

SUPREME COURT OF CANADA RESTRICTS FEDERAL DISCRETION IN ENVIRONMENTAL ASSESSMENTS

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In its recent decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)* (“*Red Chris*”), the Supreme Court of Canada has issued a significant reconsideration of the law applying to federal environmental assessments. Under this new guidance from the Supreme Court, the primary power to determine the scope of a project which may have an environmental impact is returned to the project proponent, while the federal regulators now have significantly less discretion to alter that scope (and, apparently, none at all to narrow it). This is an important development of interest to all proponents of projects which will have an environmental impact, as the “scope” of the project determines whether federal environmental assessments under the *Canadian Environmental Assessment Act* (“CEAA”) and its associated regulations will apply (in addition to provincial assessments) and, if so, the intensity of the required federal assessment.

Any project with a potential environmental impact will require approvals and assessments under the relevant provincial regulatory regime, but projects with a “trigger” that involves federal jurisdiction (commonly an impact on fish habitat or the spanning of a navigable waterway) will also require assessment under CEAA. CEAA sets forth five potential procedural tracks for environmental assessment, the selection of which depends upon the nature of the project. The five tracks vary in their levels of intensity, from no assessment at all through screenings, comprehensive studies, and mediation, and all the way up to a formal review panel. In order to determine the appropriate track, it is necessary for the federal regulator (the “responsible authority” or “RA”) to determine the scope of the project in question. Depending on the nature of the work or activity to be reviewed, the legislation sets forth guidelines as to the intensity of the assessment track that will apply. Accordingly, scoping of the project is a critical question.

In the *Red Chris* decision, the proponent submitted a project description in relation to a proposed copper and gold open pit mining and milling operation in British Columbia. *Red Chris* also submitted to the federal Department of Fisheries and Oceans (“DFO”) the necessary applications for dams to create a tailings impoundment area. While the DFO initially scoped the project as including the mine and mill and, therefore, indicated that it required a comprehensive study in accordance with CEAA, DFO subsequently re-scoped the project so as to exclude the mine and mill. On that basis, the project only required a screening. The screening report that was subsequently prepared concluded the project would not likely cause any significant adverse environmental effects, and so the project was allowed to proceed. MiningWatch filed an application for judicial review of the decision to conduct a screening rather than a comprehensive study.

Red Chris and the federal government relied heavily on two prior Federal Court of Appeal decisions addressing the question of the scoping of a project for CEAA purposes: *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* (“*TrueNorth*”), and *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)* (“*Sunpine*”). These cases addressed the issue of scoping, and concluded that the RA has the jurisdiction to scope the project, and may do so differently and in a more narrow manner than the scope as initially set forth by the project proponent. In particular, these cases indicated that the RA could scope a project such that only the particular elements of the project falling under federal jurisdiction need to be considered for the determination of the assessment obligations under CEAA. This line of reasoning vests significant discretion in the RA to scope the project narrower than as presented by the proponent, and thereby to arrive at a different level of intensity for assessment of that project under CEAA.

The Supreme Court in *Red Chris* specifically held that the approach advocated by the proponent and Canada, namely, that it is open to an RA to scope the project for federal environmental assessment purposes in a more limited way than as proposed by the proponent, could not be sustained. Further, the Supreme Court specifically stated that to the extent that the *TrueNorth* and *Sunpine* decisions “are inconsistent with the analysis that follows, these reasons now

govern.” Accordingly, the Supreme Court has overruled prior appellate court reasoning in relation to the scoping of projects under CEAA.

The Supreme Court’s analysis of the appropriate approach involved an interpretation of the express wording of CEAA. The Supreme Court concluded that the proper interpretation of the word “project” in CEAA, in relation to scoping, is “project as proposed” as opposed to “project as scoped by the RA”. Based on its interpretation of the language of CEAA, the Supreme Court concluded that the *minimum* scope is the project as proposed by the proponent. Such discretion as is vested in the RA under CEAA, the Court concluded, was discretion only to *enlarge* the scope as required by the facts and circumstances of the project. Further, this discretion is an “exception to the general proposition that the level of assessment is determined solely based on the project as proposed by the proponent”. It is necessary, the Supreme Court observed, for this exception to ensure that a proponent does not engage in “project splitting” in order to circumvent additional assessment obligations.

Accordingly, on the facts of the *Red Chris* case, the RAs acted without statutory authority by narrowing the scope of the project such that it was only subject to a screening. Based on the project as proposed by *Red Chris*, the project was expressly subject to comprehensive study assessment under the CEAA scheme. The application for judicial review was allowed, and a declaration was issued that the RAs erred in failing to use the project as proposed by *Red Chris* to determine whether CEAA was triggered, whether any exclusion applied, and the track of environmental assessment to be applied.

This case is of significant interest for project proponents whose project may be subject to a federal environmental trigger. Clearly, a careful and appropriate delineation of the scope of the project in the initial proposal is essential, in order to ensure that an appropriate scoping is arrived at under CEAA. If not, than an excessively onerous environmental assessment process may be the result, with significant implications for the success of the project. Further, as a practical matter this decision may result in large development projects being subject to comprehensive environmental assessments at both the provincial and federal levels. However, the Supreme Court stressed that duplication of assessment should be avoided, and encouraged the use of available coordination mechanisms under CEAA.

Shortly after the decision was issued, the Canadian Environmental Assessment Agency (the federal agency responsible for administering CEAA) posted a “Fact Sheet” on its website, outlining the impact of the decision on the assessment process. The Agency indicates that, as the Supreme Court “has established that the project as proposed by the proponent must be assessed, the scope of future projects is expected to be confirmed promptly and efficiently”. The Agency also advises that ongoing environmental assessments are being examined to ensure that the scope of the project complies with the Supreme Court’s ruling, and that in situations where the scope of the project to be assessed already matches that of the proponent, the environmental assessment will proceed unchanged. However, where the current scope of the project is not consistent with the proponent’s development proposal, the RA will now have to revise the scope.

Lastly, in the immediate context, the impact of this decision has been to effectively grind federal environmental approvals processes to a halt while the various RAs grapple with the implications of the decision for the various applications before them, and so project proponents are facing delays in obtaining the approvals necessary to proceed with their projects. Accordingly, while the Agency expects future applications to be processed “promptly and efficiently”, in the short term at least such has not proven to be the case.