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BC Supreme Court Quashes Morrison Copper/Gold Project Environmental Assessment Certificate Decision

On December 9, 2013, the BC Supreme Court issued a ruling quashing the decision of provincial ministers to refuse an environmental assessment certificate for Pacific Booker Minerals' Morrison Copper/Gold Project (the "Project").[1]

Key Points

The key points of this decision include the following:

- Proponents have a right to expect procedural fairness in an environmental assessment process and the fact that the Environmental Assessment Office (the "EAO") has broad discretion and expertise in making its substantive assessments does not make it any less subject to procedural fairness requirements than other statutory bodies.
- The decision making in the environmental assessment process consists of distinct but interrelated acts – the assessment report, the recommendations of the Executive Director, and the decisions of the ministers. No one step is determinative of the others.
- In some cases it will be necessary for proponents to have a right to know and respond to the Executive Director's recommendations before an environmental assessment decision is made by the ministers.

[1] The decision is available at http://www.courts.gov.bc.ca/jdb-txt/SC/13/22/2013BCSC2258.htm.

Background

On August 2012, the EAO issued its assessment report in respect of the Project, which concluded that with the successful implementation of mitigation measures, the Project was not likely to cause significant adverse environmental effects. The report also concluded that the concerns of First Nations, government agencies and the public about the Project that were within the scope of the environmental assessment had been adequately addressed, and that the provincial Crown had fulfilled its legal duty to consult First Nations about the Project.

Despite all of these findings in the report, many of which were repeated in the Executive Director's recommendations to the ministers, the Executive Director recommended that the ministers not issue a certificate to the proponent in respect of the Project. This conclusion was based on another recommendation set out by the Executive Director – that the ministers consider a number of additional factors beyond those in the assessment report. These additional factors included things like:

- The anticipated long-term decline in water quality in Morrison Lake
- Opposition from Gitxsan and Gitanyow Nations and Lake Babine Nation[2]

The Executive Director also recommended that the ministers adopt a "risk/benefit" approach when considering the conclusions of the report against these additional factors.

The proponent was not provided a copy of the Executive Director's recommendations, nor was it informed about the nature of the Executive Director's conclusions and ultimate recommendation that the Project not be granted an environmental assessment

[2] The recommendations of the Executive Director are available at http://a100.gov.bc.ca/appsdata/epic/documents/p224/1351267631848_1e0424a4c33fe2a89a5cba0094045a393d68bb95d95cbc2051966e2005ca93a1.pdf.

certificate. Subsequently, the ministers issued a decision declining to grant the environmental assessment certificate that cited the "additional factors" set out in the Executive Director's recommendations. The proponent argued that the process leading up to the ministers' decisions was procedurally unfair. The proponent also argued that the "risk/benefit" analysis suggested by the Executive Director in his recommendations had not been provided for in the procedural order for the assessment of the Project and represented a new approach in the environmental assessment decision-making process.

The Court ultimately granted some of what the proponent sought in its judicial review application – it:

- Declared that the Executive Director's referral to the ministers and the ministers' decision did not adhere to the requirements of procedural fairness
- Quashed and set aside the ministers' decision regarding the Project certificate
- Remitted the decision regarding the Project certificate to the ministers for reconsideration

In its decision, the Court rejected the proponent's argument that that the Executive Director is required by the language of the *Environmental Assessment Act* (the "Act") to make recommendations to the ministers that are consistent with the assessment report. To this end, the Court concluded that the Act does not preclude the Executive Director from exercising discretion in commenting on the assessment report and adding considerations in his recommendations to the ministers that have not been addressed in the report, and that to interpret the Act in a manner that limits the Executive Director's ability to do so would not meet the objectives of the Act. The Court expressly rejected the argument that the Executive Director's suggestion that a "risk/benefit" analysis be used introduced a new analytical tool, noting that the entire environmental assessment process can be viewed as a risk/benefit analysis. The Court's discussion of the

assessment report, the Executive Director's recommendations to the minister and the ministers' decision treats them as separate stages in an environmental assessment decision.

In finding that the decision-making process leading up to the denial of the certificate did not comport with the requirements of procedural fairness, the Court stated that the proponent had a legitimate expectation that it would be given the opportunity to be heard when serious concerns – such as those of the Executive Director in his recommendations – were expressed by others about the Project. The Court found that the proponent ought to have been entitled to know the essence of the adverse recommendations and respond to them in writing.

Commentary

The decision confirms what legal counsel are frequently called upon to remind government officials in many contexts – that the principles of administrative fairness apply to proponents as well as other interested parties and aboriginal groups. Leaving aside all of the details of the environmental assessment process and the broad discretion of the Executive Director, at its roots, environmental assessment is just another regulatory process for which common law principles of procedural fairness remain fully alive.

While most of the decision is good news for project proponents and should enhance certainty and predictability in procedural respects, there is one aspect of the decision that may be troubling from a practical perspective. That is the Court's holding that there was nothing wrong with the Executive Director using a "risk/benefit" approach when making recommendations, even though there was no such methodology referenced in the Act, the procedural order or any of the EAO's policy and guidelines documents. The Court stated:

> [126] Nor do I accept that the use of the expression "risk/benefit" analysis introduced a new analytical tool into the decision-making process. I view the entire environmental

> assessment process, and the decision-making role of the ministers following receipt of a report, along with the executive director's recommendations, as a "risk/benefit" analysis. The ultimate task of the ministers was to make a decision about the certificate after taking into account the technical analysis of environmental effects conducted by the EAO; the views of those affected by the project, prominent among which was the objections of First Nations; the risk of long term environmental damage and very substantial remediation costs if mitigation measures were not entirely successful, as well as the benefits to the people of this province of an employment and wealth generating project. They were then to weigh the risks against the benefits and decide whether it was in the public interest that the risks were worth taking. It should not be a surprise that the executive director recommended a "risk/benefit" analysis.

Those familiar with the environmental assessment process know that the *fundamental question* in environmental assessment – and the question upon which all of the EAO policies and guidance materials and reporting templates are based – is whether the project is considered "likely to have significant adverse effects". That is a term of art in the environmental assessment world, supported by well-developed and established methodologies in BC, Canada and elsewhere. While there has always been and will continue to be debates about the nuances and subtleties by which a determination of "significant adverse effects" occurs, there has never been any doubt that that is the most relevant question. Such language is found in section 10 of the Act as the very basis for deciding whether an assessment is required, and it is precisely the same test that the federal government used when developing the *Canadian Environmental Assessment Act, 2012* (see section 52).

Further, the EAO has previously used an objective framework for considering whether projects should be considered "justified" in cases where significant adverse facts are found to be likely, much as the federal government does under the *Canadian Environmental Assessment Act, 2012*. It considers questions such as the economic

benefits that a project provides, the contribution to community development, whether alternatives exist and how serious the adverse effects are, among other things.[3] Thus, the significant adverse effects test, coupled with the justification analysis, is both well-established and well-understood, and as such the environmental assessment process already includes a sophisticated risk/benefit analysis that examines a range of environmental issues and socio-economic benefits. Layering on a subsequent and rudimentary risk/benefit analysis would seem unnecessary at best and – at worst – could undermine the more structured analysis that has been used to date. Put simply, even if it is permissible from a legal perspective, there are significant questions from a policy perspective as to whether the EAO and the Executive Director should or will continue to use the risk/benefit test in any other case (and we are not aware of it ever having been used in other cases, either before or after the Morrison decision). If it is to be used, important questions will need to be answered, such as when the analysis will be undertaken, what factors will be considered, how it will relate to the significant adverse effects/justification tests and when the proponent or other parties will be allowed to comment on that analysis before decisions are made, among others.

In a similar regard, another challenging aspect of the Morrison decision arises from an atypical analysis and use of terminology in the assessment report. Whereas in most assessment reports written by the EAO, the likelihood of mitigation measures working is factored into the analysis of whether significant adverse effects are likely, in the assessment report for this Project, the "likelihood" part of the analysis seems to have been externalized and left adrift to some extent. This resulted in statements in the report that the Project was not likely to have significant adverse effects provided "the mitigation measures were effective". It was this atypical terminology that opened the door to the Executive Director saying

[3] See for example pages 71-74 of the assessment report for the Cabin Gas Plant at http://a100.gov.bc.ca/appsdata/epic/html/deploy/epic_document_341_31938.html.

he was not sufficiently confident of the mitigation measures, given the potential downsides if they did not work.

While these may sound like arcane and technical issues, they are in fact the very essence of environmental assessment and are fundamental to the ability of environmental consultants, legal counsel, investors and others to assess and advise on the likelihood of a project making its way successfully through the process. These questions play themselves out on a daily basis as investors decide whether, when and on what terms to invest in projects that can be multiple years and many millions of dollars away from a decision as to whether they can apply for permits. For these reasons, it may be helpful if the EAO were to issue policy guidance, as soon as practicable, to advise whether the "risk/benefit" approach is going to be used going forward, or whether it will be laid to rest at this point in time. While the Premier has noted that the Minister of Environment has been charged in her mandate letter with reviewing the EAO and presumably these issues are part of that, one also hopes that consideration will also be given to the old adage, "If something isn't broken, don't fix it". The EAO has one of the most enviable court records of any governmental agency anywhere – never having had a decision ultimately quashed by a court except in this particular case.

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a cautionary note

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