February 19th 2010

MiningWatch Canada v. Canada (Fisheries and Oceans): Hoisted on one's own petard?*

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Cases Considered:

MiningWatch Canada v. Canada (Fisheries and Oceans), 2010 SCC 2

Ecojustice, on behalf of its client MiningWatch Canada, declared victory on January 21, 2010 with the release of the Supreme Court of Canada's decision in *MiningWatch Canada v. Canada (Fisheries and Oceans)*. In brief, Justice Rothstein for a unanimous Supreme Court ruled that the track of environmental assessment conducted by a federal responsible authority pursuant to the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 flows directly from the scope of the project as proposed by a project proponent. The decision confirms that tracking an environmental assessment sequentially precedes project scoping under *Canadian Environmental Assessment Act*, and is of obvious significance in the conduct of federal environmental assessment on projects in Alberta on a go forward basis.

Notwithstanding declarations of victory by Ecojustice and its client MiningWatch Canada, I'd like to suggest and comment on three reasons why celebration over the *MiningWatch* judgment ought to be tempered; they are in turn: **(1)** the judgment ignores the socio-ecological context in which this dispute is situated in northwest British Columbia, thereby contributing to the ongoing sterilization of environmental law in Canada (see my previous post on ABlawg The Nothing that is: The leading environmental law case of the decade); **(2)** the disputed mine is one step closer to commencement because the Court refused to set aside the Department of Fisheries and Oceans (DFO) course of action decision notwithstanding that the Court ruled it to be in violation of the *Canadian Environmental Assessment Act*; and **(3)** despite the Court's apparent need to recast judicial review in Canada and endorse a policy of curial deference with *Dunsmuir v. New Brunswick*, 2008 SCC 9, here we see a judicial review decision of the Supreme Court that seemingly affords no deference to DFO and does so without any analysis whatsoever on the applicable standard of review.

The Sacred Headwaters

The subject of this decision is a proposed copper/gold mine by Red Chris Development Company to be located in northwest British Columbia within the traditional territory of the

Tahltan First Nation. The region – known as the Sacred Headwaters – is roughly 500 kilometers north of the Yellowhead Highway (which transects across British Columbia from Mt. Robson, through Prince George, ending in Prince Rupert) and is the source for the Stikine, Nass, and Skeena river systems which define the region. Seemingly in recognition of the area's strong wilderness character, in 1975 the British Columbia government designated the 700,000 hectare Spatsizi Plateau Wilderness Park here and currently boasts it as " . . . one of Canada's largest and most significant parks. True wilderness atmosphere, outstanding scenery and varied terrain make this park an excellent place for quality hiking, photography, and nature study. Lands within the park have an excellent capability for supporting large populations of wildlife."

The recent global commodities surge has brought new visitors to the region who are less interested in the wilderness than with the minerals contained underneath it. Resource development companies like Red Chris have arrived en mass to explore for and recover deposits of gold, silver, copper, coal and gas. This has resulted in highly contested terrain, with residents, developers, and environmental groups alike facing off over the classic wilderness versus resource development confrontation all within traditional First Nations territory. It seems that of all the proposed resource projects, Shell's coalbed methane development attracts the most visible resistance with blockades, protests, and an awareness campaign that draws analogies with Shell's operations in the Niger Delta of Africa (the Dogwood Initiative has produced a short video that summarizes the tensions in the region). That MiningWatch Canada would be interested and concerned with the boom in mineral exploration in this region is of no surprise, given its mandate to shed light on destructive mining practices and pressure mining companies to deliver on their sustainability rhetoric.

That none of this aforementioned context finds its way into the Court's judgment is a disappointment, since without the intensity of a land use conflict it is somewhat difficult to appreciate why MiningWatch would apply for judicial review. This is particularly so if one relies solely on the facts set out by Court. Justice Rothstein describes the Red Chris interest to develop the mine, the apparently (at para. 4) "smooth" provincial environmental assessment proceedings undertaken with the full cooperation of Red Chris, the numerous open house consultations undertaken by Red Chris, the submission of public comments on the application, and the eventual application by MiningWatch in relation to the federal environmental assessment component. In addition to this peaceful portrayal of the facts, Justice Rothstein specifically notes that MiningWatch did not participate in the provincial environmental assessment process, offered no comments on the mine project prior to its judicial review application, and has no proprietary or pecuniary interest in the matter. In the end, Justice Rothstein characterizes MiningWatch as an applicant having no interest in the substance of this dispute and concerned only with obtaining a judicial declaration on the interpretation of a section in the *Canadian Environmental Assessment Act* pertaining to public consultation on federal environmental assessments. This characterization of MiningWatch, as a so-called public interest watchdog or legal do-gooder, greases the wheel towards the Court's eventual denial of substantive relief here – that the Red Chris mine can proceed notwithstanding that its federal environmental assessment was not conducted in accordance with the *Canadian Environmental Assessment Act*.

Discussion leading up to the judicial review application

Whether the *Canadian Environmental Assessment Act* applies in a given case is determined using the following basic framework: (1) there must be a "project" as defined in section 2(1) not otherwise excluded by regulation; (2) there must be a "federal authority" as defined in section 2(1) involved in the project; and (3) the federal authority involvement in the project must constitute a 'trigger' within the prescription of section 5, such as the issuance of a permit, license or approval necessary for the project to be carried out.

An environmental assessment conducted under the *Canadian Environmental Assessment Act* follows one of four tracks: (1) screening; (2) comprehensive study; (3) mediation; or (4) panel review. Ninety-nine (99)% of all federal assessments on projects are conducted by way of screening by the federal responsible authority, and the screening is the least rigorous and involved of the four possible tracks. The *Comprehensive Study List Regulations*, SOR 94/638, enacted under section 58(1) of the *Canadian Environmental Assessment Act*, identifies those projects more likely to have significant adverse environmental effects for which the legislation requires, among other items, a more rigorous environmental assessment (section 16(2)) and public consultation (section 21) by way of a comprehensive study assessment. Section 25 provides the federal responsible authority with discretion to request the panel review track for those projects that may cause significant adverse environmental effects even after taking into account mitigation measures or where it believes public concerns warrant such a reference to the most involved and rigorous form of environmental assessment (this is, for example, the track followed for the Mackenzie Valley pipeline).Section 15 provides the responsible federal authority with discretion to scope components of the project that will be subject to the assessment.

The *MiningWatch* judgment concerns the federal environmental assessment process under the *Canadian Environmental Assessment Act* and its application to a mining project proposed by Red Chris in 2003 to operate in northwest British Columbia. In particular, Red Chris applied for authorization under section 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14 to destroy fish habitat in connection with the operation of its proposed mine. On the basis of the Red Chris application for section 35 *Fisheries Act* authorization, in May 2004 the Department of Fisheries and Oceans (DFO) initially scoped the mine project to include the following:

- Open pit mine and mill with ore production up to 50,000 tonnes/day
- Tailings impoundment area
- Waste rock storage
- Camp facilities
- Power supply
- Access roads

The volume of ore production brought the Red Chris mine project within the prescribed list of works in the *Comprehensive Study List Regulations* for which the federal environmental

assessment must be conducted by way of comprehensive study. And subsequent to May 2004 DFO began preparations towards a comprehensive study. However, the legislation is not a model of clarity in terms of prescribing when a comprehensive study must be conducted versus a screening, and prior Federal Court of Appeal decisions ruled federal authorities had the discretionary authority to effectively decide the track of environmental assessment notwithstanding alternate interpretations of the legislation that suggested otherwise (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, and *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] F.C. 263 (CA)). So what happened after the initial May 2004 scoping of the Red Chris mine is not entirely surprising.

In December 2004, after initially scoping the mine earlier that year, DFO altered its scoping position on the basis of new information that indicated to DFO that the open mine pit, mill, waste rock storage and access roads would not adversely impact fish habitat (and accordingly not require section 35(2) *Fisheries Act* authorization). Because of this new information, DFO determined that the federal environmental assessment would be conducted by way of the less rigorous screening report and in March 2005 announced that, of the project components initially scoped in May 2004, only the tailings impoundment area remained within the scope of the project for the purposes of the federal environmental assessment. **It is crucial to note that in the Federal Court trial division proceedings, Justice Martineau found no evidence on the record to support these DFO assertions on fish habitat** (*MiningWatch Canada v. Canada (Minister of Fisheries and Oceans*), 2007 FC 955 at para 109).

DFO completed the environmental assessment in April 2006 with the conclusion that the project – as re-scoped in December 2004 – was not likely to cause significant adverse environmental effects. In May 2006, DFO and other federal responsible authorities announced their section 20(1)(a) course of action decision that necessary authorizations for the Red Chris project could be issued (including section 35(2) *Fisheries Act* authorizations) on the basis that the environmental assessment confirmed the project was not likely to cause significant adverse environmental effects.

The MiningWatch judicial review application

In June 2006 MiningWatch Canada applied to the Federal Court of Canada for judicial review of the DFO course of action decision. Specifically at issue for MiningWatch was the failure by DFO to adhere to the public consultation requirements set out in section 21(1) of the *Canadian Environmental Assessment Act*:

> Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

While a literal reading of section 21(1) seems straightforward in requiring public consultation, the issue here was whether section 21(1) applied at all to the Red Chris mine. This was due to the DFO decision in late 2004 to reduce the scope of the Red Chris project subject to assessment scrutiny which, in result, changed the category of federal environmental assessment from comprehensive study to screening report and removed the application of section 21(1). The *Canadian Environmental Assessment Act* does not require public consultation on screenings and, in any case, the evidence here suggested that DFO was of the view that public consultations undertaken pursuant to the provincial environmental assessment process were adequate in this case (see the trial division judgement, 2007 FC 955 at para 127). Accordingly, the MiningWatch judicial review application was concerned with whether DFO's decision to limit the scope of the mine project was lawful under the *Canadian Environmental Assessment Act*.

MiningWatch asserted the obvious in that section 21 requires a comprehensive study environmental assessment for a project listed in the *Comprehensive Study List Regulations*, such as the Red Chris mine as proposed by the proponent. MiningWatch argued that to allow a responsible authority such as DFO to limit the scope of a project such that it was no longer captured by the *Comprehensive Study List Regulations* was unlawful on several counts including: (1) it would undermine the intention of section 21 that projects with potential for significant adverse environmental effects receive additional public scrutiny; and (2) it would empower a responsible authority to override the authority provided by the legislation to the Environment Minister or federal Cabinet to prescribe a comprehensive study for the project under the *Comprehensive Study List Regulations* enacted under section 58 of the legislation. DFO and Red Chris responded that scoping determines the appropriate track of environmental assessment, relying primarily on the *Prairie Acid Rain Coalition* decision, *supra*, where Justice Rothstein (as he was then) ruled that section 15 provides a federal responsible authority with the discretion to scope the extent of a project more narrowly than that proposed by the proponent so as to ensure the environmental assessment applies only to project components within federal jurisdiction.

At Federal Court Trial Division Justice Martineau held that section 21 of *Canadian Environmental Assessment Act* obligates DFO to undertake public consultation on, among other matters, scoping the Red Chris mine project for environmental assessment. Justice Martineau ultimately ruled that DFO unlawfully avoided the comprehensive study on the basis of its scoping decision, and subsequently he granted the MiningWatch application with the following relief:

- declaring that the Red Chris mine, as proposed, was subject to the comprehensive study track
- quashing the DFO section 20 course of action decision that resulted from the rescoped project and subsequent screening report
- declaring that section 21(1) imposes a duty on federal responsible authorities to ensure public consultation on project scoping in a comprehensive study environmental assessment

- prohibiting the issuance of federal authorizations until a section 37 course of action decision has been issued taking into account the comprehensive study environmental assessment.

In ruling as such, Justice Martineau distinguished *Prairie Acid Rain Coalition* on its facts and because its focus was on interpreting section 15 (which empowers a responsible federal authority to scope a project which is subject to environmental assessment under the legislation) rather than section 21. In terms of interpreting the *Canadian Environmental Assessment Act*, Justice Martineau concluded as follows:

> What is really at issue in this case is whether the RAs may legally refuse to conduct a comprehensive study on the grounds that the Project as rescoped by them does not include a mine and milling facility anymore.
>
> Overall, sections 2, 5, 13, 14, 15, 16 and 18 and the new section 21 of the CEAA, as I read them together, and having in mind the purpose of the CEAA and the intention of Parliament, support the applicant's principal proposition that where a project is described in the CSL, the RA must now ensure public consultation with respect to the proposed scope of the project for the purposes of the EA, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project (2007 FC 955 at paras. 273, 274).

The Federal Court of Appeal disagreed with Justice Martineau that its 2006 *Prairie Acid Rain Coalition* decision was distinguishable here. Instead, Justice Desjardins applied that earlier decision to confirm that a responsible authority such as DFO has the discretionary authority to scope a project for the purpose of determining which track of environmental assessment is conducted. The Court of Appeal ruled that references to 'project' in the *Canadian Environmental Assessment Act* mean the project as scoped by the responsible authority. Therefore, in this case, section 21 had no application since the project 'as scoped' by DFO was not prescribed for comprehensive study in the *Comprehensive Study List Regulations* .The Court of Appeal set aside Justice Martineau's decision and dismissed the MiningWatch judicial review application.

MiningWatch Canada at the Supreme Court: The literal ruling

By the time this matter reached the Supreme Court the legal question of general importance to be decided here concerned the sequencing or relation between scoping a project and tracking the environmental assessment. Does the *Canadian Environmental Assessment Act* provide a responsible federal authority, such as DFO in this case, with the discretion to vary, by way of its scoping a project under section 15, the track of an environmental assessment from the more involved comprehensive study to the less rigorous screening? In other words, what comes first: scoping the project or tracking the category of environmental assessment?

The Supreme Court, per Justice Rothstein, restored Justice Martineau's declaration with respect to the effect of section 21 and held that DFO's decision, based on its rescoping, to conduct a screening rather than comprehensive study on the Red Chris mine was contrary to law. In other words, the Supreme Court clarified that tracking an environmental assessment comes before scoping the project under the *Canadian Environmental Assessment Act*. While this declaration is welcome clarification of the legislation and, in my view, consistent with its overall purpose, the MiningWatch judgement is not without its faults.

As a decision of the Supreme Court concerning judicial review post-*Dunsmuir*, there is surprisingly no discussion of the applicable standard of review. Justice Martineau at trial division selected the correctness standard on the basis that the matter concerned statutory interpretation, and his selection was subsequently endorsed by the Federal Court of Appeal and presumably not argued by the parties beyond the trial division. Justice Rothstein's analysis of various sections in the *Canadian Environmental Assessment Act* leaves little doubt for the reader that he is applying the correctness standard in affording no deference to DFO in this case. But this application is questionable in light of *Dunsmuir*.

Readers will recall that in *Dunsmuir* the Supreme Court sought to simplify judicial review by reducing the available standards of review from three to two (correctness and reasonableness) and asserted respect for the decisions of administrative officials and generally endorsed a policy of curial deference. *Dunsmuir* essentially reserves the application of the correctness standard for two scenarios: (1) questions of true jurisdiction where the decision-maker must ask itself whether it has the authority to decide the matter at hand; and (2) questions of central importance to the legal system that fall outside the decision-makers specialization. Neither (1) nor (2) apply to DFO here. While DFO may have got the sequencing wrong in this case which led to further troubles for the department, DFO clearly has the legislative authority to make decisions on tracking and scoping. This is not a true question of jurisdiction. And while the sequencing of tracking and scoping is of crucial importance within federal environmental assessment, its importance is limited to this regime and not generally to the legal system as a whole. Moreover, *Dunsmuir* also stands for the principle that judicial deference is owed to the decisions of an administrative decision-maker, such as DFO, on questions of law within its specialization, including issues of statutory interpretation of its governing legislation. Thus *Dunsmuir* together with a history of significant judicial deference towards administrative decisions under the *Canadian Environmental Assessment Act* reveals the surprise in the Court's application of correctness in *MiningWatch*. Most troubling, however, is the absence of any discussion pertaining to standard of review in this case, particularly where the lower decisions in Federal Court have been decided pre-*Dunsmuir*.

So would the DFO decision(s) have survived a review under the more deferential reasonableness standard? Likely not. The test according to *Dunsmuir* is two-fold: (1) Is the decision justified, transparent, and intelligible; and (2) is the decision within the range of possible outcomes based on the facts and law. I argue the DFO rescoping decision and subsequent course of action decision are unreasonable on both counts. First, as Justice Martineau observes at trial division, the DFO decision to change the scope of the project in December 2004 was made on 'new

information' which DFO fails to disclose. This is hardly transparent decision-making and a decision for which DFO provides no factual justification. Second, the DFO decisions are outside the range of possible outcomes since, as the Court rules, the legislation does not provide DFO with discretion to change the track of environmental assessment with its scoping exercise pursuant to section 15.

The Court ultimately decides this matter by interpreting the *Canadian Environmental Assessment Act* to decipher the legislator's intentions with respect to: (1) the meaning of project in section 21 (and generally in the legislation) being 'project as proposed' or 'project as scoped; and (2) the intended sequence of scoping a project and tracking the environmental assessment. As with his approach to standard of review, Justice Rothstein is incredibly brief in setting out the applicable interpretive rules. We are told: "The duty of the Court is to interpret the Act based on its text and context" (at para 27). This is presumably shorthand for the modern principle of interpretation, which the Court has consistently articulated as:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (*Re Rizzo and Rizzo Shoes*, [1998] 1 SCR 27 at para 21)

Justice Rothstein employs a literal reading of the definition of 'project' in section 2 to conclude that 'project' in section 21 means 'project as proposed' by the proponent. This is a seemingly straightforward exercise given that the definition of 'project' includes: " . . . <u>proposed</u> construction, operation . . . or other undertaking in relation to a physical work . . ." (emphasis added). Justice Rothstein supports his interpretation by agreeing with MiningWatch that the DFO interpretation (project means 'project as scoped') would undermine the scheme and purpose of the legislation that empowers the Environment Minister or federal Cabinet to prescribe projects for which a comprehensive study is required. The absurdity in the DFO interpretation is also quite evident if one reads reference to 'project' in section 21(1) as 'project as scoped' (I leave it to the reader to entertain themselves with this exercise, rather than set it out here). I add that the Court might also have noted that legislators typically insert defined terms in legislation in order to restrict or limit its ordinary meaning, such that here the statutory definition of project means 'project as proposed' and nothing more.

Justice Rothstein similarly rules that tracking a project for environmental assessment (screening – comprehensive study – panel review) precedes project scoping by a federal authority. In other words, a responsible federal authority, such as DFO here, does not have the discretion under the *Canadian Environmental Assessment Act* to determine the assessment track for a project to be a screening by narrowly scoping its components. The Court did rule however that a responsible federal authority has the discretionary power to enlarge the scope of a project to be assessed under a given track of assessment. To summarize in the words of Justice Rothstein: "[T]he minimum scope is the project as proposed by the proponent, and the RA or Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project" (at para 39).

The Court's declaration on the meaning of project and the sequencing of tracking the environmental assessment and scoping the project under the *Canadian Environmental Assessment Act* is of significance in clarifying that a comprehensive study track assessment is triggered by operation of law and cannot be varied in the discretion of federal authorities. For this declaration, the *MiningWatch* decision is indeed cause for celebration in the environmental community. However, this story does not end here.

MiningWatch Canada at the Supreme Court: The limited relief

In terms of disposition the Court limits relief granted to its aforementioned declaration on the interpretation of the *Canadian Environmental Assessment Act*, thereby denying MiningWatch its request for *certiorari* with respect to the DFO course of action decision that flowed from its re-scoping of the Red Chris mine. In a remarkable turn of events, Justice Rothstein held that Justice Martineau at trial division erred on two counts in setting aside the DFO decision: (1) in questioning the motive of DFO in changing the scope of the project in December 2004; and (2) in punishing Red Chris for a wrong committed by DFO.

The denial of prerogative relief here seems questionable on the jurisprudence. Justice Rothstein makes no mention of the Court's 1992 decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, wherein the Court established delay and futility as two considerations relevant towards exercising judicial discretion to refuse prerogative relief. Neither consideration would seemingly apply here as MiningWatch applied for judicial review just weeks subsequent to the DFO course of action decision and setting aside that decision would not be nugatory since the shovels, so to speak, have yet to hit the ground. Indeed, in *Friends of the Oldman River* the Court held that prerogative relief was not futile even though in that case the dam project was largely complete by the time of the Supreme Court ruling. Similarly, there is no mention of previous Federal Court decisions that have granted prerogative relief in cases such as this (See for example *Bowen v. Canada (Attorney General)*, [1998] 2 F.C. 395).

It appears to me in this case that Justice Rothstein refuses to grant *certiorari* on the basis of the outcome or consequences. This is a realist ending to an otherwise positivist judgement that reasons in the abstract or solely within the confines of the legal system. Justice Rothstein shows a surprising amount of sensitivity towards the respective positions of Red Chris, MiningWatch, and DFO when it comes to granting relief. By concluding that declaratory relief satisfies the non-proprietary interest of MiningWatch, Justice Rothstein effectively comes to the rescue of Red Chris at the expense of MiningWatch, which is penalized for its role as a public interest litigant and hoisted on its own petard.

My criticism here is based on a view that the denial of prerogative relief has to be an extraordinary result in judicial review, since the outcome then typically allows an unlawful act to stand. To put it another way, if someone is to be above the law – such as DFO in this case – the rule of law demands the highest of justifications. I don't see that justification here.

**Credit for the title of this post goes to my colleague Nigel Bankes*

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