



January 19, 2009

Alistair MacDonald
Environmental Assessment Officer
Mackenzie Valley Environmental Impact Review Board
5102 50th Avenue,
Yellowknife, NT
X1A 2N7

Dear Mr. MacDonald

**RE: Environmental Assessment EA0809-002, Prairie Creek Mine
Comments Regarding Submissions for Request for Ruling on Scope of Assessment**

We refer to the submissions by Ecojustice and the Department of Justice dated January 14, 2009 on the above noted subject. We refer the Mackenzie Valley Environmental Impact Review Board (“the Review Board”) to the attached letter, dated January 17, 2009 to Canadian Zinc Corporation (“CZN”) from our legal advisors, Fasken Martineau (the “Fasken Letter”). We submit the Fasken letter as the bulk of CZN’s response to the legal issues contained in the above noted submissions. This letter will address the more technical issues in the submissions.

ECOJUSTICE SUBMISSION

From the outset, CZN has recognized that there are changes to the proposed mine operation compared to that previously permitted by Cadillac. CZN has welcomed the inclusion of those changes in the scope of environmental assessment (“EA”). Scoping of the EA of the proposed Prairie Creek Project is unique in that the majority of the mine is already built, and many of the important mine components have recently been the subject of other EA’s. In this respect, the scoping exercise is not typical. CZN’s primary objective is to have an efficient and focussed EA process. A considerable amount of time spent on EA’s of the Prairie Creek mine has produced much valuable information. We believe elements of the necessary work that have already been completed should be utilized and need not be repeated.

In our January 14, 2009 submission to the Review Board, we indicated our belief that certain mine components could be omitted from the scope of development, and others from the scope of assessment. Further, we suggested that the issues themselves could be scoped to focus on those considered to be most important. In doing this, our intent is not to avoid important assessment but to acknowledge work already completed and focus efforts on the proposed changes to the mine. Despite somewhat differing philosophies, there is considerable common ground between the Ecojustice submission and CZN’s position. Ecojustice note that a lot of useful information and plans were generated in past EA’s. Starting on page 5 of their submission, Ecojustice provide a list of changes proposed by CZN. We are in general agreement that these are indeed

changes being proposed to Cadillac's plans, and CZN has not sought to exclude them from EA. The majority of these relate to our new waste and water management plans which we believe are necessary to enable a modern mining operation, and to operate in an environmentally responsible manner.

We do wish to comment on certain specific references in the Ecojustice submission which we feel do not convey an accurate reflection of the current situation:

Page 12, Geotechnical Assessment of the Polishing Pond. While the pond was built for the recent underground decline project, its function will be no different during mine operations. CZN does not believe that the geotechnical integrity of the pond is in question, however we recognize that the capacity of the pond to 'polish' water will require further assessment as part of consideration of our water management plan. As such, the issue for EA is hydrological not geotechnical.

Page 12, Probable Maximum Flood Profile. Comments are made with respect to a flood analysis completed for the main flood protection dike for the site. Ecojustice comment that a Probable Maximum Flood (PMF) analysis was not completed because detailed data are required. Examination of the documents referred to (rfr 23 of 35) provides more background on this issue, and explains that a true PMF analysis is not possible because a lengthy time period of data is required, and such data do not exist. The magnitude of the PMF was approximated by Hay & Company Consultants Inc. ("Hayco") on behalf of CZN using two different methods. The higher flow volume of the two was then used to compute a flood profile (elevations). The elevations computed were well below those used to select the height of rip-rap armour of the dike. The dike itself is much higher.

In performing their analysis, Hayco used 16 years of data from a Water Survey of Canada hydrometric station on Prairie Creek that provided continuous monitoring from 1974 to 1990. Ker Priestman performed their analysis in 1980, and so used 6 years of this data. Comparable data has not been collected since 1990. Mine projects are normally designed based on 1-2 years of local data.

Ecojustice refer to a 200 year flood standard used in a recent geotechnical assessment of the flood protection works. This is misleading. EBA Consultants and Hayco both **recommended** the use of a 1 in 200 year return period as the appropriate standard for considering the hydrologic stability of the dike because the main pond was not in use. As noted above, the rip-rap armour and dike were built to the much higher standard of the estimated PMF.

Page 13, Flood Protection and Tank Farm Facility Reports. Reference is made to comments by EBA regarding the reassessment of flood protection works if the use of the 'tailings pond' changes. EBA had argued that a 1 in 200 year flood return period was an appropriate standard for assessment because the pond was not in use for tailings disposal, as originally intended. During a site inspection, EBA found that the rip-rap (large rock armour) was thin in one place, and absent from a short section of the dike. EBA concluded that the dike was satisfactory for the use proposed at the time, but that the dike protection should be re-evaluated if the pond was to be

used as intended. It is important to note here that EBA's comments were made in connection with the condition of the rip-rap, not the design parameters used to select the height and thickness of the rip-rap. The flood protection works have been inspected annually since EBA's report by Golder Associates. A 2007 inspection report by Golder (contained in rfr 34) notes the same rip-rap issues and provides recommendations for repair. CZN plans to act on the recommendations as part of pond reconfiguration for operations.

Page 14, MV2004C0030 – Phase 3 Drilling. Reference is made to this project as smaller scale compared to the mine proposal. The project, for which CZN still holds an active permit, consists of exploration drilling in outlying areas from the mine using drill rigs transported both on surface roads and by helicopter. An aerial wildlife survey was completed and a Flight Impact Management Plan produced to mitigate potential impacts to wildlife in the area of the Phase 3 project. While this work was a specific outcome of the EA process and permitting associated with that project, it should be clear that the results are more than applicable to the mine proposal which occupies a much smaller area in the centre of the exploration area.

DEPARTMENT OF JUSTICE SUBMISSION

CZN concurs with DOJ's 2nd paragraph on page 7 regarding an efficient EA taking into account previous EA's, reports and studies, and recognizing that certain physical works and facilities already exist.

The Fasken Letter attached asserts again that the use of CZN's winter road for mine operations is exempt from EA. However, we agree with the intent of DOJ's first paragraph under the heading 'Scoping Option #1' on page 3, that this does not prevent the Review Board from considering the cumulative environmental impact of the mine proposal with the winter road, if the Review Board chooses to do so, as per the correct definition of cumulative effects given in the Fasken Letter.

SUMMARY AND CLOSING

In summary, CZN submits that the scope of development for assessment must not include the winter road, and need not include all facilities and activities at the mine site for the reasons given above and previously. This would then focus resources on assessing the most relevant and important issues that have not been previously assessed and are not exempt from assessment.

In closing, we refer the Review Board to the August 8, 2008 letter from Indian and Northern Affairs Canada ("INAC") to Vern Christensen, Executive Director of the Review Board in which INAC stated: *"In reviewing the applications, INAC recognizes that Canadian Zinc is proposing several changes of use and additions to the existing in-place infrastructure at the Prairie Creek mine site constructed in 1982. In particular, we noted the changes to subsurface tailings disposal, use of the original surface tailings pond as a water management facility, waste rock management plans, sewage treatment plant, and power plant upgrade plans. It is the department's view that these changes should be examined through the environmental assessment process, taking into account information generated through previous environmental assessments related to this mine site"* [emphasis added]. We also refer the

Review Board to the follow-up October 14, 2008 letter from INAC to Alistair MacDonald, Environmental Assessment Officer at the Review Board enclosing INAC's submission on the scoping questions in which INAC stated: "*INAC notes that one of the key purposes of scoping during an environmental assessment is to focus the assessment on areas of greatest concern*".

Yours truly,
CANADIAN ZINC CORPORATION

A handwritten signature in blue ink, appearing to read "D. Harpley".

David P. Harpley, P. Geo.
VP, Environment and Permitting Affairs

January 17, 2009

File No.: 259474.00006/14918

Canadian Zinc Corporation
1710 – 650 West Georgia Street
Vancouver, BC V6B 4N9

Attention: Alan Taylor
COO & Vice President, Exploration

Dear Sirs/Mesdames:

**Re: Jurisdiction of the Mackenzie Valley Environmental Impact Review Board
to Scope the Development for Environmental Assessment EA0809-002 for
the Prairie Creek Mine.**

You have asked us to comment on the jurisdiction of Mackenzie Valley Environmental Impact Review Board (the “Board”) to scope the development to be subject to Environmental Assessment EA0809-002 of Canadian Zinc Corporation’s (“CZC”) Prairie Creek Mine in light of the following submissions on the same issue:

- (a) The Department of Justice’s submissions dated January 14, 2009; and
- (b) EcoJustice’s submissions dated January 14, 2009.

Summary

It is clear from the caselaw that the Board has the discretion to define the scope of an environmental assessment to be as wide or as narrow as is necessary to fulfil its mandate.

The law is also clear that a project should be scoped to ensure that, ultimately, the environmental assessment that is conducted remains sufficiently linked to the foundational regulatory authority. The Supreme Court of the Northwest Territories in *Canadian Zinc Corporation v. Mackenzie Valley Land and Water Board*, 2005 NWTSC 48 (“*Canadian Zinc*”) found that the Winter Road is exempt from the application of Part 5 of the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 (“*MVRMA*”). As

a result of this exemption, the Winter Road is beyond the jurisdiction of the Board, and therefore beyond the possible scope of EA0809-002.

Additionally, the Winter Road was confirmed by the Court as a separate undertaking. Given *Canadian Zinc* and purpose of s. 157.1, it is beyond the jurisdiction of the Review Board to bring the Winter Road within the scope of the development

Context

Canadian Parks and Wilderness Society (“CPAWS”) and Dehcho First Nations (“DFN”) filed a Request for Ruling dated November 3, 2008, part of which was dismissed by the Board in its Review of Board Directives dated November 26, 2008. The Board reformulated the Request for Ruling such that the issues are expressed as follows:

1. Should the scope of development for EA0809-002 include all physical works and activities associated with the proposed winter road?
2. Should the scope of development for EA0809-002 include all facilities and activities at the proposed mine site?

The submissions of the Department of Justice (“DoJ”) is in answer to both of the above questions, whereas EcoJustice’s submissions on the Request for Ruling stand with respect to the first questions, and their January 14, 2008 submissions respond to the second question.

CZC has responded on both issues in its submissions to the Review Board dated January 14, 2008. In support of those submissions, we prepared a letter dated January 9, 2009 focusing on the first question.

In Response to the January 14, 2009 Submissions of Both the Department of Justice and EcoJustice

Section 117 of the *MVRMA* confers on the Mackenzie Valley Environmental Impact Review Board (the “Review Board”), the power to determine the scope of a development upon which an environmental assessment is to be conducted.

117. (1) Every environmental assessment of a proposal for a development shall include a determination by the Review Board of the scope of the development, subject to any guidelines made under section 120.

The *Environmental Impact Assessment Guidelines* (the “Guidelines”) were made pursuant to s.120 in March 2004. The purpose of these Guidelines is not to usurp the discretion of the Board, but to guide the exercise of the Board’s discretion in this process

to ensure that it is fair and open. The Board’s discretion is not unlike that of a Responsible Authority under the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (“CEAA”). Such discretion was examined by the Federal Court of Appeal in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* (C.A.), [2000] 2 F.C. 263 where the Court held that CEAA “confers on the responsible authority...the power to determine the scope of the project in relation to which an environmental assessment is to be conducted.” (see para. 12)

The Board maintains the ultimate discretion to make the final determination regarding the scope of a development. In *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 it was argued that the Department of Fisheries and Oceans (“DFO”) wrongfully limited the scope of an environmental assessment of the destruction of a single creek, but should have encompassed an entire oil sands development. The Federal Court of Appeal held:

[18] The appellants’ argument that the DFO was obliged to scope the project for environmental assessment purposes as the entire oil sands undertaking ignores the words of subsection 15(1), which empower the responsible authority, the DFO in this case, to determine the scope of the project. ... The appellants’ approach would deprive the DFO of any discretion in respect of the scoping of a project contrary to the words of subsection 15(1).

The Trial Judge in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265, upheld on appeal, held the following regarding scoping of environmental assessments narrowly:

[213] The case law indicates that narrow scoping, in the context of regulatory triggers such as s. 35(2) of the FA is prima facie reasonable. To hold otherwise in the instant case would, the Minister argues, result in the marginal impact on fish habitat from the de-watering of a creek mandating, as a matter of law, an environmental assessment of a major industrial development for which the federal government has no other decision-making responsibility. And even if a broader scoping decision might have been reasonable, it does not mean that a decision to scope more narrowly is necessarily unreasonable.

[214] The words of Nadon J. in *Tolko* are again helpful on this point:

...

[86] At paragraph 67 of its memorandum of fact and law, the respondent Tolko makes the following submission with which I am in entire agreement:

This Court should also consider what the practical effects would be if it were to accept the arguments the Applicants advance. What happens if a city within Canada, or a province for that matter, decides to build a bridge? When they seek approval under Section 5 of the NWPA, does everything that city or province does become one big "project" which must be environmentally assessed under CEAA? Surely not, but this might well be the result if the Applicants' arguments are accepted. Unless the environmental assessment is connected with the regulatory authority which triggers CEAA, there is simply no reasonable limit placed on what the responsible authority in any given case would have to consider.

In the case of CZC's applications, if the Board is satisfied that the environmental assessment at question, EA0809-002, would be most efficient and effective if the assessment is scoped to take into account the on-the-ground reality that many of the buildings, structures, workings that make up the Prairie Creek Mine already exist, then that is within the Board's discretion.

When analyzing the Guidelines and their discussion of interdependence, linkage and proximity, the Board must also consider that the environmental assessment of a development must be sufficiently linked to the regulatory authority which triggers the environmental assessment. As the Trial Judge in *Prairie Acid Rain* held:

[195] In such a case, and in accordance with the Supreme Court of Canada's decision in *Oldman River*, the Minister says it is appropriate that a project be scoped to ensure that, ultimately, the environmental assessment that is conducted remains sufficiently linked to the regulatory authority that triggers *CEAA*.

[196] A similar approach has been adopted by this Court in the particular context of *CEAA* and of the "ss. 35(2) of the Fisheries Act trigger." In Tolko, Nadon J. noted as follows at para. 86:

Unless the environmental assessment is connected with the regulatory authority which triggers *CEAA*, there [would] simply [be] no reasonable limit placed on what the responsible authority in any given case would have to consider.

In the case of the Prairie Creek Mine, as we stated in our letter of January 9, 2009, it is our opinion that the Winter Road is beyond the jurisdiction of the Board (see our letter of January 9, 2009, and the analysis below) and therefore cannot be scoped into the environmental assessment.

The Winter Road was confirmed by the Court as a separate undertaking. Given *Canadian Zinc* and the purpose of s. 157.1, it is beyond the jurisdiction of the Review Board to bring the Winter Road within the scope of the development and, even if it were within the Review Board's jurisdiction, the Winter Road's status as a separate undertaking means the Review Board should not scope it in the development.

In Response to the January 14, 2009 Submissions of the Department of Justice

In its submissions on the second issue ("Should the scope of development for EA0809-002 include all facilities and activities at the proposed mine site?"), the DoJ stated: "*We submit that the subject "principal development" is CZC's proposed mining operation and that the proposed mining operation includes the winter road.*" Coming to this conclusion, the DoJ has brought its answers to the first issue forward to its answer to the second issue, and so we have had to respond to the whole of the DoJ's submissions in order to properly reply to its submissions on the second issue.

The DoJ states: "*We submit that the scope of development for EA809-002 should include all physical works and activities associated with the winter road either on the basis of the road currently being a separate and distinct development which may cumulatively contribute to the impact of CZC's proposed development on the basis of the winter road being an integral and necessary part of the proposed mining operations development which is the subject of the current EA.*" .

The second half of the above quote from the DoJ's submissions ignores the analysis of the Court in *Canadian Zinc*, which looked at the undertaking of the road independently of the exact undertaking which Canadian Zinc may have had at the end of the road. The Court analysed the Winter Road as a separate undertaking from other permits and licences which were located at its end – it is a separate undertaking and not a part of the Prairie Creek Mine that is the subject of EA809-002 – "integral", "necessary" or otherwise. As long as that use of the Winter Road is related to the Prairie Creek Mine – whether exploration, pilot plant, or full blown mine – the Winter Road is grandfathered.

In the first half of the above quote from the DoJ's submissions, it states that the Winter Road should be assessed in its entirety, "*on the basis of the road currently being a separate and distinct development which may cumulatively contribute to the impact of CZC's proposed development*" This submission reflects a misunderstanding of

cumulative effects analysis. Cumulative impacts are included in environmental assessment as described in s.117(2) of the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 (“*MVRMA*”) as:

(2) Every environmental assessment and environmental impact review of a proposal for a development shall include a consideration of

(a) the impact of the development on the environment, including the impact of malfunctions or accidents that may occur in connection with the development and any **cumulative impact that is likely to result from the development in combination with other developments;**

(emphasis added)

If the Board were to analyse the Winter Road in terms of its cumulative effects, then the Winter Road, by definition, is a separate undertaking from the Prairie Creek Mine. In a cumulative assessment the Winter Road would only be assessed to the extent that its environmental effects were cumulative with those identified for the Prairie Creek Mine.

We note that the DoJ mentions a number of times: “*We note again, however, that LUP #MV2003F0028 does not-permit CZC to operate and use the winter road in connection with the proposed mining operations.*” The present land use permit for the Winter Road allows for the resupply of the Prairie Creek Mine, and may or may not require an amendment to haul concentrate. However, this emphasis on the particulars of what is permitted under the land use permit obscures the nature of the protection provided by s.157.1 of the *MVRMA*. It is not simply the present land use permit that is exempt from Part 5 of the *MVRMA*, it is the undertaking that is the Winter Road. The Court has defined this undertaking as use of the Winter Road for “hauling materials and equipment from the mine to the highway and vice versa.” (see para. 62 of *Canadian Zinc*) The undertaking that is the use of the Winter Road for that purpose is exempt from Part 5 of the *MVRMA*.


The DoJ and others have suggested that the use of the Winter Road for full scale mining operations might not be grandfathered. However, the use of the Winter Road for that purpose is again totally in line with the original purpose of the Winter Road. There can be no doubt that the Court would similarly find that the undertakings are the same and therefore that any present day or future application for the Winter Road is grandfathered.

It is only through Part 5 that the Review Board has any authority or jurisdiction. The Court has held that this undertaking – the Winter Road to the Prairie Creek Mine – is grandfathered from the application of Part 5 of the *MVRMA*. The Review Board is

bound by the decision of the Supreme Court. Therefore, scoping the Winter Road into EA0809-002 is beyond the jurisdiction of the Review Board.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP


Kevin O'Callaghan
(signed electronically)

KGO/fxm