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LESSONS LEARNED FROM THE PROSPERITY MINE DECISION: ENHANCING PROJECT CERTAINTY THROUGH A SOCIAL LICENCE STRATEGY

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Since the Federal Cabinet's decision in November, 2010 to prohibit the proposed Prosperity Mine project from proceeding, questions have arisen about how this outcome came to pass, especially in circumstances where the project was previously approved through the British Columbia environmental assessment process and received strong words of support from the BC Government. One only has to consider the voluminous media coverage of this dilemma to understand the answer and to gain an appreciation of what now appears to be the most critical ingredient for success in any major resource project proposal. The critical ingredient? - "social licence" to develop and operate the project.

In the wake of the Prosperity decision, this article examines the importance of obtaining "social licence" for this kind of project; the ways in which the lack of social licence can adversely affect project certainty; and what proponents can do to minimize risk and advance their projects by developing and executing an effective social licence strategy.

Background: The Prosperity Mine Decision

In early 2010, the British Columbia Environmental Assessment Office considered the application from Taseko Mines Ltd. to construct and operate its proposed Prosperity Mine near Williams Lake. Provincial officials determined that the project could proceed and issued an Environmental Assessment Certificate for it. Because the project involved the destruction of fish habitat, a matter regulated under the federal *Fisheries Act*¹, the project proposal was also required to undergo an assessment under the *Canadian Environmental Assessment Act*² (CEAA). The two processes happened concurrently.

¹ R.S.C. 1985, c. F-14

² S.C. 1992, c. 37



The Prosperity Mine was planned as an \$800 million, 20-year open pit gold-copper operation located 125 kilometres southwest of Williams Lake. It was expected to create 1,000 direct and indirect jobs. Many people living in British Columbia's interior, particularly in the business community, eagerly awaited its development. The mine was anticipated to generate billions of dollars of revenues (including significant government revenues) in a region that has been suffering economically because of the devastation caused by the pine beetle epidemic, the slump in the forest industry, and the general economic downturn.

Integral to the project was the destruction of Fish Lake, Little Fish Lake, portions of Fish Creek, and adjacent meadows, for use as a tailings pond. Taseko proposed to construct a new man-made lake nearby, and to stock it with fish in order to compensate for this destruction. The Tsilhqot'in First Nation, representing six bands in the area, and on whose asserted traditional territory the project was to be located, strongly opposed the mine from early on. The principal basis of its opposition was that the Fish Lake area constitutes sacred fishing and traditional use grounds which have been used by the Tsilhqot'in people for many generations. The area in question also serves as habitat for grizzly bears. The First Nation emphasized that for these reasons, they viewed the area as irreplaceable and felt the Tsilhqot'in people would have no other place to go if the project proceeded. The Tsilhqot'in First Nation's position was supported by environmental groups and others.

It has been reported that Taseko looked at 17 other options for the location of its tailings, but few were technically viable and those that were would have added hundreds of millions in extra costs to the project compared to the Fish Lake option.³ Some of the First Nation's members were sufficiently upset by the proposal that they hinted at the use of violent means, if necessary, to protect the area.⁴ The BC Government had discussed the potential for a revenue-sharing arrangement with the Tsilhqot'in; however, this idea was rejected by the First Nation. The First Nation stated that it was not opposed to resource development altogether – only to extraction at a price that they believed would lead to the destruction of the ecosystem for future generations.

The federal assessment of the project commenced in early 2009 and proceeded by way of a Review Panel. Until May 1, 2010, the Panel carried out public hearings in communities near the proposed site. The Panel deliberated until July 2010, and then produced a report to the Federal Cabinet which concluded that the proposed mine would have significant adverse environmental effects on fish and fish habitat, grizzly bears, and potential or established Aboriginal rights or title. The report was sent to the Canadian Environmental Assessment Agency and provided to First Nations stakeholders for a 60-day consultation

³ Swain, Harry. November 8, 2010, *Globe & Mail*. See <http://www.theglobeandmail.com/report-on-business/economy/economy-lab/the-economists/prosperity-mine-decision-a-lose-lose-for-all-sides/article1789824/>

⁴ CBC News, Nov 10, 2010 See: <http://www.cbc.ca/canada/british-columbia/story/2010/11/10/bc-taseko-prosperity-mine-proposal.html>



period. The resulting First Nations Consultation document was then transmitted to the Federal Cabinet together with the Review Panel's report.

In late October 2010, the Federal Cabinet made two concurrent announcements. First, it rejected the Prosperity Mine proposal, on the basis that it "would result in significant adverse environmental effects on fish and fish habitat, navigation, on the current use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title." Second, it announced that a separate gold-copper mine project, the Mt. Milligan Project proposed by Thompson Creek Metals Company, could proceed as planned near Prince George. In making this second announcement, the Cabinet news release emphasized that Thompson Creek Metals Company had "adopted...a highly consultative and a collaborative approach," that "[t]he result is a responsible, successful project proposal...the government of Canada commends this approach and encourages other resource companies to follow this example." In the case of the Mt. Milligan proposal, the provincial government had signed a revenue-sharing agreement with the McLeod Lake Indian Band whose asserted traditional territory includes the mine, and the band had supported the development.

Through these announcements, the Federal Government has signaled that the failure of a resource proponent to obtain adequate stakeholder support has become an important factor in its determination whether a given project with the potential to cause significant adverse environmental impacts will be approved.

Differences in the BC Provincial and Federal Environmental Assessment Processes

While the British Columbia and Federal environmental assessment officials involved with the Prosperity project both identified the same adverse impacts that would be visited on the environment if the project were approved, the two assessment processes led to very different decisions. The outcome of the BC process was that an Environmental Assessment Certificate was issued, allowing the project to proceed conditional on the implementation of certain mitigation measures, while the Federal review resulted in a refusal to grant the assessment approval altogether.

When the British Columbia Minister of State for Mining, the Hon. Randy Hawes, was questioned about this inconsistency and whether it reflected on the integrity of the BC environmental assessment regime, he responded that he believed the Federal Cabinet had rejected Prosperity because the federal process is not able to take a wide enough view of all the potential benefits. He said: "We didn't disagree on the impacts...I think we looked [differently at] the economic side, which is not in their process and it is in our process...We looked at the mitigation, which was the creation of a new lake, the diversion of all of the water courses into the new lake, and the fact that none of those water courses would run through the mine. And then we balanced that with the need for some [economic activity] in that area, which has been so hard hit by the pine beetle and all of the social factors that go with it, and ours came up with a yes...The federal process looked only at



the environmental side -- the physical side -- in their report. They're not commissioned to look at the economics."⁵

Legislated differences do exist between the provincial and federal regimes, so the scope and content of the assessment of a proposed project may differ materially under each regime. In the result, a project that is approved under one regime can justifiably be rejected under the other. A comparative analysis of different regimes is beyond the scope of this article; however, it is clear that differences between the federal and provincial/territorial assessment processes can introduce a significant element of risk for proponents who are subject to two processes – and who are likely to have invested significant time and resources in their proposed projects. It has been reported that from the time of Taseko's initial project planning until the Federal Cabinet's decision 17 years later, Taseko spent in the range of \$100 million in an effort to secure the required approvals.⁶

The risk of financial loss through project permitting expenditures can be substantial if a project is ultimately rejected. However, this is not the only loss that may occur. Investors and potential investors can lose interest in funding a project where approvals are at risk (whether before or after their issuance).⁷ Loss of confidence in the project proponent by the market can also happen, resulting in lower share prices and loss of value to shareholders. Reputational outfall and a deterioration of relationships with regulators and stakeholders can also occur, so that even if a project might be re-jigged from a technical perspective to adequately mitigate significant impacts, it still might not receive the political, social, or regulatory support that is needed at the time of re-application to allow it to proceed.

While one might focus on the differences between the provincial and federal assessment regimes as a reason for the outcome in the Prosperity case, that line of analysis likely downplays the overriding factor that produced the ultimate decision in this case - a factor that is becoming more important to the successful permitting of any proposed project, regardless of whether or not it undergoes more than one level of environmental assessment (or any formal assessment process at all).

Obtaining Social Licence to Carry out the Project is Key

The key to the ultimate decision on the Prosperity project is revealed not through the language of the Review Panel's report on the proposal itself, but in the Federal Cabinet's announcement immediately thereafter about the Mt. Milligan Project. The relevant point here is the emphasis the Federal Cabinet put on the "highly consultative and collaborative process" that defined the project, and the encouragement given to other resource companies to take a similar approach.

⁵ Fowlie, Johnathan. Vancouver Sun, November 3, 2010. "Ottawa halts \$815-million Prosperity mine. Environmental concerns shelve plans for gold-copper project in Chilcotin."

⁶ Fowlie, Johnathan. Vancouver Sun, November 3, 2010.

⁷ Note that an Environmental Assessment Certificate can be cancelled if conditions of the certificate are not complied with (usually triggered by a complaint by one or more stakeholders).



The Mt. Milligan announcement and the circumstances surrounding it offer useful guidance about the social and political realities on which project permitting decisions increasingly appear to be founded. At the time of the announcement, the Mt. Milligan proposal had already been officially approved by the Federal Government through the assessment process. That project also involves the destruction of fish habitat, in particular the dewatering of a creek so that the creek valley could be used to store tailings. The ability to undertake such work, however, requires not only an environmental assessment approval, but a legislative amendment to the *Metal Mining Effluent Regulation*⁸ to the *Fisheries Act, supra*, expressly listing the Mt. Milligan project area as one that is exempt from the application of the *Fisheries Act* prohibition against destroying fish habitat. A federal environmental assessment approval had already been granted in December 2009 providing for this legislative amendment, but the amendment itself, which had been expected to come in July 2009, had been delayed, and was announced at the same time as the Federal Cabinet's decision to prohibit the Prosperity Mine from proceeding.

The timing of this announcement and the juxtaposition of it with the Prosperity decision is curious. However, the Federal Cabinet's desire to send a message to project proponents about the necessity for a "collaborative approach" is perhaps not surprising when, with the benefit of hindsight, one considers the following points:

- ❖ Other successfully permitted projects that have involved a collaborative approach have been effectively expedited in the approval process⁹;
- ❖ Several other firmly opposed applications have met the same fate as the Prosperity proposal¹⁰;
- ❖ Federal, provincial and territorial governments are facing public scrutiny about whether their environmental assessment regimes and policies adequately protect the environment and offer a fair opportunity for stakeholder engagement and consultation; and
- ❖ Despite owing a legal duty to consult with First Nations and legislated obligations under environmental assessment statutes, governments at all levels are challenged

⁸ SOR/2002-222

⁹ See, for example, News Releases regarding Cooperation Agreement and joint venture relationship between Alexco Resource Corp. and the First Nation of Nacho Nyak Dun for Alexco's Yukon Territory Bellekeno Mine project: <http://www.alexcoresource.com/s/AdvancedStage.asp?ReportID=178014> and <http://www.marketwire.com/press-release/Alexco-Updates-Bellekeno-Mine-Construction-Progress-Keno-Hill-Silver-District-Exploration-TSX-AXR-1285811.htm>

¹⁰ See for example: Joint Review Panel Decision (Sept. 17, 2007), by which the proposed Kemess open pit copper-gold mine in northern B.C. was determined not to be in the public interest and prohibited from proceeding following strong opposition from the Tse Keh Nay First Nation on the basis that the project would destroy its sacred spiritual grounds. Joint Review Panel Decision at <http://www.elc.uvic.ca/documents/Kemess-South-EA-Report-Sept2007.pdf>

See also the decision of Yukon Water Board to refuse issuing a Type A Water Licence to Western Copper for its Carmacks Copper mine, following strong opposition from environmental groups and the Carmacks First Nation. News report at <http://www.cbc.ca/canada/north/story/2010/05/11/yukon-carmacks-water.html> ; Water Board Decision at <http://www.yukonwaterboard.ca/registers/quartz/qz08-084/QZ08-084%20Reasons%20May%2010%20final.pdf>



to develop and maintain the appropriate expertise and resources necessary to carry out such obligations.

Such realities help to explain why a proponent's ability to obtain a social licence or stakeholder support for a project is so important to success at the permitting stage, and also why the concept of social licence seems to be gaining status as a factor to be considered in project assessments.

Suggestions for Gaining Social Licence

Most project proponents understand the importance of securing stakeholder support. In recent years much attention has been given to the need for proponents to engage with First Nations that have interests (or asserted interests) in the project area, in order to understand and facilitate accommodation of those interests where necessary or desirable. This is because the government's legal duty to consult with and accommodate First Nations is often effectively delegated to the project proponent. Experienced proponents know that the consultation and accommodation efforts required to meet the legal duty to First Nations can be onerous and time-consuming, depending on the circumstances, and that leaving the execution of those efforts solely in the hands of often under-resourced governments may give rise to significant project risks. Moreover, for a given project, there may also be non-aboriginal stakeholders who can do much either to support or undermine a project.

While the environmental assessment processes at both the federal and provincial levels contain a legislated consultation period, these periods are relatively short and may not afford sufficient opportunity to obtain stakeholder support. Significant efforts should already have been made by the project proponent to establish relationships of trust, engage in meaningful dialogue with key stakeholders, and resolve concerns, in order to minimize the risk that material opposition to a project will emerge during the assessment consultation period.

Obtaining social licence to develop a project amounts to having achieved broad community and stakeholder acceptance so the proponent can carry out the project without material push-back. Because this requires the establishment of ongoing trust, credibility, understanding, acceptance, and respect between the proponent and each important stakeholder group, social licence must not only be earned to gain support for the issuance of the project approval; it may also be necessary to ensure that ongoing operations are supported through the life of the project. Ideally, social licence culminates in a willingness by each affected stakeholder to continue to support (not merely to tolerate) the project, and it fosters a sense among key stakeholders of alignment or connection with the values of the proponent as well as a belief that a net benefit is being realized from the development.

Social licence is obtained in the same way that any solid personal or business relationship is built. It starts with a period of trust-building between the proponent and each key stakeholder group, and it is established when the proponent and the main stakeholders understand and respect each other's concerns and develop win-win solutions to the principal points of difference between them so that the proposed project can be adjusted if necessary and advanced.



The specific ways in which this can be accomplished are likely to differ from project to project, because success depends to a large extent on a number of factors. These include the cultures and personalities of the stakeholder groups and the most influential individuals within them; the type, location and complexity of the proposed project; social and political influences within the main stakeholder groups; the sophistication of the relevant stakeholder groups; and the ability (financial and otherwise) of stakeholders to engage meaningfully with the proponent with respect to the project in question. However, there are a number of general steps that a project proponent can take to advance the goal of obtaining social licence, including the following:

- ❖ Develop a social licence strategy at an early stage of project planning. [While proponents should adopt a business-minded approach to developing and executing the strategy, the strategy should not be treated merely as an end to project permitting means. To be successful, it must embody and reflect community respect as a core value, and those charged with executing the strategy need to exhibit that core value through their behaviour at all times].
- ❖ The strategy, at a high level, should include the following:
 - an early research or investigative stage aimed at determining the identity, interests, likely project interests and concerns, values, expectations, politics and culture of important potential stakeholders (including regulatory agencies and NGOs) and the key individuals involved;
 - a plan for the format/mode/content of first contact with each important stakeholder;
 - appropriate contact and communication protocols for these stakeholders;
 - a detailed strategy for discussing the project with key stakeholders to facilitate open dialogue, build trust and achieve credibility;
 - a meeting and events plan for each key stakeholder for each project phase; and,
 - a plan for addressing stakeholder participation or capacity issues as these may arise.
- ❖ Consider whether partnerships or other alliances might be struck with key stakeholders. [Many project proponents in British Columbia are now familiar with the development of agreements with First Nations to formalize relationships and advance project objectives. The development of agreements and even partnerships with other stakeholders, including NGOs and community organizations, can also serve to build trust and enhance the proponent's credibility and reputation, thus facilitating ongoing support for the project.]
- ❖ Determine whether certain stakeholders require participation funding or other support to allow them to engage meaningfully. [Participation funding arrangements can be structured in a number of ways and can serve as an effective trust and relationship building tool.]



This above lists only a few of many possible tools to assist in obtaining social licence. Despite the fact that project development has been going on for a long time, an appreciation by proponents of the benefits of proceeding in a more transparent and collaborative fashion seems to be a relatively recent revelation. Those who have embraced the idea have generally found that a social licence to operate is a valuable asset whose benefits go beyond helping to secure the discrete operating approvals necessary for the project. Obtaining social licence provides the proponent with a strong competitive advantage. It can reduce operational costs (and risks) for the project over time. It can also make it easier and less costly than might otherwise be the case to advance future projects and to undertake additional phases of work on the initial project.

Whether or not social licence becomes a political or legislated requirement for achieving success in the environmental assessment context, one thing is predictable – proponents who gain social acceptance will be preferred and indeed invited by communities and governments to develop projects, and will be better able to advance their projects more quickly and profitably, than those who take a less collaborative approach.
