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Re: Applicability of Section 157.1 of the *Mackenzie Valley Resource Management Act* to Application for Extension of Water Licence N1L2-0040

Please see the attached.

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Our File: 06-2014
Date: May 25, 2006

BY FAX

Mackenzie Valley Environmental Impact Review Board
200 Scotia Centre
Box 938, 5102 – 50th Avenue
Yellowknife, NT X1A 2N7

Attention: Gabrielle Mackenzie-Scott, Chairperson

Dear Sirs/Mesdames:

Re: Applicability of Section 157.1 of the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 ("MVRMA") to Application for Extension of Water Licence N1L2-0040 (the "Licence")

We are the lawyers for Miramar Con Mine Ltd. ("Miramar") and are responding to the submissions of the City of Yellowknife (the "City") as set out in their letter of May 18, 2006 (the "Letter").

It is our view that the Mackenzie Valley Environmental Impact Review Board (the "Board") does not have the jurisdiction to undertake an environmental assessment of Miramar's application to the Mackenzie Valley Land and Water Board (the "MVLWB") to extend the Licence to September 30, 2008 (the "Miramar Application") because the Miramar Application is grandfathered pursuant to section 157.1 of the MVRMA. As a result, Part 5 of the MVRMA does not apply to the Miramar Application.

Section 157.1 reads as follows:

> 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.

The City has misconstrued the undertaking being performed under the Licence and the purpose of the Miramar Application. The undertaking described in the Licence, that of a mining and

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milling operation and its associated activities at the Con Mine, remains the same undertaking as when the Licence was first issued on June 1, 1980. The purpose of the Miramar Application is to complete the processing of the arsenic and calcine sludges (the "Sludges") as required under Clause 12 of Part D of the Licence. The processing of the Sludges is part of the "associated activities" relating to the operation of the Con Mine. It is an activity that took place concurrently with the mining and milling operation when there was gold ore at the Con Mine, and it is the obligation of Miramar to continue this activity until all the Sludges have been processed and rendered environmentally inert. The purpose of the Miramar Application is to obtain an extension to the Licence so water can be used to continue processing the Sludges remaining at the Con Mine site. The Licence expires on July 29, 2006. Without the extension, Miramar will not be able to complete the processing of the Sludges as Miramar will not be authorized under the Licence.

The City is incorrect in its characterization of the processing of the Sludges as being "abandonment, decommissioning or other significant alteration of the project" and thereby falling within the exception to section 157.1. It is Miramar's view and that of the Department of Indian and Northern Affairs Canada (see reference at page 6 below), that processing of Sludges is a continuation of associated activities in connection with the operation of the Con Mine, authorized under the Licence.

There is no merit to the City's submission regarding the applicability of the doctrine of issue estoppel. The doctrine of issue estoppel cannot apply where the very issue before the tribunal or court is the jurisdiction of the tribunal to make the decision (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at paragraphs 36 and 51 ("Danyluk")). The jurisdiction of the Board to conduct an environmental assessment is the point at issue here and therefore, issue estoppel does not apply.

Therefore, we respectfully submit section 157.1 of the MVRMA applies and Part 5 of the MVRMA does not apply to the Miramar Application, and the Board does not have the jurisdiction to conduct an environmental assessment of the Miramar Application. We set out the reasons for our view below.

The purpose of section 157.1 of the MVRMA

The rationale for section 157.1 is explained by the Northwest Territories Court of Appeal in *North American Tungsten Corp. Ltd. v. Mackenzie Valley Land and Water Board*, 2003 NWTCA 5 at paragraphs 27 and 33 ("Tungsten"):

> 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.

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

The wording of section 157.1 is not limited to renewals of a licence—it is applicable to any undertaking which is subject to a licence that pre-dates June 22, 1984. That is, section 157.1 grandfathers undertakings licenced prior to June 22, 1984, and does not merely grandfather licences issued prior to June 22, 1984 (Tungsten at paragraphs 11-12).

The undertaking at issue

Pursuant to Tungsten and the wording of section 157.1, an undertaking is not subject to Part 5 of the MVRMA if the undertaking is the subject of a licence issued before June 22, 1984. The Licence was issued on June 1, 1980. The undertaking at issue, as stated in Clause 1(a) of Part A of the Licence, is the "mining and milling operation and associated activities" of the Con Mine. The processing of the Sludges is an activity "associated" with the mining and milling operation; the Sludges were a by-product of mining methods used before 1970 and their processing is a ongoing requirement under the Licence.

The processing of the Sludges is not a decommissioning activity. The processing of the Sludges has taken place throughout the term of the Licence in conjunction with the mining and milling operations (as an example, in 2005, over 7,000 tonnes of Sludges were processed). It is a requirement under the Licence that Miramar continue until all the Sludges have been processed and rendered environmentally inert (Clause 12 of Part D of the Licence). Therefore, the activities now taking place do not make the Licence "a licence...for an abandonment, decommissioning or other significant alteration of the project" within the exception to section 157.1 of the MVRMA.

Two separate and distinct issues

Throughout the City's submissions as set out in the Letter, the City conflates two separate and distinct issues: (i) the purpose of the Miramar Application and (ii) decommissioning activities.

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The purpose of the Miramar Application is to obtain an extension to the Licence so the remaining Sludges can be processed. The Sludges are processed by blending the Sludges with other materials to make a mixture which will, under a steam-pressurized environment, react to form an environmentally inert substance. Water is required to process the Sludges. Miramar will not have completed the processing of the Sludges prior to the end of the term of the Licence on July 29, 2006, and requires the extension of the Licence so the processing of the remaining Sludges can be completed.

The Miramar Application is separate and distinct from the decommissioning activities required for the Con Mine. Decommissioning activities are covered under the Closure and Reclamation Plan (the "Closure Plan") currently being assessed and reviewed by the MVLWB. We wish to correct some of the statements made by the City in the Letter concerning the Closure Plan. Miramar submitted a draft of its interim Closure Plan in June 2000 and its final Closure Plan in March 2003. At the MVLWB's recommendation, Miramar agreed to submit the Closure Plan in sections for easier assessment and review. The Miramar Con Abandonment and Restoration Working Group (the "Working Group") was formed in July 2003 to review and approve each section of the Closure Plan before it is submitted to the MVLWB. The Working Group has met 19 times and has completed its review of all of the sections of the Closure Plan. The MVLWB conducted a public hearing on the Closure Plan in April 2004, and open houses were held in June 2005, October 2005, and March 2006. Miramar expects to receive the MVLWB's approval of the Closure Plan by November 2006. The City has been a member of Working Group since 2003 and is therefore a participant in the process of approving and submitting the Closure Plan.

No significant alteration as defined under section 157.1

The City is incorrect in its contention that section 157.1 should not apply because Miramar "has departed significantly from the mode of operation approved in the existing license" (Letter at page numbered 3).

The City's position is the processing of the Sludges constitutes a significant alteration of the project as there is no longer any active mining and milling operation taking place. The processing of the Sludges, as explained above, has been and continues to be part of the ongoing operation of the Con Mine. The processing of the Sludges took place when there was mining and milling activity taking place and will continue, under the exact same method and procedure, until all the Sludges have been processed.

The washing down of the blend plant and its equipment is essentially the removal of any Sludges caked onto the blend plant and its equipment. This "residual" Sludge is Sludge and it too has to be processed. Therefore, the washing down of the blend plant is also not a decommissioning activity but a part of Miramar's obligation to process all the remaining Sludges. Miramar is only seeking an extension to complete the undertaking expressly contemplated under the Licence.

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Furthermore, the words "significant alteration of the project" as used in section 157.1 is limited to activities that would otherwise be related to decommissioning or abandonment activities. The *ejusdem generis* rule of statutory construction states that when a clause sets out a list of specific words followed by a general term, the general term is normally construed to be limited to a class set out by the preceding terms (see e.g., Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at 175-176).

Processing the Sludges past December 31, 2003

The City is incorrect in its position that Clause 12 of Part D of the Licence "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." (Letter at page numbered 7). The processing of the Sludges has always been contemplated under the Licence, whether under its current renewal or past renewals, as part of the operation of the Con Mine, since the Sludges have been present at the Con Mine before 1970. Clause 12 of Part D does not state, "Miramar is authorized to process the Sludges only up to December 31, 2003." Clause 12 of Part D states, "The Licensee shall process all arsenic sludges and calcine sludges by December 31, 2003." Clause 12 of Part D states the requirement (that Miramar is authorized and obliged to process the Sludges under the Licence) and simply places a timeframe under which Miramar should process all the remaining Sludges.

The period for processing the Sludges was imposed at a time when the true quantity of the Sludges remaining was unknown to Miramar. Miramar explained in the public hearing on November 9, 2005, the reasons for not being able to meet this deadline: the quantity of the Sludges encountered was unexpected and the collapse of the roof of the oxygen plant in 2003 delayed processing for six months (transcript of *Mackenzie Valley Land and Water Board, Miramar Con Mine Ltd. Class 'A' Water License Extension Application N1L2-0040*, held on November 9, 2005, at 6-7). Excavation by Miramar revealed that there was more than twice the amount of Sludges on site as originally anticipated. These circumstances were beyond the control and knowledge of Miramar and made the timely processing of the Sludges by December 31, 2003, impossible. However, Miramar has since excavated and quantified the Sludges remaining and can confidently predict, barring any unforeseen roadblocks, that all the remaining Sludges will be processed by late 2007 or early 2008.

If the Licence was intended to have the processing of Sludges rendered impermissible after December 31, 2003, to the detriment of Miramar, the City, and any and all other interested parties, the Licence would have expressly stated such a condition.

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The approval of the Closure Plan

The City alleges the lack of an approved Closure Plan 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" (Letter at page numbered 8).

The delay in the approval of the Closure Plan is not caused by Miramar. As discussed above, the Closure Plan was originally submitted as an interim plan in 2000 and then as a final plan in 2003. The Closure Plan is lengthy and complicated, and the parties involved decided to approve it in stages. Miramar has diligently, and in good faith, worked with the Working Group since 2003 to assess and review each of the sections and is only now in the position to submit a final Closure Plan, each section of which has been reviewed and approved by the Working Group.

Furthermore, the approval of the Closure Plan is separate and distinct from the processing of the Sludges, which is the subject of the Licence extension. The Closure Plan sets the standards and parameters by which the abandonment and decommissioning of the Con Mine will proceed. It is of interest to note that the Closure Plan does not address the processing of the Sludges, as it is understood and accepted by the Working Group that the processing of the Sludges will be completed prior to the commencement of the Closure Plan.

Progressive reclamation

The City alleges "progressive reclamation" does not "allow for the decommissioning of the Con Mine site" (Letter at page numbered 9).

Miramar agrees the term progressive reclamation does not cover decommissioning activities. However, Miramar, in processing Sludges, is not engaged in decommissioning activities under the Licence. Miramar is simply continuing to perform the activity it has always been authorized to perform as part of the operation of the Con Mine under the Licence, which is the processing of the Sludges. Furthermore, the processing of the Sludges is not "progressive reclamation", as confirmed by David Livingstone, Director of Renewable Resources & Environment, Department of Indian and Northern Affairs Canada, in a letter dated November 30, 2005, to the MVLWB:

> At the present time, Miramar has indicated that it has now identified and excavated all remaining sludges and have quantified these materials. Miramar has indicated, through an action plan submitted to the Indian and Northern Affairs Canada (INAC) Inspector and the Board, that it intends to begin processing the remaining calcines and arsenic sludges in the summer of 2006.
>
> INAC wishes to clarify for the Board that <u>these activities are authorized under Part D Item 12 of Water Licence N1L2-0040 and are included in the scope of the licence</u>.

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> These activities are not being authorized as progressive reclamation activities, but rather are a requirement of the current Water Licence contrary to [s]ome comments made during the hearing. [Emphasis added].

Issue Estoppel

The City invokes the doctrine of issue estoppel, arguing the applicability of Part 5 of the MVRMA has already been subject to a final decision and should not be re-litigated (Letter at pages numbered 10 - 12).

In our view, it is not necessary to address whether or not the three preconditions for the operation of issue estoppel are satisfied (though Miramar disagrees with the City's contention that the preconditions are satisfied). Issue estoppel cannot arise where the very issue under consideration is the jurisdiction of the tribunal to make a certain decision. As stated by Binnie J. in Danyluk at paragraph 51, "In summary, it is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. The conditions precedent to the adjudicative jurisdiction must be satisfied." The issue being considered by the Board is its jurisdiction to conduct an environmental assessment of the Miramar Application. In our view, it is clear that estoppel does not apply to the decision before the Board in this case, which is whether the Board has jurisdiction to conduct an environmental assessment of the Miramar Application.

In the alternative, we submit the Board, as a matter of discretion, should hold that issue estoppel ought not to be applied in these circumstances (Danyluk at paragraphs 62 and 80). The issues of the jurisdiction of the Board to conduct an environmental assessment and the applicability of section 157.1 of the MVRMA were neither canvassed nor addressed in the prior decision of the MVLWB to conduct a preliminary screening of the Miramar Application. The MVLWB only determined the narrow issues of section 2 of Part 1 of Schedule 1 of the *Exemption List Regulations*, S.O.R./99-13 not applying to the Miramar Application and the lack of a need to conduct an environmental assessment.

Conclusion

For the above reasons, we respectfully submit the undertaking under the Licence is grandfathered under section 157.1 of the MVRMA and cannot be subject to an environmental assessment, as Part 5 is inapplicable to the Licence. Miramar is seeking an extension to the Licence under the Miramar Application so it can fulfill its ongoing obligation in connection with the operation of the Con Mine, which is the processing of the remaining Sludges. Decommissioning activities are being properly addressed under the Closure Plan and are not part of the undertaking that is the subject of the Licence and its extension.

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We look forward to hearing your decision.

Yours truly,

Bull, Housser & Tupper LLP

Shelley O'Callaghan

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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
David Long, Miramar Con Mine, Ltd.
Gordon Van Tighem, Mayor, City of Yellowknife

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Fourth Edition by Ruth Sullivan

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> EPA for releasing a contaminant which could have only a minimal impact on a "use" of the natural environment.[96]
>
> [Emphasis in original]

Although the language of s. 13(1)(a) was vague and potentially quite broad, Gonthier J. relied on a shared feature of paragraphs (a) through (h) to narrow its scope.

While words must always be read in context, determining the impact of a given context on the meaning of a disputed word or phrase is a matter of judgment that must be exercised on a case by case basis, taking into account all relevant sources of legislative meaning. The appropriate approach is well illustrated in the judgment of Cory J. in *R. v. McCraw*.[97] The accused was charged with the offence of threatening "to cause death or serious bodily harm to any person" under s. 264.1(1)(a) of the *Criminal Code*. It was argued that because the expression "serious bodily harm" is associated with the word "death" in this provision, the offence should be limited to threats of harm that are similar in quality and seriousness to threats of death. However, this suggestion was inconsistent with the purpose of the provision, which was to preserve a secure environment in which individuals could move about freely without fear of harm. That purpose would be undermined by any serious threat, not just threats of death or near-death.[98] The Court also noted that the threat of harm to persons in para. (a) must be read in the context of the entire provision which criminalized other types of threat as well: para. (b) dealt with threats to damage property, while para. (c) dealt with threats to harm pets or farm animals. The association with these less serious types of threat offset the reference to death in para. (a).

LIMITED CLASS

The limited class rule (ejusdem generis). In *National Bank of Greece (Canada) v. Katsikonouris* La Forest J. explained the limited class rule as follows:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it.[99]

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96 *Supra* note 94, at para. 64. Compare the reasoning of Lamer C.J. at para. 20. See also *Quebec v. Regie d'alcool*, *supra* note 14, at para. 196, *per* L'Heureux-Dubé J.

97 [1991] 3 S.C.R. 72.

98 See also *R. v. Two Young Men and Kootenay* (1979), 101 D.L.R. (3d) 598 (Alta. C.A.), *per* Prowse J.A. at 608: "When general and specific words are associated together, and where they are capable of analogous meaning, the general words should be restricted to their more specific analogous meaning, *noscitur a sociis*, except where doing so would be contrary to the clear intention of the statute as a whole."

99 (1990), 74 D.L.R. (4th) 197, at 203 (S.C.C.).

The reasoning underlying this rule is explored in *Consumers' Association of Canada v. Canada (Postmaster General)*.[100] In that case the Consumers' Association sought to register its magazines as second-class mail. The issue was whether it was precluded from doing so by s. 11(1)(d)(i) of the *Post Office Act* which excluded publications of "a fraternal, trade, professional *or other association* or a trade union, credit union, cooperative, or local church organization ..." [emphasis added]. In concluding that the Consumers' Association was not an "association" within the meaning of the provision, the court reasoned as follows:

> The rule of construction generally known as the "*ejusdem generis*" rule was cited by counsel for the Applicant as applicable to if not decisive in this case. This rule is designed to assist in ascertaining the true intention of Parliament and is often a thoroughly sound guide. Looking at all the terms in the paragraph which describe specific kinds of organization, all of which have meanings quite limited in scope, and particularly at the words "fraternal, trade, professional", we cannot think that Parliament meant, by simply adding the words "or other association", to bring every conceivable kind of association of human beings within the provisions of the paragraph. If that had been the intention of Parliament there would have been no need to spell out several specific kinds of associations. Words like "any kind of association whatever" would have been sufficient. Or, if it was thought desirable to name some specific associations, the addition of words like "or any other association, whether '*ejudsem generis*' with the foregoing or not" would have sufficed to make the intention clear.[101]

As the court clearly indicates, the inferences involved in applying the limited class rule are based on the assumption that legislatures do not use superfluous words; they express themselves as concisely as possible; and every word is there for a reason and has some work to do.

In the *Consumers' Association* case, the effect of the rule was to narrow the scope of the word "association" which, considered apart from this context, would certainly have been broad enough to include the applicant association.[102] The limited class rule is also used to resolve ambiguity. In *Re Warren and Chapman*,[103] for example, the issue was whether a statement appearing in a newspaper article was a "representation" within the meaning of Manitoba's *Human Rights Act* which prohibited publishing "in a newspaper ... or by means of any other medium ... any notice, sign, symbol, emblem or other representation ... exposing or tending to expose a person to hatred". The court pointed out that the word "representation" has two distinct senses: it can refer to a verbal assertion that purports to give a true picture of a particular state of affairs; or alternatively

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100 (1975), 11 N.R. 181 (Fed. C.A.); see also *Re Warren and Chapman*, [1985] 4 W.W.R. 75 (Man. C.A.).

101 *Ibid.*, at 186-87. For similar reasoning see *Re Nelson Estate*, [1972] 1 W.W.R. 313, at 315 (B.C.S.C.); and *Re Stockport Ragged, Industrial and Reformatory Schools*, [1898] 2 Ch. 687, at 696 (C.A.).

102 See also *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877 , at para. 41.

103 *Supra* note 100.

it can refer to a visual image or sign. Relying on the limited class rule, the court in *Chapman* opted for the second possibility. Philp J.A. wrote:

> I agree with ... Morse J. ... that "the words 'notice, sign, symbol, emblem', as used in [the Act], constitute a genus or specific class". The use of the word "representation", in its sense as an image, likeness or reproduction, is consistent with the genus or specific class into which the other words fall.[104]

Specific items must belong to a single identifiable class that is narrower than the general class. For a limited class inference to arise several conditions must be present. First, there must be an identifiable class to which all the specific items set out in the provision belong. This prerequisite is essential because the class inferred from the enumerated specifics fixes the limits to which the general words are confined. If these specifics do not point to a single identifiable class, there can be no basis for limiting the scope of the general words.

As Mr. Justice Chisholm explained in *Heatherton Co-op. v. Grant*:

> The rule is that the general words following the specific words must be restricted to the same class as the specific words. Unless you can find a category there is no room for the application of the *ejusdem generis* rule.[105]

The provision to be interpreted in the *Heatherton Co-op.* case was a clause from the company's memorandum of association listing its objects. The issue was whether the scope of the clause could be narrowed by applying the limited class rule to the general words with which the clause ended. Chisholm J. refused:

> The company is expressly authorized to trade in the following among other goods, [namely] fruit, fodder, farm produce, insecticides, spraying outfits, pumps, nails, flour, feeds, fertilizer, seeds, farming implements, tools and waggons. How can these articles be grouped in a class? What feature is there common to them? If there is no common feature existing in the goods specifically mentioned, there is nothing with which the goods implied in the words "all kinds of merchandise" can be *ejusdem generis*.[106]

The feature, or set of features, that is common to each enumerated item becomes the defining feature of the limited class, that which makes it identifiable. In *Heatherton*, because the judge was unable to find any common feature in the specific items listed, he rightly refused to apply the rule.

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104 *Ibid.*, at 80.

105 [1930] 1 D.L.R. 975, at 979-80 (N.S.C.A.). See also *Magnhild S.S. v. McIntyre Bros. & Co.*, [1920] 3 K.B. 321, at 330; revd on other grounds [1921] 2 K.B. 97 (C.A.); *Stouffville Assessment Commissioner v. Mennonite Home Association*, [1973] S.C.R. 189; *Bell v. Bd. of Trustees of School District 44 (North Vancouver)* (1979), 16 B.C.L.R. 94 (S.C.); *Bains v. B.C. (Superintendant of Insurance)* (1973), 38 D.L.R. (3d) 756 (B.C.C.A.); *Tompsett v. Tompsett and Mooney*, [1947] O.R. 883.

106 *Ibid.*, at 979.

A second requirement is that the class inferred from the list of specific items must be narrower in scope than the general words that follow the list. If the inferred class were as broad as the general words to be interpreted, there would be no point in invoking the rule. This situation is likely to occur where the general words are qualified in some way, by adjectives or adverbs or by a restrictive phrase or clause.

In *Slaight Communications Inc. v. Davidson*,[107] for example, the Court was asked to interpret s. 61.5(9) of the *Canada Labour Code*. Under this subsection, an adjudicator, finding that an employee was unjustly dismissed, could require the employer to (a) pay compensation; (b) reinstate the employee; or (c) "do any other like thing that ... is equitable ... to remedy or counteract any consequence of the dismissal". Although the words "any other like thing" appear to invoke the limited class rule, the Court refused to apply it in these circumstances. Dickson C.J. wrote:

> I consider ... that the presence of the word "like" in para. (c) ... was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (a) and (b) of that subsection.... Interpreting this provision in this way would mean applying the ejusdem generis rule. I think it is impossible to apply this rule in the case at bar since one of the conditions essential for its application has not been met. The specific terms (here the orders referred to in paras. (a) and (b)) which precede the general term (the power conferred on the adjudicator in para. (c) to make any order that is equitable) must have a common characteristic, a common genus....
>
> In the case at bar I do not see what characteristic could be described as common to a compensation order and a reinstatement order. The only "denominator" which seems to me common to these two orders in the context of s. 61.5(9) is the fact that these orders are both intended to remedy or counteract the consequences of the dismissal found by the adjudicator to be unjust. However, para. (c) expressly provides that an order made under that paragraph must be designed to remedy or counteract any consequence of the dismissal. This "common denominator" cannot therefore assist in the application of the *ejusdem generis* rule, since the legislator has already expressly provided that the orders the adjudicator is empowered to make must have this characteristic.[108]

In other words, if the common denominator does not narrow the scope of the general term, the rule cannot apply.

Finally, the limited class rule cannot be invoked if the class inferred from the list of specific items has nothing, apart from those items, to apply to. Otherwise the general words would add nothing to the provision, contrary to the presumption against tautology.

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107 (1989), 59 D.L.R. (4th) 416 (S.C.C.).

108 *Ibid.*, at 439.

This point is illustrated by *Grini v. Grini*,[109] a case concerned with the courts' jurisdiction to order maintenance under the *Divorce Act*. The Act permitted orders to be made in support of children who were old enough to work but unable to provide for themselves "by reason of illness, disability or other cause". The issue was whether maintenance could be ordered for a child unable to provide for herself because she was attending high school. The father argued that the words "other cause" should be limited to physical or mental incapacities akin to illness or disability. This argument did not succeed, however, for the court found that the expression "illness or disability" already covered the full range of mental and physical incapacity:

> ... the inability of a child to support himself by his own efforts due to incapacity arising from physical or mental shortcoming is sufficiently expressed as one caused by illness or disability. What other physical or mental disablement might there be, pray, which that phrase would not embrace?
>
> And where — as I believe to be here the case — the particular words exhaust the whole *genus*, the general words which follow must refer to some larger *genus* and are not to be construed as restrictive....[110]

As the court here indicates, an interpretation must be rejected if it narrows the scope of the general words so that there is nothing to which they can apply.

A list of one. It has been suggested that the limited class rule cannot apply unless the general words are preceded by a list of two or more specific items. The reason for this suggestion is the difficulty, or the doubtful propriety, of purporting to establish a class from a sample of one.[111] In *R. v. Tremblay*,[112] for example, the court considered the following provision from the *Alberta Highway Traffic Act*:

> 144(1) No person, whether as a pedestrian or driver, and whether or not with the use or aid of any animal, vehicle or other thing, shall perform or engage in any stunt or other activity upon a highway that is likely to distract, startle or interfere with other users of the highway.

Allen J.A. wrote:

> The words "other activities on the highways" are not to be construed as limited to activities in the general nature of "stunts" because this would invoke the application of the *ejusdem generis* rule, and to invoke this rule there must be a distinct genus or category created by the particular words preceding the general words

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109 (1969), 5 D.L.R. (3d) 640 (Man Q.B.). See also *Superior Pre-Kast Septic Tank Ltd. v. R.*, [1978] 2 S.C.R. 612; *Re Gravestock and Parkin*, [1944] 1 D.L.R. 417 (Ont. C.A.); *Re County of Peel and Town of Mississauga* (1971), 17 D.L.R. (3d) 377 (Ont. H.C.).

110 *Ibid.*, at 645.

111 See *Allen v. Emmerson*, [1944] 1 K.B. 362, at 367.

112 (1974), 23 C.C.C. (2d) 179 (Alta. C.A.).