

**Friends of Davie Bay, Texada Island, Society v. Her Majesty in Right of the Province of British Columbia, and Lehigh Hanson Materials Limited
S.C.B.C. Action No S105307, Vancouver Registry. .**

PROCEEDINGS SUMMARY.

Prepared by Richard Fletcher & John Dove,
Directors, Friends of Davie Bay.
February 3, 2011

Before: **Justice Peter Voith**

Date: **February 1st, 2011**

Appearances:

Friends of Davie Bay (FODB):	David G. Perry, Debra Rusnak.
Attorney General (AG)	Nancy Brown
Lehigh Hanson	Cliff G. Proudfoot.

FODB

FODB argued that the main and primary intention of the BC Environmental Assessment Act (EAA) is to capture projects for a full assessment when these projects have a heavy environmental footprint. The Regulation attempts to capture these by using a mechanism of a threshold of 250,000 tonnes.

FODB demonstrated by the infrastructure build, the acreage and the reserves, that the Davie Bay project exceeded the 250,000 tonnes by an order of magnitude of something over 50 times. It was never the intention that the BC Environmental Assessment Act could be circumvented when a quarry goes in of this magnitude with a large environmental footprint.

FODB presented the case why there should have been an EA based on the sensitivity of the site.

FODB said that the application was done under the Mines Act, as the proponent Lehigh had indicated a production capacity of 240,000 tonnes, below the trigger where the project would have gone automatically to the EA for assessment.

FODB explained that the Mines Act is essentially for the promotion of mining, and not concerned with environmental issues as would have been the case with the Environment Agency, so the safeguards alluded to do not carry weight. And with a threshold of 250,000 tonnes the Mines Act is designed to deal with smaller projects, with a low degree of environmental damage.

FODB also said that there is no legal mechanism, once a company gets its permits by sliding under the 250,000, for an Environmental Assessment to be automatically triggered in the future, rather any increase in production and the increased environmental footprint is assessed on a discretionary basis.

The point made here was that once a quarry and its infrastructure is built, the proponent can apply for a permit allowing for production of over 250,000 tonnes per year. According to the modification provisions in the reviewable project regulation, a modified quarry only triggers an environmental assessment if in addition to the increase in capacity there is also a significant increase to the size of the mine. FODB argue that given these provisions the EAO's interpretation of production capacity results in an absurd result where proponents can avoid environmental assessments by overbuilding, and then applying for an increased permit. The Respondent's answer to this problem was reliance on the discretionary power (s.6 of the EAA) of the minister to designate a project as reviewable even when it does not meet the triggers in the Reviewable Project Regulation. Hence the importance of an Environmental Assessment in the first instance under the Regulation. Justice Voith queried the citation, FODB referred to the AG, and the AG said it would confirm after lunch. Justice Voith opined that there appeared to be a "perverse incentive to overbuild" a project.

FODB said that the Environmental Assessment Office (EAO) should have looked at the complete picture and declared it a reviewable project based on the footprint of the project as clearly the capacity exceeded the stated capacity of 250,000 tonnes, but they didn't do it, they relied on the statement from Lehigh on its estimated production of 240,000 tonnes.

During the FODB argument Justice Voith appeared attentive, checked some citations, and made copious notes.

In particular Justice Voith said he "was bothered by" the statement contained in the affidavit of MEMPR: "the selection of mining equipment and operations is made by the Mine Manager, with the understanding that, in this case, their permit would limit production to 240,000 tonnes per year. The potential capacity of an individual piece of equipment is not determinative of overall capacity: the Regulations would capture almost every mining project in the province if that was the case" He asked FODB for clarity and FODB replied that is the role of the EAO to determine need for an EA based on the overall scale of a project.

AG.

AG argued that under the Mines Act the production has been capped at 240,000 tonnes, so no need to worry as various safeguards have been placed on the permit. The capacity of the quarry is equal to that permitted. The AG confirmed that there is no automatic EA once a proponent ramps up a project at a later date.

Lehigh.

Lehigh had a map of the mining plan, indicating a green area, which had been in Lehigh's ownership for 100 years! The mining map was examined in some detail. Lehigh explained that it had looked at and answered all the environmental issues with the quarry. It indicated that the caves and karst is "over there" pointing to the postage stamp reserve, and it had been dealt with. Lehigh explained that the application had gone through 7 agencies, the EAO, Ministry of Mines, Transport Canada, Department of Fisheries, the Powell River Regional District, the Integrated Land Management Bureau and First Nations - in some detail, and these agencies answered all the environmental issues...."this project is not crying out for an EA".

Lehigh resumed after lunch explaining that the EAO had looked at the project after a request had been received from Paul Griffiths to determine whether it should be referred under sec 6 (the discretionary powers of the minister) and determined that the project was not reviewable under the Act. Lehigh argued that the EAO had looked at the wider project, the full infrastructure of the project, and had made a determination that the project need not have an EA as it fell below 250,000. Only after doing that analysis did the EAO make that determination.

Lehigh then turned to the Mining Plan and made various points to demonstrate that the project did indeed have no more than a 240,000 tonne capacity. A high capacity loadout was required because of the high cost of demurrage, and the risk of poor weather; there were just 12 men working in site; and the crusher had a capacity of 1,000 tonnes per day; the quarry was only going to work one shift a day; and there was an imposed limit by the company on blasting hours. Lehigh then stood down.

Justice Voith had questioned Lehigh regarding the way in which the mines minister and the proponent could work together to avoid an environmental assessment.

FODB

FODB replied. FODB stated that as the application was for 240,000 tonnes, it was made under the Mines Act, and the EAO was never involved. It was below the 250,000 tonnes per the Regulations as the application was taken at face value. This was because the EAO interpreted *production capacity* under the Regulation as the production which would be authorized by the Mines Act permit. "The production authorized by a Mines Act permit is the production capacity specified in the Notice of Work Application, which for the proposed Texada South Quarry is 240,000 tonnes/year" —letter of the EAO Feb 16-2010.

The EAO became involved only after Paul Griffiths wrote in September 2009 asking for an EA under sec 6, under the discretionary powers of the minister. It prefaced the review by accepting the fact that the quarry had a capacity of 240,000 tonnes per the Notice of Work Application.

FODB stated that the Transport Canada review was merely a scoping exercise as the term of reference was for a project of 240,000 tonnes, and it came below the minimum for a full federal EA under the study regulations. A scoping review is a desk exercise and does not allow intervenors, like FODB, to submit evidence to protect their position; hence its position was harmed in law.

FODB sat down.

Justice Voith asked how long he had to come down with a decision and Lehigh replied 6 months.

Summary of the FODB case

The Environmental Assessment Office wrongfully refused to carry out an environmental assessment of the Proposed Texada South Quarry. The EAO's interpretation of the legislation allows a proponent to build a quarry, without an environmental assessment that has the infrastructure to produce millions of tonnes of product per year. As a result, as long as the proponent says it will voluntarily limit its production then no environmental assessment is completed, no matter what environmental impacts the infrastructure may have.

Richard Fletcher
John Dove
Directors.
Friends of Davie Bay
Gillies Bay, BC

February 3-2011