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October 23, 2024

Ms. Joanne Deneron
Chair
Mackenzie Valley Review Board

Re: Request for Ruling - Imperial Oil Resources NWT Limited (Imperial)

I am writing in my capacity as Chair of the Sahtu Secretariat, Inc (SSI), the regional land claim body in the Central Mackenzie Valley, to provide SSI's comments on the following question raised by the Mackenzie Valley Environmental Review Board (MVEIRB) in its October 16, 2024 Directive.

"*Does the Sahtu 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*?"

Our responses follow.

1. The MVEIRB has no jurisdiction to rehear or reconsider a decision already made

Imperial appears to assume that the MVEIRB has jurisdiction to reconsider its decision to issue the Notice of Environmental Assessment on October 4, 2024 (the "**Decision**"). But MVEIRB does not have that jurisdiction. As noted by the Supreme Court of Canada:

> As a general rule, once … a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error ...[1]

This is called being *functus*. Imperial knows this principle very well – it made the same argument as SSI is now making in a previous case, and won.[2] (Though in that case Imperial was seeking to curtail royalties on natural gas products extracted from "Indian Reserves" in Alberta, payable to her Majesty in Right of Canada in trust for the Samson, Ermineskin, Louis Bull and Montana First Nations).

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[1] *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848, 62 DLR (4th) 577 at 596. See also: *Practice and Procedure Before Administrative Tribunals* (Lorne Sossin, Robert W. Macaulay, James L.H. Sprague), Chapter 35, Authority of an Agency to Rehear or Reconsider Decisions.
[2] *Imperial Oil Resources Ltd. v. Canada (Indian Affairs and Northern Development)*, 2003 FCT 478.

Unlike other statutes governing regulators,[3] the MVMRA does not contain an express power allowing the MVEIRB to re-hear or reconsider its decision. There is nothing in the MVRMA that suggests such a power be inferred. Indeed, the statute gives Imperial recourse by way of a broad right of judicial review.[4]

The MVEIRB has no authority to depart from the Decision even if it wanted to. This is a full answer to Imperial's request (assuming it was validly made in the first place). But even if MVEIRB did have that authority, there are very good reasons not to exercise it in this case.

2. Section 157.1 of the MVRMA has no application

Imperial relies heavily on *North American Tungsten Corporation Ltd. v Mackenzie Valley Land and Water Board*[5] and *Canadian Zinc Corporation v Mackenzie Valley Land and Water Board.*[6] Both those cases turn entirely on section 157.1 of the MVRMA, and involve projects entirely outside the Sahtu Settlement Area. Those cases involve projects in the Dehcho region of the Northwest Territories, which is an unsettled area to which the MVRMA applies.

This case, however, involves a project in the Sahtu Settlement Area under the *Sahtu Dene and Metis Comprehensive Settlement Agreement* (**Sahtu Agreement**). As such Article 25.3.4 of the Sahtu Agreement applies:

> 25.3.4: 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 Sahtu Tribal Council or any governmental authority, and by the Review Board on its own motion.

This is an unqualified right – indeed it is a *quid-pro quo* for the "cede and surrender" provisions of the Sahtu Agreement. While section 157.1 the MVRMA may provide for "grandfathering" of certain projects so as to exempt them from environmental assessment, the Sahtu Agreement does not.

To the extent there is an inconsistency between the MVRMA and the Sahtu Agreement on this point, the Sahtu Agreement prevails:

> 3.1.22: Where there is any inconsistency or conflict between the settlement legislation or this agreement and the provisions of any law, the settlement legislation or this agreement, as the case may be, shall prevail to the extent of the inconsistency or conflict.

This is also reflected in section 8 of the *Sahtu Dene and Metis Land Claim Settlement Act*.[7] The Sahtu Agreement, being a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*, prevails.

It is, therefore, clear that SSI's authority to refer Imperial's applications to the Review Board arises from the Sahtu Agreement and, as such, this authority is not subject to the application of section 157.1 of the MVRMA.

For greater certainty, SSI is also of the opinion that the ongoing operations are exempt from being "grandfathered in" under section 157.1 of the MVRMA because (i) the Norman Wells

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[3] See for example *Public Utilities Act*, RSNWT 1988, c 24, section 25; *Utilities Commission Act*, RSBC 1996, c 473, section 99.
[4] MVRMA section 32.
[5] 2003 NWTCA 5.
[6] 2005 NWTSC 48.
[7] SC 1994, c 27.

Expansion Project only received final approval after the applicable date for grandfathering (June 22, 1984) and (ii) changes to the physical environment at/or near Norman Wells in which the oilfield operates constitute a “significant alteration of the project ” ßfor which section 157.1 does not apply.

Climate change and increased development within the Mackenzie River basin and its tributaries have caused significant alterations to the quality of the water, quantity and flow of the water, and fish and wildlife populations in the Mackenzie River. In 2022, for example, unprecedented riverbed scouring in the Mackenzie River resulted in the breach of Line 490 flowline corridor on July 27,2022. These changes to the environment increase the risk of the ongoing operations causing harm and constitute a significant alteration.

3. Imperial’s other arguments

While this is clear-cut case, and the above is sufficient to dispose of Imperial’s request forthwith, SSI offers the following additional response, as the final nail in the coffin of Imperial’s ill-fated Request for Ruling.

Imperial makes the tortured argument, based on southern environmental assessment regimes that bear no resemblance to the MVRMA, that its project is not a “proposal for a development” within the meaning of the MVRMA. It clearly is. “Development” in Part 5 of the MVRMA is defined to mean any “undertaking, or any part or *extension* of an undertaking”.[8]

While SSI continues to take issue that the ongoing operations will look very much like those permitted in the 2014 Operations Authorization, Imperial itself refers to the present application as an “extension” in its Application for Variance of Operations Authorization OA 1210-001, where it writes on page 2, directly under the heading “Approval Requested”:

> Through this variance application to the Commission of the Canada Energy Regulator (the Commission), Imperial is requesting a variance of the existing OA pursuant to subsection 5(6) of the COGOA and section 383 of the Canadian Energy Regulator Act (2019). **Specifically, this application seeks a ten-year extension** to the expiry date (to December 31, 2034) to allow for Imperial's operations at NWO to continue. [Emphasis added.

Imperial also says the environmental assessment would duplicate existing proceedings and is unfair because it violates its right to be heard. There is no duplication because Imperial’s project is not otherwise subject to environmental assessment. And Imperial has every right to be heard during that assessment process. What would be unfair, and indeed unconstitutional, would be for the MVEIRB to engage in a review of the Decision where the issue has already been determined, and where Imperial seeks to abridge SSI’s constitutional right.

Conclusion

SSI respectfully requests MVEIRB dismiss the Request for Ruling outright and proceed with the environmental assessment that is already underway.

For the record, SSI also reiterates its reasons for the original referral, specifically that Imperial Oil’s requested Operations Authorization extension is a simple continuation of an already-approved project – it is not; that consultation by Imperial Oil with K’asho Go’tine was insufficient

[8] MVMRA section 111(1).

– it was; and that the Sahtu Region in particular and the NWT in general, have not received any significant, long-lasting benefits from Imperial Oil's Norman Wells operations – they have not.

Postscript

As a closing comment, it appears that Nathan Baines, Supervising Counsel at Imperial and Party Representative for Imperial's Request for Ruling, is not licenced to practice law in Northwest Territories.

This is not a personal attack on Mr. Baines, but nevertheless if confirmed would be a contravention of section 68 of the *Legal Profession Act*, which requires that no person shall engage in the practice of law in Northwest Territories unless they are an active member of the Law Society of the Northwest Territories.

Had this matter been before a Court (as Imperial has threatened to do),[9] the Imperial's request would have immediately been rejected for filing. Pursuant to section 25 of the MVRMA, the MVEIRB has the powers, rights and privileges of a superior court with respect to the attendance and examination of witnesses and the production and inspection of documents.

If Imperial's request was indeed filed by someone other than active member of the Law Society of the Northwest Territories (which Imperial's outside counsel does not appear to be, either), then Imperial's Request for Ruling is a nullity and this matter cannot proceed further.

If the situation in respect of Imperial's counsel is correct, it is troubling that Imperial Oil, a company that has operated in the Sahtu Region for over one hundred years, apparently could not make the effort to retain an NWT licensed partitioner to represent its case.

I thank you for your attention to this matter and for the opportunity to provide comments on Imperial Oil's Request for Ruling.

Yours very truly,

Charles McNeely
Chair, SSI

cc SSI Board Members
Ms. Valerie Gordon, Chair, SLWB
Mr. Michael Van Appelen, VP, Energy Adjudication, CER
Mr. John Gregory
Ms. Jaclyn Mersereau
Mr. Nathan Baines

[9] Imperial's request for ruling at p 3: "If required. Imperial may seek judicial review on the grounds established in this letter."