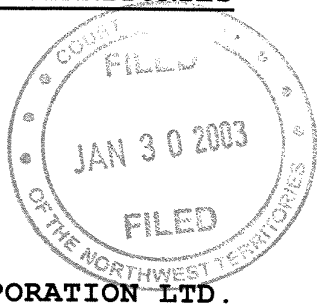
North American Tungsten Corp. Ltd. v. Mackenzie Valley Land and Water Board, 2003 NWTSC 4
NWTCA 3

A-0001-AP2003000001

IN THE COURT OF APPEAL OF THE NORTHWEST TERRITORIES



B E T W E E N:

NORTH AMERICAN TUNGSTEN CORPORATION LTD.
Appellant (Applicant)

- and -

MACKENZIE VALLEY LAND AND WATER BOARD
Respondent (Respondent)

Transcript of the Ruling on the Application for a Stay of Execution by The Honourable Justice J.Z. Vertes at Yellowknife in the Northwest Territories, on January 29th A.D., 2003.

APPEARANCES:

Mr. John U. Bayly, Q.C.:	Counsel for North American Tungsten Corporation Ltd.
Ms. K. Payne, agent for Mr. J. Donihee:	Counsel for the Mackenzie Valley Land and Water Board

THE COURT: This is an application for a stay of execution of the decision of the Mackenzie Valley Land and Water Board, as confirmed on judicial review by the Supreme Court (reported at [2002] N.W.T.J. No. 89), and of the subsequent decision of the Mackenzie Valley Environmental Impact Review Board to proceed with an environmental assessment and review of the applicant's mining property. The applicant seeks a stay until such time as its appeal of the Supreme Court decision is determined by the Court of Appeal.

The test for a stay is well-known: Re Attorney-General of Manitoba v. Metropolitan Stores (MTS) Ltd. (1987), 38 D.L.R. (4th) 321 (S.C.C.) There is a tri-partite test: the Court must determine (1) whether there is a serious issue to be tried; (2) whether the applicant will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience.

On this application the only formal respondent is the Land and Water Board. Its counsel filed submissions stating that the Board took no position on the application but then proceeded to outline various circumstances and factors which clearly implied that a stay would not be justified. Counsel for the Environmental Impact Review Board chose not to appear at all but yet filed a casebook with cases

that again clearly suggest that it would not be in the public interest to grant a stay. These are, to say the least, somewhat unusual approaches to appellate advocacy.

A party is of course entitled to take no position. Even if this application were completely unopposed, the applicant would still bear a burden of satisfying the tri-partite test. A party is entitled to sit back and let the opposing party make its case, if it can. A party may also take no formal position but simply offer helpful comments of a general nature to provide context for an application. But what is unacceptable, in my opinion, is for a party to say one thing and do another, such as, saying they take no position but then submitting arguments that clearly stake out a position. In some situations this may result in those arguments being ignored completely. Here I have not done that but I must admit to placing less weight on them.

In any event, the submissions put forward by these Boards really come down to one point: a court must consider the effect on the public interest before issuing a stay against a public authority. I accept this principle and it is certainly one that comes into consideration on this application.

The stay is requested because of the expressed

intention of the Environmental Impact Review Board to proceed with an environmental assessment process pursuant to Part 5 of the Mackenzie Valley Resource Management Act, S.C. 1998, c.25. That process is expected to be lengthy and expensive. The Review Board has estimated a time-line of 170 days culminating in a Report which will then be transmitted to the Minister of Indian and Northern Affairs (Canada) who will then consider the Report and consult with other responsible ministers. The process will require the applicant to devote considerable resources, human and financial, to this effort. The applicant will be required to retain expert consultants to prepare its assessment report and to participate in hearings. In essence, the applicant says that its mining operation is so marginal that the process would be prohibitively expensive and could have a significant adverse impact on the economic viability of the operation.

The objective of the process is to determine if the applicant should be granted a new water license for its operations. The need for a new license is at the very heart of this litigation. The applicant claims that it is exempted from the requirements of Part 5 of the Act because of Section 157.1 of the Act which exempts an undertaking that is the subject of a license issued before June 22, 1984. The

applicant has held a license since 1975. The Land and Water Board, which regulates the integrated land, water, and environmental protection regime created by the Act, decided that the applicant was not exempt. It was this decision that was upheld on judicial review and now is the subject of this appeal.

In my opinion there is a serious issue to be tried. That issue is the correct interpretation of Section 157.1 of the Act. There is some jurisprudence interpreting a similar statutory provision, Section 74(4) of the Canadian Environmental Assessment Act, S.C. 1992, c. 37, which suggests an interpretation different than the one applied by the judicial review judge: Hamilton-Wentworth v. Canada (2001), 204 F.T.R. 161 (T.D.). The interpretation of the statute will no doubt have consequences as to the scope of the Board's jurisdiction and on other entities beside the applicant.

On the question of irreparable harm, it is recognized that "resources wasted on litigation" are not generally considered to qualify but they are factors to consider nevertheless. The applicant has demonstrated that the review process will impose a significant financial burden on its operations. This is not like the situation found in some other cases

(such as RJR-MacDonald Inc. v. Canada, [1994] 1 S.C.R. 311) where the financial costs of the regulatory process can be recovered somewhat, by the party subjected to that process, by passing those costs on in the form of higher prices to the ultimate consumers of the product. Here the prices for the applicant's product are set by world markets beyond the applicant's control. The type of harm here would not be recoverable so in that sense there would be irreparable harm if a stay were not granted and it ultimately turned out that the applicant was not subject to an environmental assessment.

Finally, the third branch of the test requires an assessment of the balance of convenience to the parties. Here the applicant is not asking that a public authority which irrefutably has jurisdiction to do what it wants to do be stopped from doing it. It is not asking for a suspension of some power that authority clearly possesses. That would be, in my opinion, "inconvenient" to the public interest. It is asking that the authority be prevented from proceeding until that authority's jurisdiction to do so is clearly established. In my opinion this does not jeopardize the public interest. The Board, as a statutory body, can only do what it is clearly empowered to do. In this case, it is reasonable to have the regulatory process await a definitive

decision as to its jurisdiction.

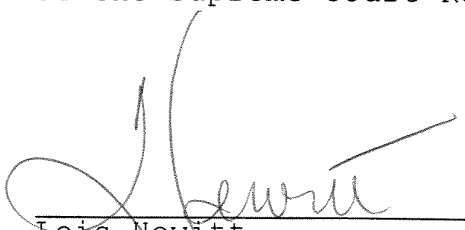
In addition, it seems to me that there is little risk in a stay to the Board whereas there is significant risk to the applicant (a risk that its counsel says it is willing to take). The applicant's license will expire on November 29, 2003. If the applicant's appeal is unsuccessful, and if the assessment process is delayed because of the appeal, then it will have to face the risk of shutting down its operations when the license expires. On the other hand, if the appeal is successful, neither the applicant nor the respondent Boards will have incurred the significant expense of embarking on the assessment, only to learn that it was all for naught.

Finally, a stay, in my opinion, would work as an incentive to all parties to move forward expeditiously to the hearing of the appeal.

For these reasons, the stay is granted on the terms sought by the applicant. The stay will be in effect until the decision of the Court of Appeal is known.

(AT WHICH TIME THE RULING OF THE COURT CONCLUDED)

Certified pursuant to Rule 723
of the Supreme Court Rules.



Lois Hewitt,
Court Reporter