

## OF PROPOSING AND SCOPING: SEMINAL ENVIRONMENTAL ASSESSMENT DECISION BY SUPREME COURT OF CANADA

Today, the Supreme Court of Canada released its much anticipated environmental law decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2. The Court unanimously held that, under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”), the level of scrutiny to be imposed by a federal environmental assessment is determined by the project “as proposed” by a proponent, rather than by a discretionary scoping decision of the federal authority charged with carrying out the assessment.

The Red Chris Mine is a proposed open-pit mining and milling operation for the production of copper and gold, located within the Tahltan Nation traditional territory, approximately 450km north of Smithers, British Columbia. The federal environmental assessment process concerning the Red Chris Mine was triggered in May 2004, when the mine proponents (Red Chris Development Company Ltd. and bcMetals Corporation) submitted two applications to the Department of Fisheries and Oceans (“DFO”) concerning the construction of starter dams relating to tailings impoundment and stream crossings. Shortly thereafter, Natural Resources Canada (“NRC”) became involved in the environmental assessment process, due to the proposed use of explosives and their storage at the mine. Together, DFO and NRC became the “Responsible Authorities” charged with carrying out the federal environmental assessment process of the mine, under the CEAA.

Depending on the particular project under review, the CEAA imposes different levels of scrutiny during a federal environmental assessment. For some projects, a “comprehensive study” that includes a mandatory public consultation process is required, under section 21 of the CEAA. For others, only a “screening report”, with optional public consultation, is required, under section 18 of the CEAA. In this case, the proposed scope of the mine and milling operation triggered the application of the CEAA’s Comprehensive Study List Regulations, which required that a mandatory comprehensive study and a public consultation be carried out.

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Thereafter, however, the DFO reduced the scope of the proposed mining project so that it did not trigger the Comprehensive Study List Regulations, thereby eliminating the requirement for a comprehensive study and mandatory public consultation.

In 2006, Miningwatch Canada, an environmental advocacy group, began a judicial review application in Federal Court, requesting that the court overturn DFO's decision to "re-scope" the Red Chris Mine environmental assessment. The issue was whether DFO had exceeded its jurisdiction by narrowing the scope of the assessment process after it had already commenced. The judicial review judge quashed the DFO's re-scoping decision, holding that whether a project triggers a comprehensive study depends on the project "as proposed" by the proponent, not as re-scoped by the federal authority. On appeal by the mining company and the federal authority, the Federal Court of Appeal overturned the previous decision, and held that whether or not a comprehensive study is warranted under section 21 of the *CEAA*, should only be determined after a Responsible Authority has exercised its discretion to re-scope a project.

In allowing the appeal, the Supreme Court unanimously rejected the reasoning of the Federal Court of Appeal. The Court held that the word "project" in section 21 of the *CEAA* means "project as proposed" by a proponent, rather than as re-scoped by a federal authority, meaning that a mandatory comprehensive study should have been carried out with respect to the Red Chris Mine.

The Court did not, however, restore the decision of the judicial review judge in its entirety, finding his remedy to be overbroad. Instead, the Court held that the appropriate relief to be granted was simply to declare that the federal authority erred in failing to conduct a comprehensive study, but not to require any further environmental assessment of the Red Chris Mine to be carried out. The Court saw no reason to require the Red Chris Mine proponents to repeat the environmental assessment process, because the mine proponents had done nothing wrong and would be prejudiced by the resulting cost and delay, and Miningwatch had not challenged the substantive conclusions of the federal environmental assessment, or of the provincial environmental assessment that had been carried out by the British Columbia Environmental Assessment Office.

Importantly, this is the first Supreme Court of Canada decision to interpret the procedural operation of the *CEAA* in relation to environmental assessments, and the proper sequence of decisions to be made when determining the level of scrutiny to be imposed on a particular project. It clarifies that where a proposed project triggers a comprehensive study under section 21 of the *CEAA*, a federal authority has no discretion to reduce its scope so as to eliminate the comprehensive study requirement. If, however, a proposed project is not sufficiently described, a federal authority does have the discretion to increase its scope so as to trigger a comprehensive study.

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If you have any questions about these or other environmental law matters, please contact any member of our **Environmental Law Group**.

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