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NUNAVUT WATER BOARD
NUNAVUT IMALIRIYIN KATIMAYINGI
OFFICE DES EAUX DU NUNAVUT

BY EMAIL: email

File Nos.: 3BM-COR0813,
3BM-KUG0914,
2BE-QIL1217

March 26, 2015

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**Subject: General Response to Aboriginal Affairs and Northern Development Canada
(AANDC) Review and Comment on Municipal Water Licence Renewals**

Dear Mr. Allain and Mr. Parsons:

This correspondence is a general follow up to discussions and correspondence that Aboriginal Affairs and Northern Development Canada (AANDC) has provided to the Nunavut Water Board (NWB or Board) with respect to AANDC's on-going review of various issues associated with municipal water licensing and compliance. The NWB notes that this response also responds to some of the general themes identified in recent comments received from AANDC in the context of AANDC's suggested changes to specific terms and conditions in Type "B" Water Licence renewals (#3BM-COR0813, #3BM-KUG0914, #2BE-QIL1217), but that the Board will also be providing a response to comments that are licence-specific rather than arising out of the general issues discussed below.

At the outset the Board notes that we greatly appreciate AANDC's substantial efforts to engage with the Board and with the Government of Nunavut to address, in a comprehensive and consistent way some of the difficult water licensing and compliance issues arising in the context of municipal water licences. In providing the Board's initial response to AANDC's recent correspondence our intention is to continue this productive and on-going dialogue that supports all parties in meeting our respective responsibilities under the *Nunavut Land Claims Agreement* (NLCA), the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* (NWSRTA) and the *Nunavut Waters Regulations* (NWR). The Board looks forward to further discussions with AANDC at the upcoming Nunavut Mining Symposium and on an on-going basis with respect to these general issues and specific licence applications. However, in advance of these discussions, the Board thought it may be helpful for AANDC to consider the Board's initial views with respect to the following:

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A. General Response to the Board's Role in Compliance and Enforcement

In discussions with AANDC's inspectors and in recent comments filed by AANDC, AANDC has suggested that compliance and enforcement of all water licences is the "sole responsibility of Inspectors appointed by the Minister of AANDC". Although the Board understands that this statement may largely be a reference to the Inspector's jurisdiction to enforce water licences as set out in ss. 85-88 of the *NWNSRTA*, the Board has concerns that this statement, when viewed in isolation is not consistent with the Board's understanding of the integrated and shared role of the Board and the Minister in terms of the regulation, use and management of water in the Nunavut Settlement Area as envisioned under the NLCA.

In the context of municipal licensing in particular, the Board is mindful of the courts having expressly noted the critical role that licensing authorities play in terms of compliance and eventual enforcement of these types of licences:

[46] In my opinion, The City of Dawson should not bear full responsibility for the current state of affairs. The conduct of the Water Board in granting a second and then third water-use license to the City of Dawson in circumstances where the City was in substantial breach of the first and then the second, constituted passive encouragement of non-compliance by the City. The Water Board's willingness to extend the third water-use license for five years, until 2005, is consistent with this message. In the *United Keno Hill Mines Limited*, supra, case, the court states:

If the responsible government agency is not pressing for compliance, or it's actually encouraging noncompliance through tacit or explicit agreements to permit non-compliant operations, the corporations cannot be severely faulted.

[47] Similarly, the government department responsible for enforcing the provisions of the Fisheries Act (currently the Ministry of the Environment, Canada) ignored and failed to prosecute the numerous breaches of the Fisheries Act since 1983 as evidenced by the repeated failures of the LC50 bioassay. This lack of action over a period of almost 20 years sent only one clear message to the City of Dawson: non-compliance is not a serious matter. It is a message that the City of Dawson received in clear and unequivocal terms, and goes some way in explaining its somnambulistic attitude for the better part of 20 years.

[48] The Water Board did recommend extending the license to 2005, and it was the unilateral refusal of the responsible federal minister to accept that recommendation that left the City of Dawson without a water license in January 2000. As I stated earlier (para 21), the City had started taking concrete steps towards dealing with its sewage effluent in 1997. The Minister's action was without notice and left the City in an impossible situation. There was insufficient time to build the secondary treatment plant prior to the summer season when sewage levels were certain to increase. But as the history of this case demonstrates, this impossible situation was largely of the City's own making.¹

On this basis, it is not the Board's view that compliance is the sole responsibility of Inspectors under the *NWNSRTA*, and by extension that the Board should not consider the compliance history of an applicant when determining whether to grant a licence, licence renewal or amendment to an existing licence. The Board not only considers the compliance history of an applicant to be relevant due to the common law recognition of the Board's role, but actually views compliance considerations to be an essential consideration in granting a licence as required by s. 57(b) of the *NWNSRTA*. Section 57(b) states that the Board may not issue a licence unless the applicant satisfies the Board that "the financial responsibility of the applicant, taking into account the applicant's past performance, is adequate for...(ii) such measures as may be required in mitigation of any adverse impact". In the Board's view, it is difficult to see how an applicant's past performance in this regard can be assessed if compliance history is not considered.

¹ *R. v. City of Dawson*, 2003 YKTC 16 (CanLII) at p. 17 (attached).

Consequently, the Board considers the compliance history of an applicant to not only be relevant in the consideration of licence applications, but reflecting case law and the *NWNSRTA*, the Board considers itself required to consider compliance history when considering an application. Reflecting the Board's view that compliance history must be considered by the Board in renewals, cancellations, grants of licences and in developing the appropriate terms and conditions for a water licence, the Board welcomes AANDC's offer to "provide comments [respecting compliance issues] weighted to reflect these responsibilities" (as offered recently by AANDC under the heading "Background" in the Technical Review Memorandum associated with the renewal application for #3BM-COR0813).

B. The Board's Jurisdiction to Develop Water Licence Terms and Conditions

Based on our review of AANDC's general recommendations about suggested revisions to the water licences for Coral Harbour, Kugluktuk and others it appears that there are some general themes to the revisions that may arise from AANDC's different view of the Board's jurisdiction to develop the specific terms and conditions in water licences.

With respect to expressly stating in several terms and conditions that the information, plans or requirements of the licence are applicable to only those activities, facilities, structures, etc. that are "subject to the *NWNSRTA* and *Regulations*", the Board believes that it is a central assumption underlying the terms and conditions of all licences issued by the Board (including all Type "A" licences and Type "B" licences that are subject to a Public Hearing and that are reviewed and approved by the Minister) that the terms and conditions are issued pursuant to the *NWNSRTA*, the *NLCA* and the applicable *Regulations*. As the Board's legal team routinely remind us, when the Board is considering changes to our processes, the Minister and the NWB are limited by the rule of law. The Supreme Court of Canada, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, provided a very clear statement on the effect of the rule of law that is fundamental to the Board's actions: "*By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution*". For ease of reference, we have attached a copy of that portion of the *Dunsmuir* decision (being paragraphs 27 to 31).

The NWB has concerns that by including express provisions that appear to link only specified terms and conditions to the *NWNSRTA* and *Regulations* it appears to imply that all terms and conditions are not necessarily derived from or linked by the Board to the *NLCA*, the *NWNSRTA* and the *Regulations*, which is of course not the case. Clearly, the NWB's jurisdiction and all regulatory instruments issued by the Board are limited by the jurisdiction established in the legislative framework created under the *NLCA* as further specified in the *NWNSRTA* and *Regulations*. So moving from the general assumption that all licence terms and conditions are grounded in the legislative framework (which is stated in the preamble to every licence), the Board offers the following perspective on areas where AANDC has raised issues that invite comment on the Board's jurisdiction.

In 2008, following the Board's decision to conduct a Public Hearing (due to significant public concern) expressed about the renewal of the Cape Dorset municipal Type "B" Water Licence, the Board noted that the Board's "toolkit" to respond to situations of persistent non-compliance (a responsibility of the Board as recognized in the Dawson City case referenced above) was limited to the decision to issue or not issue a licence.

In not pressing for the Hamlet's compliance with the existing licence and with the *NWNSRTA*, it is the view of the Board that the regulatory system is failing the people of Cape Dorset and very likely other municipalities in Nunavut. The Board is not prepared to further this failing by passively encourage the Hamlet's non-compliance with the *NWNSRTA* and the conditions of

Licence. However, the Board's jurisdiction does not extend to enforcement thus the Board is left with only a very blunt instrument – to issue or not issue a licence.²

However, given that the Board has jurisdiction under s. 70(1)(as set out below) of the NWNSRTA to include any conditions (reflecting the NLCA, Act and Regulations) considered appropriate, the Board carefully developed conditions that the NWB thought best to support municipalities to bridge the gap between persistent non-compliance and compliance.

70. (1) Subject to this Act and the regulations, the Board may include in a licence any conditions that it considers appropriate, including conditions relating to
- (a) the manner in which waters may be used;
 - (b) the quantity, concentration and types of waste that may be deposited and the manner of depositing waste;
 - (c) the studies to be undertaken, works to be constructed, plans, including contingency plans, to be submitted, and monitoring programs to be undertaken; and
 - (d) any future closing or abandonment of the appurtenant undertaking.

One of the central strategies used by the Board in the Cape Dorset case (and others) was to require non-compliant municipalities to provide a Plan for Compliance as a precondition to having their licence renewal application considered complete and to issue licences for shorter terms of 2-3 years instead of 5 years or longer. These measures were taken in an effort to ensure the Board was able to demonstrate that although there are budget and capacity limits that affect the ability of individual municipalities to comply, the Board nonetheless was taking the measures reasonably at their disposal to ensure that these licensees were required to take steps to keep up the momentum and focus gained when facing a Public Hearing.

The Board's sole focus, however was not only on issuing conditions in isolation, the Board began to conduct annual workshops with the key stakeholders, including GN-CGS and AANDC and did so for a period of three consecutive years, ending in 2010, when the Board could no longer sustain the funding for these workshops when attendance and the contributions of the key participants began to wane.

While the Board recognizes that the Board, AANDC and all participants involved in municipal licensing need to consider whether these measures have been or can be effective, and the Board welcomes that discussion with AANDC, GN-CGS in that respect. However, to be clear, in the Board's view, all of these conditions and measures were taken within the Board's jurisdiction and an active and on-going appreciation of our view of our role of not supporting persistent non-compliance. The implication of AANDC's comments on specific Type B licences that the Board does not have jurisdiction to have taken this approach clearly differs from the Board's views on this critical point. Undoubtedly further discussion is warranted as this difference appears to underpin a number of AANDC's suggested revisions where the heading identifies AANDC's concerns that a condition may be "unenforceable", and this characterization is cause for considerable concern for the Board. We welcome more detailed and specific exchange of viewpoints when we discuss the specific revisions of particular terms and conditions as outlined in recent comment submissions.

In closing, the Board notes that one of the outcomes of the annual municipal workshops was the development of a draft of a Technical Guide to Municipal Licensing which has not been finalized as the Board awaited input from various parties. The Board would be supportive of revisiting this Guide and working to finalize it if that would be a useful tool for the parties. Perhaps part of the discussions leading to a finalized version of the Technical Guide could include consideration of developing more standardized terms and conditions for inclusion in future municipal licences.

² Nunavut Water Board, Record of Proceeding/Reasons for Decision for 3BM-CAP0810, March 7, 2008, a p. 13.

Thank you for your consideration of the Board's perspective, we look forward to further discussions at the Mining Symposium.

In the interim, should you have any questions, please feel free to contact me by email to sean.joseph@nwb-oen.ca at your convenience.

Yours truly,

Original signed by:

Sean Joseph
A/Director of Technical Services

Attachments: NWB Reason for Decision Including Record of Proceedings for Hamlet of Cape Dorset
Application for Type "B" Water Licence
Regina v. The City of Dowson, Reasons for Sentencing
Excerpt from Dunsmuir v. New Brunswick

Cc: Andrea Morgan, A/Manager Water Resources, AANDC Nunavut
Robert Savard, Water Resource Officer, AANDC Nunavut
Karen Costello, Director of Resource Management, AANDC Nunavut