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New Prosperity Mine Panel Report: A "Liberal and Generous," "Complex," and Rigorous Interpretation of CEAA *2012*

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Report commented on: Report of the Federal Review Panel – New Prosperity Gold-Copper Mine Project (October 31, 2013)

Last Thursday (October 31, 2013), the Canadian Environmental Assessment Agency (the Agency) released the highly anticipated federal panel report for Taseko's proposed New Prosperity Mine project (New Prosperity Report). As many readers will know, this marks the second time that this particular proponent has been through the federal environmental assessment (EA) process. A first attempt with respect to what was then referred to simply as the Prosperity Mine project was approved by British Columbia's Environmental Assessment Office in 2009 but was thwarted in 2010 by several findings of significant adverse environmental effect (SAEE) by an initial federal panel, including the total destruction of Fish Lake, also known as Teztan Biny by the Tsilhqot'in First Nation. (As an aside, the discrepancy between the federal and provincial outcomes was noted at the time and in the ensuing debate over the fate of the since-repealed *Canadian Environmental Assessment Act*, SC 1992, c-37). Undeterred (and seemingly prompted by the federal government), Taseko quickly revised its project with a view first and foremost towards avoiding the outright destruction of Fish Lake and in 2011 re-submitted it to the federal EA process. Alas for the company, two deficiency statements and one 24-day public hearing later, it appears to be no closer to realizing its project than it was three years ago, the second federal panel having now concluded that the New Prosperity Mine project is also likely to result in SAEE on several fronts.

According to the panel,

> …the New Prosperity Project would result in several significant adverse environmental effects; the key ones being effects on water quality in Fish Lake (Teztan Biny), on fish and fish habitat in Fish Lake, on current use of lands and resources for traditional purposes by certain Aboriginal groups, and on their cultural heritage. The Panel also concludes there would be a significant adverse cumulative effect on the South Chilcotin grizzly bear population, unless necessary cumulative effects mitigation measures are effectively implemented.
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> New Prosperity Report at p ix (executive summary).

This marks the second finding of SAEE in as many federal panel reports since the release this past summer of the Shell Jackpine Report (which I wrote about here). Like the Shell Jackpine Report, the New Prosperity Report is notable for several reasons in addition to its conclusions with respect to SAEE, including the panel's approach to the new standing rules under the

Canadian Environmental Assessment Act, 2012, SC 2012, c 19 (*CEAA 2012)*, the definition of "environmental effects" pursuant to subsections 5(1) and (2) of the same, and last – but certainly not least – its approach to adaptive management (AM).

A "Liberal and Generous Approach" to Standing

Amongst the many controversial changes to the federal EA regime brought about through last year's omnibus budget bills was an attempt to restrict public participation in the EA process. Through the combined operation of subsections 2(2) and 43(1)(c) of *CEAA 2012*, only those persons deemed by a panel to be "interested parties," which is to say persons who are either "directly affected by the carrying out of the designated project" or "have relevant information or expertise" are to be granted the full suite of participatory rights.

On July 16, 2012, Ecojustice (on behalf of MiningWatch Canada) requested that MiningWatch Canada be granted "interested party" status in the context of the New Prosperity panel review. The panel issued its ruling on all such applications on October 8, 2012, wherein it drew a distinction between private and public law and, relying on the Supreme Court of Canada's then recent decision in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, adopted a "liberal and generous approach" to the standing requirements:

> Generally, "directly affected" refers to a personal interest that is distinct from the general public interest in a matter. In the private law situation, a direct interest may arise from holding property or other legal right that may be affected by a decision. In the public law situation, an interest sufficient to support standing is interpreted more broadly but still must be "genuine interest", a "real stake" or "substantial connection". The Supreme Court of Canada has emphasized the need to screen participation to allow only those with a genuine interest and exclude the mere "busybody". In public law cases, the Court calls for a "liberal and generous" or "flexible" approach, guided by the purposes that underlie the traditional limitations on standing designed to protect the efficient use of the court's resources.
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> *When assessing whether a person is "directly affected" by a designated project the Panel regards the situation to be closer to the public law situation because of the purposes of the Act*. In addition, subsection 2(2) also contemplates granting interested party status if the Panel decides a person "has relevant information or expertise". Therefore, the Panel has followed a liberal and generous approach to determine Interested Party status for this Review, weighing the requirements of 2(2) with the purposes listed in section 4.
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> New Prosperity Report, Appendix 3
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> (Emphasis added).

Those familiar with Alberta's regulatory framework will no doubt be struck by the profound contrast between the panel's approach to the "directly affected" test here and that of our provincial regulators, the most extreme manifestation of which was recently put on display in *Pembina Institute v. Alberta (Environment and Sustainable Resources Development)*, 2013 ABQB 567 (as blogged about by Professors Fluker and Bankes here and here). The New

Prosperity panel's approach also stands in contrast, albeit to a lesser extent, to the Shell Jackpine panel's approach, which simply stated its understanding of these provisions as allowing "a review panel to conduct an appropriately focused project review" but nevertheless granted standing to the vast majority of applicants (see Joint Review Panel Letter to Osler, Hoskin and Harcourt LLP and to Individuals and Groups - Regarding Interested Parties Participation in the Hearing and Presentation of New Evidence).

While a detailed discussion about the implications of these diverging interpretations of the same test (*i.e.* directly affected) is beyond the scope of this post, the following two observations are offered. The first is that, as between federal and provincial agencies' interpretations, much of the relevant provincial legislation, *e.g.* the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, has the same "public" nature and contains the same kinds of purpose clauses as those found in section 4 of *CEAA 2012* (including the importance of public participation, as noted by Marceau J in *Pembina, supra*). The second observation is that, depending on the applicable standard of review, it is conceivable that the interpretation of *CEAA 2012* – including the standing test – will vary from region to region, as does the membership in federal EA panels. The question will be whether such panels are entitled to the presumption of deference espoused in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 or whether the "rolling" membership of that institution and the consequential impact on *CEAA 2012*'s interpretation is an "exceptional" circumstance that rebuts that presumption.

In the meantime, on the basis of New Prosperity and Shell Jackpine at least, it is reasonable to suggest that the new standing rules in *CEAA 2012* have not had a dramatic effect on the number of parties participating in panel hearings.

Environmental Effects are Characterized by Complex Linkages and Interactions

Another controversial change brought about by *CEAA 2012* is an attempt to restrict the kinds of environmental effects that the federal government considers under its EA process. Following the Supreme Court of Canada's decision in *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6, where Rothstein J overturned nearly a decade of his own prior jurisprudence at the Federal Court of Appeal (and *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 in particular), the law appeared settled that there was no barrier, whether constitutional or administrative, that prevented the federal government from assessing resource projects in their entirety (see generally Marie-Ann Bowden and Martin Olszynski, "Old Puzzle, New Pieces: *Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment" (2011) 89 Can Bar Rev 445).

Nevertheless, some such limitation has now been self-imposed through subsections 5(1) and (2) of the *CEAA 2012*, the relevant portions of which are as follows:

> **5.** (1) … [The] environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are
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> > (*a*) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament: (i) fish and fish habitat as defined in the *Fisheries Act*; (ii) aquatic species as defined in *Species at Risk Act*; (iii) migratory birds as defined in the *Migratory Birds Convention Act, 1994*, and (iv) any other component of the environment set out in Schedule 2;

> (*b*) a change that may be caused to the environment that would occur (i) on federal lands, (ii) [interprovincial effects], or (iii) outside Canada; and
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> (*c*) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on (i) health and socio-economic conditions, (ii) physical and cultural heritage, (iii) the current use of lands and resources for traditional purposes, or (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.
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> (2) However, if the carrying out of the physical activity, the designated project or the project *requires a federal authority to exercise a power or perform a duty or function* conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:
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> (*a*) a change, *other than those referred to in paragraphs (1)(a) and (b),* that may be caused to the environment and *that is directly linked or necessarily incidental to a federal authority's exercise* of a power or performance of a duty or function that would permit the carrying out, *in whole or in part,* of the physical activity, the designated project or the project…

If one were to consider only the (voluminous) private bar commentary that followed the introduction and passage of *CEAA 2012*, one might reasonably conclude that subsections 5(1) and (2) are relatively straightforward – even an improvement on the previous, overly-broad approach under *CEAA 1992* (see, for example, here, here and here). However, in what will not be news to EA practitioners (or anyone with a background in ecology), it turns out that there are actually "many linkages between and among environmental changes" that are "complex" and require "careful" consideration, as the New Prosperity panel has now stated in a passage worthy of quoting at length:

> The Panel interprets the two branches of [the subsection 5(2)] definition of effects as follows: "directly linked" environmental effects to be effects that are the direct and proximate result of a federal decision; and "necessarily incidental" environmental effects are other effects that are substantially linked to a federal decision although they may be secondary or indirect effects.
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> All direct environmental effects resulting from the loss of Little Fish Lake (Y'anah Biny) and the upper reaches of Fish Creek (Teztan Yeqox) that are not captured under subsection 5(1) would be considered under subsection 5(2). *Also, if the loss of the above-mentioned areas results in the loss of habitats used by the moose or grizzly bear, for example, those indirect and substantial effects on the grizzly bear and moose would be considered environmental effects that are necessarily incidental to a federal decision,* and would therefore be captured under subsection 5(2) of CEAA 2012…
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> *There are many linkages between and among environmental changes, including changes that are environmental effects defined under CEAA 2012 and those that are not*. For example, the Panel determined that the Project would generate seepage of pore waters from the tailings storage facility. This would be considered a change in the environment – *i.e.* a change in the quantity and quality of groundwater influenced by seepage originating from the tailings storage

> facility. This seepage would also result in a change in surface water quality when it would seep into Fish Lake (Teztan Biny) which is located down slope from the tailings storage facility. *That change in water quality in Fish Lake would be considered an environmental effect under the former Act but it would not, by itself, fall within one of the listed categories defining an environmental effect under subsection 5(1) of* CEAA 2012. Fish Lake, however, consists of fish habitat which sustains a viable population of fish, namely rainbow trout. The change in the water quality in Fish Lake would have an adverse effect on both the fish habitat and the fish which are both within the listed environmental effect categories.
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> Moreover, Fish Lake (Teztan Biny) is used by the Tsilhqot'in for traditional purposes and as part of their cultural heritage. The changes caused to the Lake would affect the Aboriginal cultural heritage as well as the current use of land and resources by Aboriginal peoples for traditional purposes. These too would be environmental effects under subsection 5(1) of CEAA 2012. *Since the effects and linkages are a complex and interactive web, the Panel was careful to consider those interactions when deciding how to categorize the environmental effects*.
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> New Prosperity Report at p 21
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> (Emphasis added).

In addition to suggesting considerable breadth to the scope of environmental effects to be considered where, as in the case of New Prosperity, federal decision-making is engaged (essentially a return to the outcome in *MiningWatch*, *supra*), this part of the report could be interpreted as confirming an old adage that often comes to my mind when considering the slough of changes to Canada's environmental laws in the course of the past year: *haste makes waste*. In its rushed effort to streamline the EA process and reduce "red-tape," the federal government may have made the EA process more complex and, consequently, more uncertain – including for proponents. Certainly, requiring panels to go back and slot environmental effects into one category or another seems to do little in terms of increasing efficiency and timeliness.

Adaptive Management

As in the case of Shell Jackpine and nearly all major resource projects in Canada over the last decade, the New Prosperity Mine project proposal relies heavily on adaptive management (AM) as a means of dealing with the uncertainties associated with various adverse environmental effects. In my post on the Shell Jackpine Report, I described AM as "as an experimental approach to resource management that acknowledges the inherent uncertainty characteristic of many human-ecosystem interactions." In that post, I also stated that AM has in the past been misused – even abused – but that there are also signs that Canadian regulators are beginning to appreciate both the challenges and corresponding responses necessary to ensure its appropriate and effective use.

The panel's approach to AM in the context of New Prosperity certainly fits with that trend. Like the panel for the Lower Churchill Hydro-electric project, the New Prosperity panel has stated that blanket reliance on AM cannot be used to bring a potentially significant adverse environmental effect below that threshold:

> Taseko declined to provide some materials requested by the Panel and by other participants (e.g., description of water quality model for Fish Lake). To deal with the resulting uncertainties, the Panel considered various risk management strategies, including adaptive management in some circumstances. *However, when the Panel concluded the potential adverse environmental effects were potentially "significant", it did not agree that deferring decisions on the approach to manage the risk to subsequent regulatory processes is appropriate*. It is necessary at the environmental assessment stage for the Panel to determine if a significant adverse effect is likely and to consider if and how the risk can be managed to acceptable levels.
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> New Prosperity Report at p 22
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> (Emphasis added).

In reaching this conclusion and apparently at the urging of both Environment Canada and the Tsilhqot'in, the panel noted the Agency's own Operational Policy Statement – Adaptive Management Measures under the *Canadian Environmental Assessment Act*, wherein it is stated that "If, taking into account the implementation of mitigation measures, there is uncertainty about whether the Project is likely to cause significant adverse environmental effects, a commitment to monitor Project effects and to manage adaptively is not sufficient." Thus, in addition to federal panels, it appears that federal regulators are also becoming more rigorous in their approach to AM (elsewhere in the report, Fisheries and Oceans Canada is quoted as stating "that successful adaptive management would be directly contingent upon monitoring efforts of sufficient duration, extent, and quality" (at p 248), inadequate monitoring being a widespread problem in the implementation of AM).

The above noted passage also suggests that Taseko's approach to this second EA process, *i.e.* its failure to provide sufficient information, including with respect to its AM plans, may have been its own undoing. Indeed, the report is clear that Taseko understood relatively well the requirements of effective AM, as the discussion about its environmental management plan make plain:

> With regards to water quality in Fish Lake (Teztan Biny) tributaries, Taseko stated that, should *monitoring* indicate levels of contaminants of potential concern were increasing, the adaptive management plan would include an alert. The alert could result in increased monitoring and *an action level* would be declared if the level were to approach X% of the guideline. *The action level would initiate corrective actions*…
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> Taseko stated that the overarching goal of the adaptive management program would be to provide a monitoring, early warning and action plan that would allow the operator to maintain a habitat capable of supporting a viable population of rainbow trout during the life of the mine.
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> Taseko submitted that the final adaptive management plan and its *associated*

> *threshold levels* would be determined at the time of permitting and adjusted through-out its implementation. *Threshold levels would be based upon reaching a predetermined key indicator measurement as well as rate of change of the indicator*.
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> New Prosperity Report, at p 247
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> (Emphasis added).

Monitoring, action levels, thresholds and key indicators – these are all the language of effective and rigorous AM. The problem for the panel, however, was Taseko's curious refusal to provide such information, as in the case of water quality in Fish Lake: "the Panel is of the opinion there are too many risks and uncertainties with respect to the proposed recirculation scheme, the adaptive management plan and the technical and economic feasibility of the various water treatment options to conclude that the ecological integrity of Fish Lake could be maintained in the long term" (at p 87).

Looking ahead and bearing in mind not just the New Prosperity Report but also the Shell Jackpine and Lower Churchill Reports, it will be interesting to see whether industry's enthusiasm for AM – which to date has been significant – remains as such or wanes as panels increasingly insist on its more rigorous conception. In part, the answer to this question will depend on the government's responses to panel reports, as there are often yawning gaps between what panels recommend and what the government actually commits to doing. The government's response to the Shell Jackpine Report – expected any day now – should give observers some sense of how it will approach not only AM, but also the breadth of environmental effects that it must consider and findings of significant adverse environmental effects.