Internet Case Study #13:

The Cheviot Court Case: Implications and Precedents for Environmental Effects of Mining in Canada

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ABSTRACT

The proposed Cheviot strip-coal mine is located close to Jasper National Park, in the Canadian Province of Alberta. This project was given provincial and federal environmental approvals, based on a federal/provincial Joint Review Panel. Environmental groups challenged the federal authorizations, focussing on three primary issues, (1) breach of duties by the Joint Review Panel, (2) failure to consider external submissions, and (3) authorizations by the federal Department of Fisheries and Oceans that violated the Migratory Bird regulations. The court found that the Cheviot approvals failed on all three issues. For example, the Panel had not performed its "onerous" duty to obtain all information on past and future activity in the area, even beyond that provided by the mining company, to determine cumulative environmental effects. Also, the Panel had not performed its duty to consider alternative methods of mining (underground mining in this case) in the detail and intensity as the proposed open-pit mining. As a result, the court invalidated the authorizations and indicated the Panel should reconvene to complete its duties properly.

1. INTRODUCTION

Most of us who are interested in minesite-drainage chemistry, and the environmental effects of mining, are not lawyers. As a result, we tend to separate the technical issues, which we enjoy, from the legal issues that we do not always fully understand. However, once in awhile, it is worthwhile to combine the two, which usually happens whenever there is a court case involving mining and the environment. We can benefit from these cases because they lead to formal clarifications and resolutions of regulatory ambiguities, and thus create future regulatory requirements by setting legal precedents for them. One recent case in Canada was decided on April 8, 1999 by the Federal Court of Canada, Trial Division (Docket T-1790-98, Judge Douglas R. Campbell).

This case involved the provincial and federal environmental approvals of the Cheviot Project, a proposed strip mine for coal near the Rocky Mountains and Jasper National Park. The Respondent was the mining company, Cardinal River Coals Ltd. The Applicants were the Alberta Wilderness Association, Canadian Nature Federation, Canadian Parks and Wilderness Society, Jasper Environmental Association, and the Pembina Institute for Appropriate Development.

2. BACKGROUND

In March of 1996, Cardinal River Coals Ltd. of Alberta applied to regulatory agencies for provincial approvals, and for federal authorization from the federal Department of Fisheries and Oceans (DFO), to build the Cheviot open-pit (strip) coal mine. This proposed minesite is located only 2.8 east of Jasper National Park in the Rocky Mountains, within the Province of Alberta. It would span 23 by 3.5 km in area, involve at least 30 open pits, move millions of tonnes of waste rock into stream valleys, and include roads, rail lines, and new electrical transmission line.

There was concern that the environmental effects of this proposed minesite would be significant and harmful. Because authorizations were needed from DFO, this activated the Canadian Environmental Assessment Act (CEAA) which required a detailed environmental assessment. When it was clear that there could be significant adverse effects, a review panel was convened under CEAA. To minimize duplication between the Province of Alberta and the federal government, a federal/provincial Joint Review Panel was formed on October 24, 1996. After hearings in early 1997, the Panel recommended approval of Cheviot on June 17, 1997. This resulted in environmental organizations (the Alberta Wilderness Association, Canadian Nature Federation, Canadian Parks and Wilderness Society, Jasper Environmental Association, and the Pembina Institute for Appropriate Development) initiating legal actions.

On October 31, 1997, these organizations, as well as First Nations at a later time, requested a judicial review of the Panel's report, but the DFO minister and the mining company indicated the 30-day limit had passed. On June 12, 1998, the request for a judicial review of the Panel's report was dismissed because the environmental groups had not challenged the federal response (the federal response was the final decision point and thus had to be challenged first - discussed in more detail below). The applicants appealed.

As the appeal was pending, the DFO minister began issuing authorizations on August 17, 1998 to begin construction. This led to the court case examined here, Docket T-1790-98 in the Federal Court of Canada, for a judicial review of the federal response and for a prohibition of future authorizations from DFO. On February 8, 1999, all legal action was referred to the Trial Division with T-1790-98 being heard and decided first, and the DFO minister was granted intervener status.

The trial addressed several questions and issues raised by the environmental groups. The primary issues were (1) breach of duties by the Joint Review Panel, (2) failure to consider external submissions, and (3) DFO authorizations that violated the Migratory Bird regulations.

3. ISSUE #1: BREACH OF DUTY

"Did the Joint Review Panel err in law and jurisdiction, in purporting to carry out an environmental assessment of the Project, without complying with s.4(a) and s.34 of CEAA and with the Joint Panel Agreement?" ([17](i) of the decision, page 7 - the value in [brackets] represents paragraph numbers in the decision). The court viewed this as a question of whether the Panel had breached a duty during the Cheviot review.

The court noted that the provincial/federal Joint Panel had two roles [29]. First, it was the final decision point for Alberta. Second, it was the initial decision point for the federal government, making recommendations to the federal DFO minister. The court determined that the federal requirements demanded a high standard of care [36]. From the perspective of cumulative effects, which represent the sum of environmental effects from the project and all nearby activity, the federal CEAA requirement for obtaining "all available information" [39] placed an "onerous evidence gathering duty" solely on the Panel [40]. Although onerous, the Panel was required under CEAA to do it. Only after the lack of sufficient information on cumulative effects is clearly demonstrated can best professional judgement be used [46, 47]. Furthermore, all information had to be documented and all conclusions and recommendations had to be justified [50, 51].

To be satisfactory, the court emphasized that a cumulative-effects assessment had to include the effects from other nearby activities, like forestry and other minesites, that have been, or will be, carried out [58-60]. The Joint Review Panel had incorrectly concluded that the mining company was to supply this information, which was incomplete. Thus the court decided that the Panel had breached its duty to obtain all information about forestry and mining in the area, reach conclusions regarding them, make recommendations, and explain the bases of the conclusions and recommendations [69, 76].

The court also decided there was a breach of duty regarding alternative methods of mining. Apparently, the Panel considered statements regarding alternative source areas for coal and the economic need for the mine as being the key alternative methods [78, 79], when in fact the alternative of underground mining to the proposed open-pit mining was important [80]. The court pointed out that the right to extract coal within a mine-permit boundary does not mean there is a right to mine it by open pits [81], and a basic statement as to the feasibility of underground mining was not sufficient [80]. The court indicated a proper assessment of alternative mining methods requires a detailed mine plan and environmental assessment of equivalent detail and intensity as the chosen plan [82].

4. ISSUE #2: FAILURE TO CONSIDER EXTERNAL SUBMISSIONS

"Did the Joint Review Panel conduct its public hearings in accordance with the principles of procedural fairness, the procedural requirements of CEAA and the Joint Panel Agreement, and the legitimate expectations of the applicants?" [17](ii). The court focussed on the apparent failure of the Panel to consider a submission by the Canadian Nature Federation.

Under this issue, the court identified another breach of duty by the Joint Review Panel. The Panel had accepted submissions from the Canadian Nature Federation, but did not consider them in their decisions [85, 86].

Because of these breaches (Issues #1 and #2), the court decided the DFO minister's authorization was issued without jurisdiction and thus the authorization was quashed [87]. The court recommended that the Panel reconvene and consider the missing and ignored information [91].

5. ISSUE #3: VIOLATIONS OF ACTS BY DFO AUTHORIZATIONS

"Is the Minister prohibited from issuing Fisheries Act authorizations for aspects of the Project that will contravene the Migratory Birds Regulations?" [17](iii). This involved an apparently lawful authorization that could be in conflict with regulatory provisions.

The federal authorizations under the Fisheries Act for the Cheviot Project contravened the Migratory Birds Convention Act (MBCA) Regulations [96]. The applicants asked if this was contrary to law.

Similar to the Fisheries Act, the MBCA Regulations prohibit the deposition of any substance harmful to migratory birds in any waters or any area frequented by migratory birds, unless regulations made by the Governor in Council allow it, or unless the minister allows it for scientific purposes [96]. The Panel recognized that millions of tonnes of waste rock would permanently fill three creek and valley bottoms, including two nesting areas of harlequin ducks. Harlequin ducks are listed as "endangered" to "significantly declining" in North America due to habitat destruction, and these ducks return to the same nesting area each year.

The mining company argued the waste rock is inert (apparently referring to its geochemical condition) and thus not harmful. The court ruled that placing millions of tonnes of rock into creek beds is a threat to nesting birds and thus the inert rock is "harmful" as defined in the MBCA Regulations [103].

Overall, the court concluded that, since the DFO minister issued an authorization under the Fisheries Act to allow harmful alteration of habitat, the minister was liable for such action under the Act. Therefore, the authorizations were contrary to law [105]. However, the Minister can create regulations, as permitted under the Act, to allow harmful alteration. This would resolve the contrary-to-law problem.

6. OTHER POINTS

There were issues regarding mitigation of adverse environmental effects [56]. One focussed on whether the "significance" of an environmental effect is influenced by the proposed mitigation. The court decided a mitigation became a feature of an effect, and thus affected the significance assigned to the effect. Also, a proposed monitoring program to determine if effects are occurring was upheld by the court as a mitigation (control) measure. This is consistent with Section 2(1) of CEAA which defines mitigation as "the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means".

Also, the mining company argued that Alberta approval's process makes the federal process unimportant [83]. The court indicated federal, as well as provincial, legislation is for the benefit of Albertans and thus the federal legislation must also be fulfilled.

7. CONCLUSION

The court decision on Cheviot pointed out several flaws in the Joint Panel Review that seemed to be obvious upon reading of the applicable legislation, although this may simply be the result of hindsight. Nevertheless, the decision does not seem unexpected, and it indicates that applicable legislation must be adhered to more closely. In particular, it places "onerous" requirements on mining companies, like detailed mine plans and environmental assessments for a range of alternative mining methods, and on review committees, like intensive data collection and interpretation possibly beyond that provided by the mining company.

Apparently, the Joint Review Panel may reconvene shortly, as suggested by the court, to perform its duties more diligently.