North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board, 2002 NWTSC 76

Date: 2002 11 28
Docket: S-0001-CV-2002000232

IN THE SUPREME COURT 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

Application by North American Tungsten Corporation Ltd. for judicial review of a decision of the Respondent Board.

Heard at Yellowknife, NT on November 25, 2002

Reasons filed: November 28, 2002

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant: John U. Bayly, Q.C.
Counsel for the Respondent: John Donihee
Counsel for the Canadian Arctic Resources Committee and the Canadian Parks and Wilderness Society: Randy L. Christensen
Counsel for the Attorney General: Heather L. Potter

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REASONS FOR JUDGMENT

[1] This is an application by North American Tungsten Corporation Ltd. for the following relief as set out in the Originating Notice:

1. An order in the nature of *certiorari* quashing:

   (a) the decision of the Respondent, Mackenzie Valley Land and Water Board (the "Board"), dated July 24, 2002, ruling that section 157.1 of the *Mackenzie Valley Resource Management Act* R.S.C. 1998, c.25 ("MVRMA") does not apply to the Applicant, North American Tungsten Corporation Ltd.'s ("North American Tungsten") application to renew Water Licence N3L2-0004;

   (b) the decision of the Board, dated July 24, 2002, ruling that North American Tungsten's application to renew Water Licence N3L2-0004

is subject to Part 5 of the *Mackenzie Valley Resource Management Act* and referring the application to the Mackenzie Valley Environmental Impact Review Board for environmental assessment; and

(c) the decision of the Board, dated July 24, 2002, extending the term of Water Licence N3L2-0004 for sixty days to permit a public hearing to be held in the proposed one year extension of Water Licence N3L2-0004.

2. A declaration corresponding to paragraph 1(a), (b) and (c) above.

3. A declaration that the Applicant's Water Licence N3L2-0004 is a licence related to an undertaking that is the subject of a licence issued before June 22, 1984, and is not a licence for an abandonment, decommissioning or other significant alteration to the undertaking, pursuant to section 157.1 of the MVRMA.

4. An order in the nature of *mandamus* referring the matter back to the Board with directions that the Applicant's application to renew Water Licence N3L2-0004 be reconsidered in accordance with this Court's direction.

5. An order prohibiting or, in the alternative, enjoining the Board from requiring the Applicant to appear before the Mackenzie Valley Environmental Impact Review Board or to undertake an environmental assessment pursuant to Part 5 of the MVRMA.

6. Costs.

7. Such further and other relief as this Honourable Court may deem just.

[2] At the commencement of argument on the application, counsel for North American Tungsten indicated that he was abandoning the relief requested in paragraph 1 (c).

[3] The facts, briefly stated, are that North American Tungsten and a predecessor company have owned and operated the CanTung tungsten mine in the Mackenzie Valley in the Northwest Territories since 1962. North American Tungsten's predecessor was first granted a water licence in June 1975 for the purpose of operating a mine and milling operation and associated uses. The lands on which North American

Tungsten conducts its operation are now subject to the *Mackenzie Valley Resource Management Act*, R.S.C. 1998, c.25 (the "MVRMA").

[4] North American Tungsten and its predecessor were granted water licences in 1978, 1983, 1986, 1988 and 1995. Whether these were continuations of the 1975 water licence or new licences is one of the issues in this case. The 1995 licence had an expiry date of September 29, 2002, so in early 2002 North American Tungsten applied to the Mackenzie Valley Land and Water Board for "renewal" of the licence for a period of seven years. That application was made pursuant to s.18(1)(a) of the *Northwest Territories Waters Act*, R.S.C. 1992, c.39. Pursuant to ss. 102 and 103 of the MVRMA, such applications are made to and dealt with by the Respondent Board. North American Tungsten stated in its application that it relies on s.157.1 of the MVRMA for exemption from the requirement in Part 5 of that Act for an environmental assessment by the Mackenzie Valley Environmental Impact Review Board.

[5] After receiving submissions from North American Tungsten and various other parties, the Mackenzie Valley Land and Water Board decided that s. 157.1 of the MVRMA does not apply to North American Tungsten's water licence renewal application and therefore the Part 5 requirement for an environmental assessment applies.

[6] North American Tungsten's application triggered the application of Part 5 of the MVRMA, s. 118(1) of which provides:

> 118.(1) No licence, permit or other authorization required for the carrying out of a development may be issued under any federal or territorial law unless the requirements of this Part have been complied with in relation to the development.

[7] There is no issue that the definition of "development" in s.111 as an undertaking includes the mine operated by North American Tungsten.

[8] Section 157.1, which provides for the exemption, states:

> 157.1 Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984, except a licence, permit or other authorization for an abandonment, decommissioning or other significant alteration of the project.

[9] The position taken by North American Tungsten on this application is that s.157.1 does apply to it as its application for renewal of its water licence relates to an undertaking that is the subject of a licence issued prior to June 22, 1984 and is not an application to abandon, decommission or otherwise make significant alterations to the undertaking. Although that position was not put before the Board, the position that was put, that the licence currently held by North American Tungsten is a continuation of its pre-1984 licence and is not a new licence, and that any renewals also continue that licence, was also referred to before me.

[10] The Attorney General of Canada, to whom I granted standing for reasons delivered orally at the hearing of this application, takes the position that the focus should be on the status of the undertaking rather than the licence in determining whether s.157.1 applies and that the intention of the MVRMA is to "grandfather" undertakings or projects that were underway before June 22, 1984. Thus, the Attorney General says the exemption in s.157.1 does apply to the Applicant and the Board was incorrect in holding that it does not.

[11] The intervenors, Canadian Arctic Resources Committee and Canadian Parks and Wilderness Society, take the position that the MVRMA provides for certain exemptions from the environmental assessment regime and that s.157.1 was not meant to exempt all developments or undertakings that had commenced prior to June 22, 1984 but only those in possession of certain types of licences or permits. These intervenors say that the Board was correct in holding that s.157.1 does not apply to grant an exemption from the Part 5 environmental assessment regime for North American Tungsten's renewal application.

[12] The issue is therefore one of statutory interpretation. All counsel agreed on this and proceeded on the basis that the standard of review of the Board's decision is correctness. I accept that as the standard in accordance with the principles in *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.).

[13] As there was no issue raised or dealt with by the Board as to whether North American Tungsten's renewal application was for a licence for the abandonment, decommissioning or other significant alteration of the project, I need not deal with whether that part of s.157.1 applies in this case.

[14] In approaching the interpretation of s.157.1, I start with what the Supreme Court of Canada recently said in *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] S.C.J. No.43, at paragraphs 26 and 27, about statutory interpretation. The preferred approach is the "modern approach" described in Elmer Driedger's Construction of Statutes (2nd ed. 1983) at p.87:

> Today there is only one principle or approach, namely, the words of an Act are to 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.

[15] I will start by examining the historical context of the legislation. The MVRMA came into effect in 1998 for a defined area called the "Mackenzie Valley". Prior to that, the applicable legislation was the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (the "CEAA"). Section 74(4) of that Act states:

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

[16] Section 74(4) therefore "grandfathered" projects or undertakings where physical work or activity commenced prior to June 22, 1984, so that they were exempt from environmental assessment on the issuance or renewal of a licence.

[17] In examining the purpose of the MVRMA as part of the context, the preamble should be considered [Driedger on the Construction of Statutes (3rd ed. 1994), pp. 262-263]. The preamble of the MVRMA states:

> WHEREAS the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement require the establishment of land use planning boards and land and water boards for the settlement areas referred to in those Agreements and the establishment of an environmental impact review board for the Mackenzie Valley, and provide as well for the establishment of a land and water board for an area extending beyond those settlement areas;
>
> WHEREAS the Agreements require that those boards be established as institutions of public government within an integrated and coordinated system of land and water management in the Mackenzie Valley;

> AND WHEREAS the intent of the Agreements as acknowledged by the parties is to establish those boards for the purpose of regulating all land and water uses, including deposits of waste, in the settlement areas for which they are established or in the Mackenzie Valley, as the case may be;

[18] The references in the preamble to "an integrated and coordinated system of land and water management" and to the establishment of the relevant boards "for the purpose of regulating all land and water uses" in the Mackenzie Valley suggest that the intention is to provide a comprehensive scheme for land and water use management specific to the Mackenzie Valley in furtherance of the applicable land claims agreements. Since the MVRMA replaces the CEAA and contains different language from the latter, it is clear that the intent was not simply to re-create the CEAA regime under the auspices of new legislation.

[19] Section 114 of the MVRMA sets out the purpose of Part 5, which is the part from which North American Tungsten seeks exemption:

> 114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments, and
>
> (a) to establish the Review Board as the main instrument in the Mackenzie Valley for the environmental assessment and environmental impact review of developments;
>
> (b) to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them; and
>
> (c) to ensure that the concerns of aboriginal people and the general public are taken into account in that process.

[20] Counsel for the Attorney General of Canada argued that s.114 indicates that the purpose of Part 5 is to establish a process for the environmental assessment of *proposals* for developments, which suggests new developments. There is also reference to "proposed developments" in s.114(b). However, s.114(a) refers to "developments". When read in conjunction with s.118(1), which is quoted above, I think it is clear that the assessment regime is meant to apply not only to proposed

developments in the sense of future developments, but also to existing developments for which licences, permits or authorizations are required.

[21] There is specific reference to existing developments in the Exemption List Regulations, SOR/99-13 P.C. 1998-2265, enacted pursuant to s.143(1)(c) of the MVRMA. Section 2 of the Regulations states that:

> 2. Proposed or existing developments set out in Schedule 1 that are situated outside a national park, national park reserve or national historic site are developments for which preliminary screenings are not required by reason that their impact on the environment of the Mackenzie Valley is insignificant.

[22] Pursuant to the Schedule 1 referred to in s.2 of the Regulations, one type of proposed or existing development that is therefore exempt from a preliminary screening is (s.1 of Schedule 1):

> 1. The operation or maintenance of, or repair to, a structure that
>
> (a) will not entail the deposit of waste into a water body; and
>
> (b) does not require a land use permit or a water licence under the Mackenzie Valley Resource Management Act, the Northwest Territories Waters Act or the Territorial Land Use Regulations.

[23] Another type of proposed or existing development that is exempt is set out in s.2 of Schedule 1:

> 2. A development, or a part thereof, for which renewal of a permit, licence or authorization is requested that
>
> (a) has not been modified; and
>
> (b) has fulfilled the requirements of the environmental assessment process established by the Mackenzie Valley Resource Management Act, the Canadian Environmental Assessment Act or the Environmental Assessment Review Process Guidelines Order.

Based on the above, I am satisfied that the environmental review process applies to existing developments that come within s.118(1) and are not otherwise exempted by the Act or the Regulations.

[24] North American Tungsten's operation entails the deposit of waste into a water body and does require a water licence so s.1 of Schedule 1 does not apply to exempt it. Section 2 of Schedule 1 might apply if the conditions in subsections (a) and (b) are met, but that was not argued before the Board.

[25] That leaves for consideration s.157.1, which must be read in the context of this new regime which does apply to existing developments unless they come within its exemptions.

[26] I agree with the submission of the intervenors Canadian Arctic Resources Committee and Canadian Parks and Wilderness Society that the proper focus under s.157.1 is whether the undertaking or development, which in this case is the mining operation, "is the subject of a licence or permit issued before June 22, 1984". The focus is not on whether some physical activity was initiated before June 22, 1984, as it would have been under s.74(4) of the CEAA. Therefore the focus is not on the mining operation itself, but rather a characteristic of it - whether it is the subject of a water licence issued before June 22, 1984.

[27] Since s.157.1 speaks in the present tense, it seems to me that the question is whether North American 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 North American Tungsten currently holds (that is, the licence issued in 1995) can be said to be "issued before June 22, 1984". Found at Tab 7 of the Record, that licence is described in the licence number section of the form as a renewal, but the effective date of the licence is September 30, 1995. The expiry date is September 29, 2002. This leads directly to the issue of the nature of a renewal and whether the 1995 renewal can be said to be a continuation of the 1975 licence and therefore "a licence issued before June 22, 1984".

[28] If I were to accept the submission by North American Tungsten that the mine need only be the subject of a licence issued before June 22, 1984 in order to come within s.157.1 and that since it was the subject of a licence issued in 1975, (or 1978 or 1983) it fulfills that condition, that could lead to an absurd result. A company could apply for a licence in 2002 and claim to come within s.157.1 on the basis that the undertaking for which the licence is sought is the subject of a licence issued, say, in 1980 for a period of three years, and never renewed since. So long as the licence

sought was not for the "abandonment, decommissioning or other significant alteration of the project" within the meaning of s.157.1, Part 5 would not apply. While this scenario may be unlikely, interpreting s.157.1 in this fashion would lead to the absurd result that no environmental assessment would be required so long as the undertaking was ever the subject of a licence issued before June 22, 1984. In my view, considering the land and water management purposes of the MVRMA, that cannot have been the intent of the legislators.

[29] Interpreting s.157.1 as applying to undertakings which, at the time a licence is sought, are the subject of a licence or permit issued before June 22, 1984 means that there will be a time when no undertaking can come within the s.157.1 exemption because of the 25 year maximum term for a water licence under s.14 of the *Northwest Territories Waters Act*. To be exempted from the environmental assessment process, the undertaking would have to come within sections 1 or 2 of Schedule 1 of the Exemption List Regulations or some other applicable exemption. However this interpretation is, in my view, in keeping with the purposes of the MVRMA.

[30] Counsel for the Attorney General submitted that the change from the wording of the exemption provided in s.74(4) of the CEAA to that in s.157.1 of the MVRMA may have resulted from the difficulty in establishing factually when, under s.74(4), construction or operation of a physical activity was "initiated". While that difficulty may well have existed as may be gleaned from the case she cited, *Hamilton Wentworth (Regional Municipality)* v. *Canada (Minister of the Environment)* (2001), 204 F.T.R. 161 (T.D.), it is mere speculation to say that was the reason for the change.

[31] The change in wording from s.74(4) of the CEAA to s.157.1 of the MVRMA is significant and in my view indicates a shift away from grandfathering "old", that is, pre-June 22, 1984 undertakings, to grandfathering only those undertakings which still hold a licence issued before June 22, 1984. That this would mean some, if not most, undertakings grandfathered under the CEAA would not be grandfathered under the MVRMA cannot have been missed by the legislators.

[32] The impact of all this is that at some point in time existing developments or undertakings that fall within the purview of the MVRMA will, on application for a licence, or renewal of a licence, undergo the environmental review process unless they fall within very narrow exceptions. The mere fact that an undertaking is "old" will not save it from that process. However, repeated reviews will not be required because of the exemption in Section 2 of Schedule 1 of the Exemption List Regulations.

[33] To interpret s.157.1 otherwise would mean that any development which has been the subject of a licence issued before June 22, 1984 would not have to undergo the environmental assessment process except on abandonment, decommissioning or other significant alteration, which does not seem consistent with the intent of regulation of all land and water uses as set out in the preamble to the MVRMA.

[34] On the interpretation of s.157.1 which I have accepted, the issue becomes, as I have said, whether the 1995 renewal can be said to be a continuation of the 1975 licence and therefore "a licence issued before June 22, 1984". This is exactly what the Board set out to determine in the decision now under review, when it asked: "Simply put does a renewal of a water licence result in a continuation of the existing licence, subject to the Board's authority to make changes to its conditions, or does a renewal result in the issuance of a new licence?"

[35] In its decision, the Board reviewed various meanings of the term "renewal" from caselaw and dictionaries. It decided that the meaning of the word "renewal" has to be determined in its statutory context. It considered that water licences are issued for specific terms and that upon a renewal, the most common scenario is that the term set for the licence comes to an end and a new licence is issued rather than an amendment being made to the term of an existing licence so as to extend it.

[36] The Board also considered that "the advent of a renewal gives the Board the opportunity to remake the licence, if significant change is warranted, the Board can do so, irrespective of the terms of the previous licence". It stated that previously issued licences for North American Tungsten's mine have been subject to a number of significant changes over the years and that the mine was not operating, but was on care and maintenance, for 15 years. It also noted that the Board does not have to grant a renewal or any licence at all. Finally, the Board noted that the *Northwest Territories Waters Act* provides that the maximum term for a water licence is 25 years and that if the renewals obtained by North American Tungsten were considered to continue the original licence, that maximum term would have been reached in 2000. In the result, the Board concluded that "renewals of water licences are in effect the issuance of new licences" and that s.157.1 does not apply to exempt North American Tungsten's application from Part 5 of the MVRMA.

[37] North American Tungsten argues that the Board erred in law in failing to apply the ordinary meaning of s.157.1, failing to focus on the undertaking rather than the

licence and failing to apply the right test to the applicability of s.157.1. The latter two grounds are really the same. I have already referred above to what I find the ordinary meaning and the focus of s.157.1 to be and I need not repeat those observations except to summarize that I find that s.157.1 requires that the undertaking in question is, at the time the licence is sought, the subject of a licence issued before June 22, 1984. This requires that the licence issued before June 22, 1984 is still in existence.

[38] North American Tungsten has not shown that the Board's analysis as to what happens on renewal of a licence is incorrect. It did point out that its water licence number remained the same from 1975 to 1995, when a minor change was made to reflect a change in the Water Board office responsible for it. However, in my view the numbering is not determinative of the question whether successive renewals resulted in new licences or continued the original licence.

[39] North American Tungsten took the position that there were no other changes to the licence or the undertaking. But, as noted above, the Board found that there were a number of changes. That is a finding of fact for which no basis has been put forward for review by this Court.

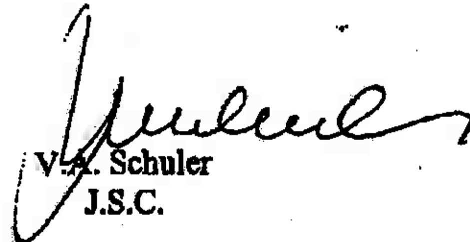
[40] I see no flaw in the Board's reasoning that a renewal creates a new licence and does not continue a previous licence. The 25 year maximum on the term of a licence is particularly supportive of that conclusion.

[41] It is not, of course, the reasoning of the Board that must be correct, but its ultimate decision. In my view, considering the ordinary meaning of the words used in s.157.1, the use of the present tense and the legislative context and purpose, and considering the nature of the water licence renewal scheme as found by the Board in its decision, the Board was correct in its finding that s.157.1 does not apply to exempt North American Tungsten from Part 5 of the MVRMA. The licence that North American Tungsten has applied for does not relate to an undertaking that is the subject of a licence issued before June 22, 1984. Rather, the undertaking, the mining operation, is the subject of a licence issued in 1995. Accordingly, the application for an order in the nature of certiorari and other relief is dismissed.

[42] I will add that counsel for Canadian Arctic Resources Committee and Canadian Parks and Wilderness Society very fairly submitted a document which he indicated might bring North American Tungsten's mining operation within the Exemption List Regulations. This document, referred to as the " DIAND Screening" was not the

subject of submissions and I am not in a position, nor was I asked, to make any findings based on it. However, should North American Tungsten wish to pursue an exemption on the basis of the DIAND Screening, it would seem to me appropriate that the Board entertain such an application notwithstanding its decision on s.157.1. I do not go so far, however, as to make any direction in that regard.

[43] Should counsel wish to speak to the costs of this application, they may contact the Registry within 30 days of the filing of this decision to obtain a date to appear before me for that purpose.



V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
28th day of November 2002

Counsel for the Applicant:	John U. Bayly, Q.C.
Counsel for the Respondent:	John Donihee
Counsel for the Canadian Arctic Resources Committee and the Canadian Parks and Wilderness Society:	Randy L. Christensen
Counsel for the Attorney General:	Heather L. Potter

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