IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADIAN ZINC CORPORATION

Applicant

-And-

MACKENZIE VALLEY LAND AND WATER BOARD

Respondent

-AND-

CANADIAN PARKS AND WILDERNESS SOCIETY
AND THE DEHCHO FIRST NATIONS

Intervenors

REASONS FOR JUDGMENT

[1] This is an application for judicial review of a decision of the Mackenzie Valley Land and Water Board (the "Board"). The Board held that Part 5 of the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 (MVRMA) applies to the application by Canadian Zinc Corporation ("CZC") for a permit for the rehabilitation and use of a winter access road to the Prairie Creek Mine and that the exemption in s. 157.1 of the MVRMA is not applicable.

[2] The Canadian Parks and Wilderness Society and the Dehcho First Nations were granted intervener status on this application.

Preliminary issue:

[3] On this application, CZC filed an affidavit of Alan Taylor setting out a history of the Prairie Creek Mine's ownership. Opposing counsel objected to the affidavit because it was not part of the record before the Board. I agree that this extrinsic evidence about ownership is not admissible. My purpose is not to consider the matter anew, but simply to review the Board's decision on the basis of the material that was before it. Since there was material before the Board on the issue of ownership, the record should not be supplemented with further evidence: *Brouwer v. British Columbia (Minister of Energy, Mines and Petroleum Resources)*, [2000] B.C.J. No. 2655 (B.C.S.C.); *Quality Control Council of Canada v. International Radiography & Inspection Services (1976) Ltd.* (1990), 114 A.R. 334 (Q.B.).

Background:

[4] According to the evidence that was before the Board, the Prairie Creek Mine was originally owned by Cadillac Explorations Ltd., which was granted a land use permit for construction and use of a winter access road from the mine to the Liard Highway in 1980. The one year permit was extended twice, for a one year period each time, and ultimately expired in June 1983.

[5] In May 1983, Cadillac went into receivership. At that time, it held a 60% interest in the mine, with the other 40% held by Procan Exploration Company as part of a joint venture agreement between the two corporations. Eventually, Procan acquired Cadillac's interest in the mine. In 1991, Procan amalgamated with Nanisivik Mines Ltd. and continued under that name. In 1993, Nanisivik transferred the mine assets to San Andreas Resources Corporation. The latter company changed its name to CZC in 1999.

[6] CZC has been engaged in redeveloping the mine property since 1991. In May 2003, CZC applied to the Board for a land use permit to use the same winter access road for which Cadillac had received the permit that expired in 1983. Some portions of the road were used in the mid-1990's pursuant to a land use permit issued in 1995, but the entire road has not been used since the early 1980's.

[7] Land use in the Mackenzie Valley is now regulated by the MVRMA. Part 5 of that Act requires that any "proposals for development" comply with an environmental assessment process consisting of a preliminary screening by the regulatory authority and, if applicable, an environmental assessment and an environmental impact review by the Mackenzie Valley Environmental Impact Review Board established under the MVRMA. For purposes of Part 5, "development" is defined as "any undertaking, or any part of any undertaking, that is carried out on land or water and ... wholly within the Mackenzie Valley": s. 111. The term "undertaking" is not defined in the Act.

[8] CZC's proposal to use the winter access road would *prima facie* require compliance with Part 5. However, s. 157.1 of the MVRMA provides an exemption in certain circumstances:

> s. 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 an abandonment, decommissioning or other significant alteration of the project.

[9] CZC submitted to the Board that it should have the benefit of the s. 157.1 exemption because Cadillac had a permit issued for the road before June 22, 1984.

The Board's decision:

[10] The Board held that CZC's application was not for a permit for an abandonment or significant alteration of the project. It considered that the real issue was the relationship between the undertaking that was the subject of the permit issued to Cadillac and the undertaking proposed by CZC. It decided that the undertaking is the whole arrangement under which the road is to be used and that it includes the whole enterprise proposed by CZC. The Board concluded that CZC is involved in a different undertaking than that which Cadillac was involved in before June 22, 1984 and that the permit sought by CZC "is not in respect of the undertaking originally permitted to Cadillac".

[11] In coming to that conclusion, the Board emphasized four factors:

1. The original land use permit expired and was not renewed;

2. The only connection between Cadillac's original use of the road and CZC's undertaking seems to be the plan to use the same right of way;

3. Although portions of the 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;

4. CZC's relationship to Cadillac's undertaking seems tenuous since the corporate antecedents of CZC secured their interest in the mine by way of assets purchase. CZC is a different corporate entity from the bankrupt Cadillac.

[12] The Board also deemed it "not compelling" that CZC wants a permit to operate the same road for which Cadillac had the permit. It found that to qualify for the exemption in s. 157.1, the undertaking must have a sufficient connection to the one that was there before 1984.

[13] In the result, the Board decided that CZC's application for the land use permit is not exempt from preliminary screening under Part 5 of the MVRMA.

Positions of the parties on the judicial review application:

[14] On this application, CZC argued that the Board erred in its interpretation of "undertaking". CZC took the position that the undertaking is the winter access road and not the larger enterprise CZC is engaged in. It also argued that the Board erred in focussing on two factors, which CZC says are irrelevant: the fact that the original land use permit was not renewed and the fact that CZC is a different corporate entity than Cadillac.

[15] The interveners argued that the Board was correct in its interpretation of "undertaking" and that it correctly took into account the expiry of the original land use permit and the change in ownership, among other factors, to find that s. 157.1 does not exempt CZC's permit application from Part 5.

[16] Counsel for the Board directed her submissions to the chronology of events and the standard of review only.

Issue:

[17] The issue is the interpretation and application of s. 157.1. In *North American Tungsten Corp. Ltd. v. MacKenzie Valley Land and Water Board*, [2003] N.W.T.J. No. 28; 2003 NWTCA 5, the Northwest Territories Court of Appeal held that s. 157.1 grandfathers an undertaking licensed (or permitted) prior to June 22, 1984. In the circumstances of that case, the Court did not have to decide whether the licence 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. It left that issue for decision another day. This case invokes that very issue. The question is whether the fact that Cadillac held a permit for the winter access road before June 22, 1984 is sufficient to bring CZC within s. 157.1 even though that permit has long expired and Cadillac is no longer in the picture.

Standard of Review:

[18] In *Tungsten*, the Court of Appeal held that the scope of the exemption under s. 157.1 is a matter of statutory interpretation and that the standard of review is one of correctness. No one disputed that on this application.

[19] As to the standard of review for the Board's application of the law to the facts before it, *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, requires that a pragmatic and functional approach be taken to determine the appropriate standard. That approach requires consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purpose of the legislation and the specific provision in question; (4) the nature of the question - whether it is law, fact or mixed law and fact. After consideration of all those factors, the reviewing court must determine what degree of deference, if any, should be accorded the tribunal's decision and whether the corresponding standard is correctness, reasonableness or patent unreasonableness.

[20] CZC submitted that the application of s. 157.1 to the facts is a question of law and the standard is correctness. The Board took the position that the issue is one of fact and the standard is patent unreasonableness. The interveners submitted that the issue is one of mixed law and fact, mandating a standard of reasonableness.

Presence or absence of a privative clause:

[21] The first factor to consider is the presence or absence of a privative clause. In *Tungsten*, the Court of Appeal noted that Board decisions are not protected under the MVRMA by a privative clause and that s. 32 specifically provides for judicial review. On this application, counsel for the interveners submitted that it appears the Court in *Tungsten* was not referred to s. 67 of the MVRMA. Section 67 provides that, subject to sections 32 and 81 (the latter inapplicable to this case), every decision or order of the Board is final and binding.

[22] Since s. 67 is explicitly made subject to s. 32, it is clearly not the full privative clause described by Bastarache J. in *Pushpanathan*. That and the absence of any mechanism for appeal in the MVRMA leads to the conclusion that s. 67 is best described as a partial privative clause. This means that some level of deference is likely appropriate, depending on whether the issue is one of law or fact or both, and the interplay of the other *Pushpanathan* factors.

Expertise of the tribunal:

[23] If a tribunal has been constituted with a particular expertise relevant to the aims of its governing legislation, then greater deference is to be shown to it. That expertise may arise from specialized knowledge of the tribunal's members or special procedure or non-judicial means of implementing the legislation.

[24] In *Pushpanathan*, the Court said that making an evaluation of expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the tribunal relative to this expertise.

[25] The Court of Appeal has already held in *Tungsten* that there is nothing in the MVRMA suggesting that the Board has any particular expertise regarding the statutory interpretation issue of the scope of the exemption under s. 157.1.

[26] In terms of what might be called factual expertise, nothing in the MVRMA indicates that the legislators recognized the need for any particular expertise for appointment to the Board. The Act does, however, provide for first nations' involvement in appointments to the Board: ss. 11 and 99.

[27] The Board has responsibility for carrying out a relatively complex statutory scheme for land use permitting and has been engaged in that task for approximately five years now. Logically, it will have developed some expertise in assessing and determining licence and permit applications. However, the interpretation of a statutory provision relating to the grandfathering of undertakings and an exemption from an aspect of the legislation the Board deals with is not something about which the Board can be said to have more expertise relative to a court. On this aspect of the test, no or very little deference is justified.

Purpose of the MVRMA as a whole and s. 157.1 in particular:

[28] In *Pushpanathan*, Bastarache J. said that where the purposes of the statute and of the decision maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes and the level of deference increases. While some of the functions exercised by the Board can be said to involve consideration of "polycentric" issues, the question of transitional grandfathering under s. 157.1 is not such an issue. It does not involve the Board fulfilling its mandate of public participation in the management of the Mackenzie Valley's resources, but rather the specific question whether CZC comes within the exemption provided by s. 157.1. This is not a discretionary issue. All of this suggests very little deference.

The nature of the problem:

[29] Generally, deference is accorded to a tribunal on questions of fact, but less so on questions of law. Sometimes, the distinction is not so clear and a tribunal is called upon to make findings of both fact and law.

[30] Bastarache J. said in *Pushpanathan* that the generality of the proposition to be decided will indicate a correctness standard, although this may be contradicted when all four factors relevant to the standard of review are considered.

[31] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, [2003] S.C.J. No. 18, the Supreme Court of Canada said that with regard to questions of mixed fact and law, more deference is called for if the question is fact-intensive and less deference if it is law-intensive.

[32] As I have pointed out, the nature of the problem is the correct interpretation of s. 157.1. That is a matter of statutory interpretation on which little or no deference is due and indicates a correctness standard as per *Tungsten*. Once s. 157.1 is properly interpreted, its application to the facts before the Board is a question of mixed law and fact: *Housen v. Nikolaisen*, [2002] S.C.J. No. 31. Although the Board should be accorded more deference on what it accepts as fact, it is to be accorded less deference on what the legal significance of the facts is. For the latter, therefore, the standard should be correctness.

[33] Balancing all of the factors leads me to conclude that very little deference is indicated for the Board's application of s. 157.1 to the facts. The Board's decision on that issue must therefore be reviewed on a standard of correctness.

Analysis:

[34] Much of the argument on this application centred on what the Court of Appeal said in *Tungsten* and the significance of some of the Court's comments for this case. A detailed consideration of *Tungsten* is therefore appropriate.

[35] In *Tungsten*, the question before the Court of Appeal was "whether s. 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 concluded that it was the latter. Although the meaning of "undertaking" was not squarely before the Court, the reasons for judgment in *Tungsten* indicate that it considered as the "undertaking" the mine or mining operation of the applicant in that case.

[36] In *Tungsten*, the Court applied a purposive and contextual approach to the statutory interpretation question and reviewed the background of the MVRMA. It noted that the MVRMA is designed to implement the Gwich'in and Sahtu land claims agreements by providing for an integrated system of land and water management in the Mackenzie Valley. The MVRMA provides for the establishment of an environmental impact review board and a land and water board, which are charged with regulating land and water use in certain areas in the Mackenzie Valley. The purpose of the boards, including the Board whose decision is now under review, is to "enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and other Canadians": s. 9.1 MVRMA.

[37] The Court held that the relevant land claims agreements and the MVRMA clearly recognize that a full scale environmental review will not be appropriate in respect of certain existing permits, projects and licences and they reflect that some grandfathering of existing developments is required to balance competing interests. It noted that, "Those interests include the legitimate goal of protecting land and water resources in the Mackenzie Valley for the benefit of its citizens, on the one hand, while, at the same time, exempting from the full force of new environmental legislation undertakings developed under an earlier legislative regime".

[38] The Court reviewed certain transitional and other sections of the MVRMA and found that they 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 that 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 s. 157.1, therefore, one must recognize that it is designed to grandfather certain undertakings which predate June 22, 1984. Accordingly, this section must be interpreted in a manner which best comports with its intended purpose.

[39] The Court also compared the MVRMA and the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA). Both Acts exempt projects which pre-date June 22, 1984. The Court found that the selection of this common date reflects Parliament's continuing intention that projects which pre-date June 22, 1984 are to be subjected to a full scale environmental assessment 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. The Court also noted that it has been determined that the purpose of s. 74(4) of the CEAA is to exempt projects from environmental assessment when significant resources have already been expended towards them, citing *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment) et al.* (2001), 204 F.T.R. 161 (T.D.), aff'd (2001) 213 F.T.R. 57 (C.A.).

[40] In comparing the MVRMA and the CEAA, the Court held that s. 157.1 "is designed to generally parallel the scope of the statutory exemptions granted to projects pre-dating June 22, 1984 under s. 74(4) of CEAA. CEAA exempts from environmental requirements any licence issuance or renewal where the "construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984"." By contrast, the Court of Appeal noted, s. 157.1 of the MVRMA ties the exemption to a licence related to an undertaking that is "the subject of a licence or permit issued before June 22, 1984".

[41] The Court of Appeal held that the difference in wording between the two Acts does not reflect a Parliamentary intention to expand the reach of the MVRMA, but rather, as indicated above, an intention that projects which pre-date June 22, 1984 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. The Court found that the change of wording reflected an attempt to overcome the difficulties of interpretation of the word "initiated" under the CEAA by referring in the MVRMA to an event which could be easily and conclusively established for a given project without litigation - that is, the actual date on which a licence or permit had been issued. The Court went on to say that the scope of the MVRMA exemption may be broader than that under the CEAA since the MVRMA exemption applies as long as the relevant licence or permit was issued prior to June 22, 1984 regardless of whether physical work on the project had been initiated by that date.

[42] CZC argued that the correct interpretation of "undertaking" in s. 157.1 is the winter access road, while the interveners argued that it is the larger enterprise engaged in by CZC. Both rely in part on *Tungsten* to support their positions.

[43] I note that in *Tungsten*, the Court uses the terms "undertaking" and "project" seemingly interchangeably throughout its decision. Indeed, s. 157.1 only makes sense if those words mean the same thing, since its intent must logically be that Part 5 does not apply in respect of any permit related to a qualifying undertaking except a permit for an abandonment, decommissioning or other significant alteration of the undertaking. This conclusion is consistent with the French version of s. 157.1, in which the phrase "un ouvrage ou une activité" are used where, in the English version, both "undertaking" and "project" are found.

[44] The interveners argued that the term "undertaking" is used in *Tungsten* in the wider sense of a business or the whole arrangement under which the licence holder in that case operated. I agree that some of the language in *Tungsten* can be read that way. For example, the Court referred to "if the subject undertaking held a water licence", "Tungsten's existing water licence for its undertaking" , "given the location of Tungsten's undertaking", and "undertakings requiring water licences". It also said:

> Tungsten operates the Cantung Tungsten Mine ... in the Mackenzie Valley. That Mine has been in place since 1962. Tungsten's predecessor was first granted a water licence for this undertaking in 1975.

[45] The quoted excerpts suggest that the Court considered the mine or the mining operation to be the undertaking.

[46] In *Tungsten*, the licence sought was for the use of water for the mining operation. The only undertaking that was relevant was, therefore, the entire mining operation. In this case, however, the permit is specifically for the winter access road. It seems to me that there are three possible meanings of "undertaking" in this context: the road itself, or the road and its operation and use, or the mining operation.

[47] Apart from the wording referred to above in *Tungsten*, the Board also relied on various definitions of "undertaking". For example, "Undertaking" is not a physical thing but is an arrangement under which of course physical things are used: *Capital Cities Communications Inc. v. Canada (C.R.T.C.)*, [1978] 2 S.C.R. 141. It also referred to an analysis by Professor Peter Hogg in his text, *Constitutional Law of Canada*, in which he concluded that "undertaking" seems to be equivalent to "organization" or "enterprise", and distinguished between a "work" which he

characterized as a tangible thing and an "undertaking" which he characterized as an intangible arrangement, organization or enterprise.

[48] In *Union des employés de service, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J., referring to other jurisprudence, concluded that an undertaking consists in an organization of resources that together suffice for the pursuit, in whole or in part, of specific activities.

[49] "Undertaking" can, however, have a more restricted meaning. In *The Concise Oxford Dictionary* (Clarendon Press, Oxford), 1995, one finds it defined as "work, etc. undertaken, an enterprise *(a serious undertaking)*".

[50] CZC argued that the "undertaking" must be the winter access road and not the larger mining operation. Relying on *Tungsten* and the Court's holding that the MVRMA and the CEAA are meant to complement each other, CZC pointed out that the CEAA refers to and focuses on work or activity in its exemption section 74(4):

> s. 74(4) Where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, this Act shall not apply in respect of the issuance or renewal of a licence, permit, approval or other action under a prescribed provision in respect of the project unless the issuance or renewal entails a modification, decommissioning, abandonment or other alteration to the project, in whole or in part.

[51] "Project" is defined as "in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work": s. 2(1) CEAA.

[52] The focus on work or activity in the CEAA is more consistent with the French version of s. 157.1 MVRMA, referring to "un ouvrage ou une activité" for undertaking, than the wider meaning of undertaking proposed by the interveners.

[53] In my view, to be consistent with the CEAA and the context and purpose of the legislation as described in *Tungsten*, the definition of undertaking must parallel the wording used in the CEAA and not focus solely on the physical "thing", that is, the winter access road. It must include the proposed operation of the road. The undertaking is not merely the winter access road, but includes the activity for which

the road will be used and the circumstances surrounding its use. It is not, however, the complete operation carried on by CZC.

[54] If the MVRMA and CEAA are meant to be complementary pieces of legislation, one would not expect the legislators to change the focus from a physical work or activity under CEAA to the larger business or enterprise within which that physical work or activity takes place under MVRMA, in determining whether a project is grandfathered and exempt from environmental assessment. This interpretation also fits better with the French version of s. 157.1.

[55] As I have already noted, the definition of "undertaking" was not the issue in *Tungsten* and the wording used by the Court of Appeal in its decision must be seen in that light. The wording used by the Court of Appeal in dealing with what was meant to be grandfathered under the MVRMA, although suggestive of the wider enterprise, the mine in that case, does not rule out an interpretation of "undertaking" as a more restricted activity for which a permit is sought, such as the operation of the winter access road in this case.

[56] The Board's decision was that:

> ... 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.

[57] It appears to me from the Board's decision, that by "whole enterprise" it meant the mining operation carried on by CZC at the Prairie Creek minesite. I say that because the Board also made the following comments and findings:

> 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.

[58] In my view, the Board erred in considering the undertaking to be CZC's whole enterprise, its mining operation.

[59] Having concluded that the undertaking is the operation of the winter access road, the question is then whether that undertaking had a permit issued before June 22, 1984.

[60] Determination of this issue involves the question left open by the Court of Appeal in *Tungsten.* That is, for purposes of this case, whether the permit issued to Cadillac before June 22, 1984 must have "some relationship in terms of subject matter, substance and direct linkage" to the permit for which CZC has applied.

[61] Here, there is clearly a relationship in terms of subject matter because both permits are for some physical work on and the operation of the same winter access road. The Board also accepted that CZC intends no significant alteration of the project. I take that as a finding of fact and no one on this application challenged it.

[62] There are differences in substance between the two permits. For example, the permit held by Cadillac was for a one year term, twice renewed. However, the permit sought by CZC is for a five year term with a two year renewal term. In my view, that is not significant because the term of the permit is up to the Board in any event. There is evidence that there are some differences between the type of materials and equipment Cadillac hauled on the road and what CZC intends to haul on the road. The major difference is that CZC intends to remove certain chemicals from the minesite via the road. I will comment on that below. Basically, however, the activity on the road, both under Cadillac's permit and CZC's proposed permit, involves hauling materials and equipment from the mine to the highway and vice versa.

[63] The “direct linkage” issue is more problematic. Cadillac’s permit was both obtained and expired prior to June 22, 1984. There was accordingly a 20 year gap before CZC applied for its permit and no linkage by way of successive renewals as was the case in *Tungsten*, although there was a permit for part of the road in the mid-1990's.

[64] Although the Court of Appeal left open the question whether there needs to be some direct linkage between the two permits, the wording of s. 157.1 does not require such linkage. And the reasoning in *Tungsten* appears to apply squarely to the circumstances of CZC’s permit application. The Court referred to the legislative intention that projects which pre-date June 22, 1984 are to be subjected to a full scale environmental assessment only if they depart significantly from their approved mode of operation and engage in decommissioning, abandonment or significant alteration of the project. The project in this case, the operation of the winter access road, pre-dates June 22, 1984. As found by the Board, the permit sought by CZC is not based on any intention to significantly alter that project or to abandon or decommission it.

[65] In *Tungsten*, the Court of Appeal suggested that the interpretive difficulties with the term “initiated” used in s. 74(4) of the CEAA resulted, under s. 157.1 of the MVRMA, in the exemption being tied to the date a licence or permit was issued. Bearing in mind that the approach under the MVRMA is meant to be complementary to that under the CEAA, it would be inconsistent if under the CEAA a project simply had to be initiated before June 22, 1984 (and the *Hamilton-Wentworth* case indicates that a very broad range of steps can qualify as initiating steps) to qualify for exemption from the environmental assessment regime, but under the MVRMA a project, even though completed under an appropriate permit before June 22, 1984, would not qualify if permits had not been sought on a continuing basis.

[66] It is also noteworthy that s. 157.1 does not refer to renewals of licences or permits and therefore does not, by its wording, apply only to renewals of existing permits or licences. If the intention of Parliament was that only undertakings for which a permit had been continually maintained would be grandfathered, surely the legislation would have spelled that out.

[67] Nor does s. 157.1 appear to require any particular linkage as to the identity of the holder of the permit. One would think that if that were the legislative intent, it would have been simple enough to set it out clearly in the statute.

[68] If a purpose of the CEAA and the MVRMA is to exempt projects from environmental assessment when significant resources have already been expended towards them, it would seem to follow that when such a project has been taken over by a new owner, one which has also expended significant resources to acquire the project, the exemption follows the project. In other words, it is the project or undertaking that is exempt from s. 157.1, not the owner or the permit holder.

[69] I find that in this case there is sufficient connection in terms of subject matter and substance between CZC's proposed undertaking - the operation of the winter access road - and Cadillac's undertaking. I find there is no requirement under the legislation that there be continuity as to the owner of the undertaking and no requirement that the pre-June 22, 1984 permit had been continued by successive renewals after that date.

[70] The permit sought by CZC is related to the operation of the winter access road. A permit had been issued to Cadillac before June 22, 1984 in respect of that same undertaking. Therefore, s. 157.1 governs and Part 5 does not apply.

[71] The environmental concerns raised by the interveners and by others before the Board are serious and worthy of consideration. The fact that CZC's permit application is exempt from Part 5 does not make those concerns any less significant.

[72] In *Tungsten*, the Court of Appeal distinguished between conditions imposed before a project is built (facility compliance) and operational standards applicable to existing projects (operational compliance). The Court noted that, "Simply because an undertaking may be exempt from the full panoply of environmental assessments under Part 5 of the MVRMA does not mean that the undertaking is exempt from applicable regulatory standards." Applicable regulatory standards in this case may well include standards with respect to the materials, such as any chemicals, that CZC intends to transport on the road; I need not decide anything about that as it was not argued before me. In any event, CZC has acknowledged that the Board may impose conditions within its jurisdiction on the granting of the permit. The concerns raised by the interveners can and should be addressed, as the Board sees fit, in the Board's determination as to whether or what terms and conditions should be attached to the permit sought.

Conclusion:

[73] Accordingly, the application for judicial review is granted. The order of the Board is quashed and the matter is remitted to the Board for continuation in accordance with this decision.

[74] None of the parties sought to speak to costs at the time of the application. If costs are an issue, counsel may arrange to address them by contacting the registry within 30 days of the date these reasons for judgment are filed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT
this 6th day of May, 2005.

Counsel for the Applicant: D. Geoffrey Cowper, Q.C.
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For the Interveners: Mr. Devon Page