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PROVINCIAL MINING EXPLORATION AND RECLAMATION PERMITS WITHSTAND FEDERAL REJECTION OF PROJECT UNDER *CEAA 2012*

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On June 22, 2018 the *B.C. Supreme Court in Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited* 2018 BCSC 1034 took a narrow view of the scope of federal environmental assessment, leaving it open to the Province of B.C. to authorize preliminary work in relation to a gold-copper mine project which had failed to obtain federal environmental assessment approval.

The Federal Designated Project and Provincial Permits

Following an environmental assessment under the *Canadian Environmental Assessment Act* (*CEAA 2012*), the federal government had rejected a designated project for the construction, operation and closing of an open pit mine because it was likely to cause unjustified adverse environmental effects. The designated project included the open mine pit, a concentration facility, support infrastructure, associated tailing and waste rock areas, access road, transmission line corridor, transport of mine concentrates and any physical activities "*incidental*" to those physical activities. The provincial permits did not specifically authorize construction of the mine or its supporting infrastructure. These permits authorized exploratory work intended to:

(i) gather the necessary data and other information required to confirm the engineering assumptions for the project,

(ii) meet provincial *Mines Act R.S.B.C. 1996*, c.293 permit requirements to authorize construction of the project once all environmental assessment approvals were in place, and

(iii) inform applications for other necessary approvals and permits for example, under the provincial *Environmental Management Act*

The Federal Government's Concern

The federal government's petition to enjoin activities under provincial permits rested on its belief that there was a serious possibility that an offence would be committed under s.6 of *CEAA 2012* unless an injunction was issued. Section 6 provided that a project proponent must not do anything "*in connection*" with the


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carrying out of a designated project without federal authority if to do so might cause changes to components of the environment within federal jurisdiction such as on federal lands, or in relation to aboriginal peoples, or to fish or migratory birds. Counsel for the federal government argued that once the assessment was completed, there was no going back to the design stage if the proponent did not receive approval. The correct approach was to develop a new proposal instead of redesigning an old one and then proceed with an environmental assessment for the new proposal. The federal government asserted that the mining company was essentially seeking a "mulligan" of the original unfavourable decision.

The Court's Decision

Ultimately, the Court's decision turned on a question of the interpretation of the project as designated and the statutory interpretation of s.6 of *CEAA 2012* and more particularly the words "*in connection with the designated project.*" The federal government argued that construction included securing approvals dedicated to and prerequisite for the actual physical step of construction. In rejecting this argument, the Court interpreted "construction" narrowly, so that activities requiring approvals prerequisite to actual building only amounted to construction if there was a sufficient nexus to the construction of the open pit mine. Similarly, the Court considered that the activities were not "incidental" to construction in the designated project description since there was an absence of proximity as well as causal connection to the construction of the mine. Section 6 of *CEAA 2012* which prohibited work "*in connection with the designated project*" with potential adverse environmental effects without federal authority did not apply to these facts because "Although the phrase 'in connection with' is indeed broad, it is qualified in my view by the phrase "carrying out." (at par. 68) The phrase "carrying out" has been defined by the *Shorter Oxford Dictionary* as "perform, conduct to completion, put in practice." The Court agreed with the mining company that s.6 connoted putting into operation or executing the construction, operation decommissioning and abandonment. The provincial permits were nothing more than "...preliminary investigation, exploration and associated reclamation work and fall outside the limits of putting the mine into construction or operation in whole or in part." (at par.70).

Implications of Decision

This decision applies the constitutional law principle of statutory interpretation that when a federal statute can be interpreted so as not to interfere with a provincial statute, such an interpretation is to be preferred to another applicable construction which would bring about a conflict between the two statutes. See *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at par. 69. The B.C. Supreme Court was clear that an overly broad interpretation of *CEAA 2012* would result in that federal statute catching an undue amount of provincial mining exploration activity, and further that it would result in impractical consequences for the provincial scheme and would be out of step with one of the purposes of *CEAA 2012* which was 'to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments' at s.4(1)c." (at

par.75). Under the new *Impact Assessment Act* Bill C-69 which received third reading in the House of Commons on June 20, 2018, s.6 of *CEAA 2012* has been replaced with a similar prohibition in section 7(1). It is therefore anticipated that barring a successful appeal by the federal government, federal environmental assessment will continue to be applied narrowly to provincial mining exploration.