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City of Yellowknife

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MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD

May 18, 2006

Mackenzie Valley Environmental Impact Review Board
P.O Box 938
5102 – 50th Avenue (200 Scotia Centre)
Yellowknife, NT XIA 2M1

Attn: Gabrielle Mackenzie-Scott, Chair

Dear Ms. Mackenzie-Scott:

Re: Applicability of Section 157.1 to Miramar Con Mine Ltd.'s Water License Amendment

This letter is further to the Mackenzie Valley Environmental Impact Review Board's (the "Board") correspondence of May 3, 2006 requesting comments regarding the applicability of section 157.1 of the *Mackenzie Valley Resource Management Act*[1] (the "MVRMA") to Miramar Con Mine Ltd.'s Water License Amendment Application (the "Application"), and the Board's May 5, 2006 correspondence extending the deadline for these comments to May 19, 2006. The purpose of this correspondence is to provide the Municipal Corporation of the City of Yellowknife's (the "City") comments on this issue.

In summary, the City submits that the Application is not for the continued operation of the Con Mine, but rather for the purpose of proceeding with activities that constitute a significant departure from the approved mode of operation of the Con Mine. Therefore section 157.1 of the MVRMA is not applicable to the Application.

Furthermore, the Supreme Court of Canada's three criteria for invoking the common law doctrine of issue estoppel are met in this case. The invocation of issue estoppel prohibits Miramar Con Mine Ltd. ("Miramar") from re-litigating before the MVEIRB the decision of the MVLWB to apply Part 5 of the MVRMA to the Application and conduct a preliminary screening of the Application pursuant to Part 5.

Accordingly, Part 5 of the MVRMA applies to the Application and the Board is mandated to carry out an environmental assessment of the Application pursuant to the City's April 5, 2006 referral of the Application to the Board as authorized by paragraph 126(2)(d) of the MVRMA.

[1] S.C 1998 c. 25.

P.O. Box 580
Yellowknife, NT
X1A 2N4
Tel: (867) 920-5600
Fax: (867) 920-5649

The Interpretation of Section 157.1:

Section 157.1 of the MVRMA states:

> 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. [Emphasis added.]

In *North American Tungsten Corp. Ltd. v. Mackenzie Valley Land and Water Board* ("*Tungsten*"), the Northwest Territories Court of Appeal discussed Parliament's purpose for enacting section 157.1 of the MVRMA. The Court of Appeal is clear that section 157.1 is to be interpreted to require a project pre-dating June 22, 1984 to be subjected to an environmental assessment in circumstances where the project departs significantly from the approved mode of operation:

> ...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.[2] [Emphasis added]

The express wording of the exception to section 157.1 and the Court of Appeal's use of decommissioning and abandonment as examples of exceptions to grandfathering pre June 22, 1984 projects from environmental assessment in *Tungsten* supports interpreting section 157.1 as requiring an environmental assessment when a project moves to the decommissioning phase of a project's life cycle.

The Dictionary of Environmental Law and Science defines decommissioning as:

> 1. Decontamination and dismantlement of retired facilities and removal and or/disposal of the resulting wastes. 2. The process of permanently

[2] 2003 NWTCA 5 (CanLII), at para. 29. See Tab 1.

closing a facility/site; includes rehabilitation and plans for future maintenance of affected land and water.[3] [Emphasis added.]

Taking into consideration the Court of Appeals decision in *Tungsten,* the meaning of "undertaking" was further considered by the Northwest Territories Supreme Court in *Can. Zinc Corp. v. Mackenzie Valley Land & Water Bd.* ("*Can. Zinc*"):

> In my view, to be consistent with the CEAA and the context and purpose of the legislation as described in *Tungsten*, the definition of undertaking must parallel the wording used in the CEAA and not focus solely on the physical "thing", that is, the winter access road. It must include the proposed operation of the road. The undertaking is not merely the winter access road, but includes the activity for which the road will be used and the circumstances surrounding its use. It is not, however, the complete operation carried on by CZC.[4] [Emphasis added.]

Thus the focus of the analysis of the applicability of section 157.1 must not be narrowly focused on the license, but rather involve a consideration of the activities for which the license is intended and the circumstances surrounding its use.

With regard to when an environmental assessment of decommissioning activities is to be conducted, section 114 of the MVRMA sets out that the purpose of environmental assessment include the careful consideration of impacts on the environment before actions are taken and to ensure that the concerns of the public are taken into account:

> Section **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
>
> ...
>
> (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. [Emphasis added.]

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[3] Environmental Law Centre, *The Dictionary of Environmental Law and Science*, 2nd Edition, June 2005, at page 101. The second part of this definition is taken from *The Glossary of Water Management Terms* produced by Indian and Northern Affairs Canada (INAC) and the Nunavut Water Board (NWB) to be used as a reference tool during Water Licence Reviews or Environmental Assessments. INAC manages the waters of Nunavut and advises the Department's Minister on water materials. The NWB has responsibility for the regulation, use and management of water in Nunavut. Both INAC and the NWB work in partnership to promote sustainable development. See http://www.ainc-inac.gc.ca/nu/nuv/wgl_e.html as of May 13, 2006.

[4] 2005 NWTSC 48 (CanLII), at para. 53. See Tab 2.

Section 114 is supported by prohibitions on the issuance of a license, permit or authorizations pursuant to the MVRMA until the requirements of Part 5 have been complied with.[5]

The Federal Court has considered parallel wording to section 114 in CEAA, and specifically in relation to decommissioning activities. In *Bowen v. Canada (Attorney General),* when no environmental studies had yet been carried out on a decision made to decommission aerodromes in both Banff and Jasper national parks, Campbell, J. (F.C.T.D.) quashed a decision to decommission the aerodromes and further prohibited the making of any decision to decommission the aerodromes until separate comprehensive environmental studies were completed on each of them:

> Regarding the timing of the assessment, section 11 of CEAA reads as follows:
>
> **11.** (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.
>
> I find that in observance of this provision, the comprehensive environmental study must be carried out before any decision is made to decommission.[6]

Applying the Interpretation of Section 157.1 to the Application:

(a) Departing Significantly from the Mode of Operation

Miramar Con Mine Ltd. has departed significantly from the mode of operation approved in the existing water license. The purpose of the water license is stated as follows:

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[5] Section 62 of the MVRMA states:

> A board may not issue a licence, permit or authorization for the carrying out of a proposed development within the meaning of Part 5 unless the requirements of that Part have been complied with, and every licence, permit or authorization so issued shall include any conditions that are required to be included in it pursuant to a decision made under that Part.

and this prohibition is reiterated in Part 5 where subsection 118 (1) states:

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

[6] 1997 CanLII 6383 (F.C.), at page 22. See Tab 3.

> The License entitles Miramar Con Mine Ltd. to use Water and dispose of Waste for a mining and milling operation and associated activities at the Con Mine, located in Yellowknife, Northwest Territories...[7] [Legal description omitted, emphasis added.]

In contrast, in the Application Miramar states:

> As you are aware, production ceased at Con Mine in November 2003, and milling of ore from Giant Mine ceased on July 9, 2004, however some facilities continue to be used to carry out work related to progressive reclamation and final clean up of the site in preparation for closure.[8]

This is consistent with the Miramar Con Mine Ltd 2005 SNP Report for Water License N1L2-0040 (the "Con Mine 2005 SNP Report") in which Miramar reported that the operations at Con Mine have ceased permanently, stating "There are no plans to resume production at Con Mine."[9]

(b) Decommissioning

Moreover, the Application is explicit that Miramar has moved from mining operations to the permanent closure of the Con Mine:

> All work conducted on the site is now directed towards preparation for final closure activities, however it will be necessary to operate some of the facilities in the upcoming two years to ensure that the majority of hazardous materials remaining on site are rendered environmentally stable.[10]

Despite Miramar's submission to the MVEIRB that "Miramar will not be decommissioning or abandoning these [blend plant, autoclave and mill] or other facilities.",[11] the significant extent of the decommissioning of facilities at the Con Mine site in 2005 is set out by Miramar in Part 8 of the Con Mine 2005 SNP Report and reproduced as Appendix A to this submission.

The irreversible decommissioning activities that are now taking place at the Con Mine site have a direct impact on the Application. At the MVLWB hearing, Mr. Ron Connell,

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[7] Northwest Territories Water Board, Miramar Con Mine Ltd., N1L2-0040 (Renewal), effective date July 30, 2000, Part A, Item 1(a).

[8] Miramar Con Mine, Ltd., Request for Extension of Con Mine Water License – N1L2-0040, dated July 20, 2005, at page 1.

[9] Miramar Con Mine Ltd 2005 SNP Report for Water License N1L2-0040, at page 8. See Tab 4.

[10] Miramar Con Mine, Ltd., Request for Extension of Con Mine Water License – N1L2-0040, dated July 20, 2005, at page 2.

[11] Bull, Housser & Tupper, Submission to the Mackenzie Valley Environmental Impact Review Board, April 21, 2006, at page 3.

Miramar's Environmental Superintendent at the Con Mine, described the effect on water quality monitoring of Miramar's decision to water flood the underground workings of the Con Mine:

> Underground: In 2003, INAC Inspector Ron Bredmore (phonetic), issued an order directing Miramar to conduct an underground risk assessment. As part of that, water-quality monitoring of the water flooding the underground workings, was required.
>
> We completed that underground risk assessment, we contracted a company called URS Canada, the results, the report on that has been submitted to the McKenzie Valley Land and Water Board, as well as INAC. It is also a support document for the closure plan that we're working on right now.
>
> We conducted water testing in 2004 successfully, we were able to lower the cage at the mine, down into the shaft, and sampled from the bottom of the cage. The water quality of the sample taken in 2004 was actually excellent, the only substance noted above water license limits was zinc, and it was just slightly above the water-license limit.
>
> We, again, our URS again attempted to sample in 2005, but there has been some deterioration of the mechanism to lower the cage and we were unable to get the conveyance down below the seventeen hundred (1,700) foot level, we were -- it was impossible at that time to lower water-sampling equipment to reach the water level in the mine; we're assuming it's down around a fifty-six hundred (5,600) foot level.
>
> At this juncture it does not appear we will be able to sample the mine water for about fifteen(15) years until it gets to within about a thousand feet of surface, where we can successfully lower sampling equipment.
>
> In order to do this in the closure plan, we are putting hatches in three (3) of the deep shafts that will allow us to lower water-sampling equipment when the time comes, and give us plenty of time to deal with any conditions that we see at that time.
>
> Again, this is a closure plan issue, it's really not part of the water license extension, it – the water license as it stands, extended or not, will be long gone by the time we get around to checking the water quality in the underground workings.[12] [Emphasis added.]

[12] Public Hearing Transcript, Mackenzie Valley Land and Water Board, Miramar Con Mine Ltd., Class 'A' Water License Extension Application N1L2-0040, November 9, 2005, at page 15-16. See Tab 5.

Specifically regarding the decommissioning of the blend plant, autoclave and mill, Miramar states in the Application that the time frame for decommissioning these facilities is in fact during the period (to September 30, 2008) for which the Application is being requested:

> As outlined in the most recent draft of the Final Closure and Reclamation Plan, which is expected to receive approval in the near future, it is anticipated that the mill, autoclave, and blend plant would operate in the latter part of 2006 and shut down by the end of the year. Contaminated water produced by this operation would be treated during the summer of 2007. All of the above facilities will be decommissioned and demolished during 2007. It will be necessary to high pressure wash or otherwise clean portions of these structures. Contaminated water produced by this activity would be treated during the summer of 2008. The conditions in the current Water License will more than adequately cover any contaminants produced by these operations.[13] [Emphasis added.]

Furthermore, in the Con Mine 2005 SNP Report, Miramar is explicit that the Application is intended to cover the closure period:

> The Con Mine Water License expires on July 26, 2006. An application for an extension to the existing Water License to September 30, 2008, to cover the period during closure activities, was submitted to the MVLWB on July 20, 2005.[14] [Emphasis added.]

These permanent closure activities constitute decommissioning. As a result, and consistent with the Federal Court of Appeal's decision in *Tungsten*, the undertaking and the Application is excepted from the application of section 157.1 of the MVRMA. Accordingly, Part 5 of the MVRMA applies to this Application.

(c) Relevant Circumstances Surrounding the Use

Miramar asserts in its submission to the Board "It is clear that neither the License nor the activities that will be conducted during the period of the extension requested are for abandonment, decommissioning or other significant alteration of the Con Mine and are not caught by the exception to section 157.1."[15] Miramar relies on correspondence from David Livingstone, Director Renewable Resources & Environment, Indian and Northern Affairs Canada ("INAC"), which states essentially that the activities for which the

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[13] Miramar Con Mine, Ltd., Request for Extension of Con Mine Water License – N1L2-0040, dated July 20, 2005, at page 2.

[14] Miramar Con Mine Ltd 2005 SNP Report for Water License N1L2-0040, at page 13. See Tab 4.

[15] See Bull, Housser & Tupper, Submission to the Mackenzie Valley Environmental Impact Review Board, April 21, 2006, at page 3.

Application is required are authorized pursuant to Part D, Item 12 of the existing water license.[16]

Part D, Item 12 states:

> The Licensee shall process all arsenic sludges and calcine sludges by December 31, 2003. An annual update including the amount of arsenic and calcine sludges processed-to-date is to be included in the annual report submitted to the Board.[17]

The City submits that this clause does not authorize Miramar to process arsenic sludges and calcine sludges past the term of the existing Water License; it mandates Miramar to complete this work by December 31, 2003. This is well before the July 29, 2006 expiry date of the existing water license. It is the City's submission that it would be incorrect to interpret the failure of the license holder to meet a term of an existing water license, even when acting in good faith, as an "authorization" of an activity some five years past the date the work was to be completed and at a time when the project has entered into the decommissioning phase of its life cycle.

Even if the Board finds the ongoing processing of arsenic sludges and calcine sludges is authorized by the existing water license, the Federal Court decision in *Can. Zinc* requires the Board to look at the broader uses of the water license and the circumstances surrounding its use.

Miramar stated in the quotes cited on the two preceding pages that the Application covers not only the processing of arsenic and calcine sludges, but also decommissioning activities such as the high pressure wash or cleaning of decommissioned and demolished structures which will result in contaminated water that requires treatment. At the hearing before the MVLWB, Miramar was explicit that the Application is intended to be used by Miramar to meet its closure plan commitments:

> An extension of the current water license will enable Miramar to meet the schedule outlined in that closure plan and the commitments under that closure plan, including processing of all the remaining calcines and arsenic sludges.[18]

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[16] See Bull, Housser & Tupper, Submission to the Mackenzie Valley Environmental Impact Review Board, April 21, 2006, at page 3.

[17] Northwest Territories Water Board, Miramar Con Mine Ltd., N1L2-0040 (Renewal), effective date July 30, 2000.

[18] Mr. Ron Connell, Environmental Superintendent, Miramar Con Mine Ltd., Public Hearing Transcript, Mackenzie Valley Land and Water Board, Miramar Con Mine Ltd., Class 'A' Water License Extension Application N1L2-0040, November 9, 2005, at page 17.

Mr. Connell reiterated this position in the closing statement for Miramar:

> Many of the issues raised today by the City of Yellowknife are related to the closure-planning process. Let me reiterate we are very near the end of the closure-planning process, we anticipate having an approved closure plan in place by the first quarter of 2006, which will then allow the other closure activities to go forward. (Transcript, at page 62).

The City further submits that the absence of an approved Abandonment and Restoration Plan as required by the existing water license, and the decommissioning activities that are currently taking place in the absence of an approved Plan, are circumstances relevant to the applicability of section 157.1.

Part H, Item 1 of the existing water license required Miramar to submit an Abandonment and Reclamation Plan satisfactory to the MVLWB by January 31, 2001.[19] This is well before the expiry date of the existing water license. More than five years after a satisfactory Abandonment and Reclamation Plan was required, the Plan remains outstanding.[20] In the absence of an approved Abandonment and Reclamation Plan, Miramar has been undertaking decommissioning activities as "progressive reclamation."[21]

The City submits this is not only inconsistent with the terms and conditions of the existing water license, but it is also inconsistent with the purpose of environmental assessment as set out in section 114 of the MVRMA, including the need for careful consideration before actions are taken.

The existing water license provides for progressive reclamation; however it does so within the context of the requirement for a satisfactory Abandonment and Reclamation Plan pursuant to Part H, Item 1. Moreover, "progressive reclamation" is defined in Part A, Item 2 of the existing water license as applying only during the operating period of the mine:

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[19] Northwest Territories Water Board, Miramar Con Mine Ltd., N1L2-0040 (Renewal), effective date July 30, 2000.

[20] The status of the Abandonment and Reclamation Plan was set out in the Con Mine 2005 SNP Report:

> Revision #5 of the Con Mine Final Closure and Reclamation Plan is being developed through a process that involves the Miramar Con Abandonment and Restoration Working Group (MCARWG). This group was formed following rejection by the MVLWB of Revision #4 of the plan. Prior to its final submission to the MVLWB each section of the plan is reviewed and approved in principle by the Working Group. As of December 2005, nine of the anticipated ten sections of the plan have been submitted to the Working Group for review. Sections one through six have received approval in principle from the Working Group, and sections one through four have received approval in principle from the Board. As Golder Associates was instrumental in compiling earlier versions of this plan, MCML contacted them to assist with preparation of Revision #5.
>
> It is now anticipated that Revision #5 of the complete Con Mine Final Closure and Reclamation Plan will be submitted to the MVLWB in the second quarter of 2006.

Miramar Con Mine Ltd 2005 SNP Report for Water License N1L2-0040, at page 11. See Tab 4.

[21] This is evidenced by the Application as referenced earlier in this submission (see footnote 8) and the title "Progressive Reclamation" used in Section 8 of the Miramar Con Mine Ltd 2005 SNP Report for Water License N1L2-0040 reproduced in Appendix 1.

> "Progressive Reclamation" means those activities conducted during the operating period of the mine to modify and reclaim the land and Water to the satisfaction of the Board;[22] [Emphasis added.]

This restriction is repeated in Part H, Item 4 of the existing water license which authorizes progressive reclamation:

> Notwithstanding the time schedule referred to in the Abandonment and Restoration Plan, the Licensee shall carry out Progressive Reclamation of areas which are abandoned prior to closure of operations.[23] [Emphasis added.]

This is in contrast to terms in the existing water license such as Part B, Item 3 which specifically provides for the security deposit to "survive the expiry of this License or renewals thereof and until full and final restoration has been completed to the satisfaction of the Minister."

It is the City's submission that "progressive reclamation" as defined in Part A, Item 2 and used in Part H, Item 4 of the existing license was not intended to allow for the decommissioning of the Con Mine site absent a satisfactory Abandonment and Reclamation Plan. Once the operating period has ceased, the activities are no longer "progressive reclamation" activities; rather the project has moved into the decommissioning phase and the required licenses and permits are no longer exempt from environmental assessment. Failure to observe this difference in the life cycle of the Con Mine renders Parliament's use of the word "decommissioning" in section 157.1 of the MVRMA meaningless.

The City notes that a finding by the Board that Miramar has departed significantly from the mode of operation in the existing water license and has moved into the decommissioning phase of the project will be consistent with the finding of the MVLWB. In its Reasons for Decision for the Part 5 preliminary screening of the Application, the MVLWB stated that, while it was unnecessary to rule on the difference between the activities authorized by the existing water license and the current activity at the Con Mine site, "the evidence at the hearing indicated that Miramar is engaged in the closure and reclamation of the Con mine site."[24]

(d) Conclusion on Applying the Interpretation of Section 157.1 to the Application:

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[22] Northwest Territories Water Board, Miramar Con Mine Ltd., N1L2-0040 (Renewal), effective date July 30, 2000.

[23] Northwest Territories Water Board, Miramar Con Mine Ltd., N1L2-0040 (Renewal), effective date July 30, 2000

[24] Mackenzie Valley Land and Water Board, Reasons for Decision, Preliminary Screening of the Amendment to the Term, Water License N1L2-0040, Miramar Con Mine Ltd., January 11, 2006, at page 2.

Miramar ceased the Con Mine mining operations in 2003 and milling operations in 2004. There are no plans to operate the mine in the future. Irreversible decommissioning decisions have been made and many of the facilities at the mine site have been decommissioned. It is the City's submission that these decommissioning activities were not contemplated when the existing water license was granted and are not authorized by the existing water license. These activities are currently being undertaken without an Abandonment and Reclamation Plan as required by the existing water license. On the evidence, the Application is not being made to allow for the continued operation of the Con Mine, but rather to allow Miramar to proceed with decommissioning.

The effect of past impacts has been repeatedly deferred until abandonment and reclamation. The operations permanently ceased in 2003/04, progressive reclamation activities have been ongoing under the existing water license since that time. The decision has been made to decommission the Con Mine. The City submits to allow reclamation to continue for two more years without an environmental assessment is inconsistent with the Court's interpretation of the purpose and application of section 157.1 and the purpose of Part 5 of the MVRMA. Accordingly, section 157.1 does not apply to this Application, and Part 5 of the MVRMA does apply.

Issue Estoppel:

(a) Invoking Issue Estoppel

The City further submits that the common law doctrine of issue estoppel precludes Miramar from re-litigating the applicability of Part 5 of the MVRMA to the Application.

In *Danyluk v. Ainsworth Technologies Inc.*, the Supreme Court of Canada per Binnie J. set out the three preconditions that must be met to successfully invoke issue estoppel: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies.[25]

In this case, the City submits the issue of the applicability of Part 5 of the MVRMA to the Application was judicially determined by the MVLWB when it held a public hearing on the matter on November 9, 2005 and issued its January 11, 2006 decision that the Application was not exempt from preliminary screening pursuant to Part 5 of the MVRMA.

Subsection 32(2) of the MVRMA provides the Supreme Court of the Northwest Territories with exclusive original jurisdiction to hear and determine any action or proceeding concerning the jurisdiction of the MVLWB:

> 32. (1) Notwithstanding the exclusive jurisdiction referred to in section 18 of the Federal Courts Act, the Attorney General of Canada or anyone directly affected

[25] 2001 SCC 44 (CanLII). at para. 25. Tab 6.

by the matter in respect of which relief is sought may make an application to the Supreme Court of the Northwest Territories for any relief against a board by way of an injunction or declaration or by way of an order in the nature of certiorari, mandamus, quo warranto or prohibition.

(2) Despite subsection (1) and section 18 of the Federal Courts Act, the Supreme Court of the Northwest Territories has exclusive original jurisdiction to hear and determine any action or proceeding, whether or not by way of an application of a type referred to in subsection (1), concerning the jurisdiction of the Mackenzie Valley Land and Water Board or the Mackenzie Valley Environmental Impact Review Board.

Rule 596(1) of the *Rules of the Supreme Court of the Northwest Territories* requires an originating notice of an application for judicial review of a decision or act to be filed and served within 30 days after the decision or act to which it relates.[26]

The MVLWB's decision to conduct a preliminary screening of the Application pursuant to Part 5 of the MVRMA was issued on January 11, 2006. The MVLWB's preliminary screening decision pursuant to section 125(2)(a) of the MVRMA was also issued on January 11, 2006. Absent the filing of an originating notice of an application for judicial review of the MVLWB's decision as of May 15, 2006, the City submits the decision of the MVLWB to conduct a preliminary screening of the Application pursuant to Part 5 to the MVRMA is a final decision on the determination of the issue of the applicability of Part 5 of the MVRMA to the application.

The City further submits that the parties to both the proceedings before the MVLWB and the MVEIRB are the same, or have sufficient mutuality of interest for the doctrine of issue estoppel to apply.

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[26] N.W.T. Reg. 010-96. Rule 596 states:

596(1) Unless otherwise provided by statute, where the relief sought in an application for judicial review is an order to set aside a decision or act, the originating notice shall be filed and served within 30 days after the decision or act to which it relates.

(2) Unless an enactment otherwise provides, the Court may extend the time for bringing an application for judicial review before or after the expiration of the 30 day time limit set out in sub rule (1).

Similarly, for judicial review of matters where there is concurrent jurisdiction pursuant to subsection 32(1) of the MVRMA, section 18.1(2) of the *Federal Courts Act*, R.S. 1985 c.F-7, also sets out a 30 day time limitation for filing of an application for judicial review:

18.1(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(b) Conclusion on Issue Estoppel:

Even if the MVEIRB was to otherwise find that section 157.1 was applicable to the Application, the three criteria established by the Supreme Court of Canada to invoke issue estoppel are satisfied and Miramar is estopped from re-litigating before the MVEIRB the issue of the applicability of Part 5 of the MVRMA to the Application. Accordingly, Part 5 of the MVRMA applies to the Application, and the Board is mandated to carry out an environmental assessment of the Application pursuant to City's April 5, 2006 referral of the Application to the Board as authorized by paragraph 126(2)(d) of the MVRMA.

The City confirms its referral of the Application to the Board for an environmental assessment pursuant to paragraph 126(2)(d) of the MVRMA.

ALL OF THE ABOVE IS RESPECTFULLY SUBMITTED BY THE CITY.

Sincerely,

Loretta Bouwmeester,
Manager of Legal Services and Corporate Policy

cc: The Honourable Jim Prentice, Minister of Indian Affairs and Northern Development
The Honourable Michael McLeod, Minister of Municipal and Community Affairs, GNWT
Bob Woolley, Executive Director, Mackenzie Valley Land and Water Board
Bob Overvold, Regional Director General, Indian Affairs and Northern Development, Yellowknife
Shelley O'Callaghan, Bull, Houser & Tupper

Appendix A

Miramar Con Mine Ltd 2005 SNP Report for Water License N1L2-0040

Excerpt

8.0 PROGRESSIVE RECLAMATION

In accordance with the terms and conditions of the Reclamation Security Agreement between DIAND and MCML signed on April 04, 2003, and Part H, Section 1 of the Water License issued by the Northwest Territories Water Board on July 30, 2000, MCML is required to incorporate progressive reclamation activities into the period of time leading up the approval of a final "Closure and Reclamation Plan" for Con Mine.

During the 2005-operating year MCML carried out the following activities:

- Continued general site clean-up and consolidation of scrap materials.
- Removed the remaining asbestos and other hazardous materials from the majority of buildings in preparation for demolition.
- Removed/demolished structures and cleaned up sites of the following buildings:
    - o 101 – Burns Meat Building
    - o 102 – Small Warehouse at Con Dock
    - o 103 – Large Warehouse at Con Dock
    - o 107 – Stanton Cottage Hospital
    - o 122 – Triple Garage on Con Road
    - o 201 – "Cabin" at "C" Shaft Gate to NWT Mining Heritage Group
    - o 202 – Gatehouse at "C" Shaft Gate
    - o 203 – Office at "C" Shaft Gate
    - o 204 – Small Warehouse at "C" Shaft Gate
    - o 205 – Large Warehouse at "C" Shaft Gate
    - o 208 – Refinery
    - o 209 – Metallurgical Laboratory
    - o 211 – Storage shed at "C" Shaft
    - o 212 – Mechanical Room at "C" Shaft complex
    - o 213 – C-1 Dry
    - o 214 – Office at "C" Shaft complex
    - o 219 – Pipe Shop at "C" Shaft
    - o 220 – Assay Laboratory
    - o 228 – Kennecott building
    - o 229 – Reagent storage building at "C" Shaft
    - o 302 – Administrative Office complex at Robertson Shaft

- Engineered, designed & placed a concrete cap on the Burns Raise
- Backfilled the adit that connects to the Burns Raise
- Engineered, designed & placed a concrete cap on the C-1 Exhaust Vent

- Located, inspected, and prepared an Engineer's report on Rat Lake Manway
- Located, drilled, tested concrete, and drafted report on Negus 116 stope
- Located, inspected, and drafted report on Rycon R-1 shaft on Tin Can Hill
- Completed cleanup, grading and final inspection of Negus 114 cap
- Completed cleanup, grading and final inspection of Negus 120 cap
- Completed cleanup, grading and final inspection of Rycon R57 cap
- Completed field work and inspection of 204Q opening to surface. (Cap in 2007)
- Completed cleanup of tailing at the south end of Rat Lake
- Completed phase 2 of Con Pond cleanup. The concrete wall must be removed in order to complete phase 3. (Need approved Closure Plan for this.)
- Installed 3 more new groundwater monitoring wells
- Carried out 2005 groundwater well monitoring program
- Designed cover system for hazardous waste sites
- Designed Engineered drainage channel from Upper Pud to Middle Pud
- Attempted second round of water sampling at Robertson Shaft
- Removed all core from former core storage areas and demolished structures
- Treated over 7,000 tonnes of arsenic sludges and calcines
- Excavated remaining calcines from former calcine storage area
- Stockpiled ~10,000 additional tonnes of calcines and arsenic sludge
- Removed and reclaimed site of former haul road that intersected Taylor Road
- Liquidated (sold) all remaining bulk Sodium Cyanide stored on site
- Liquidated (sold) three large propane storage tanks

It is anticipated that the final Closure and Reclamation Plan for Con Mine will be approved in 2006, following which the plan will be implemented.