

IN THE MATTER OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, c. 17

**AND IN THE MATTER OF AN ARBITRATION UNDER
AN ENVIRONMENTAL AGREEMENT dated March 8, 2000**

BETWEEN:

**ENVIRONMENTAL MONITORING ADVISORY BOARD
("EMAB")**

Claimant

- and-

**DIAVIK DIAMOND MINES INC.
("DDMI")**

Respondent

- and-

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Indian Affairs and Northern Development
("Canada")**

Party

- and-

**THE GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister of Resources, Wildlife and Economic Development
("GNWT")**

Party

AWARD

[1] This arbitration involves the interpretation of an Environmental Agreement dated March 8, 2000 ("EA") between Canada, GNWT, DDMI and five Aboriginal groups. In 1999 Canada approved the proposed DDMI diamond mine at Lac de Gras in the Northwest Territories ("the Project"). Approval was conditional upon, among other things, DDMI entering into an environmental agreement to provide a formal mechanism to ensure appropriate implementation and monitoring of mitigation measures committed to by DDMI and required by Canada's approvals. The EA requires the creation of EMAB and sets out its mandate, composition, and the manner in which it is funded. EMAB was incorporated January 30, 2001.

Submission to Arbitration

[2] The EA provides in Article XVI that disputes between any parties arising out of or in connection with the EA shall be submitted to binding arbitration and that the provisions of the *Commercial Arbitration Act (Canada)* shall apply. It also provides that when a dispute arises the disputing parties shall use all reasonable efforts, including voluntary mediation, to resolve the

dispute. Pursuant to article 16.5, EMAB is entitled to intervene in the resolution of disputes under the EA.

[3] Canada and GNWT gave DDMI written notice dated July 14, 2010¹ that they were invoking Article XVI for the resolution of this dispute (“Notice of Dispute”). The parties appointed me as mediator and, if necessary, sole arbitrator pursuant to the EA. The parties negotiated a Mediation and Arbitration Agreement (“MAA”) with me dated September 16. As part of the MAA dealing with confidentiality, the parties agreed that information relating to the mediation or arbitration may be disclosed to the Aboriginal parties to the EA “who have elected not to participate in this mediation/arbitration...” The MAA provides at paragraph 7:

The arbitrator shall be entitled to give such weight to the facts and arguments that are submitted to him...during the mediation sessions and arbitration hearing as the arbitrator deems appropriate without regard to whether evidence is sworn or unsworn. The parties and the arbitrator agree that neither party will be bound by, and the arbitrator will not consider, any prior agreement, concession, or understanding reached at any stage of prior proceedings or during the mediation in respect of the issues submitted to arbitration.

[4] The MAA provides at paragraph 8:

The parties acknowledge that the arbitrator may become privy to information during the mediation sessions that the parties would not otherwise introduce in an arbitration. The parties agree that the arbitrator may use mediation, conciliation or other similar techniques before and during the arbitration and continue in his role as arbitrator thereafter without disqualification.

[5] The parties and I held mediation meetings in Yellowknife September 16 and 17. However, despite their efforts and progress, the parties were not able to resolve the dispute. During a conference call with me on October 4 the parties agreed, among other things, that:

- the arbitration process began as of that date,
- for the purpose of this procedure, EMAB will be considered the claimant and all others the respondents,
- the parties would exchange statements of claim or defence and written arguments (referencing any document the party intended to rely upon) on an agreed timeline, and
- we would hold another conference call December 2.

[6] No representative of GNWT participated in the December 2 conference call. However, after receipt of an email from me setting out the conclusions reached during the call, counsel for GNWT confirmed by email that GNWT had no concerns with anything discussed during the call and agreed with the timelines. During the December 2 call the parties and I agreed that no oral hearing was needed. The parties agreed that:

- I may take into account as evidence all of the documents that accompanied the parties’ briefs,

¹ All dates are 2010 unless otherwise noted.

- no one suggests the EMAB financial statements are incorrect or inaccurate (except as to a clerical error that was corrected by a restatement of the financial documents),
- the deadline for delivery of this Award was extended to January 31, 2011 with an expectation that it would be delivered sooner, and
- there would be a timeline for responding to questions posed by me in writing and replies to those responses.

[7] I have received and read all of the statements, responses and replies.

[8] The Notice of Dispute states that EMAB and DDMI have failed to resolve a disagreement with respect to the interpretation of Article 4.8(g) of the EA concerning EMAB's ability to carry over funds and interest from a previous budget period.

The EA

[9] Article I states the EA is intended to achieve certain purposes including, among other things, to provide advice and directions to DDMI to assist it in managing the Project consistent with the purposes of the EA and to maximize the effectiveness and coordination of the environmental monitoring and regulation of the Project. The EA also states "guiding principles" that include promotion of capacity-building for the Aboriginal Peoples² respecting Project-related environmental matters, full consideration and use of both traditional knowledge and other scientific information, and promotion of a cooperative approach among the Parties respecting Project-related environmental matters.

[10] EMAB is to operate at arm's length and independent from the Parties³ and its mandate is stated to include participation as an intervenor in regulatory processes, the dispute resolution process under the EA, and other legal processes⁴. Its accounts are to be audited annually and its financial records are to be maintained in accordance with generally accepted accounting principles.⁵

[11] The EA prescribes how EMAB is to be funded. Article 4.8(a) states:

...DDMI shall provide funding, in accordance with [EMAB's] budget, to [EMAB] to carry out its mandate.

[12] Article 4.8(c) requires EMAB to "manage and conduct its affairs in a fiscally prudent, reasonable and cost-effective manner" and to that end it is to "endeavour wherever possible to reduce the cost of fulfilling its responsibilities."

[13] EMAB's budget is to be for two year periods after the first two years.⁶ Its annual budget for each of its first two years was set at \$800,000 with DDMI, Canada, and GNWT contributing

² Capitalized terms that are not defined in this Award have the meaning given them in the EA.

³ EA, 4.2.

⁴ EA, 4.2(l).

⁵ EA, 4.6(j).

⁶ EA, 4.8(e).

\$600,000, \$150,000, and \$50,000 respectively.⁷ The first two years' budget was stated to include non-recurring start-up costs and was not to be considered a base amount for future years. Canada and GNWT had no further funding obligations after the first two years.

[14] Article 4.8(e) prescribes how EMAB's budget for a period is determined. In summary, EMAB prepares a budget and reviews it with DDMI with a view to reaching agreement. If they cannot agree, each may submit a proposed budget to the Minister. If EMAB, DDMI and the Minister cannot agree on a budget, the Minister will select either the budget submitted by DDMI or, "provided the Minister is reasonably satisfied that [EMAB] has complied with Article 4.8(e)(ii)," the budget submitted by EMAB.

[15] Article 4.8(e)(ii) requires EMAB to:

...make best efforts to ensure that the amount of DDMI's contribution to the budget for any two year period shall not, without the agreement of DDMI, exceed DDMI's contribution...for the preceding two year period by a percentage which is greater than the percentage change in the Consumer Price Index...over that two year period. For this purpose, the budget for the second year shall be considered \$600,000.⁸

[16] The crux of the disagreement between the parties arises from Article 4.8(g):

Any funds provided by DDMI, Canada, or GNWT in a budget period that are not expended in that period shall be applied to fund [EMAB's costs] in accordance with the budget for the succeeding budget period, provided that funds that are designated for a program that continues into a new budget period may be used for that program.

[17] Article 4.11 provides for a review of, and negotiations to amend, Article IV two years after the Effective Date. However, "DDMI shall not, as a result of such negotiations, be required to provide, in relation to the Project, any funding in excess of its funding obligations specified in Article 4.8."

[18] The remedies provided in the EA for a breach or default are said to be cumulative and not in substitution for remedies at law or equity. Article 17.1 further provides:

...Any waiver by any Party of the strict observance of, performance of, or compliance with, any term covenant, condition or agreement of [the EA] must be in writing to be effective and any waiver or indulgence by any Party shall not constitute a waiver of any other provisions, a continuing waiver or a waiver of any subsequent default.

[19] The EA is to be governed by and construed in accordance with the laws of the Northwest Territories and the laws of Canada applicable therein.⁹

⁷ EA, 4.8(d).

⁸ It is common ground that the adjusted amount is \$697,000 for 2009-10 and \$719,000 for 2010-11.

⁹ EA, 17.3.

Dispute

[20] DDMI claims that as of March 31, 2009 EMAB had unexpended contributions of \$243,503 plus accumulated earned interest of \$127,354 for a total of \$370,867 as shown on the March 31, 2010 financial statements. DDMI submits that pursuant to Article 4.8(g) EMAB should apply \$300,000 of that amount to fund EMAB's costs for the years 2009-10 and 2010-11 thereby reducing DDMI's contribution by \$150,000 in each of those budget years. DDMI has reduced its contribution by \$150,000 in each of those budget years.

[21] DDMI notes that when it decided to reduce its contributions by \$300,000 it was not known what the exact amount of the unexpended funds would be, but that it would be at least \$300,000. It submits that the balance of \$70,867 will result in an unexpended contribution of that amount as at March 31, 2011 and it should be applied (along with any other unexpended funds) to fund EMAB's costs in the succeeding budget period.

[22] EMAB submits that:

- a. Interest income should not be included in the calculation of funds that are not expended in a budget period;
- b. In calculating unexpended funds, DDMI cannot include contributions made by Canada and GNWT;
- c. Unexpended funds from a budget period are to be applied to fund EMAB's costs, not to reduce contributions by DDMI;
- d. To be properly applied to fund EMAB's costs in a succeeding budget period, funds provided must have been contributed in the preceding budget period; and
- e. It is within EMAB's discretion to decide whether contributions designated for a particular program that are not expended in a budget period are carried forward for that program to the next budget period.

[23] EMAB submits that unexpended contributions (not including interest) in a budget period are to be applied only to the succeeding budget period and therefore only the unexpended contributions made by DDMI as at March 31, 2009 may be applied to the budget period ending March 31, 2011. It submits that its failure to apply unexpended funds in this fashion in previous budget periods or DDMI's failure to insist on such application of the funds means that DDMI is now estopped from seeking to apply to EMAB's costs unexpended funds from budget periods up to March 31, 2007. It submits that by stating in writing its agreement to budgets and work plans (or, in the case of the 2007-09 budget period, by having provided funds), DDMI has waived in writing strict observance of, performance of, or compliance with any requirement that those unexpended contributions be applied to fund EMAB's costs in subsequent years.

Facts

[24] Canada made its first \$150,000 contribution to EMAB before March 31, 2001. By March 31, 2001, EMAB had spent only \$39,746 of the contributions on hand. Accordingly, there was \$110,254 excess revenue over expenditure as at that date. EMAB notes that the excess is fully

attributable to Canada as the only contributor to that point in time. For accounting purposes the sum was designated as unrestricted net assets (“UNA”).

[25] In 2001-02 Canada made its second contribution (\$150,000), GNWT made its first contribution (\$50,000) and DDMI made its first contribution (\$600,000). By March 31, 2002, EMAB had unexpended contributions of \$259,129 plus \$12,509 of earned interest for a total of \$271,638 which it characterized as UNA. Based on the proportionate amount of the total contributions from the three funders, EMAB calculates that DDMI’s portion of the unexpended contributions was \$81,626. It conducted the same analysis for each fiscal year for which it has audited financial statements (up to the beginning of the 2009-10 fiscal year) and produced a table¹⁰ showing that as of March 31, 2009 the total amount of unexpended contributions attributable to DDMI was \$97,739.

[26] EMAB’s financial statements do not allocate unexpended contributions among the contributors.

[27] EMAB’s budget forecast for 2003-05 states “In fiscal 04/05 any surplus from 03/04 operations will be deployed to fund projects.” Each of EMAB’s budget forecasts for 2005-07, 2007-09 and 2009-11 state “Any surpluses will be deployed to make up predicted shortfalls in the following year.”

[28] In its responses to questions posed by me, EMAB said it always indicated that it planned to spend the surpluses but was not always able to completely fulfill the work plan and that there has never been an intention to retain funds. However, funds were retained and accumulated.

[29] The March 31, 2010 financial statements show on the Statement of Financial Position, for March 2009 (restated) net unexpended contributions of \$243,503 and accumulated interest of \$127,364 (together totalling \$370,867).

[30] Prior to the preparation of EMAB’s 2009-11 work plan and budget, DDMI and EMAB had been able to agree on EMAB’s budget. EMAB points out that DDMI never took issue with the amount of EMAB’s UNA.

[31] Since 2003 DDMI has provided funding to EMAB for traditional knowledge programs. This funding is in addition to DDMI’s obligations under the EA and unspent funds are refunded to DDMI. Canada has also provided refundable funding.

[32] When the disagreement between EMAB and DDMI arose regarding the 2009-11 budget period, Canada retained McKay LLP chartered accountants to help it attempt to resolve the dispute between EMAB and DDMI. McKay LLP produced a report effective June 11, 2009 (“the Report”) which Canada shared with the parties to the EA. The executive summary in the Report states that McKay LLP identified that the primary issues to be addressed “were in respect to *‘the components of EMAB’s Unrestricted Net Assets’*, from the perspective of the [EA].” It states that the specific matters to be addressed were:

- What are the components of the ‘surplus’

¹⁰ EMAB written submission, tab 11

- What restrictions, if any, are on the ‘surplus’ or components thereof
- If there are restrictions what is the ‘trigger’, either event or action, required to release such restrictions.

The Report summarizes McKay LLP’s understanding of the parties’ perspectives and then presents its understanding of the issues based on its interpretation of the EA. At page 13 the Report notes that McKay LLP could not determine the correct interpretation of the EA “as certain interpretations may require legal clarifications.” At page 18 the Report states that interpretations within the report “should be considered as assumptions that we apply.”

[33] Retaining McKay LLP to resolve the dispute was no doubt well intentioned and a good idea. However, the Report expresses opinions and conclusions on the very matters that are before me to decide and McKay LLP disclaimed legal interpretative expertise. The conclusions expressed in the Report are opinions based on the assumptions used and are not determinative of any matter before me.

[34] DDMI notes that in 2001 EMAB established a Capacity Building Program to which it allocates up to \$30,000 per year to each of the five aboriginal parties for a total of \$150,000 per year. Funds allocated to that program have not been fully spent in each year with the result that as of March 2009 EMAB had \$383,707 in unused funding allocated to the program.

Issues

[35] The following questions must be decided to resolve the present dispute:

- Must EMAB’s unexpended funds as at March 31, 2009 be applied to its costs in the following budget period?
- In calculating unexpended funds are contributions from Canada and GNWT to be considered?
- What is the effect, if any, of DDMI raising the matter of unexpended funds for the 2009-11 budget period, but not previously?
- How should EMAB’s accumulated interest be treated?
- What is the amount of EMAB’s unexpended funds and interest as at March 31, 2009?

[36] In addition, the following questions arise:

- When unexpended funds are applied to fund EMAB’s costs for a succeeding budget period, will this necessarily result in a reduction in DDMI’s contribution for that succeeding period?
- May funds designated for a program that continues into a new budget period be used for that program at EMAB’s sole discretion, and may it continue to do so year after year?
- Is DDMI entitled to input into EMAB’s work plans, or only with respect to its budget?

- i. Is EMAB entitled during a budget period to reallocate actual spending from budgeted spending?

Discussion and Conclusions

Contract Interpretation

[37] The goal of contract interpretation is to determine the intention of the parties to the agreement.¹¹ Intention is to be determined by looking at the words of the document and giving meaning to all its terms, if possible, with a view to harmonizing potentially conflicting clauses. The absence of words may also be considered and also the circumstances in which the contract was made.¹²

[38] Commercial contracts are to be interpreted as a whole, giving meaning to all of their terms and avoiding an interpretation that renders one or more terms ineffective. Parties are presumed to have intended what they have said and regard may be had to the factual matrix underlying the negotiation of the contract. Contracts are to be interpreted in a way that accords with sound commercial principles and good business sense and that avoids commercial absurdity.¹³

[39] EMAB was created to further the purposes of the EA. It is to operate at arm's length and independent from the Parties and its mandate includes serving "as a public watchdog of the regulatory process and the implementation of" the EA. It is to review reports, plans, programs, measures, and data produced by any of the Parties or regulatory authorities and "make recommendations for the achievement of the purposes and guiding principles in Article I, to DDMI, the Minister, and any other Party or body having regulatory or management responsibility for the matter." A Party receiving such a recommendation must give it "full and serious consideration" and either accept the recommendation for implementation or provide EMAB with written reasons where it determines the recommendation is not appropriate and will not be implemented.

[40] EMAB is not a watchdog without teeth. Various provisions of the EA give it broad power and authority. For example, each of the Parties must cooperate with EMAB and provide it with information and assistance on request.¹⁴ At EMAB's request, the Minister may direct any qualified person to conduct investigations to confirm DDMI's compliance with the EA and all Environmental Plans and Programs submitted and reviewed in accordance with" the EA. DDMI must admit the qualified person to the Project and provide that person with all reasonable assistance.¹⁵

¹¹ EMAB is not a party to the EA, but is, by its terms, permitted to intervene in disputes such as this one.

¹² See: *Orbus Pharma v Kung Man Lee*, 2008 ABQB 754, paragraph 40.

¹³ See: *The Plan Group v. Bell Canada*, 2009 ONCA 548, paragraph 37

¹⁴ EA, 4.10.

¹⁵ EA, 5.4.

[41] The EA contemplates and calls for a high degree of consultation, reporting, and cooperation between the Parties and EMAB. See, for example, articles 4.2(a) and (b) where EMAB is mandated to provide an integrated approach to achieving the purposes of the EA and to assist the Parties to implement a cooperative approach, and article 14.1 that lays out general communications principles to ensure, among other things, a timely, responsive, pro-active and cooperative approach to communication and exchange of information among the Parties, EMAB and the Parties, and Affected Communities.

[42] The EA is worded to give DDMI some comfort that its obligation to fund EMAB (recall that it is EMAB's sole funder after the first two years of operation) will not exceed a certain amount. Article 4.8(c) requires EMAB to manage and conduct its affairs in a fiscally prudent, reasonable and cost-effective manner. Article 4.8(e)(ii) requires EMAB to make best efforts to ensure that DDMI's contribution will not increase by more than the percentage increase in the Consumer Price Index ("CPI") and the base budget for this calculation is set at \$600,000. Article 4.8(e)(iii) requires EMAB and DDMI to jointly review EMAB's plan of anticipated work and its recommended budget and to attempt to agree on a budget. Article 4.11 allows the Parties "to negotiate to amend" Article IV after two years but provides that DDMI shall not, as a result of those negotiations, be required to provide any funding in excess of the obligations specified in 4.8.

[43] DDMI might also have expected some comfort from article 4.8(g).

Article 4.8(g)

[44] I reproduce here for convenience article 4.8(g) exactly as it appears in the EA but with italics added to highlight words that may give rise to some difficulty in interpretation:

Any funds provided by DDMI, Canada, or GNWT in a budget period that are not expended in that period shall be applied to fund the costs of the Advisory Board in accordance with the budget for the succeeding budget period, provided that funds that are designated for a program that continues into a new budget period may be used for that program.

The Nature of Funds Provided

[45] Article 4.8(g) does not provide that once funds are provided to EMAB they are to be in any way pro-rated for any purpose. Those funds, in their entirety, are to be applied to fund EMAB's costs, either during the budget period during which they were supplied or during the succeeding budget period. This means that whether the funds came from DDMI, Canada, or GNWT, they are to be treated the same.

[46] EMAB submits that its bylaw requiring that on dissolution its funds are to be distributed among the parties who provided the funds demonstrates that unexpended funds should be credited to the party who provided them. The provisions are unrelated and the bylaw does not aid in the interpretation of the EA. Furthermore, under the bylaw there might be many funders other than those required by the EA to provide funds.

[47] GNWT in its submission stated that it does not take a position regarding the proper interpretation of 4.8(g). It admits that it has not asked for or received any money back from EMAB and is not now asking for a return of any funds (including interest). However, GNWT takes the position that DDMI is not entitled to deduct whatever portion of surpluses is from contributions attributable to GNWT.

[48] Similarly, Canada does not take a position regarding the interpretation of 4.8(g). Canada “is content that EMAB should retain the surplus funds provided by Canada under the Contribution Agreement and the Comprehensive Funding Arrangement”. The Contribution Agreement and the Comprehensive Funding Arrangement both reference the EA and it appears that they pertain only to Canada’s obligation to provide \$300,000 during EMAB’s first budget period. In any case, the agreement and the arrangement are between Canada and EMAB and they do not alter the terms of the EA.

[49] **I conclude** that funds provided by DDMI, Canada and GNWT under article 4.8 are not discrete. Once provided to EMAB, they form a single fund. Had the parties intended that when a surplus occurred only certain of the funds provided would be applied to a succeeding budget, they could have said so. Instead, they stated that *any funds* provided by DDMI, Canada or GNWT would be so applied. The position of Canada and GNWT that EMAB should be allowed to retain a surplus does not alter the EA or otherwise affect DDMI’s rights under it.

[50] I recognize that this conclusion may result in a benefit to DDMI arising from the contributions of Canada and GNWT. However, this is nothing more than a consequence of how EMAB’s funds were spent during its first two two-year budget periods. Depending upon EMAB’s expenses in the first period and its budget for the second period, the funds may or may not have been fully used. As it turns out, they were not fully used. In any case, on the wording of 4.8(g), both Canada and GNWT were always going to provide \$300,000 and \$100,000 respectively with no prospect of a refund as none is provided for in the EA. Canada and GNWT never faced a prospect of unexpended funds resulting in reduced contributions on their part in a subsequent budget period because they have no obligation to fund in any of those subsequent budget periods.

[51] Labelling the unexpended funds UNA (or anything else) does not change the requirements of 4.8(g).¹⁶

Preceding and Succeeding Budget Periods

[52] It is clear that EMAB had surpluses at the end of budget periods. Some of the surpluses in some instances were applied to fund EMAB’s costs in accordance with the budget for the *succeeding* budget period. Some were not. At no time before the current budget period did this result in a reduction in the amount of DDMI’s contribution.

[53] The wording of 4.8(g) is mandatory in this respect. It states that unexpended funds from a budget period *shall* be applied to EMAB’s costs in the next budget period. If the parties had

¹⁶ EMAB sometimes receives refundable funding, called “partnership income”, outside of the EA and certainly not under article 4.8. Partnership income should not be included in calculating unexpended funds. Partnership income is not “funds provided by DDMI, Canada, or GNWT” within the meaning of 4.8(g).

intended this to be a suggestion rather than a requirement, they would have used permissive language such as “may” as they did later in the same paragraph regarding program funding.

[54] What is the result of EMAB’s failure to apply all unexpended funds (the logical corollary of “any” as used in 4.8(g)) and DDMI’s failure to insist upon such application to succeeding years? EMAB submits that DDMI has waived this requirement in 4.8(g), at least with respect to budget periods before the current one and, further, that DDMI is estopped from requiring unexpended funds from any budget period except the immediately preceding one to be so applied.

Waiver

[55] Article 17.1 provides that any waiver must be in writing and does not constitute a continuing waiver or waiver of any subsequent default.

[56] EMAB says that because EMAB is not a party to the EA, article 17.1 does not apply to it. On that theory, none of the provisions of the EA would apply to EMAB and it would have no standing to enforce any part of the EA. The EA gives it intervenor status in some circumstances, but that is not the same as party status. Ultimately, the argument is not helpful to EMAB.

[57] The other parties to the EA who are active participants in this arbitration are entitled to have it enforced. Canada initiated this dispute resolution process. Canada and GNWT represent the citizens who may be affected by DDMI’s activities and would no doubt take all necessary steps to enforce DDMI’s obligation under the EA. Similarly, DDMI is entitled to take all necessary steps to enforce its rights under the EA. EMAB, as intervenor, has made its submissions about how the EA should be interpreted and with what result.

[58] EMAB says that DDMI has waived the “succeeding budget” requirement of 4.8(g) in writing by having accepted EMAB’s 2005-05 budget by letter dated January 24, 2002, EMAB’s 2005-07 budget by letter dated December 13, 2004 (and, on the face of the letter, the work plan), and EMAB’s 2007-09 budget in the absence of a letter to that effect by having provided its contributions as shown in the budget.

[59] The two letters and the contributions might, at most, constitute implied or inadvertent waiver. They are certainly not express waivers. In any case, pursuant to article 17.1 they are not continuing waivers and DDMI has now made it clear that it intends to insist on the application of the “succeeding budget” provisions.

[60] **I conclude** that DDMI has not waived its right to insist that unexpended funds be applied in a succeeding budget period. By not having insisted in each prior budget period that that should occur, DDMI and EMAB (which has a positive obligation) have permitted some application of unexpended funds to EMAB’s costs in succeeding years and the carry forward and accumulation of unexpended funds as at March 31, 2009. Those funds should now be applied to fund EMAB’s costs in the succeeding budget period.

Estoppel

[61] EMAB submits that DDMI is estopped from requiring unexpended funds to be applied to succeeding budgets. It suggests that until the 2009-11 budget period, DDMI and EMAB dealt with each other on the shared assumption that EMAB could produce budgets where unexpended-

ed funds remained on the books into the next budget period. EMAB says it relied on this assumption and therefore the requirements for estoppel are met. The burden of establishing the elements necessary for estoppel rests with EMAB.

[62] The essence of estoppel is representation by words or conduct which induces detrimental reliance.¹⁷ There is no evidence here that EMAB was induced to act in any particular way by DDMI's words or conduct. That EMAB carried forward funds is not necessarily evidence of inducement. An essential element of estoppel in all its forms is detrimental reliance. There is no evidence that EMAB has suffered any detriment by any claimed reliance upon DDMI's words or conduct. No detriment is alleged and none can be seen. **I conclude** that there is no estoppel here.

[63] The result most in keeping with the spirit of the EA is not that EMAB should be entitled to retain funds for so long as it wishes if by its own conduct in presenting a budget the proper application of funds under 4.8(g) has not occurred. Rather, the situation should be corrected.

Interest

[64] The EA is silent on the matter of interest earned on contributions to EMAB. The timing of the contributions from Canada, GNWT and particularly DDMI suggest that EMAB would earn interest. EMAB is required to manage its affairs in a fiscally prudent, reasonable and cost-effective manner and to that end endeavour wherever possible to reduce the cost of fulfilling its responsibilities (article 4.8(c)), so it would naturally put contributions into interest-bearing accounts or investments until they were needed. What should happen to that earned interest?

[65] EMAB argues that 4.8(g) only refers to funds provided by DDMI, Canada and GNWT and that interest is not provided by contributors and that, therefore, it should not be included in the calculation of unexpended contributions.

[66] DDMI submits "any funds" is a broader term than "contributions" and should include interest earned. This misses the restriction on the meaning of "any funds" by the words that follow them: "provided by DDMI, Canada, or GNWT in a budget period".

[67] The parties were not able to find any cases directly on point.

[68] There is nothing in the EA to suggest that EMAB has a need to, or should, accumulate a nest egg. Its budget is known, and its funding is provided, well in advance of the beginning of its budget year. As noted above, it can expect to receive interest on contributed funds until they are used, up to a year later. This no doubt supplies some cushion for unforeseen contingencies although the EA makes no express provision for such a cushion.

[69] The obligation on EMAB's responsibility to manage and conduct its affairs in a *fiscally prudent, reasonable and cost-effective manner* and *wherever possible reduce the cost* of fulfilling its responsibilities is not only good business practice, but also a contractual obligation for the benefit of those who fund it. This is in keeping with the general intent of the EA that recognizes a cap on DDMI's contributions even if the funding clause had been renegotiated pursuant

¹⁷ *Scotsburn Co-operative Services Ltd. v W.T. Goodwin Ltd.*, 1985 CanLII 57 (S.C.C.) at paragraphs 25 and 26.

to article 4.11. It is noteworthy that as of March 31, 2009 EMAB has accumulated \$127,364 in interest, more than 18% of DDMI's maximum funding liability for the next year.

[70] **I conclude** that DDMI, being the only party who currently must fund EMAB pursuant to the EA, is entitled to have interest EMAB earns applied to EMAB's costs in each year after the interest is earned.

The Amount of EMAB's Unexpended Funds and Interest

[71] The parties take no issue with EMAB's financial statements for the year ended March 31, 2010. They include reference to the restated financial position for March 2009 and show net unexpended contributions of \$243,503 and accumulated interest of \$127,364 for a total of \$370,867.

[72] EMAB prepared the analysis described in paragraph [25] showing a much smaller amount for unexpended contributions. However, as noted, it is a calculation of unexpended contributions *attributable to DDMI*. As I have found at paragraph [49], all non-partner contributions comprise a single fund. There is no need or reason to attempt to attribute remaining funds to a particular contributor.

[73] **I conclude** that as of March 31, 2009 EMAB had unexpended contributions of \$243,503 and accumulated interest of \$127,364 for a total of \$370,867.

Reduction in DDMI's Contributions

[74] The application of unexpended funds and interest from a budget period to EMAB's costs¹⁸ in the succeeding budget period will not necessarily result in a reduction in DDMI's contribution. That will depend upon the total amounts of unexpended contributions and budgeted expenses exclusive of partner income for specific projects.

[75] In response to a question I posed, EMAB acknowledged that there can be circumstances where DDMI's contribution in a subsequent year could be reduced.

[76] **I conclude** in the current circumstances the application of unexpended funds and accumulated interest does result in a reduction in DDMI's contribution for the two years of the budget period. As noted at paragraph [21], the reduction claimed by DDMI results in a balance of unexpended funds and interest of \$70,867. Assuming no budget calamities, that amount should be available to apply to fund EMAB's costs in a succeeding budget period.

[77] **I conclude** DDMI is justified in reducing its contribution until the unexpended funds and accumulated interest have been used to fund EMAB's costs. Article 4.8(g) requires this.

[78] EMAB is required to make best efforts to ensure that DDMI's contribution to a budget period shall not exceed the previous contribution by more than the CPI. If EMAB proposes a budget showing costs exceeding the total of its unexpended funds and the maximum contribu-

¹⁸ The application of the funds is to EMAB's costs and not in substitution for other revenue such as partnership income.

tion DDMI is required to make, there may be some considerable difficulty in attempting to reach agreement on the budget as required by 4.8(e)(iii).¹⁹

[79] In such cases, EMAB might seek additional funding from DDMI pursuant to 4.8(f). If DDMI does not accept the request, the Minister may be asked to review the matter and provide his/her views on how the matter might be resolved and shall make those views public. The EA does not provide that DDMI must provide the additional funding. As EMAB states in response to a question I posed, a budgeted shortfall could be made up by special program funding from governments.

Program Funding

[80] Article 4.8(g) states: "...funds that are designated for a program that continues into a new budget period may be used for that program." If all this provision does is permit the continuation of budgeted programs into the next budget period using funds budgeted for that program, then it is superfluous. EMAB could always continue to fund incomplete or ongoing projects in a succeeding budget period using the agreed or imposed budget for that period.²⁰ Consideration would be given in that succeeding budget to the unexpended program funds and they would be applied to fund EMAB's costs, including the program. The parties must have intended the words to be more than superfluous.

[81] EMAB points out that it is only required to attempt to agree with DDMI on the budget, not the work plan. However, the budget flows from the work plan that EMAB and DDMI are to jointly review and the work plan and budget are inextricably connected. DDMI is reasonably entitled to input on more than whether EMAB has properly costed the various components of the work plan. Failing agreement on the budget, there is a process involving the Minister.²¹

[82] This "program" provision permits EMAB, at its discretion, to use unexpended funds designated for a program in the next budget period without having to seek DDMI's re-approval and agreement. That is, once a program makes it into the budget, EMAB may continue it in the next budget period and use unexpended funds for that purpose. Of course, it is within EMAB's discretion to decide not to use the program funds for the program in the next budget period.

[83] The program funds and costs are still part of the overall budget. Otherwise, EMAB could (I am not suggesting it would) designate most of its funding to ongoing programs and circumvent the requirement for joint review and efforts at agreement on at least some portion of the

¹⁹ DDMI asks that I ignore attachment 2 to EMAB's responses to questions posed by me. Attachment 2 is described by EMAB as an indication that DDMI takes the position that EMAB cannot create budgets in which total expenditures exceed "confirmed revenues". I have ignored the attachment 2 in coming to the conclusions reached in this Award.

²⁰ This appears to be what EMAB has done. At paragraph 72 of its submissions, EMAB states: "To date, where funds for one of these designated programs have not been fully expended in a budget period, EMAB has not elected to carry them forward for the same program...Rather, EMAB has elected to treat them as [UNA]."

²¹ Whether the Minister in that process could choose an EMAB budget that would result in DDMI being required to contribute more than the Consumer Price Index cap set out in article 4.8(e)(ii) is an open question and not one that is before me.

budget. Furthermore, it would be unreasonable to permit EMAB to carry forward unexpended funds designated for programs year after year. As those unexpended funds continue to form part of the overall budget, DDMI has the opportunity for input.

Reallocation within Budget

[84] EMAB asks that I confirm it has flexibility under the EA to reallocate actual spending from budgeted spending. This is neither provided for nor prohibited in the EA. EMAB has a broad and important mandate. In managing and conducting its affairs in a fiscally prudent, reasonable and cost-effective manner, EMAB can be expected from time to time to adjust its priorities to meet changing circumstances. EMAB is a board comprised of representatives from each party to the EA and others. Article 4.6(g) requires that it establish procedural rules and bylaws that are not inconsistent with the purposes and principles of the EA. Its accounts are audited annually and provided to the Parties and others. Its annual report is to available to the public.

[85] The composition of the board and its requirement for considerable transparency makes it unlikely that it would radically depart from its budget and any departures would be measured and considered. In that respect, it is not unlike other non-profit organizations and may establish its own guidelines in regard to its performance to budget.

The CPI Cap on DDMI's Contributions

[86] My conclusion that DDMI is entitled to reduce its contribution by \$150,000 per year as it has done for the 2009-11 budget period should not result in DDMI's contribution for the purpose of the CPI cap in 2009-11 budget period being \$547,000 and \$569,000. These are correction years where the parties are correcting their failure to apply unexpended funds to the succeeding budget year. I cannot speculate as to what DDMI's contributions would have been had the parties applied 4.8(g) in each budget period. One might reasonably assume that the budgets would have been different.

Summary of Conclusions

[87] The issues before me revolve around the basic question of who, under the terms of the EA read as a whole, is entitled to have, hold or keep funds in EMAB's hands that are not used in a budget period. The answer is DDMI, the funder, rather than EMAB the funded entity.

[88] The answers to the questions set out at paragraphs [35] and [36] are as follows:

- a. EMAB's unexpended funds as at March 31, 2009 must be applied to its costs in the following budget period.
- b. For the purpose of calculating unexpended funds, there is to be no apportionment or pro-rating of the contributions by DDMI, Canada and GNWT.
- c. DDMI's delay in not raising the matter of unexpended funds until the 2009-11 budget period does not change the wording or effect of the EA. Neither waiver nor estoppel

prevents now giving effect to the proper application of unexpended funds as mandated in article 4.8(g).

- d. Interest should form part of the calculation of unexpended funds and be treated in the same way.
- e. EMAB's unexpended funds and interest as at March 31, 2009 totalled \$370,867.
- f. The application of unexpended funds to EMAB's costs in a succeeding budget period may or may not give rise to a reduction in DDMI's contribution for that succeeding period.
- g. EMAB may elect to use funds designated in a budget for a program that continues into a new budget period for that program. However, such programs and funds must still be considered within the context of the overall budget (exclusive of partnership income and projects).
- h. EMAB's budget is not separate from, but rather flows from, its work plan. DDMI and EMAB, when attempting to agree on budget must necessarily discuss both. This is in keeping with the broad consultative, cooperative and transparency requirements of the EA.
- i. EMAB may reallocate actual spending from budgeted spending during a budget period in keeping with its bylaws, the guiding principles of the EA, and as overseen by the members of the board.

Reservation of Jurisdiction

[89] I reserve jurisdiction to deal with the matters set out in in article 33 of the Schedule (Commercial Arbitration Code) to the *Commercial Arbitration Act (Canada)*, and such other matters as may be required to give effect to this Award or resolve the matters in issue.

Article 31(3) of the Commercial Arbitration Code requires in that this Award state the "place of arbitration". The parties and their counsel took reasonable and effective measures to reduce the cost of this proceeding. No party sought an in-person hearing and all procedural and interim matters were handled through telephone conference meetings. The parties to the EA and the Project are in Yellowknife, Northwest Territories, and that is the place of this arbitration.

Dated at Calgary, Alberta, January 16, 2011.



Jim McCartney
Arbitrator