

B.C. Court Grants Injunction to Restrain Mineral Exploration Work

On December 2, 2011, the B.C. Supreme Court granted an interim injunction restraining Taseko Mines Limited (Taseko) from continuing exploratory work under two provincial permits, where B.C.'s decision to grant the permits was pending a petition for judicial review. The application was brought on behalf of the Tsilhqot'in First Nation (Tsilhqot'in) and the Xenigwet'in First Nation Government (the Petitioners).

Background of the Prosperity Project

For a period approaching 20 years, Taseko has pursued the development of a major open pit gold and copper mine known as the Prosperity Project. The Prosperity Project is located in an area over which members of Tsilhqot'in assert aboriginal title, and within which they claim aboriginal rights.

In December 2010, Taseko's proposal regarding the Prosperity Project failed to satisfy a Review Panel established by the Federal Minister of the Environment. Taseko redesigned the proposal, and submitted a revised project description to the Canadian Environmental Assessment Agency in August 2011. The agency advised the parties that by November 2011, it would determine whether to proceed with an environmental assessment, or whether to reject the project altogether.

In October and November 2011, Taseko obtained two provincial permits authorizing an exploration program designed principally to obtain geological information, which Taseko hoped would assist in the environmental assessment process. The Petitioners believed that these exploration activities would cause irreparable environmental harm.

When Taseko attempted to begin work, Tsilhqot'in initiated a road blockade that prevented Taseko from entering the project area. Meanwhile, the Petitioners filed a petition seeking judicial review of the decision to issue the permits.

Decision of the B.C. Supreme Court to grant the interim injunction

Was there a fair question to be tried?

In his decision to grant the interim injunction, Justice Grauer found that there was a fair question to be tried. He declined, however, to conclude whether the Crown acted appropriately by restricting its focus solely on the work to be performed under the provincial permits, as Taseko and the Crown submitted, or whether, as the Petitioners argued, deeper consultation was required considering the project's past and potential future environmental impact. Instead, Justice Grauer found this matter to be more appropriate for the petition for judicial review.

Which side does the balance of convenience favour?

Next, Justice Grauer found the balance of convenience favoured an injunction, citing the following reasons:

- The delay an interim injunction would cause Taseko is insignificant considering the time horizon of the whole project.

- An interim injunction would not deprive Taseko of its right to exploration activities, but not granting the interim injunction would deprive the Petitioners of their asserted right to deeper consultation.
- The harm of proceeding with exploration was irreparable for the Petitioners. On the other hand, the harm of Taseko having to postpone exploration activities was not irreparable.
- Public interest considerations favoured the reconciliation of competing interests through appropriate consultation and accommodation.
- Although the Petitioners were unable to offer any undertaking to abide by any court order for damages, Justice Grauer found that that the above circumstances justified an order relieving the Petitioners of this obligation.

Justice Grauer, however, awarded the mining company costs for its injunction application, considering the unlawful road blockade by Tsilhqot'in and Taseko's lawful conduct throughout the matter.

Comments

This case demonstrates the uncertainty regarding the Crown's duty to consult when granting provincial permits for mining exploration. It will be interesting to see the outcome at the petition for judicial review, which may address whether the Crown, in making a decision about permitting, must draw on past and potential events not directly related to the restricted permitting issue at hand when deciding the level of consultation required.