



Vancouver Office
214 - 131 Water Street
Vancouver, BC V6B 4M3
www.ecojustice.ca

Keith Ferguson, Staff Lawyer
Tel: (604) 685-5618, ext. 287
Fax: (604) 685-7813
E-mail: kferguson@ecojustice.ca

January 19, 2009
BY EMAIL

Alistair MacDonald
Environmental Assessment Officer
Mackenzie Valley Environmental Impact Review Board (MVEIRB)
200 Scotia Centre
Box 938, 5102-50th Ave
Yellowknife, NT X1A 2N7
Phone: 867 766 7050, 1 866 912 3472
Email: amacdonald@reviewboard.ca, amacdonald@mveirb.nt.ca

Dear Mr. MacDonald,

Re: DFN and CPAWS reply on Request for Ruling Scoping Questions #1 & #2
File: Canadian Zinc (CZN) Prairie Creek Mine, EA 0809-002

Please find attached reply submissions on behalf of the Dehcho First Nations (DFN) and the Canadian Parks and Wilderness Society (CPAWS and CPAWS-NWT) on questions 1 and 2 of the Review Board's December 18, 2008 letter. As we have stated in our previous submissions, we answer both of these questions as yes.

Please do not hesitate to contact me should you have any questions.

Yours truly,

A handwritten signature in black ink, appearing to read "K. Ferguson".

Keith Ferguson, Staff Lawyer
On behalf of DFN, CPAWS and CPAWS-NWT

cc: Laura Pitkanen, Dehcho representative (pitkanen@csolve.net)
Jen Morin, CPAWS (jennifer@cpaws.org)
Lani Cooke, Executive Director, CPAWS-NWT (lani@cpaws.org)

Reply to CZN's Jan 14, 2009 submission

Please note our previous submissions have already addressed many of the issues discussed in CZN's Jan 14, 2009 letter (the 'CZN letter') and the attached Jan 9, 2009 letter from Fasken Martineau (the 'Fasken letter'), and to avoid duplication we will not repeat them here. In reply, we add the following.

Question 1. Should the scope of development for EA0809-002 include all physical works and activities associated with the proposed **winter road**?

Grandfathering and project splitting

The CZN letter states, "no assessment under the act [the MVRMA] will occur with regard to the Winter Road and so there will be no danger of split assessment. ... The guidelines are written for new projects that have not undergone prior assessment. The dependence, linkage and proximity arguments are irrelevant as the road was assessed before and is grandfathered"¹. This statement relies in part upon the Fasken letter which argues that CZN does not need a new land use permit for the road², and that the *Canadian Zinc*³ court case applies today to grandfather the use of the road for full-scale mine operations. As for the transfer facilities, the Fasken letter adds, "The proposals to use the transfer stations are the subject [of] separate LUP applications which will be the subject of environmental assessment by the Review Board"⁴.

With respect, we submit this approach of first splitting the undertaking into pieces and then claiming that some of the individual pieces are grandfathered is not the correct approach under s.157.1. We submit the correct approach is to answer the following questions in order:

1. First, what is the undertaking being proposed?
2. Second, is that undertaking grandfathered pursuant to s.157.1 (e.g. has it been significantly altered)?
3. Third, if not grandfathered, then apply Part 5 of the MVRMA and thus the Guidelines, and so ask: what is the correct scope?

This order of questions is a necessary result of both of the referenced court cases that have considered s.157.1. In the *Tungsten*⁵ case, the NWT Court of Appeal considered the proposed

¹ CZN letter at page 2.

² Fasken letter at page 3.

³ *Canadian Zinc Corp. v. Mackenzie Valley Land and Water Board*, [2005] N.W.T.J. No. 41 (QL), 2005 NWTSC 48 ('*Canadian Zinc*').

⁴ Fasken letter at page 5.

⁵ *North American Tungsten Corp. Ltd. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5, 1 C.E.L.R. (3d) 161, [2003] N.W.T.J. No. 28 (QL) ('*Tungsten*').

undertaking to be the entire mining operation⁶ and concluded that that undertaking was grandfathered. As discussed in our Jan 14, 2009 submission, the court in *Tungsten* made it very clear that, “Under s.157.1, the primary focus is on the undertaking itself. ... one must first have regard to whether the undertaking meets the requirements of the section”⁷.

Similarly in the *Canadian Zinc* case, the NWT Supreme Court applied the above steps in the above order as follows:

1. In the context of the application for MV2003F0028 (rehabilitation, clean-up and supply of exploration activity), the Court held the proposed undertaking was not just the road nor the entire mining operation, but rather was the road “and the activity for which the road will be used and the circumstances surrounding its use”⁸.
2. Having determined what the ‘undertaking’ was, the Court then asked if it was grandfathered⁹. The Court noted that the MVLWB accepted there had been no significant alteration since the original 1980 permit (and no party challenged that finding)¹⁰, and so the undertaking was grandfathered.
3. Part 5 was therefore not applicable.

In the present EA, we therefore submit the correct approach is as follows:

1. The proposed undertaking is full-scale mine operations and delivery of product.
2. That undertaking is not grandfathered because it has been significantly altered (including multiple changes at the mine site, the addition of transfer facilities, and changes to road traffic intensity, timing, duration, etc).
3. Therefore Part 5 applies, and the scope of development should be determined according to the Review Board’s Guidelines with the result that the road and all activities associated with it are included in the scope.

⁶ *Tungsten* at para. 5: “Tungsten operates the Cantung Tungsten Mine ... Tungsten’s predecessor was first granted a water licence for this undertaking in 1975.” See also *Canadian Zinc* at para. 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.”

⁷ *Tungsten* at para. 32.

⁸ *Canadian Zinc* at paras. 53.

⁹ *Canadian Zinc* at para. 59.

¹⁰ *Canadian Zinc* at para. 61. See also MVLWB’s Reasons for Decision, June 2, 2004 (in Rfr 32 of 35 – Material related to Application for Winter Access Road) at page 6 where the MVLWB stated, “The Applicant’s evidence is however, that no significant alteration of the project is intended and the MVLWB accepts that assertion.”

In contrast, CZN is arguing for the following order of operation:

1. First, split the undertaking apart – in this case, into the minesite, the two transfer facilities, and the road¹¹. Further, when CZN argues that specific components at the minesite should also not be included in the scope of development, CZN appears to be proposing to split the individual facilities and activities at the minesite into those that have been previously permitted/assessed versus those that have not.
2. Second, after splitting, ask whether each of the individual pieces is grandfathered.
3. Third, for those pieces not grandfathered, scope them for assessment.

With respect, this is fundamentally the wrong order. Indeed, such an approach could render the exception in s.157.1 (i.e. that significantly altered undertakings are still subject to Part 5) relatively meaningless, in that for any significantly altered undertaking, the significant alterations could be split off, what remains would be grandfathered, and only the split-off parts would proceed to assessment. This was not the intent of s.157.1, would result in significant project splitting and all the negative consequences that go along with that, and does not follow the interpretation of s.157.1 as held by the courts in *Tungsten* and *Canadian Zinc*. Recall, for example, the NWT Court of Appeal in *Tungsten* at para. 31 stated, “Both CEAA and the MVRMA require projects pre-dating June 22, 1984 to be subjected to a full scale environmental review if the licence renewal involves a decommissioning, abandonment or [significant] alteration to the project” (and the NWT Supreme Court in *Canadian Zinc* held that ‘project’ and ‘undertaking’ mean the same thing¹²).

Quite simply, CZN proposes not only splitting the road from the mine operation, but also splitting the transfer facilities from the road, and then argues that whatever alterations to the road remain (such as changes to the timing and duration of traffic¹³) are insignificant. If that is not project splitting, then what is?

Does the Canadian Zinc court case exempt the road from this EA?

With regard to the *Canadian Zinc* court case, the Fasken letter states:

- “The Court held at para. 62 that ‘*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*’¹⁴. “This remains the case and the relevant facts are the same as were considered by the Court”¹⁵.

¹¹ Recall from our Request for Ruling that we submit the road still requires an application for a new land use permit for its use as part of the full-scale mining operation, and the federal Jan 14, 2009 submission agrees.

¹² *Canadian Zinc* at para. 43.

¹³ Both the CZN letter at page 2 and the Fasken letter at page 5 acknowledge that traffic on the road may change, although as we explained in our request for ruling, it is difficult to know to what extent given that CZN has not yet applied for a new land use permit for the road for full-scale mine operations.

¹⁴ Fasken letter at pages 4, 5.

¹⁵ Fasken letter at page 5.

- “CPAWS and DFN were unsuccessful before the Supreme Court of the NWT. They must live with the results of that case and cannot now – through a Request for Ruling – attempt to try the same case again. The matter is *res judicata* – a rule that a final judgement of a Court on the merits is conclusive as to the rights of the parties”¹⁶.
- “In our opinion if the issue were again before the court ... CPAWS and DFN would not be permitted to subvert the judgement of the court and the intentions of Parliament by an attempt to piggyback an assessment of the Winter Road onto the environmental assessment of the Prairie Creek Mine”¹⁷.

With respect, the facts now are not at all the same as during consideration of MV2003F0028 and all of this ignores a key finding in both the *Tungsten* and *Canadian Zinc* cases, namely that it is necessary to determine the undertaking being proposed in order to determine whether grandfathering applies. In the *Canadian Zinc* case, the court noted that the applied-for permit “is specifically for the winter access road”¹⁸. Thus, unlike the *Tungsten* case where the proposed undertaking was the entire mining operation¹⁹, in *Canadian Zinc* the proposed undertaking was the road and “the activity for which the road will be used and the circumstances surrounding its use”²⁰ (which at that time was for the activities applied for in MV2003F0028, namely rehabilitation, clean-up and supply for exploration). Thus the undertaking did not include full-scale mine operations²¹. Having determined what the undertaking was, the Court noted acceptance that there had been no significant alteration to it, and went on to hold the application for MV2003F0028 was grandfathered.

Today the situation is very different: the current applications make it clear that the proposed undertaking includes full-scale mine operations and delivery of product, that there have been significant alterations to this undertaking since the early 1980s, and even CZN (by accepting this EA process) acknowledges that Part 5 of the MVRMA applies, at least in part.

CZN says the road is even exempt from consideration as a cumulative effect

The CZN letter states, “the Winter Road, as an undertaking in conjunction with the Prairie Creek Mine, is not within the jurisdiction of the Review Board and therefore cannot be scoped into EA0809-002”²². This appears to claim that the road could not even be considered in the cumulative effects assessment stage of the current EA – that CZN is claiming this is confirmed by previous CZN submissions²³.

¹⁶ Fasken letter at page 5.

¹⁷ Fasken letter at page 6.

¹⁸ *Canadian Zinc* at para. 46.

¹⁹ *Canadian Zinc* at para. 46.

²⁰ *Canadian Zinc* at para. 53.

²¹ *Canadian Zinc* at para. 53.

²² CZN letter at page 1. See also the Fasken letter at page 1.

²³ See CZN’s Nov 3, 2008 letter (RE: Environmental Assessment EA0809-002, Prairie Creek Mine, Comments Regarding Scoping) attached to the Jan 14, 2009 letter, which states at page 4: “paragraph

This cannot have been the intention of grandfathering under s.157.1. Consider, for example, a hypothetical situation where a completely grandfathered mining project exists on a river, and a second mine on that same river is then proposed. CZN's argument would imply that in the assessment of that second mine, the cumulative impacts from the first mine could not be considered at all because that first mine is grandfathered. We submit this cannot have been the intention of s.157.1. Rather, grandfathering is not about whether the first mine could be considered a cumulative effect, but instead is about whether Part 5 applies to the second mine. If it does, then any other project (grandfathered or not) could be considered in the cumulative effects assessment of the second mine.

However, as we have argued above and elsewhere²⁴, we submit the appropriate approach here is to include the road in the scope of development and thus consider it as a direct impact, rather than relegate it to a cumulative effect.

Wildlife assessments

The Fasken letter refers to “numerous and extensive studies” carried out in 1980-81, 1994/1995, and in 2007/2008, which according to the Fasken letter, “have been used as the basis to determine that the environmental impacts of the winter access road are expected to be negligible”²⁵.

As we have argued previously, while previous studies should of course be used to inform the current EA, they are not a reason to exclude things from the scope of development²⁶. These previous studies, while they will no doubt be of use during the present EA, were often carried out in very different contexts to the presently proposed undertaking. Further, things may have changed over time, some of these studies have acknowledged limitations, and certain questions remain open. For example:

- In relation to the 1980-81 studies: The *1980 Preliminary Environmental Evaluation for the Winter Access Road Report* was described by Parks Canada in 1994 as “a superficial analysis based on very limited field work”²⁷, the *1980 Environmental Evaluation Report* noted a number of limitations such as difficulties in surveying wildlife along the road due

117 is included in Part 5 of the MVRMA, and therefore the winter road is exempt from consideration of cumulative effects.”

²⁴ See for example our Request for Ruling (Nov 3, 2008) at pages 8-9 (re: the tests in the Review Board's Guidelines: dependence, linkage and proximity) and pages 10-11 (re: additional benefits of including the road in the scope of development rather than considering it only as a cumulative impact).

²⁵ Fasken letter at page 2.

²⁶ See our Jan 14, 2009 submissions at page 15.

²⁷ Aug 19, 1994 letter from Erik Val, Canadian Parks Service, Environment Canada, to Demitri Stone, Rescan (in Rfr 10 of 35 – Correspondence Prior to San Andreas Mine Permits), at page 1: “The KPA 1980 report of the preliminary environmental evaluation of the winter access road is a superficial analysis based on very limited field work. Apparently only 1-2 days of reconnaissance field research was done for a 160 km road. Therefore, it is no surprise that the results are extremely generic and not site specific enough to substantially predict meaningful impacts of the road.”

to weather conditions²⁸, the *1981 Fisheries and Invertebrate Studies Report* noted an insufficient number of invertebrates were collected to make reliable interpretations²⁹, and a number of deficiencies in the *1981 Vegetation and Wildlife Studies Report* were identified³⁰.

- In relation to the 1994/1995 studies: In April 1995, land use permit N95C373 was issued, but this was for an exploration drilling program to increase ore reserves and discover new deposits³¹, very different to the currently proposed undertaking. Also in 1994/1995, San Andreas made application to construct an all-weather road to the Prairie Creek mine, but appeared to abandon this application by not providing requested information within deadlines³² – presumably any wildlife studies prepared for this application were therefore not fully assessed.
- In relation to the 2007/2008 studies: MV2007L8-0026 concerned repairs to eroded sections of the road between the mine and Km 8.3 in the context of MV2003F0028³³,

²⁸ Rfr 38 (1 of 3) Final 1980 environmental assessment report – text only, *Environmental Evaluation for Cadillac Explorations Limited, Prairie Creek Project, N.W.T.*, October 1980, by Ker, Priestman and Associates Ltd, at page 103: in describing the wildlife surveys conducted in relation to the road which were intended to focus on woodland caribou and Dall’s sheep in a portion of the Mackenzie mountains and a portion of the Nahanni Range, this report noted, “weather conditions prevented surveys east of Prairie Creek in the Mackenzie Mountains and restricted the survey coverage in the Nahanni Range.” This report goes on to state at pages 103-104, “The winter road alignment east of Mile 23 crosses what is considered to be good woodland caribou and moose habitat. However, the density of deciduous vegetation cover precluded surveying for these species.” And at page 105, “The surveys in this programme were not directed at obtaining information concerning bears and wolves. This factor, combined with the low observability of these species during aerial surveys, and their generally reclusive nature, has resulted in the collection of little data on their distribution and abundance in this region.”

²⁹ Rfr 49 of 55, *Fisheries and Invertebrate Studies, 1981*, prepared by Beak Consultants Limited, at page v (item 7): “Low sample sizes of invertebrates were collected during the 1981 survey. Numbers were not sufficiently high to enable reliable interpretations.”

³⁰ See Rfr 9 of 35, *Prairie Creek Project, Wildlife Studies, 1982 Addendum*, prepared by Beak Consultants Limited, at page 1. This document is in response to one of the identified deficiencies (Dall’s sheep lambing areas).

³¹ Rfr 13 of 35 – Issuance of Land Use Permit N95C373 for Diamond Drilling, Application, March 1, 1995, item 5: Summary of Operation. See also Rfr 55 of 55 – Correspondence related to N95C373.

³² Rfr 15 of 35 – Series of Correspondence re: Application for All Weather Road, Jan 4, 1996 letter from DIAND to San Andreas stating the land use permit for the all weather road would not be issued since the one-year deadline to issue or refuse the permit had expired and San Andreas had not provided the previously requested information. See also Rfr 10 of 35 – Correspondence Prior to San Andreas Mine Permits, Rfr 12 of 35 – Winter Road Access Application & Supporting Documents, 1994, and Rfr 14 of 35 – Draft Guidelines for Environmental Assessment Report, June 1995.

³³ Rfr 35 of 35 – Material related to Type B Water Licence MV2007L8-0026, June 5, 2007 Application for Type B Water Licence, item 4: Description of Undertaking.

again all very different to the currently proposed undertaking (note also MV2007L8-0026 was not subjected to Part 5 of the MVRMA³⁴).

- As for MV2003F0028 itself, the MVLWB noted in 2007 that reviewers still had many concerns about wildlife in relation to the road³⁵. GNWT stated in 2007, “ENR [Environment and Natural Resources] strongly urges CZN to commence baseline wildlife studies along the road corridor and other project areas to support future development activities at this site. This type of work would greatly enhance the understanding of wildlife activities in the area and how it has changed from when initial studies were undertaken in the early 1980s”³⁶. The MVLWB in its 2007 reasons for issuing MV2003F0028 stated, “The Board notes the lack of specific wildlife habitat information that is currently available and due to this lack of information is unable to set specific terms and conditions for protection of specific wildlife habitats”³⁷. As for mitigation, the MVLWB noted it did not want to further delay issuance of MV2003F0028, but added: “The Board strongly encourages the GNWT to work with the Applicant, DIAND and the NBDB to investigate options on how a special management area or ‘no-hunting’ corridor could be established along the winter road”³⁸.

Question 2. Should the scope of development for EA0809-002 include all facilities and activities at the proposed **mine site**?

Past approvals and assessments

The CZN letter states that some components have been the subject of recent assessment by the Review Board, specifically noting the fuel tank farm containment and the flood profile for the main site protection dike, and argues: “These components have been determined to be suitable for any site operations, and this suitability does not change if such components are now used for mine operations”³⁹.

However, as we noted in our Jan 14, 2009 submission, the authors of the geotechnical assessment report that considered the Flood Protection Works and the Tank Farm Facility during consideration of the underground decline/pilot plant project explicitly noted limitations in their assessment. For example, as described in an April 2005 MVLWB Staff Report:

³⁴ June 7, 2007 letter from MVLWB (in Rfr 35 of 35).

³⁵ Mar 1, 2007 letter from MVLWB to Mr. Bailey, Deputy Minister, GNWT (in Rfr 32 of 35 – Material related to Application for Winter Access Road).

³⁶ Mar 21, 2007 letter from Mr. Bailey, Deputy Minister, GNWT, to MVLWB, at page 3 (in Rfr 32 of 35 – Material related to Application for Winter Access Road).

³⁷ MVLWB, Reasons for Decision for issuing MV2003F0028, Apr 20, 2007, at page 5 (in Rfr 32 of 35 – Material related to Application for Winter Access Road).

³⁸ MVLWB, Reasons for Decision for issuing MV2003F0028, Apr 20, 2007, at page 4 (in Rfr 32 of 35 – Material related to Application for Winter Access Road).

³⁹ CZN letter at page 3.

“EBA conducted the geotechnical assessments to a level that, in their professional opinion, was appropriate for the scope of the water licence, that is, for advanced exploration activities. EBA also took into consideration the fact that there are no tailings in the Tailings Pond and that under the current water licence the Tailings Pond is not to be used. EBA was careful to point out that the conclusions in their Geotechnical Report may need to be re-examined if the scope of the project changes or the use of the Tailings Pond changes. ... EBA recommended that the 200 year flood be used as the standard because: the scope of the licensed undertaking is limited to exploration activities only; ... EBA was also careful to point out that if the use of the Tailings Pond changes at some point in the future, the Flood Protection Works will have to be reassessed”⁴⁰.

Obviously the scope of the project has changed since the underground decline/pilot plant project was considered, and the Tailings Pond is now proposed to become the Water Storage Pond.

The CZN letter similarly claims that there are no changes to the Polishing Pond and the Catchment Pond, and so it is not necessary to repeat assessments of these components⁴¹. Again, however, please see our Jan 14, 2009 submission describing how these components are proposed to change (such as the flows directed into them)⁴², and how previous assessments of them were in the context of the limited underground decline/pilot plant project⁴³.

Reply to federal Jan 14, 2009 submission

We agree with most of the Jan 14, 2009 letter on behalf of federal departments (the ‘federal letter’), but note the following.

Question 1. Should the scope of development for EA0809-002 include all physical works and activities associated with the proposed **winter road**?

The federal letter states:

“We submit that the scope of development for EA0809-002 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 environment or on the basis of the

⁴⁰ See our Jan 14, 2009 submission at pages 12-14, in particular footnotes 73-76 referring to MVLWB Staff Report (prepared April 4, 2005 for meeting April 12, 2005 in *Rfr 34 of 35 – Material related to Tank Farm Inspections and Flood Erosion Protection*) at pages 5-6.

⁴¹ CZN letter at page 3.

⁴² See our Jan 14, 2009 submission at pages 6-7.

⁴³ See our Jan 14, 2009 submission at pages 12-14.

winter road being an integral and necessary part of the proposed mining operations development which is the subject of the current EA”⁴⁴.

To clarify our understanding of this statement in light of the rest of the federal letter, we read it as saying two things: (a) that ongoing activities associated with MV2003F0028 should be scoped into the current EA as cumulative effects; and (b) that future activities associated with the road as part of the proposed full-scale mine operations should be scoped into the current EA as part of the scope of development. If this is the intended meaning, we agree with it. If however it was intended to mean that those future activities (i.e. (b)) could be considered “a separate and distinct development” we disagree.

With think the intended meaning is the former because the federal letter goes on to state (all of which we agree with):

- “It is our view that, like the water licence in the *Tungsten* decision, the winter road would be required for use and operation of the proposed mining operation because it appears to us that use and operation of the winter road is an integral and necessary component of the proposed mining operation”⁴⁵.
- “s.157.1 has been judicially determined to apply so as to exempt the existing winter road and its current operation and use for the purpose of site clean-up and the supply of CZC’s advanced exploration as a development, project or undertaking distinct from CZC’s proposed mining operation. Therefore, the current permitted use and operation of the winter road can only be scoped into the EA from a cumulative impact perspective. However, we also submit that the future use and operation of the winter road as a necessary and integral component of the proposed mining operation (which is the “undertaking” that is now the subject of the EA) is not subject to s.157.1 because CZC has explicitly stated that it is not asserting that s.157.1 applied to the proposed mining operation and has explicitly stated that it does not oppose the current EA...”⁴⁶.
- “We submit that the subject ‘principal development’ is CZC’s proposed mining operation and that the proposed mining operation includes the winter road. We reach this conclusion because CZC’s Project Descriptions with respect to the transfer facilities describe the winter road as an integral and necessary component of the proposed mining operation”⁴⁷.

Thank you for your consideration of our submissions.

⁴⁴ Federal letter at page 2.

⁴⁵ Federal letter at page 4.

⁴⁶ The final words in this sentence, omitted here, are “thus presenting another option”, which leaves us with some confusion.

⁴⁷ Federal letter at page 6.