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On behalf of

No. A-001-AP-2003000001
Yellowknife Registry

IN THE COURT OF APPEAL OF THE
NORTHWEST TERRITORIES

IN THE MATTER OF AN APPLICATION FOR
THE RENEWAL OF WATER LICENCE N3L2-004
BY NORTH AMERICAN TUNGSTEN
CORPORATION LTD.

BETWEEN:

NORTH AMERICAN TUNGSTEN
CORPORATION LTD.

APPLICANT

AND:

MACKENZIE VALLEY LAND AND
WATER BOARD

RESPONDENT

**MEMORANDUM OF ARGUMENT OF THE
APPELLANTS ON THE STAY APPLICATION**

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IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES

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BETWEEN:

NORTH AMERICAN TUNGSTEN CORPORATION LTD.

APPELLANT
(APPLICANT)

AND:

MACKENZIE VALLEY LAND AND WATER BOARD

RESPONDENT
(RESPONDENT)

MEMORANDUM OF ARGUMENT OF THE APPELLANTS ON THE STAY APPLICATION

1. The Appellant, North American Tungsten Corporation Limited, seeks a stay of execution of the decision of the Mackenzie Valley Land and Water Board ("MVLWB") dated June 24, 2002 as confirmed on judicial review by the Honourable Justice Virginia Schuler in her Judgment entered in the Supreme Court of the Northwest Territories, January 9, 2003, and of the decision of the Mackenzie Valley Environmental Impact Review Board ("MVEIRB") to proceed with the environmental assessment and review of the Cantung Mine under Part 5 of the *Mackenzie Valley Resource Management Act* ("MVRMA") made December 23, 2002. This application is brought pursuant to Rule 7 of the *Rules of the Court of Appeal* respecting civil appeals and pursuant to Section 29(2) of the *Judicature Act*, RSNWT, 1988 c. J-1.

2. The Appellant submits that there is substantial merit to its Appeal, that it will suffer irreparable harm if the stay is not granted and that there is no prejudice to the Respondent or to the public if the stay is granted.

PR

PART I - STATEMENT OF FACTS

3. The Appellant/Applicant, North American Tungsten Ltd. ("NATCL") owns and operates the Cantung Mine on the Flat River in the Northwest Territories within the jurisdiction of the Mackenzie Valley Resource Management Act ("MVRMA") and the Respondent Board, the MVLWB.

Affidavit of Stephen Leahy, sworn January 17, 2003, paragraph 2.

4. NATCL has held a water licence since 1975 and its water licence was recently extended by the Respondent to November 30, 2003, to enable its undertaking and licence renewal application to be dealt with without the water licence expiring. The extension was granted on identical terms by the Respondent and approved by the Minister of Indian & Northern Affairs pursuant to the provisions of the *Northwest Territories Waters Act*.

Affidavit of Stephen Leahy, sworn January 17, 2003, paras. 3, 4 and 5 and Exhibits "A", para. 2 and "B", para. 2 to the said Affidavit; and

Affidavit of Stephen Leahy, sworn January 17, 2003, para. 6 and Exhibit "C".

5. In early 2002, NATCL applied to the Respondent for renewal of its water licence under the *Northwest Territories Waters Act*. On July 24, 2002, instead of deciding to proceed with the Appellant's water licence renewal application, the Respondent decided that the Cantung Mine was not exempt from the provisions of Part 5 of the MVRMA, and the undertaking was referred to the Mackenzie Valley Environmental Impact and Review Board ("MVEIRB") for environmental screening, assessment and review.

Affidavit of Stephen Leahy, sworn January 17, 2003, Exhibit "D", para 2.

6. On August 22, 2002, judicial review proceedings were commenced on behalf of the Appellant, seeking to have the Court quash the Respondent's July 24th decision.

7. On November 28, 2002, after hearing the NATCL judicial review application, the Honourable Justice Virginia Schuler upheld the Respondent's July 24th decision.

8. On December 6, 2002, counsel for the Appellants wrote to the MVEIRB, notifying the Chair of NATCL's intention to Appeal Justice Schuler's November 28, 2002 decision and asking the MVEIRB to voluntarily stay its own proceedings. The MVEIRB declined to stay its own proceedings and wrote to Mr. Searle to that effect on December 23, 2002.

> Affidavit of Stephen Leahy sworn January 17, 2003, paras. 16, 17 and 18 and Exhibits "E" and "F".

9. On January 10, 2003, the MVEIRB issued draft terms of reference with respect to its environmental assessment and review. The Appellant's response to those draft terms of reference has been required on or before January 24, 2003.

> Affidavit of Stephen Leahy, sworn January 17, 2003, para. 19 and Exhibit "G".

10. The Appellant is a small mining company whose only undertaking is the Cantung Mine. Environmental assessment and review is time consuming and expensive. The process is expected to last several months. The Appellant estimates the cost of environmental assessment and review to the company of between $500,000.00 and $1,500,000.00. Those costs would not be recoverable notwithstanding that the Appellant may be successful on this Appeal. The expense and effort to participate in the environmental assessment and review will cause irreparable harm to the Appellant.

> Affidavit of Stephen Leahy, sworn January 17, 2003, paras. 7, 8, 9, 24 and 25 and Exhibits "G".

PART II - POINTS IN ISSUE

11. Whether it is appropriate in the circumstances that an Order be granted staying or suspending the proceedings underway before the MVEIRB as a result of the decision of the MVLWB as confirmed in the judicial review decision of the Honourable Justice Schuler of the Supreme Court of the Northwest Territories.

PART III - ARGUMENT

Principles Applied on Stay Applications

12. The Court has authority to grant a stay of proceedings pursuant to the provisions of Section 29(2) of the *Judicature Act* and Rule 7 of the *Rules of the Court of Appeal* respecting civil appeals.

> *Judicature Act* R.S.N.W.T., 1988, c. J1 s. 29(2) **Tab 1**;
>
> *Rules of the Court of Appeal* respecting Civil Appeals, Rule 7 **Tab 2;** and
>
> *Rules of Court*, Rule 604 **Tab 3.**

13. In considering whether or not to grant a stay of execution of proceedings, the Courts follow the same principles they apply on motions for interlocutory judgment in civil cases which were set down in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 These principles are:

> (i) whether there is a serious issue to be tried;
>
> (ii) whether the applicant will suffer irreparable harm if the injunction is not granted. In this context, "irreparable harm" is harm that cannot be compensated in monetary damages; and
>
> (iii) the balance of convenience between the parties.
>
> *Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd.* (1987), 38 D.L.R (4^{th}) 321 (S.C.C) at 11-12 **Tab 5.**

14. Where a tribunal decision is under review, and that decision is one which attracts a high degree of deference by the Court, a higher test may be imposed, namely the requirement to show a strong *prima facie* case to be tried rather than that there is a serious issue to be tried.

> *Sobey's Inc. v. UFCW Local 1000 A* (1993), 12 OR (2d) 157 (Gen. Div.) **Tab 10.**

15. However, in the matter under appeal, there was no issue as to a high degree of deference since the matter under judicial review by agreement of all parties involved an issue of correctness in statutory interpretation. That position was accepted by the Court and is not being placed in issue by the Appellants.

Reasons for Judgment of the Honourable Justice V.A. Schuler, paragraph 12, page 5 (filed November 28, 2002), Supreme Court of the Northwest Territories, **Tab 17**.

Application of Principles

Merit - A Serious Issue to be Tried

16. The Appellant submits that it can satisfy the threshold issue of establishing that there is substantial merit to its appeal. Central to the finding of Justice Schuler is that any undertaking that is not operating under a licence that was, on its face, issued prior to June 22, 1984, is subject to Part 5 of the MVRMA and required to submit to environmental assessment and review of its entire undertaking notwithstanding that its application for the renewal of its licence, permit or authorization is not for an abandonment, decommissioning or other significant alteration of the project.

17. In so finding, the Honourable Justice Schuler reasoned that she was able to distinguish between the meanings of Section 157.1 of the MVRMA and Section 74(4) of the *Canadian Environmental Assessment Act* ("CEAA"). Section 74(4) of CEAA provides that where construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, CEAA does not apply unless the issuance or renewal entails a modification, de-commissioning, abandonment or other alteration of a project in whole or in part.

18. In spite of their similar terms and apparent purposes and their use of the same "grandfathering" date, the Honourable Justice Schuler decided that the two provisions have widely differing meanings notwithstanding that both the MVRMA and CEAA apply within the Northwest Territories and, with respect to certain projects or undertakings, both statutes may apply in the same area and with respect to the same undertaking project or works.

Section 157.1 of the MVRMA, R.S.C., 1998 c. 25 **Tab 14**; and

Section 74(4) of the CEAA (S.C.) 1992 c. 37 **Tab 12**.

19. Justice Schuler distinguished between the exemption clauses of the two statutes after examining the preamble of the *Mackenzie Valley Resource Management Act* which recites that the *Act* was brought into being because of a commitment made in the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene Métis Comprehensive Land Claim Agreement,

which agreements provide for the establishment of institutions of public government to deal with land use planning, management and environmental assessment and review within an integrated system of land and water management in the Mackenzie Valley. Justice Schuler distinguished between the two similarly worded statutory provisions, ruling that the preamble provided the basis for her different interpretation of Section 157.1 of the MVRMA from that which other Courts had previously made with respect to Section 74(4) of CEAA. It is the Appellant's position that she did so without regard to the provisions of the referenced land claims or to the Inuvaluit Final Agreement of June 5, 1984 which applies to the area adjacent to the Gwich'in land claim settlement area and within the Northwest Territories or to the fact that CEAA and its exemption provisions apply in the Inuvaluit settlement region of the Northwest Territories.

Section 157.1 of the MVRMA, *supra,* **Tab 14**;

Section 74.4 of the CEAA, *supra* **Tab 12**.

20. The *Mackenzie Valley Resource Management Act* is sufficiently new that none of its provisions has been subject to judicial interpretation and no Court has previously been asked to compare and interpret Section 157.1 of the *Act* in light of provisions of Section 74(4) of the *Canadian Environmental Assessment Act* which appear to have similar purpose and in the case of Section 74(4) of the *Canadian Environmental Assessment Act* to have been the subject of judicial interpretation.

Hamilton Wentworth (Regional Municipality) v. Canada (Minister of the Environment) (2001), 204 F.T.R. 161 (T.D.) **Tab 4.**

Irreparable Harm

21. While the authorities appear clear that "resources wasted on litigation" are not generally considered irreparable harm, the costs of preparing for and participating in administrative tribunal proceedings can, in appropriate cases, be considered in assessing irreparable harm.

Bell Canada v. Communications, Energy and Paper Workers Union, (1997), 127 F.T.R. 44 (F.C.T.D.) at 56 **Tab 2**;

Bank of Nova Scotia v. British Columbia (Superintendent of Financial Institutions) (2002), 99 B.C.L.R. (3d) 357 (B.C.C.A.) **Tab 1**;

Northwest Territories v. Public Service Alliance of Canada, (2001) 33, Admin. L.R. (3d) 310 at 314 **Tab 6**; and

Re Island Telephone Co. (1987), Nfld. & P.E.I.R. 158 at 164 (P.E.I.C.A.) **Tab 7**;

22. It is submitted that the principle that the costs of proceedings before an administrative tribunal do not constitute irreparable harm even if they are not recoverable, in the context of an appeal of a decision which allows such proceedings to continue or commence, does not apply in a situation, such as this, in which the parties seeking judicial review or appeal might be exempt from the requirement to appear before the tribunal because the tribunal lacked jurisdiction.

23. In the case under appeal, the MVLWB decided that the Appellant was subject to the full environmental assessment requirements of Part 5 of the MVRMA. It therefore declined to deal with the Appellant's application for a renewal of its water licence and instead referred the Appellant's undertaking to the MVEIRB, a separate Board provided for under the *Act* with jurisdiction to conduct environmental assessment and review where there is no exemption. This assessment and review will be complex and expensive. It has been scheduled to proceed, notwithstanding this Appeal. If the Appellant is successful, it will have participated in some or all of the environmental assessment and review from which, it will be argued, it should be exempted. It is the costs of having to prepare for and participate in a process from which it may well be exempted, that the Appellant submits is irreparable harm.

Affidavit of Stephen Leahy, sworn January 17, 2003, paras. 24, 25, 26, 27 and Exhibit "G".

24. In July 2002, the Respondent, MVLWB decided the Appellant was not exempt from the full environmental assessment requirements of Part 5 of the *Mackenzie Valley Resource Management Act* and, on the Appellant applying for the renewal of its water licence, the Board referred the matter to MVEIRB a separate Board provided for under the *Act*, for environmental assessment and environmental review of its entire undertaking. Since judicial review proceedings were commenced on August 22, 2002, and in order to preserve the Appellant's water licence pending the environmental assessment and review and water licence renewal proceedings, the MVLWB, after holding a public hearing, granted the Appellant a one year extension of its water licence to November 30, 2003.

Affidavit of Stephen Leahy, sworn January 17, 2003, Exhibits "B" and "C".

Balance of Convenience

25. The public interest in seeing that a tribunal discharges its public duties must be considered in determining the balance of convenience in an application for a stay of proceedings. However, it is submitted that the context in circumstances under which the public tribunal exercises its duties must be considered as well. In the *Bell* decision, the issue involved a tribunal established to determine pay equity adjustments and the Court determined there was a public interest in ensuring that these obligations to employees were dealt with as expeditiously as possible. It is respectfully submitted that consideration of the public interest does not weigh as heavily in this case.

Bell Canada v. Communications, Energy and Paper Workers Union, supra at 56-57 **Tab 2**;

RJR-MacDonald Inc. v. Canada (Attorney General) [1994] 1.S.C.R. 311 (S.C.C.) at 19-21 **Tab 8;**

Re Island Telephone Co., supra at 163-164 **Tab 7**; and

Northwest Territories v. Public Service Alliance of Canada, supra at 314 **Tab 6**.

26. The issue on this Appeal is not when but whether the Appellant has to go through the environmental assessment and review processes of the MVEIRB. If the Appeal is successful, the Appellant is exempted. If the Appeal is not successful, the environmental assessment and review process will simply be postponed and the public interest will be served eventually. According to the draft work plan of the MVEIRB, that should occur well within the one year extension of the water licence granted by the MVLWB in November 2002.

Exhibit "G" to the Affidavit of Stephen Leahy sworn January 17, 2003.

27. The Respondent, Board, will not be inconvenienced or compromised by a stay. It will either proceed with the water licence renewal application in the near term if the Appellant succeeds on Appeal or following the completion of the environmental impact, assessment and review if the Appellant fails.

28. It is submitted that staying the proceedings of the Mackenzie Valley Environmental Impact and Review Board pending the Appeal in this matter would cause no harm to the Respondents or the public interest. The Tungsten Mine has been operating since 1962 and has been operating under water licence since 1975. The Board saw fit to extend its current licence which came into effect in 1995 for a year to permit the regulatory and assessment processes to take place and granted the extension without amendment. If the Appellant's undertaking is exempt from the provisions of Part 5 of the MVRMA, not only will it be saved the burdens of preparing for and participating in the environmental assessment and review before the MVEIRB, but the MVEIRB and the public will be spared that effort and expense as well. If on the other hand the Appeal is not successful, there will simply be a delay in the environmental assessment and review.

29. As a regulatory body, the Respondent has no vested interest in the outcome of the Appeal. Nor does the MVEIRB. Indeed, the advantage of the Appeal for the Respondent and the MVEIRB is that the decision will provide clear guidance for the future and may make it unnecessary for the latter Board to conduct assessments and review in this matter. With respect to the operations of the Appellant, if the Appellant is successful, it will proceed to water licence renewal hearings for which it is already been preparing and will not have to deal with environmental impact assessment or review until such time as it applies for abandonment or decommissioning or other significant alteration to its undertaking.

Re Island Telephone Co., *supra* at 164 **Tab 7**; and

Mackenzie Valley Resource Management Act, Section 157.1 **Tab 14**.

Exceptional Circumstances

30. The Courts will grant a stay of proceedings to ensure that an appeal will not be nugatory. The Courts will also grant a stay in exceptional or special circumstances. Given that the Appeal concerns an exempting provision which would, if the Appellant's position is upheld, take the licensing of the mine under the MVRMA outside the jurisdiction of the MVEIRB under Part 5 of the MVRMA, and given the limited public interest in having an environmental assessment proceed immediately, it is respectfully submitted that these represent special or exceptional circumstances justifying a stay of proceedings in this case.

Wilson v. Church (No. 2) (1879) 12 Ch. D. 454 (C.A.) **Tab 11**;

Simons v. Edmonton [1974] 1W.W.R. 160 **Tab 9**; and

Fulton Insurance Agencies Ltd. v. Purdy, (1990) 100 N.S.R. (2d) 341 (N.S.C.A.) at 346-347 **Tab 3**.

PART IV - NATURE OF THE ORDER SOUGHT

31. The Appellant seeks an Order staying the execution of the decision of the MVLWB dated July 24, 2002 and the supporting decision of the Supreme Court of the Northwest Territories on judicial review entered January 9, 2003 and an Order staying the proceedings of the Mackenzie Valley Environmental Impact and Review Board under Part 5 of the *Mackenzie Valley Renewable Resources Act* until such time as this Appeal is decided.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Yellowknife, in the Northwest Territories this 20th day of January 2003.

Fasken Martineau DuMoulin LLP
Per:

Solicitors for the Appellant,
John U. Bayly, Q.C.

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