Federal Court  Cour fédérale

Date: 20150723

Docket: T-2601-14

Citation: 2015 FC 898

Ottawa, Ontario, July 23, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

MINNOVA CORP

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Canadian Environmental Assessment Agency [the Agency] to characterize the Applicant's gold mine in Manitoba as a "new" mine when it resumed operations, rather than an existing one since 1987, and finding that the mine is subject to section 16(c) of the Schedule to the Regulations Designating Physical Activities [the Regulations] [the Schedule to the Regulations].

I. Background

[2] Minnova Corp [Minnova], formerly the Auriga Gold Corp [Auriga], owns PL Mine (also known as the Puffy Lake Mine) in Northern Manitoba. The mine was constructed by its former owner Pioneer Metals Corporation [Pioneer]. A license was initially issued under the Manitoba *Environment Act* [EA License] in November of 1987 to Pioneer.

[3] The PL Mine operated from December of 1987 to March of 1989, at which time Pioneer closed its mining operations and the PL Mine was placed in care and maintenance in accordance with a Closure Plan approved by Manitoba's Director of Mines.

[4] In May of 2012, Minnova became the licensee under the EA License. As it exists now, the license "allows for underground mining and processing at 1,000 tpd [tonnes per day]."

[5] PL Mine is also subject to a subsisting Closure Plan, developed by Pioneer in 2010, and approved by the Manitoba Director of Mines. Current care and maintenance of the PL Mine is governed by Manitoba's *Environment Act*, CCSM, CEI25, the *Mines and Minerals Act*, CCSM, CM162, and the *Water Rights Act*, CCSM, CW80.

[6] The existing PL Mine is a decline and underground mine, associated mill, tailings management area, and associated infrastructure, which includes an access road and security gate.

[7] On June 4, 2014, Minnova (then Auriga) submitted a Notice of Alteration to Manitoba Conservation and Water Stewardship, seeking approval to add open pit mining methods to existing underground methods for the near surface portion of the Mine. New features to be constructed included the opening, closing, and rehabilitation of a succession of open pits, to be operated concurrently with the existing underground workings. However, this open pit proposal was abandoned in December of 2014, in favour of the resumption of underground activities.

[8] On July 30, 2014, the Project Manager of the Agency, Sean Carriere, wrote to Minnova to inform them that the re-opening of the mine would fall within subsection 16(c) of the Schedule to the Regulations, characterizing it as a "new" mine.

[9] On August 26, 2014, Minnova received further correspondence from the Agency, stating "the mine has not been in operation since 1989. The re-opening of the mine in addition to the development of five open surface mining pits [and other related new features] constitutes a "new" mine for the purposes of paragraph 16(c) of the Regulations."

[10] The August 26, 2014 letter also stated that section 128(1)(a) of the Regulations, a transitional provision making the *Canadian Environmental Assessment Act* 2012 [CEAA 2012] inapplicable to projects already under construction, did not apply to the Notice of Alteration, because the proposed project was characterized as "distinct and separate" from the existing mine and facilities.

[11] In a letter dated December 1, 2014, Minnova informed the Agency that it no longer planned to proceed with the open pit plan, and instead intended to re-start the existing mine, with an output of less than 600 tpd. Minnova asked for confirmation that this re-start would not constitute a "new mine" pursuant to section 16(c) of the Schedule to the Regulations.

[12] In a letter dated December 3, 2014 [the Decision], the Agency replied, acknowledging the abandonment of the open pit plan, and stating that they still viewed a re-opening of the existing underground mine to fall under section 16(c) of the Schedule to the Regulations.

[13] On December 23, 2014, Minnova filed this application for judicial review.

[14] The Agency requires a project description of the PL Mine from the Applicant, pursuant to section 16(c) of the Schedule to the Regulations, as a "new" mine, in order to continue the process of deciding whether the project requires an environmental assessment.

II. Issues

[15] The issues are:

A. Is this application for judicial review premature?

B. Is the Agency's requirement that the Applicant submit a project description reasonable?

III. Standard of Review

[16] The standard of review to be applied to the second issue is reasonableness, given that the decision maker in this case is interpreting its home statute (*Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 50).

IV. Statutory Provisions

[17] The relevant statutory provisions are attached as Appendix A hereto.

V. Analysis

A. *Is this Application for Judicial Review Premature?*

[18] The Applicant argues that the CEAA's decision that the PL Mine is a designated project subject to section 16(c) of the Schedule to the Regulations is a final decision, not interlocutory in nature. To decide otherwise would be to condone an improper collateral attack by the Respondent on the Applicant's PL Mine status as an existing mine.

[19] The Respondent replies that the Applicant's application is premature. The Agency's decision to require a project description from the Applicant is interlocutory in nature, and thus judicial review is premature.

[20] Before applying to this Court, the Respondent argues that the Applicant was expected to pursue all available effective remedies, and to wait until the completion of the administrative

process. Only in truly exceptional circumstances should this practice be departed from, and no such exceptional circumstances exist here. The Applicant is not being denied the benefit of a fair hearing, subjected to an apprehension of bias, or had its substantive rights curtailed (*CB Powell Ltd v Canada (Canadian Border Services Agency)*, 2010 FCA 61 at paras 31-33; *Lundbeck Canada Inc v Canada (Minister of Health)*, 2008 FC 1379 at paras 27-28; *Fairmont Hotels Inc v Director Corporations Canada*, 2007 FC 95 at para 10).

[21] The Agency is required per section 10(b) of the CEAA 2012 to "decide" whether an environmental assessment need be conducted. The Applicant has admitted that they intended to avoid the requirement of an environmental assessment. Since the Agency may conduct its screening and determine that an assessment is not required, it is further illustrated that the impugned decision is not final.

[22] The Respondent summarizes the required information outlined in the Schedule to the Prescribed Information for the Description of the Designated Project Regulations as follows:

a) general information: project name, proponent name, description of any consultations with other jurisdictions/parties/Aboriginal peoples, description of any environmental studies;
b) project information: description of the context and objectives of the project, physical works, production capacity, production processes, waste likely to be generated, waste management plans and anticipated phases of construction/operation/decommissioning/abandonment;
c) project location information: geographic coordinates, site maps, legal description of lands, proximity to residences/reserves/traditional territories, resources currently used for traditional purposes by Aboriginal peoples;
d) federal involvement: federal financial support, federal lands used, federal permits/licenses/authorizations required;
e) environmental effects: description of physical and biological setting, changes that may be caused to fish/aquatic species and fish habitat or migratory birds, effects on Aboriginal peoples of any changes to the environment.

[23] The heart of the matter before the Court is whether an environmental assessment is required, and not whether the Applicant is required to submit a project description. No such decision has yet been made. The structure and wording of the CEAA 2012 outlines that determining if a project is designated is not a "final decision", and is an administrative step necessary to support a final and substantive decision. As the Applicant agrees, a proponent is even open to declare its own project as designated. The submission of a project description does not necessarily result in the requirement of an environmental assessment.

[24] I agree with the Respondent that this application for judicial review is premature. A final determination appropriate for review in the current circumstances would be the Agency's decision to require, or not require, an environmental assessment of the PL Mine project. The current impugned "decision" appears, from the process outlined in the CEAA 2012 and the mandate of the Agency, to be an interim part of the process of reaching a final determination concerning an environment assessment.

[25] The emphasis on sustainable development and the employment of the precautionary principle in the CEAA 2012 supports such a finding. The Agency is charged with determining whether an environmental assessment is required. To review the requirement of basic information on a project, so as to determine whether an assessment is required, is to require a review of an interlocutory step in the overall process.

[26] While the Applicant may have an arguable case that their project does not fall under the heading of "new" pursuant to the CEAA 2012 and its Regulations, that is an argument that can and should be made once a final determination has actually been reached.

B. *Is the Agency's Decision that the Applicant Submits a Project Description Reasonable?*

[27] However, if I am wrong in my decision that this application is premature, I will go on to consider whether the Agency's decision is reasonable, that the PL Mine is a new mine subject to section 16(c) of the Schedule to the Regulations, as opposed to an existing mine not subject to that section of the Schedule.

[28] There is no definition of "new" or "existing" mines under the CEAA 2012, or the relevant Regulations.

[29] The Applicant's position, succinctly expressed to the Court in oral argument and in its written submissions, is that an existing mine that was in operation from 1987 to 1989, and under care and maintenance as a non-operating mine under valid provincial laws for the past 26 years, cannot be regarded as a new mine.

[30] Simply put, what is old cannot be new again, and if one purposively interprets the CEAA 2012 and Schedule to the Regulations as a whole, the meaning of "new" mines as distinguishable from "existing" mines contextually makes it clear that a pre-existing mine still in existence cannot be determined to be a new mine under the CEAA 2012 and Schedule to the Regulations.

[31] Moreover, the Applicant argues that Parliament's intent is that what triggers federal environmental assessments is the determination of what is new or existing, in its plain and ordinary meaning, not by whatever activities have been undertaken, over whatever period of time, as a prerequisite in finding that a mine that has been in operation is either new or existing.

[32] Accordingly, "new" must mean mines not in existence, and not mines that are so old they should be considered new again.

[33] Finally, the Applicant also directs the Court to the A.C.A. Howe Report, July 9, 2014, Exhibit E to the Affidavit of Shawna Sigurdson, page 184 of the Respondent's Record, which specifies that:

> The processing plant crushing complex, fine-ore bin, grinding complex and concentrator/recovery plant site is compact and well-planned. The fire of 1989 did not affect the concentrator and associated structures.

[34] A such, the Applicant argues that while there may well be refurbishment and reactivation of the existing PL Mine, no reasonable interpretation can result in the PL Mine being designated as a new mine under the CEAA 2012 or the Schedule to the Regulations.

[35] The Respondent argues that since the damage suffered to the infrastructure at the PL Mine during its dormancy was so extensive, re-opening the mine would constitute the operation of a new mine, and not simply the "flick of a switch" to re-start operations.

[36] The Respondent lists a number of major and minor licenses and permits that were required of Pioneer when the mine originally opened. Further, the Respondent lists damage and changes to the dormant property since its placement in "care and maintenance":

a) the majority of the Property was burned in the 1989 fires and now contains young, deciduous forest;
b) Ragged Lake (the former Tailings Impoundment Area) is now frequented by fish; and
c) the decline ramp and the underground mine-shaft have been flooded.

[37] The Respondent also lists what they consider to be relevant characteristics of the property:

a) 24 plant and berry species that are traditionally harvested by Aboriginal people may occur at the site, several of which were observed at the Property during a 2012 terrestrial field visit;
b) moose and black bear are common in the region and use the general area for foraging; and
c) northern leopard frogs, listed as a species of special concern under the *Species at Risk Act*, may occur within the region.

[38] In determining the reasonableness of a particular statutory interpretation, the Court may look to the purpose, context, and text of the statutory instrument. Further, the provisions of a statute are to be read as a harmonious whole. The stated purposes of the CEAA 2012 are as follows:

> To protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project…
>
> To encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy.
>
> *British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at para 39
>
> *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at para 21, citing *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10

[39] The Respondent also argues that the CEAA 2012 is explicitly intended to encourage federal authorities to "take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy." Pursuant to section 4(2) of the CEAA 2012, the Agency is mandated to apply the precautionary principle in exercising its powers. Both of these considerations support the reasonableness of requiring more project information from the Applicant to reach a final determination on whether an environmental assessment is required for their project.

[40] The Respondent states that the word "new" can be interpreted in a number of ways and holds a highly nuanced meaning. Its ordinary meaning need not play an overriding role in the current interpretive analysis. The Canadian Oxford Dictionary gives eleven different definitions for "new", including "renewed or reformed; reinvigorated".

[41] Finally, I am asked to consider the February 3, 2014 internal Operational Guidance used by the Agency in determining whether a proposed designated project is a new mine or an expansion of an existing mine, in Exhibit K to the Affidavit of Shawna Sigurdson, pages 378-379 of the Respondent's Record. Included in that document are four factors to be considered:

a) proximity to existing operational mine;
b) use of existing infrastructure;
c) same vs. different ore body; and
d) temporary cessation of operations vs. permanent closure of existing mine.

[42] Counsel for the Respondent conceded that the first three factors don't assist the Respondent's view that a "new" mine can cover an already existing mine under the CEAA 2012 or the Regulations. Only the fourth factor, which provides that where a proponent proposes to

"re-open" a former mine that is now closed or decommissioned and is no longer producing a mined ore, can be considered possible support for a decision that the former PL Mine is new.

[43] However, as pointed out by the Applicant, the PL Mine is not decommissioned or closed, but simply non-operating for an extended period of time and in need of refurbishment.

[44] The Court's role is to fairly and purposively construe the meaning and use of the words "new" and "existing" in sections 16 and 17 of the Schedule to the Regulations, in light of the relevant CEAA 2012 provisions and the Regulations.

[45] It is not the Court's role to expand or limit such a construction for policy reasons; that is the role of the legislation, and by extension the legislators.

[46] While the Respondent's invitation to construe "new mine" in a more expansive light is persuasive, given the substantial length of the suspension of operations, the substantial need for new infrastructure and reconstruction, the significant environmental changes over 25 years, and consideration of the purposes of the CEAA 2012 and the mandate of the Agency, nevertheless, the Applicant's argue it should not be so construed on the following bases:

i. given the plain and ordinary meaning of "new mine", in the context of the underlying legislation enacted in the CEAA 2012 and related Schedule to the Regulations;
ii. the PL Mine has never been closed and holds a valid and subsisting Manitoba *Environment Act* license to operate;
iii. the PL Mine is subject to a valid and subsisting Closure Plan binding on Minnova;
iv. the PL Mine is placed in care and maintenance and continues to be so placed;
v. the PL Mine meets at least three of four operational factors to be considered by the Agency according to their own operational guidance, which favour a finding that the PL Mine is an existing mine; and

vi. section 14(2) of the CEAA 2012 contemplates that even if an existing mine's activities are not covered by physical prescribed activities that would trigger section 16 or 17 of the Schedule to the Regulations, and if activities of that existing mine cause an adverse environmental impact or public concerns related to those effects may warrant it, the existing mine may still be designated by the Minister.

[47] It is unfortunate for both parties that the language of the impugned legislation is ambiguous and leaves room for multiple interpretations. However, I find that a purposive construction of the terms "new mine" and "existing mine", in the context of the CEAA 2012 and in sections 16 and 17 to the Schedule to the Regulations, results in the PL Mine being an existing mine, not a new mine. As such, the Respondent's decision is unreasonable.

[48] To find otherwise is to go down a slippery slope in subjectively deciding what a new mine is under the CEAA 2012 and Regulations, without defined parameters, based on questions of "how long must a mine be non-operating?", and, "in what state of rebuilding must it be?", in order to ascertain whether it is a still existing mine, or now, is new again. That is a slide this Court should not go down, since it invites uncertainty and subjective analysis that is neither a helpful or pragmatic approach to legislative construction. While I acknowledge deference is owed to the Respondent in matters of policy decisions, in my view the Respondent's position is not a reasonable interpretation of the terms "new mine" and "existing mine", as included in the CEAA 2012 and sections 16 and 17 of the Schedule to the Regulations.

[49] However, given my finding above that this application is premature, the application must be dismissed.

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs to the Respondent fixed in the amount of $3500.

"Michael D. Manson"
Judge

APPENDIX "A"

Canadian Environmental Assessment Act, (SC 2012, c. 19, s. 52)

Definitions

S. 2(1) "designated project" means one or more physical activities that

(a) are carried out in Canada or on federal lands;

(b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and

(c) are linked to the same federal authority as specified in those regulations or that order.

It includes any physical activity that is incidental to those physical activities.

Proponent's obligation — description of designated project

8. (1) The proponent of a designated project — other than one that is subject to an environmental assessment under section 13 or subsection 14(1) — must provide the Agency with a description of the designated project that includes the information prescribed by regulations made under paragraph 84(b).

Screening decision

10. Within 45 days after the posting of the notice on the Internet site, the Agency must

(a) conduct the screening, which must include a consideration of the following factors:

(i) the description of the designated project provided by the proponent,

(ii) the possibility that the carrying out of the designated project may cause adverse environmental effects,

(iii) any comments received from the public within 20 days after the posting of the notice, and

(iv) the results of any relevant study conducted by a committee established under section 73 or 74; and

(b) on completion of the screening, decide if an environmental assessment of the designated project is required.

Définitions

2(1) « projet désigné » Une ou plusieurs activités concrètes :

a) exercées au Canada ou sur un territoire domanial;

b) désignées soit par règlement pris en vertu de l'alinéa 84a), soit par arrêté pris par le ministre en vertu du paragraphe 14(2);

c) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté.

Sont comprises les activités concrètes qui leur sont accessoires.

Obligation des promoteurs — description du projet désigné

8. (1) Le promoteur d'un projet désigné — autre que le projet désigné devant faire l'objet d'une évaluation environnementale au titre de l'article 13 ou du paragraphe 14(1) — fournit à l'Agence une description du projet qui comprend les renseignements prévus par règlement pris en vertu de l'alinéa 84b).

Examen préalable et décision

10. Dans les quarante-cinq jours suivant l'affichage de l'avis sur le site Internet, l'Agence :

a) effectue l'examen préalable du projet désigné en tenant compte notamment des éléments suivants :

(i) la description du projet fournie par le promoteur,

(ii) la possibilité que la réalisation du projet entraîne des effets environnementaux négatifs,

(iii) les observations reçues du public dans les vingt jours suivant l'affichage de l'avis sur le site Internet,

(iv) les résultats de toute étude pertinente effectuée par un comité constitué au titre des articles 73 ou 74;

b) décide, au terme de cet examen, si une évaluation environnementale du projet désigné est requise ou non.

Regulations Designating Physical Activities, SOR/2012-147

Designated activities — designated projects

2. The physical activities that are set out in the schedule are designated for the purposes of paragraph (b) of the definition "designated project" in subsection 2(1) of the Canadian Environmental Assessment Act, 2012.

16. The construction, operation, decommissioning and abandonment of a new
(a) metal mine, other than a rare earth element mine or gold mine, with an ore production capacity of 3 000 t/day or more;
(b) metal mill with an ore input capacity of 4 000 t/day or more;
(c) rare earth element mine or gold mine, other than a placer mine, with an ore production capacity of 600 t/day or more;
(d) coal mine with a coal production capacity of 3 000 t/day or more;
(e) diamond mine with an ore production capacity of 3 000 t/day or more;
(f) apatite mine with an ore production capacity of 3 000 t/day or more; or
(g) stone quarry or sand or gravel pit, with a production capacity of 3 500 000 t/year or more.

17. The expansion of an existing
(a) metal mine, other than a rare earth element mine or gold mine, that would result in an increase in the area of mine operations of 50% or more and a total ore production capacity of 3 000 t/day or more;
(b) metal mill that would result in an increase in the area of mine operations of 50% or more and a total ore input capacity of 4 000 t/day or more;
(c) rare earth element mine or gold mine, other than a placer mine, that would result in an increase in the area of mine operations of 50% or more and a total ore production capacity of 600 t/day or more;
(d) coal mine that would result in an increase in the area of mine operations of 50% or more and a total coal production capacity of 3 000 t/day

Activités concrètes — projets désignés

2. Pour l'application de l'alinéa b) de la définition de « projet désigné » au paragraphe 2(1) de la Loi canadienne sur l'évaluation environnementale (2012), les activités concrètes sont celles prévues à l'annexe.

16. La construction, l'exploitation, la désaffectation et la fermeture :
a) d'une nouvelle mine métallifère, autre qu'une mine d'éléments des terres rares ou mine d'or, d'une capacité de production de minerai de 3 000 t/jour ou plus;
b) d'une nouvelle usine métallurgique d'une capacité d'admission de minerai de 4 000 t/jour ou plus;
c) d'une nouvelle mine d'éléments des terres rares ou d'une nouvelle mine d'or, autre qu'un placer, d'une capacité de production de minerai de 600 t/jour ou plus;
d) d'une nouvelle mine de charbon d'une capacité de production de charbon de 3 000 t/jour ou plus;
e) d'une nouvelle mine de diamants d'une capacité de production de minerai de 3 000 t/jour ou plus;
f) d'une nouvelle mine d'apatite d'une capacité de production de minerai de 3 000 t/jour ou plus;
g) d'une nouvelle carrière de pierre, de gravier ou de sable d'une capacité de production de 3 500 000 t/an ou plus.

17. L'agrandissement :
a) d'une mine métallifère existante, autre qu'une mine d'éléments des terres rares ou mine d'or, qui entraînerait une augmentation de l'aire d'exploitation minière de 50 % ou plus et une capacité de production totale de minerai de 3 000 t/jour ou plus;
b) d'une usine métallurgique existante qui entraînerait une augmentation de l'aire d'exploitation minière de 50 % ou plus et une capacité d'admission totale de minerai de 4 000 t/jour ou plus;

or more;

(e) diamond mine that would result in an increase in the area of mine operations of 50% or more and a total ore production capacity of 3 000 t/day or more;

(f) apatite mine that would result in an increase in the area of mine operations of 50% or more and a total ore production capacity of 3 000 t/day or more; or

(g) stone quarry or sand or gravel pit that would result in an increase in the area of mine operations of 50% or more and a total production capacity of 3 500 000 t/year or more.

c) d'une mine d'éléments des terres rares existante ou d'une mine d'or existante, autre qu'un placer, qui entraînerait une augmentation de l'aire d'exploitation minière de 50 % ou plus et une capacité de production totale de minerai de 600 t/jour ou plus;

d) d'une mine de charbon existante qui entraînerait une augmentation de l'aire d'exploitation minière de 50 % ou plus et une capacité de production totale de charbon de 3 000 t/jour ou plus;

e) d'une mine de diamants existante qui entraînerait une augmentation de l'aire d'exploitation minière de 50 % ou plus et une capacité de production totale de minerai de 3 000 t/jour ou plus;

f) d'une mine d'apatite existante qui entraînerait une augmentation de l'aire d'exploitation minière de 50 % ou plus et une capacité de production totale de minerai de 3 000 t/jour ou plus;

g) d'une carrière de pierre, de gravier ou de sable existante qui entraînerait une augmentation de l'aire d'exploitation minière de 50 % ou plus et une capacité de production totale de 3 500 000 t/an ou plus.

FEDERAL COURT

SOLICITORS OF RECORD

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