

FR ENVIRONMENTAL LAW BULLETIN



Charles Birchall, Partner

MiningWatch Canada v. Canada (Fisheries and Oceans), 2010 SCC 2

Supreme Court of Canada Issues First Decision on *Canadian Environmental Assessment Act*

MiningWatch Canada Wins & Red Chris Doesn't Lose

Introduction

For the first time, the Supreme Court of Canada has rendered a decision respecting the *Canadian Environmental Assessment Act* ("CEAA"). Mr. Justice Rothstein (with Justices Binnie, LeBel, Fish, Abella, Charron and Cromwell concurring) clearly spelled out the limits of discretion that can be exercised by a federal authority in scoping or limiting the extent of environmental assessments conducted under the CEAA. He concluded that since the mine and mill project as proposed by the proponents (Red Chris Development Company Ltd. and BCMetals Corporation ("Red Chris")) came under the Comprehensive Study List, it should have been assessed under comprehensive study assessment track. As a result, the Court determined that the federal responsible authorities (Department of Fisheries and Oceans and Natural Resources Canada) did not have the statutory discretion under the CEAA to retroactively limit the scope of the environmental assessment to the extent that the project no longer qualified for a comprehensive study assessment but instead was subject to a screening.

At the same time, Mr. Justice Rothstein also determined that Red Chris should not be ordered to substantially re-do the environmental assessment. He noted that Red Chris did nothing wrong in following an approach to environmental assessment that was determined by the federal government. Mr. Justice Rothstein also found that MiningWatch did not bring forward any evidence of dissatisfaction with the environmental assessments that had been conducted by the B.C. Environmental Assessment Office or the federal responsible authorities. Instead, MiningWatch only brought the judicial review as a test case of the federal government's obligations under section 21 of the CEAA for conducting comprehensive studies.

Background

In seeking to develop a copper and gold open pit mining and milling operation in north-western British Columbia, Red Chris submitted a project description to the BC Environmental Assessment Office ("BCEAO") on October 27, 2003. Red Chris followed other steps in the provincial environmental process, including seeking public comment on the project. The BCEAO determined that the project was not likely to cause significant adverse, environmental, heritage, social, economic or health effects and issued a provincial environmental assessment certificate.

On May 3, 2004, Red Chris also submitted to the federal Department of Fisheries and Oceans ("DFO") applications for dams required to create a tailings impoundment area thereby triggering the federal environmental assessment process. Initially, as a responsible authority ("RA") under the CEAA, DFO indicated that a comprehensive study was required since the project's proposed ore production fell within the provisions of the *Comprehensive Study List Regulations* ("CSL") as established under the CEAA.

On June 2, 2004, Natural Resources Canada announced that it was also a RA because Red Chris required an approval under the *Explosives Act*.

However, DFO subsequently scoped the project so as to exclude the mine and mill and thus concluded that a comprehensive study was no longer necessary and that the assessment could proceed by way of a screening – a less intensive level of assessment.

Additional public comment was not sought and the screening instead relied on the information that had been obtained through the provincial environmental assessment process. The federal screening report concluded that the project was not likely to cause significant adverse environmental effects and the RAs made the decision to allow the project to proceed.

MiningWatch filed an application for judicial review of the decision to conduct a screening rather than a comprehensive study. The Federal Court allowed the application finding that the RA had breached its duty under the CEAA by scoping the environmental assessment down to a screening. The Court also quashed the government decision to issue permits and approvals and prohibited further action by the RA until it had conducted a public consultation and completed a comprehensive study pursuant to section 21 of the CEAA. The Federal Court of Appeal set aside the decision.

Issue

The issue here was whether the RAs had the discretion under the CEAA to determine whether an environmental assessment could proceed by way of a screening or a comprehensive study.

Judicial Analysis and Decision

1. Mr. Justice Rothstein noted that the decision of the Federal Court of Appeal and the positions of the government and Red Chris on the proper interpretation of section 21 were largely based on their interpretation of the application of section 15(1) of the CEAA which grants the discretion to "scope" the project as follows:

"**15.** (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
(a) the responsible authority; or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority".

Red Chris and the government took the position that section 15(1) is of "general application" and conferred on the RA the discretion to determine the scope of the project in relation to which an environmental assessment was to be conducted. Therefore, even though a project as proposed by the proponent was under the CSL, it was open to the RA to scope the project for federal assessment down to a screening.

2. For Mr. Justice Rothstein, the starting point for statutory interpretation in this case was section 2 of the CEAA and the definition of "project". It provides, in part:

"means

(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work..."

Since the definition of "project" expressly uses the word "proposed", according to the Court, it therefore meant "project as proposed by the proponent". Further, inclusion of the word "proposed" in the CSL suggests that the opening words of section 21 respecting the conduct of comprehensive assessments should be interpreted as "where the project 'as proposed' is described in the CSL" and not "where a project 'as scoped by the RA' is described in the CSL".

3. Mr. Justice Rothstein stated that such an interpretation is consistent with the fact that the CEAA grants the Minister the authority to prescribe that certain projects or classes of projects are subject to a comprehensive study pursuant to section 58(1)(i). By accepting the arguments of Red Chris and the government, the Minister's authority would be overridden by the RA, presumably under section 15(1), to determine on a case-by-case basis whether a project would be subject to a comprehensive study.

"In other words, the decisions of the Minister would be subordinate to decisions of the RA. The presumption in Canada, with a democratically elected responsible government, must be the other way around... It would follow that by authorizing the Minister to make such regulations and thereby determine which projects require comprehensive study, Parliament intended the Minister to determine which projects did or did not require comprehensive study, not the RA" [paras 32 & 33]

4. Based on the foregoing, Mr. Justice Rothstein found that, generally, the RA does not have the discretion to determine the assessment track (screening versus comprehensive study) but once the appropriate track is determined, the RA does have the discretion to determine the scope of the project for purposes of the assessment. In the case of a project in the CSL, the RA, after ensuring public consultation in accordance with section 21(1) of the CEAA, can determine the proposed scope of the project for the purposes of a comprehensive study. Under section 21(2)(a), the RA reports to the Minister on its determination and recommends to the Minister to continue with environmental assessment by means of a comprehensive study to be conducted by the RA, or alternatively that the Minister refer the project to a mediation or panel review under section 21(2)(b). In the event that a project is referred to a mediator or a panel review under section 21.1(1)(b), the scope of the project is determined by the Minister after consulting with the RA.

5. Further, with respect to section 15 of the CEAA, the minimum scope of the project is as proposed by the proponent. However, pursuant to section 15(3), the RA or the Minister has the discretion to enlarge the scope when required by the fact or circumstances of the project. The RA or the Minister is

also granted further discretion by section 15(2) to combine related proposed projects into a single project for purposes of the assessment.

6. With respect to the issue of federal and provincial environmental assessments for a project, Mr. Justice Rothstein recommended that RAs can, and should, minimize duplication by using the coordination mechanisms provided for in the CEAA. He noted that detailed provisions for coordination are set out in the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, the *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (2004), and similar provincial-federal harmonization agreements across the country.

In the present case, the RAs were "free to use any and all federal-provincial coordination tools available, but they were still required to comply with the provisions of the CEAA pertaining to comprehensive studies". [para. 42]

Remedy

1. Mr. Justice Rothstein set out three reasons why he did not order Red Chris to re-do the environmental assessment or conduct any further public consultation respecting its environmental assessment:

- (i) In scoping the project down to a screening, the RAs were following a decision of the Federal Court (*TrueNorth*) that had been released after the initial decision had been taken to conduct the assessment under the comprehensive study provisions;
- (ii) Red Chris did nothing wrong as the approach to the environmental assessment was determined by the government; and
- (iii) According to the evidence, Red Chris cooperated fully with the environmental assessment conducted by the BCEAO.

2. In addition, MiningWatch stated that it had no proprietary or pecuniary interest in the outcome of the proceedings. MiningWatch did not participate in the environmental assessment conducted by the BCEAO. Nor did it bring forward any evidence of dissatisfaction with the environmental assessments conducted by the BCEAO or the RAs. Instead, MiningWatch only brought this judicial review as a test case of the federal government's obligations under section 21 of the CEAA.

3. For the foregoing reasons, Mr. Justice Rothstein concluded that the only appropriate relief in this instance would be to allow the application for judicial review and declare that the RAs erred in failing to conduct a comprehensive study.

Public Reaction and Conclusion

This is the first time that the Supreme Court of Canada has ruled on any aspect of the CEAA. The Court has provided a clear interpretation on the issue of scoping and the extent to which RAs can exercise discretion in relation to this aspect of the environmental assessment process.

The reaction of environmental non-governmental organizations to the decision has been mixed. Ecojustice stated that "this landmark decision confirms that the government can no longer shirk the environmental protection duties that Parliament has assigned to it". Canadian Environmental Law Association legal counsel, Rick Lindgren, said:

"We are pleased that the Court has affirmed the importance of public participation in environmental decision-making, and we hope this decision breathes new life into Canada's environmental assessment law".

On the other hand, Sierra Club of Canada expressed disappointment that the decision allows the Red Chris mine to proceed even though the federal government had been found to have violated the CEAA.

Not surprisingly the President and CEO of the British Columbia Mining Association, Pierre Gratton, stated that they were pleased that the Court decision would not hold up the development of the Red Chris mine. He went on to note that the Court had also sent a clear signal that when it comes to environmental assessment, federal and provincial governments should avoid duplication and act in a cooperative and coordinated fashion.

It will be very interesting to see how, in the future, proponents will describe their projects for the purposes of federal environmental assessment, and the extent to which RAs or the Minister will use their discretion to enlarge the scope of assessment when required by the facts and circumstances.

Charles Birchall is a Partner at Fogler, Rubinoff LLP and specializes in environmental law, both the regulatory and transactional aspects thereof. He can be reached at (613) 842-7440 or cbirchall@foglers.com.

For further information, please contact Charles Birchall or your usual Fogler, Rubinoff LLP contact.

This update is intended for general informational purposes only and should not be relied upon as legal advice.