Délı̨nę Got'ı̨nę Government
Our People. Our Future. Our Délı̨nę.

JoAnne Deneron, Chairperson
Mackenzie Valley Environmental Impact Review Board
Box 938, 200 Scotia Centre
5102 - 50 Avenue
Yellowknife, NT X1A 2N7

Náhkale Ms. Deneron,

Re: Proceeding EA2425-02 – Norman Wells Operation - Request for Ruling

On October 9th, 2024, Imperial Oil Resources N.W.T. Limited ("Imperial") submitted a Request for Ruling to the Mackenzie Valley Environmental Impact Review Board ("the Board") on the question of whether section 126(2)(b) of the *Mackenzie Valley Resource Management Act* ("MVRMA") applies to the Applications. On October 16th, 2024, the Board requested the views of governments and organizations with referral authority under 126(2) of the MVRMA on the following question:

> *Does the Sahtú Secretariat Incorporated have the authority to refer Imperial's Water Licence renewal application (S24L1-005) and Operations Authorization (1210-001) to the Review Board for environmental assessment under paragraph 126(2)(b) of the MVRMA, considering subsection 157.1 of the MVRMA as well as the other arguments described in Imperial's Request for Ruling?*

The Délı̨nę Got'ı̨nę Government ("the DGG") is a government with referral authority under 126(2), and has reviewed the Request for Ruling and the Board's request. The DGG would answer the above question in the affirmative.

Background

The Délı̨nę Got'ı̨nę Government is a Self-Governing Indigenous Government in the NWT. The DGG derives its authority from two constitutionally protected sources: as a Designated Sahtú Organization ("DSO") with responsibilities under the *Sahtú Dene and Métis Comprehensive Land Claim Agreement* (the "Sahtú Treaty" or "Treaty"); and the power to make laws and deliver programs and services as described in the *Délı̨nę Final Self-Government Agreement* ("the SGA.")

As a DSO, the DGG has been designated under Chapter 7 of the Sahtú Treaty to exercise certain rights and responsibilities in respect to the management of lands and resources, including the right to refer development proposals to the Board for environmental assessment under s. 25.3.4 of the Treaty and s. 126(2)(b) of the MVRMA. The DGG's role in this regard is reflected in the definition of "Sahtu First Nation" in the MVRMA:

> **Sahtu First Nation** means the Sahtu Dene and Metis as represented by The Sahtu Secretariat Incorporated, a corporation without share capital under Part II of the Canada Corporations Act, R.S.C. 1970, c. C-32, being the successor, for the purposes of this Act, to the Sahtú Tribal Council referred to in the Sahtu Agreement, or by any successor to that corporation. It also includes the Déline Got'ine Government in the case where The Sahtu

Secretariat Incorporated or its successor has made a delegation or assignment to that government of any powers and functions conferred under this Act.

The DGG also participates as a member and appoints a director to the Sahtú Secretariat Incorporated ("SSI"). Through its board of directors, SSI represents the collective interests of the Sahtú Dene and Metis in the implementation of the Treaty.

Imperial Mischaracterizes the 126(2)(b) Referral as a Board Decision

Section 126(2)(b) of the MVRMA is clear that the Review Board is required to conduct an environmental assessment of a proposal for a development referred to it by SSI or the DGG.

The DGG notes further notes that 126(2)(b), like the MVRMA itself, is a statutory codification of the right described in s. 25.3.4 of the Sahtú Treaty:

> A development proposal in the settlement area or which may impact upon the settlement area may be referred for assessment to the Review Board by the Sahtú Tribal Council or any governmental authority, and by the Review Board on its own motion (emphasis added)

In the Request for Ruling, Imperial mischaracterizes the referral to environmental assessment under 126(2)(b) as a "Board decision". As both the MVRMA and the Sahtú Treaty make clear, there is no scope for a decision by the Board in the face of a referral by an authority under 126(2): the Board is obligated by its statute to carry out an environmental assessment of the proposal for development.

A 126(2)(b) Referral does not give rise to procedural fairness obligations to Imperial from SSI

Imperial notes in its Request for Ruling that "Imperial was not provided an opportunity to make formal submissions regarding a potential EA referral to SSI prior to the decision, nor was it provided with an opportunity to provide a response to SSI's decision."

It is well-established in Canadian law that such duties only arise when *public bodies* make *administrative decisions* that affect individual rights, privileges or interests.[1] SSI is not a public body. It is an incorporated representative of the Sahtú Dene and Metis beneficiaries to the Sahtú Treaty. Further, the SSI decision to refer the matter to environmental assessment is not an administrative decision; but rather, it was a decision made in response to the Applications that were at that time before the Sahtú Land and Water Board for decision, and for which the views of the Sahtú Dene and Metis were being sought.

[1] Generally, such a duty is imposed "on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" per *Cardinal v. Kent Institution* 1985 CanLII 23 (SCC) at paragraph 14.

Accordingly, the SSI does not owe any obligations of procedural fairness to Imperial, particularly in a context where it was the SSI and the other Sahtú Dene and Metis organizations who were being engaged and consulted by Imperial in respect to the Applications as required by the Board's Engagement and consultation policies.

Imperial's contention that it is owed procedural fairness in relation to a decision made by SSI pursuant to a treaty right is therefore misplaced. It should not be open to a proponent to challenge the manner in which the Indigenous parties to a modern treaty exercise their treaty rights on the basis of procedural fairness owed to the applicant for a development proposal, particularly when the exercise of the right is in order to better protect their rights from the impacts of the proposed development, and in furtherance of the constitutionally protected duty to consult owed to Indigenous peoples under s. 35.

The DGG further notes that the MVRMA is clear that the procedural fairness obligation that arises in respect to a referral under s. 126(2) is discharged by the Board giving notice to the applicant of the referral under s. 126(5).

The Applications constitute a Development Proposal

Imperial contends that Part 5 of the MVRMA does not apply to the Norman Wells Operations, and accordingly s. 126(2) does not apply. Imperial's arguments rely on narrow principles of statutory interpretation to suggest that development approvals are intended only to be considered at the outset of a project, and not during renewals.

However, this interpretation cannot be sustained in light of s. 25.3.4 of the Sahtú Treaty. This provision sets out a treaty right to require developments to undergo an environmental assessment before the Review Board. The specific provision must be considered in accordance with the principles of modern treaty interpretation as articulated by the Supreme Court of Canada in *Nacho Nyak Dun*:

> Paying close attention to the terms of a modern treaty means interpreting the provision at issue in light of the treaty text *as a whole* and the treaty's objectives…a modern treaty will not accomplish its purpose of fostering positive, long-term relationships between Indigenous peoples and the Crown if it is interpreted "in an ungenerous manner or as if it were an everyday commercial contract"…Furthermore, while courts must "strive to respect [the] handiwork" of the parties to a modern treaty, this is always "subject to such constitutional limitations as the honour of the Crown".[2]

The fundamental objectives of the Sahtú Treaty are set out in 1.1.1. Of particular note is 1.1.1 (g), which states the objective to provide the Sahtú Dene and Metis with "the right to participate in decision making concerning the use, management and conservation of land, water and resources",

[2] *First Nation of Nacho Nyak Dun v. Yukon,* 2017 SCC 58 (CanLII) at para 37.

and (h) "to protect and conserve the wildlife and environment of the settlement area for present and future generations.

These objectives are advanced by a specific promise under s. 25.3.1 of the Treaty to require all development proposals in the Mackenzie Valley, including development proposals in relation to Sahtú lands, to be subject to environmental assessment and review.

Imperial, however, seeks to rely on a transitional provision in s. 157.1 of the MVRMA to exclude the Norman Wells Operations (NWO) from the application of environmental assessment under Part 5 and referrals under126(2)(b) specifically on the basis that the development is an "undertaking that is the subject of a licence or permit issued before June 22, 1984". Imperial further contends that the Application is not a "proposal for development", but simply a renewal of licenses for an existing development.

DGG takes considerable issue with Imperial's contentions. DGG notes that the case law interpreting 157.1, specifically the *Tungsten* and *Zinc* decisions cited by Imperial as granting effective immunity from environmental assessment to all developments which received any form of license or permit prior to June 22, 1984, were rendered over a decade before the current principles of modern treaty interpretation were articulated by the Supreme Court of Canada.

Accordingly, the DGG submits that the question of whether 157.1 applies to a referral under 126(2)(b) in fulfillment of a treaty right to an environmental assessment could well be decided differently in this matter, as both the practice of environmental assessment (and in particular, the consideration of cumulative impacts and the present and future consequences of climate change) and the understanding of Indigenous rights have significantly changed.

DGG also notes that s. 25.3.3(b) of the Treaty clearly intends that the MVRMA provide for the referral of projects that are otherwise considered to be exempt:

> Legislation shall provide that a development proposal which would otherwise be exempt from assessment may be assessed if, in the opinion of the Review Board, it is considered to be of special environmental concern by reason of its cumulative effects or otherwise.

Conclusion

It is obvious from the record that there are numerous outstanding concerns that have been raised by the Sahtú Dene and Metis respect of the Applications. It is also clear that the development proposal may impact on the settlement area, and accordingly have impacts on Sahtú Treaty rights.

As s. 126(2)(b) serves to enable the Sahtú Dene and Metis to exercise their 25.3.4 treaty right to require additional information and undertake further deliberation about the proposed development through an environmental assessment, the exercise of this right by the Sahtú Dene and Metis should not be constrained by Imperial's procedural objections.

DGG submits that if the objectives of the Treaty as a whole and the specific provisions of the Treaty rights described in 25.3.4 are properly considered, the fulfillment of the constitutional rights of the Sahtú Dene and Metis to refer developments to environmental assessment before the Board cannot be simply denied by mere reference to a transitional provision in the MVRMA.

Further, if the Board is not persuaded by our submissions in respect to the powers of the SSI to refer the NWO to environmental assessment in accordance with 126(2)(b) and 25.3.4, it is entitled to exercise its own powers under 126(3) to conduct an environmental assessment of the NWO on its own motion, and it should do so here in accordance with 25.3.3(b) of the Treaty, given the referral advanced by SSI.

Finally, while extent of any participation by the DGG in the environmental assessment of the NWO has not been determined, these submissions are in made to ensure the Board is mindful and respectful of the Treaty rights of the Sahtú Dene and Metis under s, 25.3.4 to refer developments to environmental assessment before the Board. Such rights are paramount over any conflict with s. 157.1 of the MVRMA.

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Danny Gaudet
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