

Supreme Court of Canada overrules narrow scoping of project

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The Supreme Court of Canada, in a unanimous decision, significantly limited the discretion of federal “responsible authorities” under the *Canadian Environmental Assessment Act* (CEAA) to determine the scope of project subject to federal environmental assessment. In *MiningWatch Canada v. Canada (Fisheries and Oceans)*, a proponent was proposing to construct and operate a copper and gold open pit mine in British Columbia. The entire project was subject to the provincial environmental assessment regime. Some components of the proposed project, including a tailings impoundment area, water diversion system and explosives storage and manufacturing area, required federally issued permits or authorizations. The federal Department of Fisheries and Oceans (DFO) determined that the scope of project for the purposes of federal assessment under CEAA was limited to these facilities.

The Supreme Court determined that the DFO had erred in adopting a narrow scope of project that did not include the entire proposed open pit mine. Pursuant to CEAA, the *Comprehensive Study List Regulations* (CSL) prescribes those projects that should be subject to more rigorous forms of environmental assessment under CEAA, including comprehensive study and review panels. The Court reasoned that because the copper and gold open pit mine as proposed by the proponent was one of the types of mines described in the CSL, the entire project as proposed should have been assessed under CEAA. By focusing on the CSL, the Supreme Court was able to avoid addressing the complicated constitutional issues which arise with respect to the overlapping provincial and federal spheres of power and jurisdiction as they relate to the environment. In rendering this decision, the Court has overruled the reasoning of the Federal Court of Appeal in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* (“Sunpine”), and *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* (“TrueNorth”).

While the Supreme Court recognized that a requirement to scope projects as broadly as described in the CSL might result in regulatory duplication and inefficiency, the Supreme Court relied on the ability of the federal assessment to be coordinated with the provincial assessment to address this issue. However, experience demonstrates that this coordination does not significantly reduce duplication and, in fact, often increases the legal risk associated with approval of a given project.

Impact of the decision

The Supreme Court’s decision in this case will inevitably create inconsistency and uncertainty for project proponents. For example, if two proposed mines

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subject to a provincial environmental assessment regime are exactly the same except that one mine will result in the diversion of a small fish-bearing stream and the other mine has no elements to bring it under CEEA jurisdiction, both will be subject to the same level of provincial environmental assessment but the former will also be subject to a rigorous federal environmental assessment whereas the latter will not be subject to any federal environmental assessment. Project proponents will now need to carefully consider the timing and sequence of publicly disclosing their projects. To the extent proponents take a piece-meal approach in project disclosure to avoid the result noted above, it is likely to result in future legal challenges related to project-splitting. This results, at least partly, from the Supreme Court's decision to focus on the CSL instead of the pertinent constitutional issues that were discussed in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, Sunpine and to some degree, TrueNorth.

Renewable power continues to energize project development in Ontario

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As the dust finally settles from the 60-day initial launch period in the Fall of 2009 under the Ontario Power Authority (OPA) Feed-in Tariff (FIT) program, many project developers, renewable energy generation equipment manufacturers, investors, lenders and governmental agencies are quickly realizing that Ontario's renewable energy market is experiencing explosive growth. This article briefly reviews some of the most recent developments.

FIT program – launch period closes

On December 16, 2009, the OPA announced that more than 1200 microFIT applications (10 kW or less) and more than 1000 FIT applications were received throughout last October and November, representing nearly 9000 MW of potential electricity generation. Rooftop solar projects amounted to more than 97% of the microFIT applications. The OPA has already sent out more than 700 offers to enter into microFIT contracts for those applications received during the launch period and intends to start offering conditional contracts to those applications received after the launch period in February 2010. Project applications under the FIT program were divided between wind (79%), solar (16%) and biofuels and water (5%).

Although the OPA has estimated that there is approximately 2500 MW of available transmission capacity, the overwhelming popularity of the FIT program based on the submission of FIT applications to date and the announcement of the Samsung deal had left many potential developers wondering what progress has been made to develop new transmission capacity and when will that capacity be operable. The Distribution Availability (DAT) and Transmission Availability Tests (TAT), as well as the Economic Connection Test (ECT), all components of the application assessment under the FIT Program, will be critical tools to ensuring that the most shovel-ready projects can proceed as quickly as possible. The OPA has recently announced that it expects to start issuing contract offers to project launch applications in the next few weeks. Those projects not issued contracts will be subject to the ECT, which will be run on a regional basis and is tentatively scheduled to commence as early as the spring of 2010. It should be noted that DATs and TATs will be paused for periods of three months during the operation of an ECT in the applicable region – which will slow down the application review process. The OPA continues to accept FIT and microFIT applications and with the first ECT occurring imminently, prospective developers are working to ensure that new applications are received before the deadline for ECT consideration, being sixty days before the test begins.

Ministry of Natural Resources – Crown land release process

While project developers anxiously await news of FIT contract offers, the Ministry of Natural Resources (MNR) has released proposed revisions to its Crown land release process for windpower projects and the MNR and the Ministry of Environment (MOE) have each recently issued guides to the new permitting and approval framework for renewable energy projects in Ontario.

The MNR released draft revisions to its Windpower Site Release – Crown Land Policy and Procedure in late December, which outline the distinct stages in the process of developing windpower projects on Crown land

including off-shore wind projects. Following the moratorium on Crown land applications for windpower projects in place since September 24, 2009, these proposed amendments represent the first phase of the MNR's review of its Crown land release process, and are intended to address the concerns of project developers with current applications under review by the MNR. The second phase of this review will focus on the long-term application of the site release process and the policy direction for renewable energy developments on Crown land in the context of Ontario's new green energy initiatives. It is unclear how the second phase of the review will affect developers who have not yet submitted applications under the site release process or when the MNR's review of this process will be completed.

The proposed revisions provide that the MNR will periodically establish "windows of opportunities" during which project developers may apply for the opportunity to secure Crown land. It is unclear how often and for what duration such "windows of opportunities" will be opened. The MNR must complete its initial review of an application for Crown land and schedule a pre-screening meeting with the applicant within 60 days after the receipt of the application. Following a required consultation process, the MNR will either issue an Applicant of Record (AoR) letter or deny the application. No estimate has been provided on how long the consultation process will take. Once an AoR letter has been issued, the formal site release process is complete. The MNR has expressly clarified that neither an application for Crown land nor an AoR status provides any right, title or interest in land and only the AoR status is transferable in limited circumstances. Following receipt of necessary approvals related to the proposed project, the MNR will instruct the applicant to submit an application for Crown land, which will include a current corporate profile and specified survey requirements. Authorization to construct the proposed project will be by Crown Lease, the term of which is generally 25 years. In certain instances, an interim Land Use Permit may be issued until all survey requirements are met (for a maximum period of one year).

Approval and permitting requirements for renewable energy projects

The MOE released its guide to the Renewable Energy Approval (REA) in late January, clarifying the new approval process that most renewable energy projects must undergo (there are limited exemptions for small-scale projects). The MOE, as the ministry responsible for coordinating the necessary review of proposed projects, has undertaken to complete the REA process within six months of receipt of a complete submission. Among the things that are to be included in submission packages are:

- > a project description report
- > a construction plan report
- > a consultation report
- > a design and operations report
- > a decommissioning plan report
- > technical reports
- > proof that setback requirements are met, and
- > archaeological and heritage resource studies/reports.

The REA regulations require that a project developer commence consultation with the applicable municipality, Aboriginal groups, and the public at least 90 days before submitting a REA application. Further, a developer must coordinate with the MNR in respect of certain issues falling under the MNR's scope of review, including those related to the *Endangered Species Act* and the *Fish and Wildlife Conservation Act*, in advance of a developer's REA application submission. As this new approval process has just begun, it remains unclear how long the entire process will take. This is particularly so given the need to file a complete application. Fulfilling the application requirements may be onerous and time-consuming, which may lead to uncertainty. Further, coordination with the federal environmental assessment process and the MNR release of Crown land process remains unclear.

For further information, please contact your Stikeman Elliott representative, the author listed above or any member of our Energy Group listed at www.stikeman.com

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