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THE ENVIRONMENTAL ASSESSMENT TRACK – DISCRETION TO SCOPE IS NOT DISCRETION TO TRACK?

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In the ***Mining Watch Canada* v. *Canada (Fisheries and Oceans)*,** 2010 SCC 2, Red Chris Development Company and BCMetals Corporation ("Red Chris") sought to develop a copper and gold open pit mining and milling operation in north-western British Columbia. In May 2004, Red Chris triggered a federal environmental assessment by submitting to the Department of Fisheries and Oceans ("DFO") applications for dams required to create a tailings impoundment area.

DFO initially concluded that a comprehensive study was required because the project's proposed ore production was great enough that it fell within the provisions of the *Comprehensive Study List Regulations*, SOR/94-638 ("CSL"), under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("*CEAA*"). However, DFO subsequently advised that it had scoped the project such that it excluded the mine and the mill and, as a result, a comprehensive study was not necessary and the assessment would proceed by way of screening.

In April 2006, the Screening Report was released, concluding that the project is not likely to cause significant adverse environmental effects, and in May 2006, the project was allowed to proceed.

In June 2006, Mining Watch Canada, a non-profit society interested in the environmental, social, economic, health and cultural effects of mining and in particular its effects on indigenous people, filed an application in the Federal Court for judicial review of the decision to conduct a screening rather than a comprehensive study. It alleged a breach of the duty under the *CEAA* to conduct a comprehensive study and to consult the public on the scope of the assessment.

The Federal Court allowed the application, concluding that the DFO had been correct in first determining that the project required a comprehensive study. However, the Federal Court of Appeal allowed the appeal, holding that "project" for federal environmental assessment purposes means "project as scoped" by a federal responsible authority ("RA").

The issue before the Supreme Court of Canada thus became whether the environmental assessment track is determined by the project as proposed by a proponent or by the discretionary scoping decision of the federal authority.

The position of Red Chris and the government was that s. 15(1) of the *CEAA*, which grants the discretion to "scope" the project, i.e. define what aspects of the project will be included in the federal environmental assessment, includes the discretion to "track" the project, i.e. determine the level of assessment. According to this argument, even though a project as proposed by a proponent appears in the CSL, it is open to a RA to scope the project for federal environmental assessment purposes in a

more limited way. If the project as scoped by the RA is not in the CSL, it will be subject to a screening and not a comprehensive study.

Mr. Justice Rothstein, speaking for an unanimous Court, held that the approach of the Federal Court of Appeal and that advocated by Red Chris and the government could not be sustained. He concluded the *CEAA* and regulations require that the environmental assessment track be determined according to the project as proposed; it is generally not open to a federal authority to change that level.

This conclusion was based on Rothstein J.'s interpretation of s. 21(1) of the *CEAA*, which initiates the set of procedures that RAs must follow when a project is listed in the CSL. He found that the word "project" in s. 21 meant "project as proposed" by the proponent, not "project as scoped" by the RA. This was based on three main considerations:

- The statutory definition of "project" in s. 2 of the *CEAA* is "project as proposed", and there is nothing in s. 21 to suggest that the defined term is not applicable or is displaced by the project as scoped by the RA under s. 15.
- The CSL describes projects in terms of proposals.
- The *CEAA* grants the Minister the authority to prescribe that certain projects or classes of projects are subject to a comprehensive study. Red Chris and the government's interpretation of s. 21 would subordinate decisions of the Minister to decisions of the RA, which runs contrary to the presumption in Canada with a democratically elected responsible government.

Mr. Justice Rothstein also held that tracking and scoping are distinct steps in the *CEAA* process. While the RA does not have the discretion to determine the assessment track, once the appropriate track is determined, it has the discretion to determine the scope of the project for the purposes of assessment under s. 15(1)(a). Further, while the presumed scope of the project to be assessed is the project as proposed by the proponent, under s. 15(2) or (3), the RA or Minister may enlarge the scope in the appropriate circumstances.

In result, since the project as proposed by Red Chris was described in the CSL, the Court held that the requirements of s. 21 applied. 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. By conducting a screening, the RAs acted without statutory authority.

The application for judicial review was allowed, and the Court declared the RAs erred in failing to conduct a comprehensive study. No further relief was warranted in the circumstances because the Court held that Mining Watch had no proprietary or pecuniary interest in the outcome of the proceeding and did not participate in the environmental assessment. Thus because there was no evidence of dissatisfaction by an interested party, this was just a test case and no further relief was warranted and Red Chris was not required to repeat the environmental assessment process.

For further information on this case or the environmental assessment process, please contact:

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