

## NEWS

February 2nd, 2010

### MININGWATCH CANADA ET AL v. RED CHRIS DEVELOPMENT COMPANY LTD ET AL

2010 SCC 2 / January 21, 2010

#### *SUPREME COURT OF CANADA DECIDES PROJECT PROPOSAL DESCRIPTION TRUMPS RESPONSIBLE AUTHORITY SCOPING DISCRETION IN FEDERAL ENVIRONMENTAL ASSESSMENTS*

The Supreme Court of Canada has ruled that Responsible Authorities (RA) conducting environmental assessments (EA) under the Canadian Environmental Assessment Act (CEAA) do not have the discretion to scope down a project from its proposal description, and thereby to limit the extent of federal environmental assessment which would otherwise be required. The Court has held that it is the project as described in the project proposal and in consequence its listing (or not) in the Comprehensive Study List (CSL) which is determinative of the minimum federal tracking level.

With provincial (B.C.) EA underway on its open pit mining and milling project, Red Chris triggered federal environmental assessment by submitting an application to Fisheries & Oceans (DFO) for dams required to create a tailings impoundment area. DFO as Responsible Authority initially described the project as an open pit mine with associated infrastructure including tailing impoundments area etc. DFO said that the described mining operation, via its production quantities, fell within the CSL and therefore a comprehensive study was required.

DFO (joined by then as RA by NRCan by virtue of an Explosives Act permitting application) subsequently scoped the project under s. 15(1) of CEAA so as to include only the tailings impoundment area and water diversion with ancillary explosives aspects, thus excluding the mine and the mill, and determined that a comprehensive study was therefore not necessary and the assessment could proceed by way of screening only, being the least intense assessment track.

The appeal to the Supreme Court, which came to it by way of judicial review application in Federal Court, went squarely on the issue whether or not the RA had the discretion under s. 15(1) to determine via scoping that an EA could proceed by way of screening rather than comprehensive study.

The Supreme Court has decided that the scoping discretion is subordinate to project description in determining EA tracking.

The Federal Court of Appeal had previously asserted in this and previous cases that scoping was a discretionary exercise and which, provided done reasonably, could re-define EA tracking (prior cases were Sunpine in 1999 and Truenorth in 2006).

This has now been reversed, with the Supreme Court concluding (and overruling those prior cases so far as inconsistent) that the word "project" means the project as proposed (in this case the mine and mill). Since the project as proposed was in the CSL, the minimum tracking was by way of comprehensive study. While the RA could scope the project upwards, it did not have the discretion to scope down.

The judgment undoubtedly broadens the circumstances in which more intense federal environmental assessments will be carried out, but leaves in its wake a number of question marks, notably that of proponent definition of projects, which probably signify that litigation over federal EA in general and EA tracking in particular is not yet a thing of the past.

Nick Spillane