or the deposit of waste at the Norman Wells Operation of Imperial Oil Resources Limited (IORL).

The Board is of the view that its authorities do not conflict with those granted to the National Energy Board (NEB) under its legislation and that these regulatory regimes are complementary. More specifically, the SLWB is of the opinion that it has jurisdiction to regulate the closure and reclamation of the appurtenant undertaking, at the end of project life, including project effects on groundwater. The Board finds that these authorities are not affected by the Proven Area Agreement. The Board's jurisdiction applies to the Norman Wells Operations and is not displaced by NEB authorities which operate independently, within the jurisdiction granted to that Board by Parliament.

The SLWB has explicit jurisdiction to determine the appropriate amount of security, for closure and reclamation of the licensed undertaking under section 72.11 of the *Mackenzie Valley Resource Management Act* (MVRMA), in a manner consistent with the *Northwest Territories Waters Regulations*.

1. BACKGROUND AND HISTORY OF THE PROCEEDING:

IORL has been producing oil at Norman Wells since the 1920's and has operated facilities at Norman Wells NWT under the Proven Area Agreement since 1944. When the *Mackenzie Valley Resource Management Act*[1] (MVRMA) came into force in 1998, the SLWB was established to regulate land and water within its management area. Since the MVRMA came in to force, IORL has conducted its Norman Wells Operations pursuant to the terms and conditions of two water licences issued by the SLWB, S99L1-003 and S03L1-001 (the current licence).

Water licence S03L1-001 expires on August 29, 2014. Consequently, IORL has applied to the Board for the renewal of this Type A water licence. IORL's renewal application, S13L1-007, was deemed complete on October 1, 2013, initiating this Type A licence renewal process.

In Schedule III of IORL's licence renewal application, the proponent described the undertaking at its Norman Wells Operation as follows:

> Imperial Oil Resources NWT Limited (IOR) produces petroleum from wells drilled in the vicinity of Norman Wells. Operational areas associated with its activities at Norman Wells include: the Central Processing Facility (CPF), the Natural Islands (Goose, Bear & Frenchy's) and the Artificial Islands (1-Rayuka, 2-Rampart, 3-Dehcho, 4-Ekwe, 5-Iteh K'ee & 6-Little Bear). These locations are collectively located within the area described as the Norman Wells Proven Area. In addition to processing petroleum, the CPF also generates electricity and natural gas. Imperial currently supplies natural gas used by the Town; however, as supplies have been declining, this natural gas service will cease in 2014. Provision of electricity to NTPC for use by the Town is expected to continue for the foreseeable future.
>
> As part of these activities, IOR (a) obtains water from the Mackenzie River on an ongoing basis and (b) routinely conducts maintenance activities in and around the banks of the Mackenzie River. Water from the Mackenzie is required for process cooling and reservoir pressure maintenance. Regular maintenance work in and around the banks of the River is required to control erosion, and protect, replace and repair equipment.

Further to what was identified as the undertaking in the proponent's application, IORL manages several waste streams at the Norman Wells Operation as identified in the Waste Management Plan which forms a part of their renewal application. This includes coolant water released to the river, surface water released, the biocell, the waste storage yard, contaminated soil and groundwater management, and domestic waste.

It is noted that in the previous two water licence renewal proceedings, in 1999 and 2003, there is no record of the Board's jurisdiction being questioned. The Public Hearing transcript from the 1999 renewal includes an exchange between Aboriginal Affairs and Northern Development Canada (AANDC, formerly INAC) and IORL regarding security estimates for closure and reclamation of the licensed undertaking. Representatives from AANDC at that Public Hearing recommended to the Board that the security deposit be

[1] S.C. 1998, c.25.

reviewed to ensure that the Crown's liability after closure was minimized. In order to properly conduct this review, AANDC recommended that an estimate for abandonment and restoration and post-abandonment monitoring be developed by an independent consultant. AANDC argued that there should be a security deposit regardless of any other guarantees from the National Energy Board (NEB) or other assurances from IORL. IORL's position at that time was that they are contractually obligated to return the site in a condition satisfactory to the Minister and that IORL's financial strengths and significant assets ensure it will meets its obligations. Despite this exchange, the Board was not required to rule on the scope of its jurisdiction in relation to that licence.

Since that time the Board has required financial security estimates for the closure and reclamation of licensed operations, consistent with federal government policy.[2]

2. THE REQUEST FOR CLARIFICATION OF BOARD JURISDICTION:

The Board's decision to initiate a process through which a ruling on the scope of SLWB jurisdiction would be made was the result of several instances in which the applicant, IORL, put this jurisdiction into question. One of the most direct examples is found in the response to Information Requests (IRs) filed by IORL on February 6, 2014. The response to IR#4, (which had requested an accounting for all site liabilities at the Norman Wells Operation to assist in the determination of a security deposit) was received from IORL on February 28, 2014 and raised the question of Board jurisdiction directly. In that response, IORL stated,

> Final abandonment and reclamation responsibilities are addressed in the Proven Area Agreement, and, as such, fall within the jurisdiction of the federal Minister…<u>If the Board feels otherwise, we would ask it to rule on its jurisdiction as a preliminary matter prior to the hearing scheduled for April 2-3</u>. (Our emphasis)[3]

Further assertions relevant to these jurisdictional questions were made by IORL in their response to interventions submitted on March 26, 2014. In response to a recommendation by AANDC related to an expansion of the scope of the licence, IORL submitted that:

> Imperial submits that the subject of this licence renewal is the use of water and the deposit of waste to the Mackenzie River.
>
> It is submitted that the Board does not assume jurisdiction over all other aspects of the Norman Wells Operations, including: the former refinery site, the tank farm, the gathering system, the Central Processing Facility, the artificial islands, and all other facilities which properly fall under the jurisdiction of other regulators or are governed by the Proven Area Agreement.[4]

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[2] See the AANDC 2002 Mine Site Reclamation Policy. The SLWB asked AANDC if this policy applied to oil and gas operations such as the IORL Norman Wells Operation in AANDC IR#2. The AANDC response was that the principles of the policy apply to oil and gas developments.

[3] See S13L1-007 – Response to Additional IR Requests – Imperial Oil – Feb 28_14 on the SLWB Registry.

[4] See S13L1-007 – Responses to Interventions from Imperial Oil – Mar 26_14 on the SLWB Registry.

IORL also questioned the Board's jurisdiction in relation to groundwater in their response to interventions, but not in the submission of their Position filed in this ruling proceeding on March 28, 2014. AANDC and the GNWT had recommended in their interventions that a requirement for groundwater wells be included in the Surveillance Network Program. IORL responded:

> The Board's authority to regulate groundwater monitoring is one of the subjects of its jurisdiction review. It is submitted that hydrocarbons which are detected in groundwater are unrelated to water use or the deposit of waste and, therefore, fall outside the jurisdiction of the Board. They are properly governed by other agencies and the Proven Area Agreement.[5]

Finally, when AANDC recommended the SLWB establish a process to assess existing securities against the liabilities of the Norman Wells Operation. IORL responded;

> It is recognized that the Board has jurisdiction to review the securities, and ability of Imperial to manage reclamation liabilities, in respect of water use and the deposit of waste back into the Mackenzie River, but it does not have jurisdiction to step outside of its statutory jurisdiction to review the securities, and end-of-life reclamation responsibilities which have been statutorily assigned to other agencies.[6]

These IORL responses led the Board to postpone the Public Hearing and delay the licence renewal process in order to conduct this review of its jurisdiction to address the matters questioned by IORL.

The Jurisdictional Ruling Process --

The SLWB sent a letter to IORL counsel requesting that IORL set out its position related to Board jurisdiction on all matters, including closure and reclamation and security by March 28, 2014. In a letter distributed on March 24, 2014, all other parties on the Board's distribution list were given the opportunity to respond to these jurisdictional questions, and to the IORL Position, and to submit their arguments by April 11, 2014.

The submission from IORL was received on March 28, 2014. Responses were received on the April 11, 2014 deadline from AANDC on behalf of the Attorney General of Canada, from counsel representing the Government of the Northwest Territories (GNWT), and from the Sahtu Secretariat Incorporated (SSI).

IORL filed its final reply and response to these arguments on April 22, 2014 after being given an extension from the original April 17, 2014 deadline.

No other parties to the proceeding participated in this ruling process.

3. THE ISSUES:

The issues raised in the various IORL submissions and in the "Position" filed on March 28, 2014 included the following:

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[5] ibid.
[6] ibid.

- The authorities and role of the SLWB as set out in the *Mackenzie Valley Resource Management Act* (MVRMA);
- IORL water use and waste deposit in relation to the scope of the appurtenant undertaking subject to the licence;
- The effect of NEB authorities on Board jurisdiction;
- The effect of the Proven Area Agreement (PAA) on Board jurisdiction;
- SLWB authority over the regulation of groundwater; and
- SLWB authority over closure and reclamation including the determination of security in relation to the scope of the appurtenant undertaking.

4. THE SUBMISSIONS OF THE PARTIES:

IORL --

IORL's first submission, received March 28th,was entitled "Position on Board Jurisdiction" (the "Position"). That submission, the IORL Reply, and the submissions of the other parties are on the record for this proceeding. Only the more salient points of each are reviewed below.

IORL cites considerable authority to support the proposition that jurisdiction must be found within the statute which sets up a tribunal. This is settled law and none of the other parties disagreed. The SSI and GNWT, however, noted and the Board agrees, that the *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (SDMCLCA) is also a source of legal authority for the SLWB.

The period during which this ruling process was undertaken overlapped the coming in to force of large portions of the *Northwest Territories Devolution Act*[7] and devolution to the GNWT of authority for the regulation and management of territorial lands. The entirety of the IORL Norman Wells Operation take place within the Norman Wells Proven Area and IORL correctly notes (Position: paras 30-31), that the Proven Area was excluded from the transfer of public lands to the GNWT and remains under federal control. The AANDC submission reviews the post devolution law (AANDC: paras 1-14) applicable to the IORL application. IORL accepted those paragraphs of the AANDC submission (Reply: para 1).

IORL's Position asserts that their application is only for a water licence and that there is no accompanying application for a land use permit for activity associated with its Norman Wells Operations. It goes on to point out that the water uses for which it holds a licence are limited to the operation of a cooling system, injection of water into wells for oil and gas production and smaller ancillary uses such as dust suppression and hydrovac. IORL submits that the only deposits of waste associated with the Norman Wells Operation are cooling system return water and surface water run-off. It argues that the Board's authority over waste at the site of the Norman Wells Operation is limited "to the

[7] S.C. 2014, c.2

deposit of waste back into the Mackenzie River, or any other water body" (Position: para 8).

In its March 26, 2014 response to Interventions (page 11) IORL also challenged the Board's jurisdiction over groundwater at the site of the Norman Wells Operations. This challenge was not carried forward in the Position but will be addressed in the Board's ruling below in order to ensure clarity on this point as well.

With respect to end of life reclamation, IORL acknowledges Board jurisdiction to require the posting of security and submits that the "undertaking" covered by the licence is comprised of "the water inlet, cooling pipes, cooling pond and discharge facility which deposits waste back into the Mackenzie River". They argue that the undertaking does not include any other facilities or operations on the Proven Area.

IORL argues that the National Energy Board is "the primary regulator of the Norman Wells Operations' oil and gas facility" and cites authority for this proposition from the *National Energy Board Act*[8], the *Canada Oil and Gas Operations Act*[9] and the *Canada Petroleum Resources Act*.[10]

IORL relies on the Proven Area Agreement not only as the standard setter for eventual reclamation and remediation but as the regulatory framework for dealing with abandonment and reclamation liabilities at its Norman Wells Operations:

> "Imperial submits that the abandonment and reclamation liabilities at its Norman Wells Operations are specifically regulated by the Federal Minister, pursuant to the terms of the Proven Area Agreement." (Position: para 27)[11]

IORL notes that its federal leases also include covenants to deliver up possession of those lands in accordance with an approved abandonment and restoration plan.

IORL concludes its statement of Position by arguing that end of life abandonment and reclamation responsibilities, beyond the cooling facilities which relate to the use of water, are adequately covered by the jurisdiction of other government agencies.

AANDC --

AANDC sets out the applicable statutory framework in paragraphs 1 to 14 of its submission and agrees with IORL that a tribunal's jurisdiction must be found within the four corners of the statute which establishes it.

AANDC cites previous decisions of the Nunavut Water Board, the Federal and NWT Courts in support of its submission that the SLWB has broad jurisdiction to deal with the use of water, deposit of waste and more specifically with closure and reclamation of the IORL Norman Wells Operations under a water licence.[12] It notes that in the mining

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[8] R.S.C. 1985, c. N-7.
[9] R.S.C. 1985, c. O-7.
[10] R.S.C. 1985, c. 36 (2nd Supp).
[11] See S13L1-007 – Imperial Oil Submission on Board Jurisdiction – Mar 28_14 on the SLWB Registry.
[12] See paras 16-19 AANDC submission citing: *Re: BHP Diamonds Inc.* (1999), 29 C.E.L.R. (N.S.) 248 (Nunavut Water Board); *Re: Miramar Hope Bay Ltd.*, Nunavut Water Board decision (September 19, 2007) in Board File No. 2AM-DOH0713; *Qikiqtani Inuit Association v. Canada* (1999), 155 F.T.R. 161; and *BHP Billiton Diamonds Inc. v. Wek'eezhii Land and Water Board* (2010), 2010 NWTSC 23.

context, the NWT Courts have agreed that the Wek'eezhii Land and Water Board, a tribunal operating under the same MVRMA authorities as the SLWB, has jurisdiction for water use, waste disposal and reclamation over the whole of a mine site (AANDC: paras 16-19).

ANNDC further submits that the MVRMA establishes an integrated system of land and water management that treats land and water as interconnected systems and that the Board's jurisdiction should be interpreted accordingly.

AANDC disagrees with the narrow scope proposed for the appurtenant undertaking in the IORL Position and cites the much broader description of the Norman Wells Operation set out by IORL in its application for the licence renewal.[13] The operation of the cooling system it is argued cannot be separated from the rest of the operation. AANDC argues for a comprehensive determination of what is included in the appurtenant undertaking for the renewal licence (AANDC: para 21).

AANDC reviews the MVRMA case law[14] on the meaning of "undertaking" noting that these cases are not strictly on point, since they were focussed on the word "undertaking" as used in s.157.1 of the MVRMA and not the newly defined phrase "appurtenant undertaking" now found in the MVRMA. AANDC submits that the cases are nonetheless helpful and that their consideration of the word "undertaking" is relevant.

In the *Tungsten* case the issue was whether an environmental assessment (EA) was needed when the mine applied for a water licence renewal. The "undertaking" was deemed to be grandfathered by the Court of Appeal when it decided that no EA was required. In reviewing this Court of Appeal decision in the *Canadian Zinc* case, the NWT Supreme Court observed that the undertaking in *Tungsten* was the whole mine, even though it came to a different decision itself in relation to the *Canadian Zinc* matter. AANDC argues that the proper approach to interpreting the "appurtenant undertaking" in the IORL application is to determine that it is the whole of the Norman Wells Operations because as in *Tungsten,* the application before the Board is for the renewal of a water licence for the whole facility. This AANDC submits should be distinguished from *Canadian Zinc* where the permit in question was for a winter road which was only a portion of the mine operation (AANDC: paras 22-29).

AANDC suggests that financial arrangements between licensees and third parties can be taken into account when the SLWB considers the quantum of security required for the Norman Wells Operations. More specifically, AANDC cites section 14 of the IORL Crown leases which deals with abandonment and restoration saying that it is relevant to a Board delineation of the Proven Area and goes on to say that no security is held under these leases. There is also discussion of the NWT Supreme Court's findings in relation to the question of whether a contract between the Department of Fisheries and Oceans and the mining company in the *BHP Diamonds* case[15] could bind the Wek'eezhii Land and Water Board in the subsequent exercise of its water licence jurisdiction over closure and reclamation. As AANDC points out, the NWTSC held that the Land and Water Board

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[13] See page 1 above which reproduces this description.

[14] *North American Tungsten Corp. Ltd. V. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5; and *Canadian Zinc Corp. v. Mackenzie Valley Land and Water Board*, 2005 NWTSC 48.

[15] See note 12.

was not bound by that contract (AANDC: paras 30-33). AANDC goes on to argue that a private commercial arrangement such as the Proven Area Agreement cannot bind or oust the jurisdiction of a regulatory tribunal such as the SLWB.

In response to the IORL argument that the NEB is the "primary" regulator of the Norman Wells Operation, AANDC argues that it is incorrect to interpret the law in a way which results in the authorities of one tribunal ousting those of another, if the possibility exists for their authorities to work in harmony. Canadian law has come to emphasize the interplay of legislation where there is overlap in jurisdictional authority. The coherence of legislation is presumed and an interpretation which results in conflict should be avoided where possible (AANDC: paras 35-39). As a result the MVRMA authorities dealing with the use of water and deposit of waste must be examined together with the NEB authorities under the *Canada Oil and Gas Operations Act*, the *Canada Petroleum Resources Act* and the *National Energy Board Act* to determine whether there is any operational conflict. AANDC conducts such a review and submits that there is no operational conflict amongst these statutes.

AANDC submits that the security held by the NEB under s.27 of COGOA is for recovery of damages resulting from a discharge, emission or escape of oil or gas or any spill and for the clean up of debris. This is distinguished from the security held by a Land and Water Board for closure and reclamation of the site of a licensed activity at the end of project life. AANDC also submits that s.114 (4) of the CPRA does not exempt the Proven Area Agreement or the Norman Wells Operation from the application of the MVRMA.

GNWT –

GNWT agrees that a tribunal must find its jurisdiction within the legislation that creates it. GNWT goes on to make submissions about the proper approach to statutory interpretation which are consistent with the AANDC argument and authorities. GNWT argues that legislation should be interpreted to avoid narrow technical construction and endeavour to make effective the legislative intent as applied to the administrative scheme involved (GNWT: para 9). The MVRMA it argues is intended to give effect to the SDMCLCA and to establish an integrated system of land and water management with broad environmental purpose (GNWT: para 15).

GNWT points out that the definition of waste in the MVRMA is very broad and that it encompasses a wide range of materials which do not have to be deposited directly into water. The GNWT submissions argue in favour of broad SLWB jurisdiction in relation to the use of water and the deposit of waste, including consideration of abandonment and reclamation and related security. GNWT submits that the Norman Wells Operation as a whole should be determined to be the appurtenant undertaking under the licence. Finally, GNWT adopts the Government of Canada's submissions in respect of the Proven Area Agreement.

SSI --

The Sahtu Secretariat Incorporated submitted a letter supporting a broad mandate for the SLWB including the regulation and collection of security for abandonment and reclamation liabilities at Imperial's Norman Wells Operation. SSI emphasized the

importance of the Board and its relationship to the *Sahtu Dene and Metis Comprehensive Land Claim Agreement*.

IORL REPLY:

IORL exercised its right to reply to the submissions of AANDC, GNWT and SSI.

To the AANDC Argument --

The reply accepts all AANDC's legal authorities set out in paras 1-15 of that submission. IORL clarifies that it never purported to question the Board's jurisdiction to regulate a "water undertaking". They say that they merely seek clarification on the scope of the Board's responsibility "especially where that responsibility more properly falls under the jurisdiction of other government agencies which are in a better position to discharge those responsibilities" (IORL Reply: para 2).

IORL argues that its oil and gas operations are very different than mining operations and that the mining cases cited by AANDC should thus be distinguished. In paragraphs 3 to 6 IORL submits that the cases referred to by AANDC are either irrelevant, not binding or were wrongly decided. The central part of this argument is that the water licensing of mining activities should be distinguished from oil and gas activities. IORL then argues that the SLWB is not vested with authorities which have broad environmental purpose pointing out that one of the express purposes of COGOA as set out in s.2.1 (b) is the protection of the environment.

In paragraph 7 of its Reply, IORL submits that the Board's duty to treat and manage land and water as interconnected systems as set out in the MVRMA "applies generally, where the Board has the duty, and responsibility, to manage both land and water use. This is not the case in the Norman Wells Operation as the land was specifically designated in 1944 by the Federal Government".

At the root of the Reply, IORL holds on to its position that the NEB is the primary regulator and that the SLWB jurisdiction is ousted by that authority. Paragraphs 10 to 12 of the Reply speak of COGOA authorities and provide details about an NEB "Remediation Process Guide" which sets out the NEB approach for site remediation of any release of petroleum and for any remedial action required. The Guide applies to NEB regulated facilities and indicates that the NEB will be the lead agency for all contamination incidents at such facilities (IORL Reply: para 11).

In reply to the *Tungsten* and *Canadian Zinc* cases which address the interpretation of the word "undertaking", IORL argues that the narrower view of the term, as set out in the *Canadian Zinc* case which was about a land use permit for a winter road, is the appropriate authority in relation to the Norman Wells Operation. The SLWB must, in IORL's submission "yield to the express will of Parliament and defer to the jurisdiction of the National Energy Board" (IORL Reply: para 13).

In paragraph 20 of the Reply, IORL describes the Proven Area Agreement as the "original and primary regulatory instrument for land use and end of life responsibility set in place by the Federal Crown".

IORL submits that it agrees with the presumption of legislative coherence and says that harmonization was achieved when Parliament assigned "full and exclusive jurisdiction"

for oil and gas activities to the NEB. It goes on to submit that the NEB has "statutory jurisdiction to manage, and to take security for abandonment, dismantling, decommissioning, remediation and reclamation of all oil field and production facilities and the debris left after decommissioning" (IORL Reply: para 25). The IORL Reply to Canada's arguments concludes by reasserting the position that the Proven Area Agreement is the primary, original, operating authority for the site which includes abandonment and reclamation and that the SLWB should respect this Agreement.

To the GNWT Argument –

IORL repeats its argument that the Norman Wells Operation is an exception to the SLWB's need to operate in an integrated and coordinated manner in the regulation of land and water. It argues that the approach set out in its Position is based on respect for the Proven Area Agreement and not a narrow technical view of the SLWB's authorities.

It appears that the parties all agree that the Board can take into its consideration financial security held under agreement or by third parties when considering the appropriate amount of security to be ordered for a licensed undertaking.

IORL responds to the GNWT on the Board's authority to take security by saying that the water licence is not designed to regulate land activities and that the expertise for closure and decommissioning of the Norman Wells Operation is with the NEB under COGOA.

To the SSI Argument –

IORL submits that it has been open and transparent in its dealing with SSI and that it has engaged the public and stakeholders in the preparation of its water licence renewal application. IORL indicates that it welcomes the opportunity to meet and work with members of Sahtu communities and submits that it has met all of its obligations under Chapter 9 of the Land Claim Agreement.

5. ANALYSIS:

The Board wishes to begin by thanking counsel for the parties participating in this jurisdictional ruling process for their thorough and thoughtful submissions. These are difficult questions and as a co-management tribunal the SLWB has done its best to understand the concerns raised and to provide a ruling which, to the best of the Board's ability, sets out its position on SLWB jurisdiction in relation to IORL's Norman Wells Operations.

The Approach to Interpreting the Legal Authorities --

It is clear that there are competing interpretations of the applicable legal authorities in this case. Consequently, the Board must adopt an interpretive approach for dealing with the statutes, regulations, agreements and other legal authorities cited in the various arguments. The SLWB works with other regulators and land claim organization on a daily basis, including SSI, the NEB and other federal and territorial authorities. The Board, other regulators and organizations are part of the integrated resource management regime established by the MVRMA. This collaborative approach protects the environment which includes land and water, as intended by Parliament, the Legislature and the SDMCLCA which has constitutional protection. Given this collaborative

framework, the Board has a hard time accepting the IORL "either – or" approach to reconciling the jurisdiction of the SLWB with that of the NEB.

Review of the IORL arguments indicates that they base their Position on this matter largely on the wording and their subsequent analysis of COGOA. IORL said in reply that they accept the interpretive approach set out in the AANDC and GNWT authorities, but it appears to the Board that IORL makes little effort to work through the legal authorities granted to the SLWB and the NEB to find a way to make the jurisdictions at issue work together harmoniously. IORL cites no cases or tribunal decisions from the NEB or others to support its position. IORL repeatedly states that Parliament simply gave the authority over oil and gas production and facilities at the Norman Wells Operations to the NEB.

The AANDC and GNWT arguments rely on Supreme Court of Canada authority in setting out what they say is the appropriate interpretive approach. They recommend that an interpretation which results in operational conflict should not be adopted unless such a conflict is unavoidable. In this way, the important roles granted by Parliament to the NEB can be carried out while working in concert with the authorities granted to the SLWB by statute and as required by the Sahtu Land Claim.

In the Board's view an interpretation of the MVRMA which cuts down the authorities of the SLWB that are derived from the Land Claim must be avoided, if possible. In addition, this approach is consistent with that set out by the cases cited by AANDC and the GNWT. As a result, the Board finds that the interpretive approach recommended by AANDC and the GNWT is the proper one to be applied to the legal interpretations required by this decision.

This does not mean by itself that there is no conflict between or amongst the legal authorities in issue, only that if such conflict is alleged that the Board should look for an interpretation of the conflicting provisions which avoids the conflict and allows both tribunals (the NEB and SLWB) to work together and fulfill their mandates.

Some Important Provisions of the MVRMA –

It appears to the Board that several of the statutory provisions cited by AANDC and accepted as relevant by the other parties bear repetition before we proceed to further analysis of the various arguments. There is no issue that the Norman Wells Proven Area is a "federal area" as defined in the MVRMA. Nor is there disagreement that sections 60(1), 72(1) and 72.01(1) of the MVRMA apply to the Norman Wells Operation. So, broadly expressed, the SLWB has been granted jurisdiction over all uses of water and deposits of waste in a federal area for which a licence is required and no person may use water or deposit waste in such a federal area without a licence.

Thus the following definitions are important:

> "Deposit of waste" is defined in section 2 of the MVRMA as follows:
>
> "deposit of waste" means a deposit of waste in any waters in the Mackenzie Valley or in any other place under conditions in which the waste, or any other waste that results from the deposit of that waste, may enter any waters in the Mackenzie Valley. (Our emphasis)

"Use" is defined in section 51 of the MVRMA as follows:

"use", in relation to waters, means a direct or indirect use of any kind other than a use connected with shipping activities that are governed by the *Canada Shipping Act, 2001,* including

a) any diversion or obstruction of waters;
b) any alteration of the flow of waters; and
c) any alteration of the bed or banks of a river, stream, lake or other body of water, whether or not the body of water is seasonal. (Our emphasis)

"Waste" is defined in section 51 of the MVRMA as follows:

"waste" means any substance that would, to an extent that is detrimental to its use by people or by any animal, fish or plant, degrade or alter or form part of a process of degradation or alternation of the quality of any water to which it is added. Alternatively, it means any water that contains a substance in such a quantity or concentration or that has been so treated, processed or changed, by heat or other means, that it would, if added to other water, degrade or alter or form part of a process of degradation or alteration of the quality of that other water to which it is added. It includes

a) any substance or water that is deemed, under subsection 2(2) of the *Canada Water Act,* to be waste;
b) any substance or class of substances prescribed by regulations made under subparagraph 90.3(1)(b)(i);
c) water that contains any substance or class of substances in a quantity or concentration that is equal to or greater than a quantity or concentration prescribed in respect of that substance or class of substances by regulations made under subparagraph 90.3(1)(b)(ii); and
d) water that has been subjected to a treatment, process or change prescribed by regulations made under subparagraph 90.3(1)(b)(iii).

The Board concludes that the IORL argument that the licence must be limited to deposits of waste into water bodies is not consistent with the definitions. Likewise, the argument that use of water includes only the abstraction of water from the Mackenzie River is inconsistent with the definition of "use" and improperly excludes work on the river banks and shore of the islands in the Proven Area. Finally, the Board notes that the definition of waste is very broad and that many activities on the Proven Area could involve the deposit or the management of waste to avoid such deposits.

The Appurtenant Undertaking --

The IORL licence application sets out a description of the activities which will take place on the Proven Area,[16] including the use of water for dust suppression, hydrovac and ancillary activities and also involving maintenance work in and around the banks of the River and artificial islands … to control erosion, and protect, replace and repair equipment etc. Historically the Board has experience with the regulation of other IORL activities on the Proven Area and the draft Waste Management Plan submitted by IORL with the licence application, which is proposed to form part of the licence, subject to Board approval, indicates other IORL waste streams which must also be managed.

It is difficult, given this factual background for the Board to understand how IORL can argue that the Board's water use and waste disposal jurisdiction is limited to the operation of a cooling system, injection of water into certain water injection wells and the return to the Mackenzie River of cooling system water and surface runoff. (IORL Position: paras 6-7)

This argument ignores the contents of the application and the clear wording of the definitions cited above. In the Board's view a licence whose scope was limited in the way suggested by IORL could present legal risk to its Norman Wells Operation because a number of activities excluded by the IORL argument are prohibited without a licence. The draft licence circulated in this proceeding was based on a broad interpretation of the "appurtenant undertaking". This view is supported by argument and authorities cited by all the other parties.

The AANDC submission indicates that there is no case law which directly addresses the interpretation of "appurtenant undertaking" in the MVRMA. AANDC argues by analogy that the decisions of the NWT Court of Appeal in *Tungsten* and of the NWT Supreme Court in *Canadian Zinc* and *BHP Diamonds* are of assistance. Both the *Tungsten* and *Canadian Zinc* cases involved consideration of how an undertaking which might be subject to environmental assessment should be characterized. In the *Tungsten* case the application was for the renewal of a mine water licence. In *Canadian Zinc* the application was for a land use permit for a winter road, not the mine. The Court in *Canadian Zinc* observed that the Court of Appeal in *Tungsten* treated the whole mine as the undertaking. The *Canadian Zinc* Court nonetheless held that in that case the undertaking could be something less and restricted it to the winter road. AANDC did not argue that these were binding authorities. But in the opinion of the SLWB they are relevant and helpful, especially considering that there is no other authority directly on point.

We note that IORL has argued that mining cases and the mining context is different than the oil and gas context because other government agencies have jurisdiction over various aspects of the oil production operation (IORL Reply: para 3). The Board does not agree. In the mining context there is a similar overlap of regulatory authorities. The *BHP Diamonds* case cited by AANDC addressed problems with overlapping authorities similar to those in issue here. In that case, there were concerns about the authorities of the Department of Fisheries and Oceans overlapping those of the Wek'eezhii Land and Water Board. In the SLWB's view, the management of resource development and the

[16] See para 20 AANDC argument.

environment is a complex matter whether the industry in question is mining, oil and gas or even forestry. The challenge is to ensure that the various statutory regimes work harmoniously, as discussed earlier in this decision.

The question here is whether IORL can operate in conformity with the MVRMA requirements for licensing of water use and waste deposit if the scope of the licensed undertaking is restricted in the way suggested in the IORL argument. Or given the analogy to the *Tungsten* water licence, should the IORL undertaking be interpreted to be the whole Norman Wells Operation? IORL argued that the narrower *Canadian Zinc* outcome was appropriate, but the SLWB disagrees. The facts before the Board in this licence renewal proceeding indicate a broader "use" of water and "disposal of waste" than is described in the IORL argument. It is the Board's view that the AANDC and GNWT arguments are more consistent with both the facts and the legislative framework. As the GNWT put it:

> "…. The various functions of the Norman Wells Operation cannot really be separated into individual undertakings for the purpose of this licence. The cooling system is one component of the Operation as a whole, intrinsically linked with all other components of the facility to ensure its success. Therefore, the Operation must be considered as a whole." (GNWT: para 26)[17]

The SLWB agrees and finds that the appurtenant undertaking is the whole of the IORL Norman Wells Operation. This is a situation like *Tungsten* where a water licence renewal application has been made for the whole of the operation involved.

Financial Arrangements with Others --

All parties agreed that the MVRMA requires the financial capacity of a licence applicant to be taken into account by the Board before a licence can be issued. Perhaps more importantly, if security is assessed for closure and reclamation of a licensed undertaking at the end of project life, evidence of security arrangements with third parties is relevant and can be taken into consideration if the Board makes an order requiring security under a licence. The Board agrees and notes that in this case, subject to sufficient evidence being adduced, IORL indicates that security for closure and reclamation of the Norman Wells Proven Area has already been set aside by the federal government which is a part owner of the field.

The Effect of NEB Authorities on Board Jurisdiction –

IORL argues that the NEB is the primary regulator of the Norman Wells Operations' oil and gas facility. The SLWB is not in the business of oil and gas regulation. The question is whether the authorities of the two tribunals overlap in such a way as to present unavoidable conflict. Practically, the staff of these tribunals collaborate on a regular basis.

IORL refers to section 114(5) of the *Canada Petroleum Resources Act* which exempts the Norman Wells Proven Area from the operation of that Act. In the Board's view the CPRA is primarily about petroleum rights issuance, not operations. It seems logical that the CPRA would exempt the Proven Area because by the time that Act came into force

[17] See S13L1-007 – GNWT Submission on Board Jurisdiction – Apr 11_14 on SLWB Registry.

the oil and gas rights to the Proven Area had already been granted to Imperial Oil. On its face that provision has no relationship to the MVRMA. It may bind the federal government in relation to oil and gas rights but the Board agrees with AANDC (para 46) that section 114(5) of the CPRA does not oust the application of the MVRMA to the Proven Area.

The definition of waste set out in COGOA was raised by AANDC in its review of NEB authorities. The Board agrees with IORL (Reply: para 26) that the term "waste" used in the oil and gas context is unrelated to the term "waste" defined in the MVRMA. Sections 26 and 27 of COGOA, however, focus on discharge, emission or escape of oil or gas or spills, and liability for loss and damages resulting from such events. AANDC argues that these sections do not address or require security for environmental liability or reclamation costs in the event that an oil or gas facility was abandoned.

The security which may be required of an oil and gas operator under s.27 of COGOA would appear to be primarily oriented to spill clean up. As IORL points out, these sections do apply to debris resulting from such incidents and debris is defined to include installations and structures. But in the Board's view it is possible to interpret these provisions in a way to avoid operational conflict. NEB is responsible for addressing spills and debris arising from incidents (spills and upsets) occurring at oil and gas facilities under its regulatory control. The SLWB can still be responsible for dealing with the effects on land and water of such facilities at the end of project life when closure and reclamation is necessary. It appears in this case that NEB does hold security for spills and debris but that it does not hold security for closure and reclamation of the Norman Wells Operations. The SLWB's review of the Remediation Process Guide published by the NEB indicates that it is primarily directed at remediation for spills from NEB regulated facilities. This interpretation is consistent with the distinction in roles between the SLWB and the NEB set out above.

In the Board's view, these tribunals have different responsibilities both of which are part of Canada's overall environmental protection framework. The Board is not aware of any conflicts between these mandates. It would appear that the NEB and SLWB can work together in an integrated resource and environmental management framework. In the Board's opinion, there is no basis to conclude that the NEB's jurisdiction over oil and gas ousts the SLWB jurisdiction over water use, the management of waste which may enter water or closure and reclamation of licensed undertakings at the end of project life.

The Effect of the Proven Area Agreement on Board Jurisdiction—

The Norman Wells Proven Area Agreement has been in effect since 1944. IORL submits that it is the "original and primary authority establishing end of life responsibilities for the Proven Area and that it has regulatory force. IORL submits no authority to support its argument for "regulatory" authority for this Agreement. It seems unusual in the Board's view, that the Proven Area Agreement, which clearly grants petroleum rights that were explicitly recognized when Parliament enacted the CPRA, could have had regulatory force, only to have that special "regulatory" authority repeatedly ignored by Parliament, first when the MVRMA was enacted in 1998, and more recently when all the changes required for devolution were reflected in the *Devolution Act* and the most recent amendments were made to the MVRMA.

A review of the Agreement and more recent amendments reveals nothing on its face which could be said to grant or establish regulatory force for this Agreement. There is no doubt that s.23 of the Agreement sets a standard for the lands when they are delivered up to the Minister. That standard is simply that they be in good condition and that the Minister be satisfied (IORL Position: para 23). Such arrangements are common in surface lease agreements and AANDC notes that IORL is subject to similar obligations under federal surface leases on the Proven Area. In the Board's view s.23 of the Proven Area Agreement does not provide regulatory status to the Agreement.

AANDC argues that the Norman Wells Proven Area Agreement is merely a private commercial contractual arrangement between the Government of Canada and Imperial Oil and that it does not oust or override other federal legislation which may regulate aspects of the Norman Wells Operation. The GNWT adopts that position. IORL offers no authority to suggest otherwise.

The Agreement itself does not indicate or claim regulatory authority and by contrast with the CPRA's recognition of the Agreement, the MVRMA and other statutes responsible for land and water regulation and the end of life closure and reclamation of licensed facilities make no exemption or even any reference to the Proven Area Agreement.

Considering all the above, the SLWB is persuaded by the AANDC position and holds that the Proven Area Agreement is simply a private commercial contract with no effect of Board jurisdiction over closure and reclamation.

The Board's Authority in Relation to Groundwater—

This issue was raised in the IORL response to parties' interventions but not in argument or reply. The IORL comment in relation to groundwater is set out on page 3 above.

The definition of "waters" in the MVRMA is: "…inland waters, whether in a liquid or frozen state, on or below the surface of land". There can be no doubt that the SLWB has jurisdiction over the use of groundwater or deposit of waste into groundwater, based on this definition. IORL's comment about hydrocarbons detected in groundwater which are unrelated to water use or the deposit of waste could have merit, but this is a question of fact related to the source of the hydrocarbons. In the Board's opinion, its jurisdiction over water use and the deposit of waste extends to groundwater and this includes consideration of the effects of such activities on ground water both during the course of a licensed operation and at the time of closure and reclamation.

The Board's Authorities over Closure and Reclamation and Security for Licensed Undertakings --

The arguments advanced by IORL recognized the jurisdiction of the SLWB for closure and reclamation and to set financial security for those elements of the Norman Wells Operation which IORL considered to be within Board jurisdiction. The focus of the IORL argument was on what elements of the Norman Wells Operations were in and which were outside of Board jurisdiction.

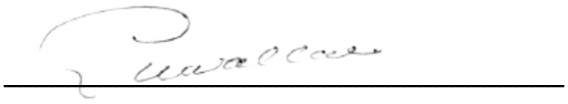
The MVRMA section 72.11 provides explicit authority to the Board to set and require a licence applicant to furnish financial security. The Board decided earlier in these reasons that the appurtenant undertaking was the whole of the Norman Wells Operations. The

SLWB therefore holds that it has closure and reclamation and security jurisdiction over the whole of the operation.

IORL is justified in wanting to ensure that no more security than necessary is required for closure and reclamation of the licensed undertaking at the end of the project life. However, the Board is also responsible to deliver to the Federal Minister an accounting of all potential liabilities that may be incurred in relation to the reclamation of a licenced undertaking. The Board has proposed, and parties have already agreed, to collaborate in studying these matters in a Closure Working Group which includes the licensee, interested parties and the NEB. This Working Group will assist with the development of the draft Closure and Reclamation Plan and should be able to avoid operational duplication or overlap with other regulators.

APPROVED BY THE SAHTU LAND AND WATER BOARD:

Chair's Signature on behalf of the Board:



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