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Environment Assessment of Major Projects in British Columbia

November 16, 2011

Presented by Robin Junger

Overview

1. Updates in BC and federal environmental assessment (EA) law
   - 2010 and 2011 amendments to legislation
   - Case law developments
2. Making the most of creative options under the acts
   - Waive outs and alternative processes
   - Limiting the scope of federal comprehensive studies
   - Delegation and equivalency agreements
3. Practical tips for navigating the EA process and related aboriginal consultation

2010/2011 amendments to CEAA and regs

1. Changed the “responsible authority” for conducting the comprehensive study
   - Section 11.01 now provides that, for most major projects requiring a “comprehensive study” level of assessment, the Canadian Environmental Assessment Agency is the entity charged with undertaking the EA
   - Effect is to centralize major EA process responsibility in a single agency dedicated to this work

2010/2011 amendments to CEAA and regs

2. Eliminating the early “track decision”
   - No longer a requirement to make a track decision at the outset of the process (which often was delayed while further information was sought)
   - Minister of Environment now has the authority to refer project to an independent review panel at any time

2010/2011 amendments to CEAA and regs

3. Minister can set the scope of a project (s. 15.1)
   - Despite section 15, the Minister may, if the conditions that the Minister establishes are met, determine that the scope of the project in relation to which an EA is to be conducted is limited to one or more components of that project
   - Provision can be used to reduce overlap and duplication with matters being assessed in provincial process, and can preserve limited federal EA resources for those matters that are most closely connected to federal jurisdiction

2010/2011 amendments to CEAA and regs

4. Imposing timelines for certain aspects of the comprehensive study process
   - *Establishing Timeframes for Comprehensive Studies Regulation* came into effect on July 23, 2011
     - » Clarifies requirement for “project description” which in past caused much delay
     - » Upon reciept, CEAA has 90 days to decide whether the assessment will occur by way of a “comprehensive study”

2010/2011 amendments to CEAA and regs

- Comprehensive study report must be completed and notice of public comment period posted within 365 days of the notice of commencement.
- Some potential slippage regarding how the 365 days are calculated (see s. 5(2))
- Does not specify length of public comment period or time after which a decision must be rendered
- CEAA must report annually on its implementation of the timeline provisions.

Amendments to BC EA Act

- Addition of express authority to consider cumulative impacts
- -EAO has developed guidelines re implementation

EA case law update

- *MiningWatch Canada v.Canada (Fisheries and Oceans)*, 2010 SCC 2
  - Application for judicial review of the Department of Fisheries and Oceans decision to conduct a screening rather than a comprehensive study of a mining project
  - The department initially stated that a comprehensive study was required because the project fell within the *Comprehensive Study List Regulations* under the federal EA act. Subsequently, the project was scoped to exclude the mine and mill. Given this the department determined that assessment would proceed by way of screening

EA case law update

- *MiningWatch* cont.
  - Court held that when determining which track of assessment a project should follow, the term “project” must be interpreted as the “project as proposed” by the proponent
  - The responsible authority does not have the discretion to determine whether a project required a comprehensive study. If the project as proposed is listed in the *Comprehensive Study List Regulations,* a comprehensive study is mandatory

EA case law update

- *Quebec (Attorney General) v. Moses*, 2010 SCC 17
  - Company proposed to build a mine in an area covered by the James Bay and Northern Quebec Agreement (treaty)
  - Primary issue was whether the Agreement precluded an EA by the federal government pursuant to the federal EA act
  - It is divided lands into three jurisdictional categories and said there would be no more than one EA (unless project fell within both federal and provincial jurisdiction)
  - First case interpreting the treaty since it was signed in 1975
  - Harsh difference of views among the judges

EA case law update

- *Moses* cont.
  - Majority held that treaty EA provisions related only to EA undertaken within the treaty context to support decision by "the administrator" to allow the project
  - Did not affect EA required to support decisions otherwise required under general federal law (fisheries). Treaty could not effectively "force" federal officials to issue such authorizations when CEAA said federal EA was required
  - May see similar issues arise in BC with modern day treaties that have EA provisions

EA case law update

- *Canadian Transit Co. v. Canada (Minister of Transport)*, 2011 FC 515
  - Case involved challenge to federal EA decision to permit new bridge crossing between Windsor and Detroit
  - Challenge was brought by Sierra Club and a company that wanted to expand the existing bridge
  - Alleged various errors including bias, failure to consider need for the project, failure to duly consider cumulative effects and failure to duly consider the precautionary principle
  - Carefully applied standard of review analysis to each issue and did not accept any of the claims
  - Gives wide discretion to EA officials - acknowledges that mitigation measures can be augmented after EA approval

EA case law update

- *Nlaka'pamux Nation Tribal Council v. British Columbia,* 2011 BCCA 78
  - Multiple First Nation entities involves, each claiming they spoke for the Nation
  - EAO addressed consultation with numerous bands through the formal procedural order, and consulted NNTC outside of it
  - Court held that NNTC should have been named in the order. No remedy ordered however
  - Court essentially said that when faced with competing claims of aboriginal representation government must engage with all

EA case law update

- *Upper Nicola Indian Band v. British Columbia (Environment)*, 2011 BCSC 388.
  - Aboriginal groups challenged the EA Certificate relating to the construction of an electrical transmission line from the interior of the province to the lower mainland
  - Part of the proposed project used the right-of-way of two existing transmission lines built in the 1960s and 1970s
  - Aboriginal groups argued the scope of the Province's duty to consult includeed existing and ongoing impacts of past works that were not consulted upon

EA case law update

- *Upper Nicola Indian Band* cont.
  - The court rejected this argument and held that:
    - » Duty to consult is confined to the impact on the claimed rights of the current decision under consideration
    - » Other avenues are available to deal with historic and ongoing impacts of past decisions, such as suits for damages and treaty tables
  - Court also found that while the Crown had offered to engage in separate consultations regarding past works, that was not part of the duty to consult and not amenable to judicial review

EA case law update

- *Halalt First Nations v British Columbia (Minister of Environment)*, [2011] B.C.J. No. 559
  - Halalt challenged the EA certificate issued for the Chemainus Wells Project
  - Project as originally proposed consisted of three groundwater extraction wells operating year round
  - Scope of the project was narrowed after tests and studies concluded that groundwater extraction year round could reduce river flows and have significant adverse effects on fish habitats during the dry summer months

EA case law update

- *Halalt* cont.
  - Court held that the Province failed to discharge its duty to consult the Halalt and accommodate its asserted interests
  - Said modifications to the Project were not made in consultation with the Halalt but in response to concerns that the Project as initially designed would not be approved
  - Court also found EAO did not undertake a proper strength of claim assessment
  - Decision is being appealed

EA case law update

- *Friends of Davie Bay v. British Columbia*, [2011] B.C.J. No. 832
  - Friends of Davie Bay sought judicial review of the BC EAO's decision that an EA was not required for a proposed limestone quarry on Texada Island
  - Friends of Davie Bay argued that the BC EAO erred in interpreting the term "production capacity" in the regulations that determine whether EA is triggered

EA case law update

- *Davie Bay* cont.
  - Petitioners argued “production capacity” should not be interpreted only as the intended capacity during operations, but the potential capacity of the quarry upon review of the project’s land base, facilities and equipment
  - Court dismissed the application – “production capacity” referred to the permitted and intended levels of production
  - Deference was given to EAO in interpreting its statute
  - Court also noted importance of certainty and clarity regarding what triggers the *Reviewable Projects Regulation*

Creative options under the BC act – waive outs and alternative processes

- Waive out applications under s. 10(1)(b) where project is not likely to have significant adverse impacts
- Form of process can be flexible even where EA is required
  - Procedural requirements are spelled out in a “procedural order” of the Executive Director or his delegate, which can be tailored
  - Efficiencies can include things like using information from another EA where relevant
  - EAO has done things like the Common Issues and Commitment Report for secure landfills

Creative options under the BC act – equivalency agreements

- Agreement where one level of government accepts the other's EA as "equivalent" to its own, and in doing so eliminates the obligation for EA to be conducted under its legislation
- Section 27 of the BC EA act confers the minister with the power to enter into equivalency agreements
- Federal government has ability to enter into agreements to have province accept a federal EA equivalent but it does not have the ability to do the opposite e- i.e. accept provincial EA as equivalent
- Province of BC and industry have sought amendment to CEAA

Creative options under federal legislation

- Scope down a comprehensive study (discussed earlier)
  - Minister needs to establish conditions before exercising that power (and not yet done)
- Delegate EA functions to a province
  - Power exists under section 17 of CEAA
  - Recently used for the first time (Northwest Transmission Line, Line Creek)
  - Federal government still makes EA decision

Practical tips

- Ensure a senior official in the company fully understands and oversees the environmental assessment process
- Help the Crown fulfill its duty to consult and engage aboriginal groups
- Choose a well regarded environmental assessment consultant and establish clear responsibilities as between the consultant, company officials and legal counsel
- Establish early and constructive relations with aboriginal groups, local governments, stakeholders and the general public

Practical tips (cont.)

- Ask environmental assessment officials to be creative and flexible - make process suggestions
- Help the Crown fulfill its duty to consult and engage aboriginal groups
- Consider economic benefits agreements with aboriginal groups but keep them distinct from the environmental assessment process and the duty to consult
- Monitor the environmental assessment process carefully - do not be afraid to question and challenge

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