Mackenzie Valley Environmental Impact Review Board

MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD

In the Matter of:	**A referral to Environmental Assessment by the City of Yellowknife of an application to amend Water Licence N1L2-0040 by Miramar Con Mine Ltd.**
And In the Matter of:	**A request for a ruling by Miramar Con Mine Ltd. on the application of section 157.1 of the MVRMA to its Water Licence amendment application**

REASONS FOR DECISION

BACKGROUND:

On July 26, 2005 Miramar Con Mine Ltd. (Miramar) applied (the Application) to the Mackenzie Valley Land and Water Board (MVLWB) for an amendment to the term (extension) of its existing water licence N1L2-0040 under which Miramar is operating at the Con Mine site within the municipal boundaries of the City of Yellowknife. The only provision of the licence proposed for amendment was the term. The current licence is due to expire July 29th, 2006. The proposed extension was until September 30th, 2008.

The MVLWB followed its normal practice of circulating the Application for review and comment to a list of interested organizations among which was the City of Yellowknife (the City). During this review, the issue of the preliminary screening of the extension Application was raised and, on November 1st, 2005 the MVLWB requested that interested organizations make submissions on that matter and specifically that the applicability of the *Exemption List Regulations*[1] (Exemptions Regulations below) to the Application be addressed.

On November 7th,[2] the City responded outlining its position that the Application was subject to preliminary screening under part 5 of the *Mackenzie Valley Resource Management Act* (MVRMA). In that correspondence, the City expressed concern about the time provided for it to provide its response to the MVLWB. Consequently, the Board extended the period for the City's submissions and on November 17th, 2005 the City submitted further argument. The November 17th letter did mention section 157.1 of the MVRMA and appears to argue that the extension Application is an "other authorization" in relation to abandonment and decommissioning under that section. The City's letter also argued that the Exemption Regulations were inapplicable to the Application and that a preliminary screening should be done.

[1] P.C. 1998 – 2265, December 16th, 1998.
[2] It appears that this letter was dated October 7, 2006 in error.

None of the other submissions made in response to the MVLWB request to address the requirement for preliminary screening of the Application referred to the effects of section 157.1 on the Application.

On January 11th, 2006 the MVLWB issued its reasons for decision on the preliminary screening of the Application. It ruled that the Exemption Regulations did not apply. The MVLWB conducted a screening in accordance with sections 124 and 125 of the MVRMA and determined that an Environmental Assessment was not necessary. These reasons make no mention of section 157.1 of the MVRMA.

On April 4th, 2006 the Mackenzie Valley Environmental Impact Review Board (MVEIRB or the Review Board) received correspondence in which the City exercised its authority under section 126(2)(d) of the MVRMA and referred the Application to Environmental Assessment, citing its concerns that the activities proposed under the Application would result in significant environmental impacts within the boundaries of the municipality. The Review Board then took steps to initiate an Environmental Assessment of the Application.

On April 21st, 2006 counsel for Miramar wrote to the MVEIRB asserting that section 157.1 of the MVRMA applied to the Application and that the Review Board therefore had no jurisdiction to continue with the EA of the Application. The MVEIRB notified the City and other interested parties indicating that it intended to treat the Miramar letter as a request for a ruling on the applicability of section 157.1 to the Environmental Assessment of the Application. The Review Board's letter included deadlines for a response by the City and other parties and for reply by Miramar.

On May 18th, the City submitted argument in support of the referral to Environmental Assessment. The North Slave Metis Alliance also submitted a letter in support of the continuation of the Environmental Assessment process. Miramar's reply was received by the MVEIRB on May 25th, 2006. No other party submitted argument in the request for ruling process.

The Review Board has reviewed all of the arguments and authorities submitted by the parties and its decision on the application of section 157.1 is set out below.

ISSUES:

The issues raised by Miramar and by the City in response are straightforward:

1. Does the doctrine of issue estoppel apply to prevent Miramar from invoking section 157.1 of the MVRMA to stop the Environmental Assessment?

2. Does section 157.1 of the MVRMA apply to the Application thereby exempting it from the application of part 5 of the MVRMA?

ANALYSIS:

1. **Does the doctrine of issue estoppel apply to prevent Miramar from invoking section 157.1 of the MVRMA to stop the Environmental Assessment?**

The City argues that the issue of the applicability of part 5 of the MVRMA to the Application was judicially determined by the MVLWB when it held its public hearing on the Miramar Application and issued its reasons for decision on the preliminary screening question on January 11th, 2006.

Both the City and Miramar agree that the ruling authority is the Supreme Court of Canada Decision in *Danyluk v. Ainsworth Technologies Ltd.*[3] As set out in *Danyluk*, there are 3 preconditions that must exist for issue estoppel to apply. They are:

(1) that the same question has been decided;
(2) that the judicial decision which is said to create the estoppel was final; and,
(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.[4]

The Supreme Court decision also indicates that the question of the application of issue estoppel involves a two part analysis. First, do the preconditions for the application of issue estoppel exist? Second, is the decision-maker inclined to exercise its discretion and apply issue estoppel?[5] The Review Board's analysis is set out based on these questions below.

Considering the three preconditions, there is no doubt that the third one is met. Miramar and the City were both involved in the argument about the preliminary screening before the MVLWB.

With regard to the question of whether the same question has been decided, the City says that "the issue of the applicability of Part 5 of the MVRMA to the Application has been judicially determined by the MVLWB ..."[6] The Review Board notes however, that there are at least two ways in which the application of part 5 of the MVRMA to the Application could be determined.

First, the Application could have been exempted from preliminary screening by the Exemption Regulations. Second, section 157.1 could apply to the Application. The MVEIRB considers it essential to determine which of these authorities provided the basis for the January 11, 2006 MVLWB decision.

Review of the MVLWB January 11th, reasons for decision indicates that no mention was made of section 157.1. In the Review Board's view these reasons only address the Exemption Regulations. The submissions to the MVLWB, with the exception of the City's brief mention of section 157.1 do not

[3] [2001] 2 S.C.R. 460; 2001 SCC 44.
[4] *Danyluk* paragraph 25. These preconditions were first set out by Dickson, J. in *Angle* v. *Minister of National Revenue*, [1975] 2 S.C.R. 248.
[5] *Danyluk* paragraph 33.
[6] City submission May 18th, 2006 page 10 paragraph 5.

mention that section of the MVRMA at all. In the MVEIRB's opinion, the MVLWB did not address section 157.1 but made its decision on the need for a preliminary screening on the basis of its analysis of the applicability of the Exemption Regulations to the Application.

As for the second precondition, the Court set out 3 further factors to use to decide if a particular decision is "judicial". Those factors are as follows:

> First is to examine the nature of the administrative authority issuing the decision. Is it an institution that is capable of receiving and exercising adjudicative authority? Secondly, as a matter of law, is the particular decision one that was *required* to be made in a judicial manner? Thirdly, as a mixed question of law and fact, was the decision made in a judicial manner? [7] [Emphasis added]

It appears to the Review Board that the MVLWB does, in certain instances, exercise quasi-judicial authority for example, in the water licensing process. It has the power to issue subpoenas. In the case of a Type A water licence like the Miramar licence, it must hold a public hearing and is bound by the rules of fairness. In order to make a preliminary screening decision, however, no hearing is held and the proceedings do not involve public hearings. In this case though, the Review Board finds that the MVLWB took steps to ensure that its process was fair and open.

In relation to the second and third factors cited above, the Alberta Court of Queen's Bench looked at a decision made by the Alberta Energy and Utilities Board (AEUB) and wrote:

> Elements two and three raise a couple of issues on judicial process. First of all, s. 21 of the Alberta Energy and Utilities Board Act, RSA 2000, c. A-17 indicates that the Board is not bound by the rules of law concerning evidence that would normally be necessary in judicial proceedings. There are a lot of very good reasons for proceeding in a less formal structure before administrative tribunals. For example, the Board has a number of technical people who work directly with the Board to assist it in determining and understanding the technical data. In determining if the decision was made in a judicial manner it is important to note that the information put together by these individuals and the conclusions drawn by the Board with the input from these technical persons is not an open process. The parties are not able to see what happens to the information put forward and what conclusions are drawn by those working with the Board. This is no criticism of the Board as this procedure is necessary for it to fulfill its mandate. It is important, however, when considering whether the decision of the tribunal is a judicial decision. Amber argues here that the parties are bound by determinations made by the Board on the facts which form the substance of this application. The Board decision is the end result of the information put before the Board publicly but also contains a significant element of input by professional persons who are assisting. Maps and calculations were prepared by those assisting the Board with no input or knowledge of the parties involved as to what the calculations were. Without that transparency, very little weight can be put on the Board's calculations of volumes, which calculations are critical to the issues in this lawsuit. As indicated by Goodwell, we do not know what information the Board used in reaching its determination. Amber has not met the second part of the test for issue estoppel. [8] [Emphasis added]

The Court in *Goodwell* found that the decision of the AEUB was not "judicial". The Review Board notes that many of the points made by the Court in *Goodwell* could be applicable to a screening decision made by the MVLWB. Nonetheless, considering the process undertaken by the MVLWB, the MVEIRB has decided that the MVLWB process was judicial.

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[7] *Danyluk*, paragraph 35.
[8] *Goodwell Petroleum Corp. Ltd.* v. *Alberta Energy Co.* [2003] A.J. No. 1301, 2003 ABQB 852 [hereinafter *Goodwell*]

Conclusion on Question 1:

In summary the Review Board finds that preconditions 2 and 3 of the *Danyluk* test have been met. The MVEIRB is not, however, convinced that the same question has been raised by the Miramar request for ruling on section 157.1 as was decided on January 11th by the MVLWB. Miramar raises the application of section 157.1 while the MVLWB reasons for decision address the application of the Exemption Regulations to the Application. The Review Board therefore finds that the preconditions for the application of issue estoppel have not been met.

Even if the Review Board is wrong in its analysis of the facts and application of the test in relation to the preconditions for issue estoppel set out in *Danyluk*, there is still the question of the MVEIRB's discretion. In these circumstances, given the Board's finding about the question addressed by the MVLWB and some doubt about the judicial nature of the MVLWB screening decision the Board is not convinced that it exercise its discretion and apply an issue estoppel.

There is one final argument advanced by Miramar in respect of the applicability of issue estoppel which is compelling and also supports the decision made by the Review Board. It relates to the requirement set out by the Supreme Court of Canada in *Danyluk* to have the decision to which the issue estoppel is applied made within a tribunal's jurisdiction.[9] As indicated by the Northwest Territories Court of Appeal in *North American Tungsten,*[10] the effect of section 157.1 is jurisdictional. That is, if section 157.1 applies, the MVEIRB has no authority to conduct an Environmental Assessment.

If that section applies and the MVLWB made a decision to proceed with a preliminary screening anyway, then the MVLWB acted outside its jurisdiction. In such circumstances, issue estoppel could not prevent the MVEIRB from making a ruling on the application of section 157.1 because the earlier MVLWB decision was made without jurisdiction. As Miramar put it:[11]

> **There is no merit to the City's submission regarding the applicability of the doctrine of issue estoppel. The doctrine of issue estoppel cannot apply where the very issue before the tribunal or court is the jurisdiction of the tribunal to make the decision (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraphs 36 and 51 ("Danyluk")). The jurisdiction of the Board to conduct an environmental assessment is the point at issue here and therefore, issue estoppel does not apply.**

This submission is compelling and is a further reason why the MVEIRB has decided that issue estoppel is not applicable to prevent the Review Board from considering and making a decision on the application of section 157.1 of the MVRMA to the Miramar Application.

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[9] *Danyluk* paragraphs 36 and 51.
[10] 2003 NWTCA 5.
[11] Miramar reply argument May 25th, 2006 page 2 paragraph 3.

2. **Does section 157.1 of the MVRMA apply to the Application thereby exempting it from the application of part 5 of the MVRMA?**

The legal authorities with respect to the application of section 157.1 of the MVRMA to the Miramar Application are clear and were cited by both the City and Miramar. The City's May 18th, submission sets out the relevant authorities:[12]

The Interpretation of Section 157.1:

Section 157.1 of the MVRMA states:

> 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 an abandonment, decommissioning or other significant alteration of the project. [Emphasis added.]

In *North American Tungsten Corp. Ltd. V. Mackenzie Valley Land and Water Board* ("*Tungsten*"), the Northwest Territories Court of Appeal discussed Parliament's purpose for enacting section 157.1 of the MVRMA. The Court of Appeal is clear that section 157.1 is to be interpreted to require a project pre-dating June 22, 1984 to be subjected to an environmental assessment in circumstances where the project departs significantly from the approved mode of operation:

> ...The approach taken under the *MVRMA* is complementary to that taken under *CEAA* and intended to be so. Both *Acts* exempt project which pre-date the same date, namely June 22, 1984. That is the date on which the *Environmental Assessment and Review Process Guidelines Order,* SOR/84-467, the predecessor to *CEAA*, came into effect. The selection of this common date under both *CEAA* and the *MVRMA* reflects Parliament's continuing intention that projects which pre-date June 22, 1984 (as defined under both statues) are to be subjected to a full scale environmental assessment as prescribed under the applicable legislation only if they depart significantly from their approved mode of operation and engage in, for example, decommissioning, abandonment or significant alteration of the project. [Emphasis added]

The express wording of the exception to section 157.1 and the Court of Appeal's use of decommissioning and abandonment as examples of exceptions to grandfathering pre June 22, 1984 projects from environmental assessment in *Tungsten* supports interpreting section 157.1 as requiring an environmental assessment when a project moves to the decommissioning phase of a project's life cycle.

In the Review Board's view, Miramar's argument that the undertaking is what is grandfathered by section 157.1 also has merit:[13]

[12] City of Yellowknife submission May 18th, 2006 page 1 emphasis in City submission.
[13] Miramar submission May 25th, 2006 page 3 emphasis in Miramar submission.

...

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. Instead, the focus is on the undertaking and whether it, and not its current licence, pre-dated June 22, 1984. [Emphasis added.]

The wording of section 157.1 is not limited to renewals of a licence—it is applicable to any undertaking which is subject to a licence that pre-dates June 22, 1984. That is, section 157.1 grandfathers undertakings licenced prior to June 22, 1984, and does not merely grandfather licences issued prior to June 22, 1984 (Tungsten at paragraphs 11-12).

There is no argument from the City that the licence in question N1L2-0040 was issued before June 22nd, 1984. In such a case, part 5 of the MVRMA does not apply to the undertaking unless the exception set out in section 157.1 comes in to play. This is precisely what the City is arguing. It says that the activities proposed in the extension Application constitute a significant departure from the mode of operation approved under the existing water licence or alternatively that what is proposed for the site constitutes decommissioning of the undertaking.[14] Miramar argues that the activity proposed in the Application is not decommissioning and that it does not constitute a significant alteration of the project as that term is used in section 157.1.[15] Review of previous water licences indicates that treatment of arsenic sludges has been a part of Con water licences since 1980.[16] The major point of departure between the City and Miramar is thus with respect to the characterization of the activities which are proposed to take place during the extension of the term of the licence proposed in the Application.

Significant Alteration:

The City cites the Scope of the existing water licence, in particular paragraph (a) of Part A Item 1 of N1L20040.

> "This Licence entitles Miramar Con Mine Ltd. to use Water and dispose of Waste for a mining and milling operation and associated activities at the Con Mine ..."

In the materials supporting the Application Miramar indicates that mining and milling have ceased but that it continues to use the facilities to carry out progressive reclamation. This includes the treatment of contaminated sludges, an activity specifically required by Part D Item 12 of the Licence. It is clear from the evidence that although that section of the Licence anticipated that this work would be complete by December 31st, 2003 more sludges have been found at the site and Miramar is continuing to treat them, to

[14] *Supra,* note 3 at pages 3 to 6.
[15] *Supra,* note 4 at pages 3 to 6.
[16] Water Licence N1L3-0040 from June 1, 1980 to May 31st, 1986 included under Part C "Conditions Applying to Operation" the following item. "12. The Licensee shall submit to the Board annual reports on progress made toward the restoration and reclamation of the arsenic storage areas and abandoned tailings areas." It seems that treatment of arsenic contamination has been a part of activity at the site for over 25 years.

the overall benefit of the environment. In the Review Board's view, the explicit requirement to clean up and treat these contaminated sludges, an action which has been underway since the Licence was issued in July 2000 is clearly one of the activities that was associated with the regular business at the mine site, that being the mining and milling of ore.

It also seems clear to the Review Board that the NWT Water Board drafted a water licence in July 2000 which required Miramar to treat these sludges, even as it continued its normal mining operations. This interpretation is consistent with the definition of progressive reclamation found in the Licence.

> "Progressive Reclamation" means those activities conducted during the operating period of the mine to modify and reclaim the land and Water to
> the satisfaction of the Board;"

The Licence also clearly indicates that it considers progressive reclamation to be something other than "Abandonment and Restoration" since Part H Item 4 requires progressive reclamation "notwithstanding" the schedule set out in the Abandonment and Restoration Plan required under Part H Item 1.

The Review Board concludes that the treatment of the contaminated sludges is an activity which has been underway for at least the life of the current Licence and that it was contemplated in the scope of the licence as part of progressive reclamation which is an activity that was "associated" with the mining and milling at the Con Mine site. Consequently, it is the Review Board's opinion that a continuation of this activity would not constitute a significant alteration of the activity at the site.

Decommissioning:

The Review Board's reasoning with respect to the question of significant alteration underlies its views on the question of whether the treatment of the sludges as part of the extension Application constitutes "decommissioning" of the site and thereby triggers the exception in section 157.1 of the MVRMA.

In the Review Board's opinion, the treatment of contaminated sludges is simply an extension of activities already authorized by the existing water licence. This is an extension of the existing undertaking which is required simply because more contaminated material was found than originally estimated. The time proposed for the extension is linked to the rate at which these sludges can be treated. This is an extension of the ongoing progressive reclamation required by the existing Licence.

The Review Board finds that the treatment of the sludges does not constitute the decommissioning of the site. Miramar is close to completion of a Closure and Reclamation Plan[17], work that is ongoing currently and in which the City is playing a role. Decommissioning will commence once that plan is approved by the MVLWB.

[17] Miramar submission May 25th, 2006, page 4.

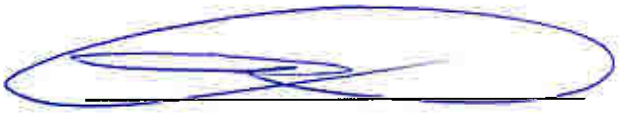
Conclusion on Question 2:

The Review Board finds that the treatment of the contaminated sludges proposed in the Application does not constitute either a significant alteration of the undertaking at the Con Mine site or decommissioning of the undertaking.

DECISION:

Considering the analysis set out above, the Review Board finds that section 157.1 of the MVRMA does apply to the Miramar Application and that the doctrine of issue estoppel in inapplicable in this case. As a result the Review Board has no authority to conduct an Environmental Assessment of the Miramar Application.

FOR THE MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD:



John Stevenson, Vice Chairperson

DATED: the 2nd **of** June **, 2006.**