



**Mackenzie Valley Land and Water Board**

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June 1, 2004

File: MV2003F0028

Mr. Alan Taylor  
Vice President Exploration  
Canadian Zinc Corporation  
Suite 1202-700  
West Pender Street  
VANCOUVER, BC V6C 1G8

Fax: (604) 688-2043

Dear Mr. Taylor:

**Winter Road - Prairie Creek Mine to the Liard Highway  
Section 157.1 Written Hearing, Reasons for Decision**

Please find the attached Reasons for Decision of the Mackenzie Valley Land and Water Board in the determination of whether a preliminary screening of Land Use Permit Application MV2003F0028 is required based on the legal application of Section 157.1 of the *Mackenzie Valley Resource Management Act*.

If you have any questions regarding this letter, contact me at (867) 669-0506 or email [mvlwbpermit@mvlwb.com](mailto:mvlwbpermit@mvlwb.com).

Yours sincerely,

A handwritten signature in black ink, appearing to read "S. Mathyk".

Stephen Mathyk  
Regulatory Officer

Attachment: Reasons for Decision – Legal Application of Sec. 157.1

Copied to: Parties to Section 24 Hearing  
Robert Overvold, RDG – DIAND



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**IN THE MATTER OF:**                    **An Application for Land Use Permit  
MV2003F0028 for Operation, Maintenance and  
Use of a Winter Road Alignment from the  
Canadian Zinc Corporation Prairie Creek Mine  
Site to the Liard Highway;**

**AND IN THE MATTER OF:**        **A hearing pursuant to Section 24 of the  
*Mackenzie Valley Resource Management  
Act.***

### **REASONS FOR DECISION OF THE MACKENZIE VALLEY LAND AND WATER BOARD**

#### **Background:**

On June 15, 2003, Canadian Zinc Corporation (the Applicant) applied to the Mackenzie Valley Land and Water Board (MVLWB or the Board) for a five year land use permit (MV2003F0028) pursuant to the *Mackenzie Valley Land Use Regulations* (MVLUR) for a winter road to connect its Prairie Creek Mine Site (the Mine) with the Liard Highway near Lindberg's Landing, just east of the Blackstone River in the Northwest Territories. The application indicated that repair of the all weather portion of the existing alignment would take place between August and September 2003 and that use of the winter road would thereafter take place between December 15 and March 31 of each year.

The letter of application indicated that in the Applicant's view, the application was exempt from environmental impact assessment under Part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA) because of Section 157.1 of the MVRMA and the decision of the Northwest Territories Court of Appeal in *North American Tungsten v. Mackenzie Valley Land and Water Board*<sup>1</sup> (the Tungsten decision). The Applicant set out its views on the legal issues in a letter dated September 23, 2003.<sup>2</sup>

The MVLWB sought advice from counsel which was provided on October 13, 2003.<sup>3</sup> The opinions from the Applicant's counsel and from Board counsel came to different conclusions. The Board decided to seek input from interested parties by way of a hearing called pursuant to Section 24 of the MVRMA. Submissions from interested parties were due December 12, 2003. The following parties participated:

<sup>1</sup> 2003, NWTCA 5.

<sup>2</sup> Letter from David H. Searle, C.M., Q.C. to Mr. John F. Kearney, of Canadian Zinc Corporation dated September 23, 2003.

<sup>3</sup> Letter from Board Counsel John Donihee, October 13, 2003.

1. The Deh Cho First Nations;
2. The Parks Canada Agency;
3. The Lidlii Kue First Nation;
4. The Department of Fisheries and Oceans; and
5. The Canadian Parks and Wilderness Society (NWT Chapter).

No submission was received from the Department of Indian Affairs and Northern Development (DIAND). Consequently, in early February, the Board corresponded with that department seeking their assistance. On March 15, 2004, DIAND submitted a letter taking no position on the legal issues but which clarified certain of the facts relied upon by various parties.

Having considered all the submissions made by the parties, the MVLWB has decided that the winter road application is subject to Part 5 of the MVRMA and that the exemption provided by Section 157.1 of the MVRMA does not apply in the case of land use permit application MV2003F0028. The Board's reasons are set out below.

**The Facts:**

The following chronology of the activity related to the Canadian Zinc winter road was prepared by Board staff, reviewed by the Board and amended based on the submissions of DIAND:

- The original application for land use was submitted to DIAND by Cadillac Explorations Ltd. (Cadillac) on March 8, 1980, under application number N80D249.
- Cadillac was granted a LUP on July 2, 1980, for a winter access route to the Prairie Creek mine site (Prairie Creek to Liard Highway NWT). The permit was approved for 1 year, commencing on July 2, 1980, and expiring July 1, 1981.
- On June 30, 1981, LUP N80D249 was extended to June 30, 1982.
- On June 1, 1982, the LUP was again extended to June 29, 1983.
- On May 31, 1983, Cadillac issued a Bankruptcy Notice. Cadillac had 60% interest in the Prairie Creek development at this time. The operation was taken over by Procan Explorations Company (They held the remaining interest in the mine).
- The original permit for the access road expired on June 29, 1983.

- On July 13, 1983, DIAND received a letter from Procan requesting the LUP be transferred to their name and the LUP be "renewed". There is no further correspondence in the file indicating that LUP N80D249 was ever transferred, renewed or extended past June 29, 1983.
- Some time in 1983 Nanisivik Mines bought the Prairie Creek Mine assets.
- Conwest acquired mine assets in 1990, with Strathcona Mineral Services Ltd. managing the site.
- The actual mine site was tied up in litigation until 1991.
- In 1991 San Andreas Resources Corporation acquired an interest in the mine site.
- In 1995, San Andreas held a land use permit N95F346 over a portion of the road and a separate permit N95C373 to conduct diamond drilling in the Prairie Creek mine site area of the NWT.
- In 1999, San Andreas changed its name to Canadian Zinc Corporation.
- On June 15, 2003, Canadian Zinc Corporation submitted an application to the Mackenzie Valley Land and Water Board for a Type "A" land use permit for a Winter Access Road Development in which they state that they have a legal opinion regarding Part 5 of the MVRMA.

The Application is for use of a winter road alignment that has not been used in entirety since the early 1980's. Portions of the road may have been used in support of the 1995 drilling operations but except for applications made by the Canadian Zinc, the Board finds that no use of the whole road has taken place.

### **The Authorities:**

#### **The MVRMA**

**157.1** Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for abandonment, decommissioning or other significant alteration of the project.

From section 111:

"development" means any undertaking, or any part of an undertaking, that is carried out on land or water and, except where the context otherwise indicates, wholly within the Mackenzie Valley, and includes measures carried out by a department or agency of government leading to the establishment of a park subject to the *Canada National Parks Act* and an acquisition of lands pursuant to the *Historic Sites and Monuments Act*.

### The Tungsten Decision

The excerpts from the Court of Appeal's decision set out below and were referred to in the submission made by counsel for Canadian Zinc.<sup>4</sup> Paragraph 37 from the Court's judgment is also included:<sup>5</sup>

[11] .... In essence, this comes down to whether Section 157.1 of the MVRMA grandfathers a licence issued prior to June 22, 1984 or an undertaking licensed prior to June 22, 1984

The Court of Appeal in paragraph 12 concluded:

"... that it is the latter", namely that it is the undertaking that is grandfathered, not a licence or a permit.

In coming to that conclusion, the Court of Appeal, in paragraphs 23 and 24 of the Tungsten decision reviewed the overall legislative scheme of the MVRMA and the comprehensive land claim agreements that resulted in the passage of the MVRMA and then it concluded in paragraph 27:

[27] These provisions (of the MVRMA) collectively reflect that Parliament did not intend to impose an entirely new environmental review process on every project in the Mackenzie Valley irrespective of the status of the project at the time the MVRMA came into effect. Instead, the MVRMA grandfathered certain projects and provided that others yet would be dealt with under prior applicable legislation. In interpreting Section 157.1, therefore, one must recognize that it is designed to grandfather certain undertakings which pre-date June 22, 1984. Accordingly, this section must be interpreted in a manner that best comports with its intended purpose".

Then in paragraphs 32 and 33 the Court of Appeal says that:

"The primary focus is on the undertaking itself". (emphasis added)

Those two paragraphs are particularly relevant here and are quoted in their entirety below:

[32] The specific wording of s.157.1 supports this interpretation. Under s.157.1, the primary focus is on the undertaking itself. To determine whether an application to renew a licence relating to that undertaking is exempt from the application of Part 5, one must first have regard to whether the undertaking meets the requirements of the section. To do so, the undertaking must be the subject of a licence or permit issued before June 22, 1984. These words modify the word "undertaking" and in this context, the key words are "the subject of". It is noteworthy that the MVRMA does not state that the undertaking must be subject to a licence issued prior to June 22, 1984, but merely that it be the subject of a licence issued prior to June 22, 1984. In other words, to fall within the scope of the exemption under s.157.1, one of the qualities or

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<sup>4</sup> Letter cited in foot note 2.

<sup>5</sup> *North American Tungsten v. Mackenzie Valley Land and Water Board*, 2003 NTCA 5. Citations are to paragraph numbers in the case.

characteristics of the undertaking is that it must have had a licence issued as of June 22, 1984. Tungsten's undertaking did. (Underlining in the original decision)

[33] Further, under the grammatical and ordinary sense of the words used in s.157.1, there is no requirement that the undertaking be operating today under an original licence issued before June 22, 1984. Nor is there a need for the licence which is the subject matter of the renewal application to be the same licence issued before June 22, 1984. The French version of s.157.1 is consistent with this interpretation referring as it does to: "une activité par un permis délivré avant le 22 juin 1984". **To put it another way, the licence renewal application must relate to the same undertaking that was issued a licence before June 22, 1984.** (emphasis added)

In addition, the Court of Appeal decision commented on but did not decide the legal effect of the application of s.157.1 where the relationship or chain between the original licence and that being applied for in the instant case was broken:

[37] Accordingly, we have concluded that "an undertaking that is the subject of a licence or permit issued before June 22, 1984" means an undertaking in respect of which a licence or permit has been issued before June 22, 1984. **We do not find it necessary to determine whether the licence or permit issued before June 22, 1984 must have some relationship in terms of subject matter, substance and direct linkage to the licence in respect of which a renewal application has been filed. In this case, Tungsten's application for renewal of its water licence does and thus, we leave that issue for another day.** (emphasis added)

### **Analysis:**

Counsel for the Applicant has pointed out that the circumstances associated with the transition from the Canada Tungsten Corporation to the North American Tungsten Corporation bear a similarity to those in this case and in the transition from Cadillac to Canadian Zinc Corporation. Paragraph 37 of the Court of Appeal's decision, however, indicates that the Court did not consider these matters in their North American Tungsten decision. Whether the circumstances are the same then is not helpful. The Board must consider the facts in this matter and apply them to s.157.1 and the Court of Appeal's decision to see if that case applies in the circumstances at hand. If there is no difference between these matters, the MVLWB is bound by the Court of Appeal decision.

The Board notes that all of the parties, with the exception of the company, made submissions which argued that the Application was subject to Part 5 of the MVRMA. Some of these submissions suggested, among other things, that the winter road was abandoned. With respect, the question of abandonment is not important unless the application made is to abandon the project.

More important to the exemption in s.157.1 is the question of whether the new permit will result in a significant alteration of the project. The Applicant suggests that a winter road is never abandoned, something which common

sense does not support. For example, vegetation cut to establish the original alignment could regenerate and eventually would choke the right of way. There are no facts to support a suggestion that the right of way for this road has regenerated in the 20 years since it has been used and the Board is aware that regeneration times in mountainous areas like the project site and road alignment are long. It is clear though, from the June 15, 2003 letter of application that "repair of the all weather portion of the road" and "maintenance ... of the winter road" will be necessary. The Applicant's evidence is however, that no significant alteration of the project is intended and the MVLWB accepts that assertion.

The more difficult question is one of mixed fact and law. What is the relationship between the "undertaking" that was the subject of the permit issued in 1982 and the "undertaking" now proposed by Canadian Zinc?

The use of the term "undertaking" in Section 111's definition of development seems unhelpful in these circumstances. Resort to cases defining the term indicates the following:

The term undertaking has been held time and again to mean more than just physical things. Some examples of judicial interpretation are cited below.

In the *Capital Cities*<sup>6</sup> case the Supreme Court of Canada held, following an earlier decision of the Privy Council, that:

**"Undertaking" is not a physical thing but is an arrangement under which of course physical things are used.** Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking "connecting the Province with other Provinces and extending beyond the limits of the Province."<sup>7</sup> (emphasis added)

In *Capital Cities*, the Supreme Court cited other Supreme Court of Canada cases that had interpreted the meaning of undertaking. One such case referred to was the 1955 case of *Reference re Industrial Relations and Disputes Investigation Act*<sup>8</sup> in which Kellock J. had given a "large meaning to the word" undertaking. One of the questions in that case was whether the stevedoring employees were employed "upon or in connection with the operation of the work, undertaking or business of the Company".

The Supreme Court in *Capital Cities* also cited the case of [*Ontario Attorney General*] v. *Winner*<sup>9</sup> in which the word "undertaking" was used interchangeably with

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<sup>6</sup> *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, 18 N.R. 181 Laskin, C.J. (Martland, Judson, Ritchie and Spence JJ. concurring citing *Regulation and Control of Radio Communication in Canada, Re*, [1932] 2 D.L.R. 81. [hereinafter *Capital Cities*])

<sup>7</sup> *Regulation and Control of Radio Communication in Canada, Re*, [1932] 2 D.L.R. 81 at 86 (S.C.C.).

<sup>8</sup> [1955] 3 D.L.R. 721 at pp. 748-9

<sup>9</sup> [1954] 4 D.L.R. 657 at 672

the word "enterprise". As well, the Court equated the word "undertaking" with "organization" in the *Empress Hotel* case.<sup>10</sup>

The quote from *Radio Communications* that was adopted by the Supreme Court in *Capital Cities* has been applied in several contexts. For example, it was applied in the railway context in 1945 by Chief Justice Rinfret of the Supreme Court of Canada to mean that "undertaking" in the particular railway statute "comprises the whole works of the company".<sup>11</sup>

Professor Peter Hogg has also considered the meaning of the word "undertaking" in his work on the *Constitutional Law of Canada*. Hogg discussed the term "undertaking" and said that it 'seems to be equivalent to "organization" or "enterprise".<sup>12</sup>

Later in the book Hogg stated: 'We have already noticed that there are dicta which distinguish between a "work" and an "undertaking" on the basis that a "work" is a tangible thing while an "undertaking" is an intangible "arrangement" or "organization" or "enterprise"'.<sup>13</sup> Hogg's characterization of a work as tangible and an undertaking as intangible may help to characterize what is an undertaking before the MVLWB.

Hogg also cited Viscount Dunedin's definition of undertaking from *Capital Cities* as "not a physical thing, but an arrangement under which...physical things are used."

In conclusion, then, the Board is of the view that the term "undertaking" used in Section 157.1 of the MVRMA should be interpreted in a manner consistent with these authorities. The meaning of the word is broad. For purposes of 157.1 then, the undertaking referred to is more than the physical work or the winter road or the right of way which the company proposes to use again. The undertaking is the whole arrangement under which the physical thing (winter road right of way) is proposed to be used. It includes the whole enterprise proposed by Canadian Zinc.

Here, the Board notes several important facts. The original land use permit expired and was not renewed. The only connection between Cadillac's original use of the road and Canadian Zinc's undertaking seems to be the plan to use the same right of way. Although portions of that road near the mine may have been used in 1995 to support diamond drilling, the large majority of the road alignment has not been used since about 1983. Moreover, the Board notes that although the Applicant terms itself the "successor in title" this relationship to Cadillac's undertaking seems tenuous since the corporate antecedents of Canadian Zinc secured their interest in the mine by way of assets purchase. Canadian Zinc is a different corporate entity from the bankrupt Cadillac.

<sup>10</sup> *C.P.R. v. A.-G. B.C. et al.* [1950] 1 D.L.R. 721.

<sup>11</sup> *Quebec Railway, Light and Power Co. v. Beauport (Town)*, [1945] S.C.R. 16 at 24, [1945] 1 D.L.R. 145, 57 C.R.T.C. 245.

<sup>12</sup> Hogg, p. 22-4 The

<sup>13</sup> Hogg, p. 22-16.

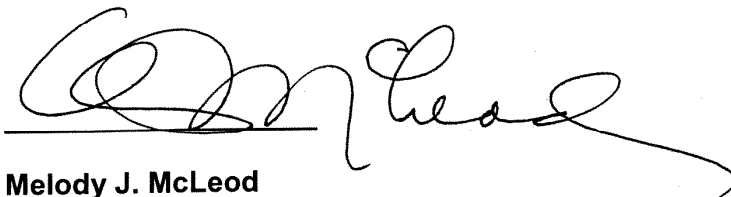
That the Applicant wants a permit to operate the same road is not compelling. The real issue is whether the application is for a permit related to the same undertaking that was in place before June 22, 1984. It seems to the MVLWB that there must be a positive connection between the two. If no such connection were required, any licence, permit or authorization issued before June 22, 1984, would be sufficient grounds for any subsequent unrelated activity at the same site to be exempted from the application of Part 5 of the MVRMA. The Board accepts Parliament's intention, as interpreted by the Court of Appeal, to ensure that activities permitted before June 22, 1984, for which there is sufficient continuity to continue without the need for preliminary screening, since such statutory requirements did not exist before 1984. The effect of this exemption can not be unbounded however. To qualify for the exemption in s.157.1, the undertaking must have a sufficient connection to the one that was there before 1984.

Having considered all the evidence, argument and the facts in this case, the Board is of the view that Canadian Zinc is involved in a different undertaking than that which was present before 1984. It is thus the Board's view that the Tungsten decision does not apply in this case and that Canadian Zinc is subject to Part 5 of the MVRMA.

**Conclusion:**

After considering all the submissions made, the MVLWB is of the view that Canadian Zinc's application for land use permit MV2003F0028 is not in respect of the undertaking originally permitted to Cadillac. Consequently, the Board has decided that Section 157.1 of the MVRMA does not provide an exemption from Part 5 of the Act and that the land use permit application is subject to preliminary screening.

**SIGNED on behalf of the Mackenzie Valley Land and Water Board**

A handwritten signature in black ink, appearing to read 'Melody J. McLeod', written over a horizontal line.

**Melody J. McLeod  
Chair**

Copy to: Canadian Zinc Corporation  
Parties to Section 24 Hearing  
Bob Overvold, RDG DIAND