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MINING WATCH CANADA V. CANADA (FISHERIES AND OCEANS)

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The Supreme Court of Canada's recent decision, *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, provides important guidance for natural resource developers and transporters whose projects may be subject to the federal environmental assessment process in the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA").

Case Summary

Red Chris Development Company ("Red Chris") and BCMetals Corporation applied to the B.C. Environmental Assessment Office for an environmental assessment certificate for the development of a copper and gold open pit mining and milling operation in northwestern B.C. The provincial environmental assessment was completed and the certificate was issued. Approval was also required from the federal Department of Fisheries and Oceans ("DFO"), which triggered the federal environmental assessment process under the CEAA.

The DFO initially determined that a comprehensive study was required because the ore production would be greater than the threshold in the *Comprehensive Study List Regulations*, SOR/94-638 ("CSL"). The DFO later finalized the scope of the project as only including the tailings impoundment area, the water diversion system and the explosives storage and manufacturing (for which a separate federal approval was required from Natural Resources Canada (NRCAN)). The DFO determined that since the mine and mill were no longer included in the project as scoped, a comprehensive study was not required and it proceeded with an environmental assessment by way of a screening.

MiningWatch Canada filed an application with the Federal Court for judicial review of the decision to conduct a screening rather than a comprehensive study. The issue before the Supreme Court of Canada was whether a Responsible Authority ("RA") has the

discretion under the CEAA to determine whether an environmental assessment proceeds by way of a screening or a comprehensive study.

The Court held that when determining which track of assessment a project should take, the term "project" must be interpreted as "project as proposed", not "project as scoped". The determination of whether a project requires a comprehensive study is not within the discretion of a RA. If the project as proposed is listed in the CSL, a comprehensive study is mandatory.

The Court made it clear that the tracking and scoping of a project are distinct steps in the CEAA. After the project has been tracked, the RA (and in some cases the federal Environment Minister) has discretion to scope the project, but this discretion is limited. The scope of the project may be enlarged, however the minimum scope is the project as proposed by the proponent. RAs also have the discretion to combine projects. It was noted that RAs should minimize duplication of assessments by coordinating with provincial counterparts.

The Court declared that the RAs, the DFO and NRCAN, erred in failing to conduct a comprehensive study. However it declined to grant any further relief because Mining Watch had initiated judicial review as a test case. Also, since there was no substantive opposition to the mine itself, the Court held that the existing permits should not be quashed. The environmental assessment process did not have to be undertaken all over again.

Recommendations

The Red Chris case contains a number of important lessons for natural resource developers in all sectors, including mining, forestry, energy and transportation. Because the scope of a project to be assessed under federal legislation is, at minimum, the project as proposed by a developer, care must be taken in the preparation of project descriptions to minimize jurisdictional overlap and procedural delays. The Red Chris decision also underlines the risks associated with project designs that entail minor or ancillary federal

approvals, and the need to understand and explore opportunities for coordination of federal and provincial environmental assessment processes at the earliest stages of project planning.

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For further information or specific advice on how federal and provincial environmental assessment laws may affect your business, please contact us.

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