North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board, 2003 NWTCA 5

Date: 20030501
Docket: A-0001-AP-2003000001

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MADAM JUSTICE PICARD

IN THE MATTER OF AN APPLICATION FOR THE RENEWAL OF WATER LICENCE N3L2-0004 BY NORTH AMERICAN TUNGSTEN CORPORATION LTD.

BETWEEN:

NORTH AMERICAN TUNGSTEN CORPORATION LTD.

APPELLANT
(APPLICANT)

- and -

MACKENZIE VALLEY LAND AND WATER BOARD

RESPONDENT
(RESPONDENT)

Appeal from the whole of the Judgment of
The Honourable Justice Virginia Schuler
Dated January 9, 2003

MEMORANDUM OF JUDGMENT

COUNSEL:

D.J. Cowper, Q.C.
For the Appellant

J.J.P. Donihee
For the Respondent Mackenzie Valley Land and Water Board

H.L. Potter
For the Intervener Justice Canada

R.L. Christensen
For the Interveners Canadian Arctic Resources Committee and Canadian Parks and Wilderness Society

MEMORANDUM OF JUDGMENT

SUMMARY

[1] Given the urgency surrounding this matter, this Court heard this appeal in Edmonton at a special sitting of the Northwest Territories Court of Appeal. To avoid further delays, we provided counsel with our decision at the conclusion of the appeal and indicated that we would amplify our reasons. These are those reasons.

[2] This is an appeal from a decision of a chambers judge dismissing an application for judicial review of a decision by the Mackenzie Valley Land and Water Board (Board). The Board held that Part 5 of the *Mackenzie Valley Resource Management Act*, S.C. 1998, c.25 (*MVRMA)* applied to the application by North American Tungsten Corporation (Tungsten) to renew its water licence number N3L2-0004. The chambers judge upheld the Board's decision on the basis that s.157.1 of the *MVRMA* did not exempt Tungsten from the application of Part 5. Tungsten now appeals this decision.

[3] The Canadian Arctic Resources Committee (Arctic Committee) and the Canadian Parks and Wilderness Society (Wilderness Society), together with the Attorney General of Canada (Attorney General), sought and were granted intervener status on this appeal.

FACTS

[4] Under the *Northwest Territories Waters Act*, S.C. 1992, c. 39 (*Waters Act*), no person can use water or deposit waste in specific areas in the Northwest Territories without a licence to do so: ss.8 and 9. Section 102 of the *MVRMA* provides that it is the Board which has jurisdiction with respect to all uses of water and deposits of waste in the area for which a licence is required under the *Waters Act*. Accordingly, the Board may issue, amend, renew and cancel licences in accordance with the *Waters Act* and exercise any other power of the Northwest Territories Water Board under the *Waters Act*: see ss.102 and 60(1) of the *MVRMA.*

[5] Tungsten operates the Cantung Tungsten Mine on the Flat River 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. Tungsten renewed this licence in 1978, 1983, 1986, 1988 and 1995. In early 2002, Tungsten applied to the Board for a renewal of its 1995 licence. The Board held that Tungsten's licence application was not exempt from Part 5 of the *MVRMA*.

[6] Part 5 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 the purposes of Part 5, "development" is defined as"any undertaking, or any part of an undertaking, that is carried out on land or water and ... wholly within the Mackenzie Valley": s.111. This would arguably include a proposal regarding the proposed use of water for which Tungsten now seeks a renewal of its licence. However, s.157.1 of the *MVRMA* as follows provides for an exemption from Part 5 in certain circumstances:

> 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.

[7] The Board focused mainly on whether Tungsten's current water licence was a continuation of a licence issued before June 22, 1984. It concluded that a renewed licence was in effect a new licence and thus, the exemption under s.157.1 did not apply. Tungsten applied to the Northwest Territories Supreme Court for judicial review of the Board's decision: s.32 of the *MVRMA.*

[8] On judicial review, Tungsten and the Attorney General, as intervener, argued that s.157.1, read in its statutory context and in light of s.74(4) of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (*CEAA*), exempted Tungsten's application for renewal of its water licence from the environmental assessment required under Part 5. Both submitted that an exemption is not lost even though a licence issued before June 22, 1984 has been subsequently renewed. The interveners, the Arctic Committee and the Wilderness Society, contended that the exemption only applies where an undertaking is subject to a current licence issued before June 22, 1984 and that licence remains outstanding. Since a renewed licence is not a continuation of the original licence, it followed that in their view, Tungsten's application must fail.

[9] The chambers judge dismissed Tungsten's application. The chambers judge agreed with the Board that s.157.1 exempts an undertaking only where its current licence, which is the subject of a renewal application, is dated prior to June 22, 1984. As the chambers judge concluded:

> Since s.157.1 speaks in the present tense, it seems to me that the question is whether [Tungsten's] mining operation is now the subject of a water licence issued before June 22, 1984, not whether it has ever been the subject of a water licence issued before June 22, 1984. Therefore s.157.1 will apply only if the water licence which

> [Tungsten] currently holds (that is the licence issued in 1995) can be said to be "issued before June 22, 1984".

[10] The chambers judge agreed with the Board that a renewal of a licence creates a new licence and does not continue a previous one. Therefore, since Tungsten's 1995 renewed water licence was not a continuation of its 1975 licence, it had not continuously held a licence issued before June 22, 1984. This being so, the chambers judge concluded that Tungsten's application for renewal of its water licence did not fall within the s.157.1 exemption.

ISSUE

[11] Resolution of this appeal turns on the interpretation of s.157.1 of the *MVRMA* and in particular the scope of that statutory exemption. Put simply, the question is this: is Tungsten's application for a renewal of its water licence exempt from Part 5 if the subject undertaking held a water licence issued prior to June 22, 1984, regardless of whether that licence is now outstanding? In essence, this comes down to whether s.157.1 of the *MVRMA* grandfathers a licence issued prior to June 22, 1984 or an undertaking licenced prior to June 22, 1984.

[12] We have concluded that it is the latter. This being so, it is not necessary for this Court to deal with the alternative argument, namely that Tungsten's existing water licence for its undertaking is a continuation of the pre-1984 water licence.

STANDARD OF REVIEW

[13] The standard of review applicable to the Board's decision depends upon the application of a pragmatic and functional analysis: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. This analysis requires a consideration of the purpose of the grant of jurisdiction and the specific provisions at issue, the presence or absence of a privative clause, the Board's expertise and the nature of the question the Board considered.

[14] The Board is appointed pursuant to Part 4 of the *MVRMA*. The purpose of the *MVRMA*, as stated in its Preamble, is to provide an integrated and coordinated system of land and water management in the Mackenzie Valley, including the settlement areas referred to in the Comprehensive Land Claim Agreement made between Her Majesty the Queen in right of Canada and the Gwich'in as represented by the Gwich'in Tribal Council, signed on April 22, 1992 and given effect by the *Gwich'in Land Claim Settlement Act*, S.C. 1992, c.53 (Gwich'in Ageement) and the Comprehensive Land Claim Agreement made between Her Majesty the Queen in right of Canada and the Sahtu Dene and Metis as represented by the Sahtu Tribal Council, signed on September 6, 1993 and given effect by the *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c.27 (Sahtu Agreement).

[15] Tungsten's undertaking is located on lands outside of the designated settlement areas but within that part of the Northwest Territories covered by the *MVRMA.* As noted, s.102 grants the Board the jurisdiction to deal with all uses of water in the Mackenzie Valley for which a licence is required under the *Waters Act*. This includes any application for the use of waters outside any settlement area: s.103.

[16] Board decisions are not protected under the *MVRMA* by a privative clause and s.32 specifically provides for judicial review of Board decisions. Further, there is nothing suggesting that the Board has any particular expertise regarding the statutory interpretation issue before this Court. That involves the scope of the exemption under s.157.1. Thus, we have concluded that in all the circumstances, the applicable standard of review on this issue is one of correctness: *Pushpanathan, supra*. Indeed, no one argued otherwise.

ANALYSIS

[17] Tungsten and the Attorney General agree on the interpretation of s.157.1. They contend that s.157.1 grandfathers undertakings in respect of which a licence had been issued prior to June 22, 1984. In their view, there is no requirement that an undertaking's current licence, which is the subject of a renewal application, have subsisted without renewal since prior to June 22, 1984. They argue that this interpretation is consistent with the purpose of the *MVRMA*. In particular, long-term established projects were not intended to be subjected to Part 5 environmental assessments unless an application for a licence related to an abandonment, decommissioning or other significant alteration of the subject project.

[18] They also point to s.74(4) of *CEAA* as follows in support of their position:

> 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.

[19] It has been determined that the purpose of s.74(4) of *CEAA* is to exempt projects from environmental assessment when significant resources have already been expended towards them: *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.). Both the Attorney General and Tungsten argue that in the absence of a clear and explicit Parliamentary intent to withdraw this exemption from established projects (such as Tungsten's), s.157.1 of the *MVRMA* should be interpreted in a manner consistent with s.74(4). In other words, in their view, Parliament intended that projects

which pre-date June 22, 1984 as defined by these statutes would be exempt from environmental assessments.

[20] The Arctic Committee and Wilderness Society take a contrary position. They submit that the difference in wording between s.157.1 of the *MVRMA* and s.74(4) of *CEAA* signals a Parliamentary intention to broaden the scope of projects now subject to a full environmental assessment under the *MVRMA*. Parliament has accomplished this, in their view, by limiting the exemption under s.157.1 to those undertakings subject to "a licence or permit issued before June 22, 1984" at the time of renewal of the licence or permit.

[21] Principles of statutory interpretation require that the words of a statute should be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 2; see also *Re Rizzo and Rizzo Shoes*, [1998] 1 S.C.R. 27; *Bell Express Vu Limited Partnership v. Rex* (2002), 212 D.L.R. (4th) 1 (S.C.C.).

[22] This is often described as a purposive and contextual approach to statutory interpretation. The purposive dimension of this interpretive exercise requires courts to assess legislation in light of its purpose and with due regard to the legislative scheme of which it forms a part. The contextual dimension requires that the words chosen be interpreted in the entire context in which they have been used: see *Love v. Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 292, [2002] A.J. No. 1516 (QL).

[23] Dealing first with the overall legislative scheme, as noted, the *MVRMA* is designed to implement the Gwich'in Agreement and the Sahtu Agreement (collectively the "Comprehensive Agreements") by providing for an integrated system of land and water management in the Mackenzie Valley. Under the Comprehensive Agreements, land use planning boards and land and water boards must be established for the settlement areas referred to in those Agreements. In addition, an environmental impact review board must be established for the Mackenzie Valley along with a land and water board for an area extending beyond the settlement areas. These boards are charged with regulating all land and water uses, including deposits of waste, in the areas in the Mackenzie Valley under their jurisdiction. The purpose of establishing these boards, including the Board, is to "enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians": s.9.1, *MVRMA*.

[24] However, both the Comprehensive Agreements and the *MVRMA* also clearly recognize that a full scale environmental review will not be appropriate in respect of certain existing permits, projects and licences. Instead, both reflect that some grandfathering of existing developments is required to balance competing interests. 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. For example, the Comprehensive Agreements explicitly protect certain mineral interests, and arguably rights associated therewith, in existence as of the date of the settlement legislation: see Gwich'in Agreement, s.18.5.2; and Sahtu Agreement, s.19.5.2.

[25] This respect for vested interests is reflected in the *MVRMA*. Part 7 contains a number of transitional provisions designed to preserve and protect existing rights and interests. For example, s.151 provides that certain existing permits continue in effect despite the implementation of the new legislation. Section 152 protects all existing rights to the use of any lands under any lease, easement or other interest granted under any territorial law, again despite what would otherwise have been the impact of the new legislation on such interests. Section 153 provides that any water licences issued under the *Waters Act* continue in effect and are deemed to be licences within the meaning of Part 3 or Part 4 of the *MVRMA*, as the case may be. In Tungsten's case, the water licence Tungsten is seeking to renew would, given the location of Tungsten's undertaking, be deemed to be a licence within the meaning of Part 4.

[26] Further confirmation that Parliament did not intend the *MVRMA* to interfere with existing rights can be seen in the fact that even pending applications for permits and licences are to be dealt with under the prior applicable legislation and not under the *MVRMA*: see for example, s.154 (dealing with certain pending permit applications); and s.155 (dealing with certain pending licence applications, including those under the *Waters Act*).

[27] These provisions collectively reflect that Parliament did not intend to impose an entirely new environmental review process on every project in the Mackenzie Valley irrespective of the status of 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.

[28] It is against this general statutory backdrop that we turn to the specific wording of s.157.1. In our view, this section 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, 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".

[29] However, this difference in wording does not reflect a Parliamentary intention to expand the reach of the *MVRMA* by narrowing the category of projects pre-dating June 22, 1984 that are exempt from full scale environmental assessments. The approach taken under the *MVRMA* is complementary to that taken under *CEAA* and intended to be so. Both *Acts* exempt projects 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 statutes) 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.

[30] What the change in wording does reflect is an attempt to overcome the interpretive difficulties which have arisen concerning what is meant by the word "initiated" under *CEAA*: see *Hamilton-Wentworth (Regional Municipality)*, *supra*. To avoid this factually driven interpretive issue, Parliament chose to refer in s.157.1 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. In fact, the scope of the *MVRMA* exemption may be broader than that under *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.

[31] The exceptions to the exemptions under both legislative schemes reinforce the similarity between them. 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 alteration to the project. While *CEAA* provides that a review is triggered by any alteration to the project, by contrast, the *MVRMA* provides that a review is required only if the licence involves a <u>significant</u> alteration to the project. Thus, in this sense too, the environmental reach of the *MVRMA* may not be as great as *CEAA*. Accordingly, the *MVRMA* does not signal Parliament's intention to expand the scope of those projects pre-dating June 22, 1984 that are subject to full scale environmental assessments.

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

exemption under s.157.1, one of the qualities or characteristics of the undertaking is that it must have had a licence issued as of June 22, 1984. Tungsten's undertaking did.

[33] Further, under the grammatical and ordinary sense of the words used in s.157.1, there is no requirement that the undertaking be operating today under an original licence issued before June 22, 1984. Nor is there a need for the licence which is the subject matter of the renewal application to be the same licence issued before June 22, 1984. Instead, the focus is on the undertaking and whether it, and not its current licence, pre-dated June 22, 1984. The French version of s.157.1 is consistent with this interpretation referring as it does to: "une activiteé viseé par un permis délivré avant le 22 juin 1984". To put it another way, the licence renewal application must relate to the same undertaking that was issued a licence before June 22, 1984.

[34] It has been argued that if Tungsten's undertaking, and others, were exempt from Part 5, they would enjoy an absolute exemption from environmental monitoring on any basis and this could not have been Parliament's intention. However, the assumption underlying this argument is incorrect. One must distinguish between conditions imposed before a project is built (facility compliance) and operational standards applicable to existing projects (operational compliance). 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. Tungsten acknowledges that it has no right to an automatic renewal of its water licence and that if the Board decides to grant the same, the Board may impose whatever conditions it considers appropriate in the circumstances in the exercise of its jurisdiction.

[35] We also note that the *MVRMA* contains numerous sections dealing with "proposals for development" in the context of environmental assessments. The *MVRMA* explicitly recognizes the need to undertake and complete environmental assessments early in the development process. In this regard, s.114(b) provides for the assessment to be done to ensure that the impact on the environment receives "careful consideration" before actions are taken in respect of proposed developments. Hence, this too supports the conclusion that Parliament did not intend a full environmental assessment for licence renewal applications affecting undertakings in respect of which a licence or permit had been issued prior to June 22, 1984 unless the application falls within the exception to the statutory exemption under s.157.1.

[36] Moreover, if the interpretation of Arctic Committee and Wilderness Society were correct, then as of June 22, 2009, there would be no undertakings requiring water licences grandfathered under the *MVRMA* since the longest water licence possible under the *Waters Act* is 25 years. That cannot have been the intent of Parliament or it would have been clearly stated. An interpretation of s.157.1 which required all water licence renewals to be subject to a full scale environmental review under Part 5 would be inconsistent with the concept of grandfathering and would strip s.157.1 of

certainty, of fairness and, ultimately, of effect. Without some clear Parliamentary intention to the contrary, grandfathering is not a passing state under the *MVRMA.*

CONCLUSION

[37] Accordingly, we have concluded that "an undertaking that is the subject of a licence or permit issued before June 22, 1984" means an undertaking in respect of which a licence or permit had been issued before June 22, 1984. We do not find it necessary to determine 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. In this case, Tungsten's application for renewal of its water licence does and thus, we leave that issue for another day.

[38] The appeal is therefore allowed. The order of the chambers judge is vacated; the Board order is quashed and the matter is remitted to the Board for reconsideration in light of these reasons.

APPEAL HEARD on March 31st, 2003
AT EDMONTON, ALBERTA

MEMORANDUM FILED at YELLOWKNIFE,
NORTHWEST TERRITORIES
this 1st day of May, 2003

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FRASER C.J.N.W.T.

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CONRAD J.A.

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PICARD J.A.

APPEAL #A-0001-AP-2003000001 A.D. 2003

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