

MEDIATION REPORT

February 11, 2008

Participants:

BHP Billiton Diamonds Inc. (“BHPB”);

Government of the Northwest Territories (“GNWT”), represented by the Minister of Environment and Natural Resources;

Government of Canada (“Canada”), represented by the Minister of Indian Affairs and Northern Development;

and

Independent Environmental Monitoring Agency (“IEMA”);

History and Procedural Matters

This mediation, which involves access to a \$40,000 separate fund, is related to issues that arose in the 2006 mediation which addressed operational differences between the same participants¹ in the following four areas:

- IEMA² mandate
- workplan
- budget process, and
- core budget

Generally, the authority for the Dispute Resolution option, of which mediation is one alternative, comes from Article XIV of the Environmental Agreement³ between Canada, GNWT, and BHP Diamonds. Article XIV, in relevant part, states:

1 The reader will note that this Report, and the Resolution Agreement, makes a distinction between “Participants” and “Parties”. “Participants” refers to the four signatories to the Resolution Agreement including the intervenor IEMA, whereas “Parties” refer to the three signatories to the Environmental Agreement (BHP, GNWT, and Canada).

2 **Independent Environmental Monitoring Agency.** Canada, the Government of Northwest Territories (NWT) and BHP Billiton Diamonds Inc. have established an Independent Environmental Monitoring Agency (IEMA). The IEMA serves as a public watchdog for the regulatory process, and collects and reviews reports on environmental data, environmental effects, monitoring programs and the integration of traditional knowledge and experience into environmental plans.

3 The aim of the Environmental Agreement is:

XIV. Dispute Resolution

Except as expressly provided otherwise in this Agreement, Canada, the GNWT and BHP hereby agree that all matters of dispute arising out of this Agreement shall be resolved as follows:

1. "Canada, the GNWT and BHP shall act in good faith and promptly engage in discussions to resolve any dispute;
2. In the event that any one of Canada, the GNWT or BHP determine that the dispute cannot be resolved through discussions, Canada and the GNWT shall appoint, in Consultation with BHP, a mediator to assist in further discussions to resolve the dispute;
and
3. In the event that any one of Canada, the GNWT or BHP determine that the dispute cannot be resolved satisfactorily with the assistance of a mediator, the dispute shall be referred to an Arbitration Committee and the arbitration process shall be open to the public. ... "

A key difference between mediation and arbitration, as seen from the above section of the Environmental Agreement, is that mediation is a non-binding⁴ process whereby a neutral helps parties reach settlement through discussions based on parties' interests. Arbitration, on the other hand, is a form of decision-making and involves adjudication of parties' interests and positions, following a formal hearing. Should the participants not reach agreement in the case of the separate fund dispute (see Appendix A) I have suggested the matter be referred to the next step which is arbitration.

Similar to 2006, the mediation was open-minded and collaborative and overall was a good learning and enjoyable experience, at least for me. Once again, the participants wanted to eliminate issues of disagreement and build a better future in the context of working relationships formed under the Environmental Agreement.

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- To respect and protect land, water and wildlife and the land-based economy essential to the way of life and wellbeing of the Aboriginal peoples.
 - To facilitate the use of holistic and ecosystem-based approaches for the monitoring, management and regulation of the project.
 - To provide advice to BHP Billiton to assist BHP Billiton in managing the project consistent with these purposes.
 - To maximise the effectiveness and coordination of environmental monitoring and regulation of the project.
 - To facilitate effective participation of the Aboriginal peoples and the general public in the achievement of the above purposes.

⁴ Non-binding means parties may or may not agree to the mediation option. If a settlement is reached, it is binding between the parties and it is an agreement created by the parties and not imposed by someone else.

Issue

The issue that led to this year's dispute is much narrower than 2006. One of the questions in dispute surrounded the meaning of a legal or regulatory proceeding. This is the other related question to be answered:

Is the use of the Separate Fund confined solely to public hearings and legal proceedings or can it be used for the preparation and participation in any regulatory proceedings?

Views of the Participants

While the views of the GNWT and Canada were relatively neutral, both BHPB and IEMA took opposing views.

BHPB believes the separate fund is to be used *only* in legal or regulatory proceedings, such as public hearings for license and permit applications or judicial review proceedings in which IEMA formally intervenes. BHPB does not believe IEMA should be able to frequently access the separate fund, i.e., to use it to review and comment on BHPB's reports and plans in the ordinary course of its monitoring activities.

On the other hand, IEMA believes it is entitled to both prepare for and intervene in regulatory and other legal processes. Thus wherever the Mackenzie Valley Land and Water Board, subsequently replaced by the Wek'eezhii Land and Water Board (WLWB) in February 2006, is required to approve a plan, study or report under a BHPB water licence for Ekati, the IEMA's preparation for and participation in such a regulatory process should be considered an activity eligible for expenditures under the Separate Fund.

In the spirit of compromise and following a meeting of the three signatories and the Agency on March 30, 2007, the two governments suggested that the separate fund might be used for those activities for which a hearing is reasonably certain. In the interest of cooperation, IEMA was willing to limit the application of the separate fund to intervening in regulatory and other legal processes for which a hearing is "reasonably assured".

Mediator's Comments on Definitions

In this mediation, I believe there is a need for a better understanding of the role of an "intervener" such as IEMA, at public hearings, and to find out what 'public hearings' means. The confusion seems to have arisen due to comments that I made at the last mediation in 2006. I had mistakenly left the impression at least in a water licensing context, that interventions in a public hearing potentially continued after the hearing ended and license issued. In making comments in this report (which the parties asked me to do) two important clarifications are necessary: First, giving an opinion is something

mediators do not do; I only explicate these matters upon request and with the warning of losing the necessary neutrality. And second, my comments are NOT to be construed as a legal opinion on appropriate rules or procedures for either the Mackenzie Valley Land and Water Board or the WLWB. Those Boards have their own statutory framework that should be checked along with their rules and related judicial interpretations.⁵ Suffice it however that the Boards are quasi-judicial at least when they conduct hearings and there are pieces of statutory wording that reflect this judicial personality.⁶ I appreciate that the rules of evidence for tribunals can be relaxed, and I know there are certain cases (where no objections are noted and so on) where a hearing need not be conducted, but these principles are not at play in the mediation before me.

Let me first address the word “interveners”. Several cases have given ‘intervener’ some context and placed boundaries around it. In *Apotex v. Eli Lilly Canada*,⁷ Richard C.J. for the federal court set out the various factors relevant to an intervention. The following list used by the Court⁸ shows the parameters an intervener must meet for formal standing in the federal courts:

- 1) Is the proposed intervener directly affected by the outcome?
- 2) Does there exist a justiciable issue and a veritable public interest?
- 3) Is there an apparent lack of any other reasonable or efficient means to submit the question ... ?
- 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
- 5) Are the interests of justice better served by the intervention of the proposed third party?
- 6) Can the Court hear and decide the proceeding on its merits without the proposed intervener?

Similarly, in *Ethyl*⁹ the court noted the obligation on interveners to contribute to hearings through their intervention:

“[d]espite the more generous rules with respect to intervention in constitutional cases, the proposed intervenor must still show a direct interest and the likelihood that it can make a useful contribution to the proceedings.”

For tribunals, the Manitoba Public Utilities Board shows the obligation on interveners to which it awards costs. That Board focused on the need for a significant contribution,

5 See e.g., *Ka'a'gee Tu FN v. Canada* 2007 FC 764; *North American Tungsten Corp. v. Mackenzie Valley Land and Water Board*[2003] 10 WWR 257; *DeBeers v. Mackenzie Valley et al*, 2007 NWTSC 24 (Canlii).

6 See e.g. section 25 of the Mackenzie Valley Resource Management Act.

7 2001 213FTR 317.

8 Quoting *C.U.P.E. v. CAI Ltd*, (2000) A-346-99 (F.C.A.)

9 1997 Carswell Ont 4039 (Ont. Gen. Div)

cooperation with other intervenors, and avoiding duplication:¹⁰ The Board said the intervener must have:

- a) made a significant contribution that is relevant to the proceeding and contributed to a better understanding by all parties of the issues before the Board;
- b) participated in the hearing in a responsible manner and cooperated with other Interveners who have common objectives in the outcome of the proceedings in order to avoid a duplication of intervention;
- c) insufficient financial resources to present the case adequately without an award of costs; and
- d) a substantial interest in the outcome of the proceeding and represents the interests of a substantial number of the ratepayers.

In summary, an intervener obtains its standing to participate in a hearing by meeting a variety of tests. One additional list comes from British Columbia¹¹ as follows (cases and cites omitted):

1. The decision to grant intervenor status will be affected by the nature of the applicant seeking intervention status, the directness of the applicant's interest in the matter, and the nature of the issue in the case.
2. Intervenor status should not be granted where the applicant has a direct interest in the outcome of a specific action between particular parties. A person with such an interest should be added as a party.
3. Intervenor status will be considered where an applicant shows that it has a substantial interest in the proceeding different from the interest of the parties and that its interests will be affected by the outcome of the litigation.
4. The fact that a public or private interest group may bring a different perspective to the issue before the court may overcome the absence of a direct interest in the outcome of the case and favour intervention.
5. Intervention is more likely to be permitted in proceedings concerned with issues of public law rather than private law.
6. The fact that the addition of an intervenor will add to the length and complexity of the trial, and consequently result in additional expense, should not deter the exercise of the court's discretion to permit intervention in otherwise appropriate circumstances.
7. The submissions of intervenors should not be directed to the *lis inter partes* but should be confined to the public law issues arising in the case.

In my words then, an intervener is someone who has a significant interest in a case who with permission inserts or interposes itself into a defined case or defined proceeding to

10 Manitoba PUB, order 3/02 (2002).

11 International Forest Products v. Kern, 2000 BC SC 1087.

participate by bringing a unique point of view by offering evidence that is cross-examinable and following which there is a decision made pursuant to a statute. Permission to intervene must always be sought by interveners and approved by the Court or tribunal, absent clear and exceptional statements to the contrary (such as land claims standing by aboriginal groups or Attorney Generals who have automatic status in constitutional question cases).

There are a couple of cases involving the Minister of DIAND, but the principles are the same.¹²

Next, it is helpful and probably necessary to find the boundaries around the phrase "proceeding". When does a legal or regulatory proceeding begin, and when does it end? In my experience, a legal proceeding has these boundaries and they are tight:

- a) there is a certain beginning date, indicated by filing initiating documents, a notice of motion, or specific order;
- b) clear rules of procedure for the hearing;
- c) before a presiding officer delegated by law to make a decision (judge or tribunal member), and;
- d) (subject to appeals), ending with a final decision such as a judge's order or in the case of Northern water licenses, a Minister's signature.

To use the example of water boards in the north, they can if the public interest warrants, have hearings in connection to any matter relating to its statutory objects. That rule includes the issuance, renewal, cancellation, or amendment of water licenses.¹³ The Board also has mandatory hearing obligations in certain other situations.¹⁴ The Board can also suspend and assign permits and authorizations.¹⁵ Again, there are specific notice requirements, and the Board has an obligation to issue and make available written reasons

¹² In *Maurice v. Canada (Minister of Indian Affairs & Northern Development)* (Fed. T.D.) [2000] F.C.J. No. 208, the court had to find a balance between adding interveners and keeping intact the parameters of the litigation.

Among other things, the Court made these comments regarding interveners::

It is common ground that an intervenor takes the pleadings and record as it finds them. While an intervenor may bring new viewpoints and special knowledge to a proceeding, the intervenor may not litigate new issues (*Yale Indian Band v. Aitchelitz Indian Band* (1998), 151 F.T.R. 36 (Fed. T.D.) (Proth.)).

... Because an intervenor is limited to the issues that have already been raised by a plaintiff, the involvement of the intervenor will necessarily be limited in the evidence he or she can adduce. (One can of course be an intervenor without having the right to adduce any evidence).

¹³ See e.g. Northwest Territories Waters Act 1993, c. 39, section 21(1).

¹⁴ *Id.*, section 21(2).

¹⁵ See e.g., section 59 of the MVRMA.

for its decisions or orders relating to any licence or application.¹⁶ The whole process is formal and rules of procedural fairness apply.

Part of the confusion arises with the connotation that a public hearing carries with it the requirement of a full public, oral hearing. Yet, in my experience with tribunals across Canada, there is no rule that prohibits a *written* hearing. In fact, there are several examples including north of 60 that allow tribunals flexibility in using whatever procedures necessary (written, teleconferences and so on) in conducting hearings.

That said, there is still the legislative requirement for water licenses that the Minister approve them. Thus, it is on the shoulders of the Minister when he approves licences that come to his desk, to ensure the conditions are clear and final enough such that he is not allowing the Board to be a revolving door of repeated applications and ‘hearings’ without his statutory approval oversight. On that concept, the Mackenzie Valley Land Use Regulations differentiates situations where a hearing be held *versus* further studies conducted.

A couple of additional thoughts. First, at least for tribunals, there should be a certain expediency about its work; tribunals exist by statutory delegation to be fair and efficient. There is the constant need to avoid delaying proceedings;¹⁷ interveners are subject to set rules;¹⁸ and in some Canada jurisdictions, Boards with Courts approval have held that an intervening party’s interests must be something in addition to the “abstract interests ... in generalized goals of environmental protection.”¹⁹

16 NWT Waters Act, section 25(1).

17 In *Hartling v. Nova Scotia (Attorney General)* (N.S.S.C.), 2006 NSSC 144, the Court added the Insurance Bureau of Canada as an intervener to the proceeding, and stated:

As well, the court itself will control its own process with respect to any abuse that could arise by their participation. Following *Nova Scotia (Attorney General) v. Arrow Construction Products Ltd.*, 1996 CarswellNS 79 (N.S. C.A. [In Chambers]) I have considered the consequences of IBC’s possible intervention in this proceeding.

In considering an application to intervene, appellate courts will consider: (1) whether the intervention will unduly delay the proceedings; (2) possible prejudice to the parties if intervention is granted; (3) whether the intervention will widen the *lis* between the parties; (4) the extent to which the position of the intervener is already represented and protected by one of the parties; and (5) whether the intervention will transform the court into a political arena. As a matter of discretion, the court is not bound by any of these factors in determining an application for intervention but must balance these factors against the convenience, efficiency and social purpose of moving the case forward with only the persons directly involved to this *lis*.

18 See e.g. MVRMA Land and Water Board *draft* Rules of Procedure, Rule 86.

19 *Kostuch v. EAB* (1996) 35 Admin LR (2d) 160. To be sure, the statutory test in Alberta (that one be “directly affected”) is different.

Resolution Agreement

As stated above, I met with the participants over the last several months in Yellowknife and in Calgary and in summary, I can report that I have discussed with all participants an “algorithm” that can be used to resolve questions regarding the future access of the separate fund. Again, this is found in Appendix A.

It is worth quoting from the previous Mediation Report to point out the special fund had parameters around its access; the 2006 Report said such funds were to be: “... used **solely** for IEMA’s participation as an intervenor in regulatory and other legal proceedings respecting environmental matters pursuant to paragraph IV.2(d) of the Environmental Agreement.” (emphasis added). The special nature of the fund seems to have been captured by Gavin Moore of the GNWT.²⁰

Dated this < > day of February 2008.

“Original signed by”

William A. Tilleman, J.S.D., Q.C.
Mediator

Attachment: Resolution Agreement, Appendix A.

²⁰ “If this is so, the Special Fund would then be for really special activities [whatever that may be] and regular funding would be for all ongoing monitoring plans and programs no matter what process.”

APPENDIX A

I. For purposes of this Mediation, participants accept that participation in a hearing in the Northwest Territories flows from and is governed by whatever Statutes, Regulations, or Rules set by of for that tribunal or Court. Generally, participants also accept that a hearing begins with notice to parties, includes either a oral or written proceeding as the Board dictates, an opportunity to question or cross-examine the views of other parties, and ends with a decision as evidenced by a court or tribunal signature;

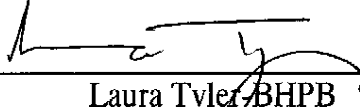
II. For matters involving a current license, a hearing as opposed to ongoing monitoring takes place when there is an issue not yet decided by the Board for which the Board engages by notice, all interested parties, in the course of a hearing for rules it sets, and then formally and legally decides the matter. Where the subject matter is for the Minister to decide, the Board in its judgment sends the matter to him;

III. Where it becomes necessary to confirm that a 'hearing' will take place (as opposed to ongoing monitoring of conditions from a previous license) IEMA or any other participant may write to the court or tribunal, with notice to other participants, seeking written confirmation that a hearing of a yet-to-be-resolved license issue will occur. When the tribunal gives notice of a hearing by statute or otherwise indicates in writing that a hearing will occur, then, it will be 'reasonably assured' and the Agency is entitled to allocate related expenses to the Separate Fund. Given the short notice timelines in NWT regulatory legislation (usually one to two months) it is expected that a hearing is not reasonably assured if it exceeds 12 months unless stated by a Board or Court to the contrary. Exceptions to the 12 month rule can include applicants seeking Board approval of changes to a permit or approval with an established future date.

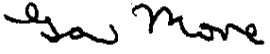
IV. Following receipt of a court or tribunal's letter in III above, where the participants are still in doubt about whether a hearing is reasonably assured, the participants will hold a special meeting. After hearing the case presented, a majority vote of the parties (2/3) finally decides the matter.

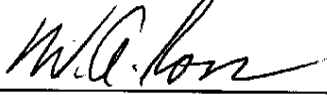
V. To close the books on all past expenditures of the Separate Fund, IEMA is asking BHPB to forgive all amounts spent to date. BHPB's signature below indicates their approval to waive repayment of those amounts not to exceed 70,000.00.

Signed this 5th day of March, 2008 at Yellowknife, NWT.


 Laura Tyler-BHPB


 David Livingstone-Canada


 Gavin More-GNWT


 William A. Ross-IEMA

Witness as to signatures: 