ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an order granting leave to construct a natural gas distribution pipeline and related facilities in the Township of King in the Regional Municipality of York.

REPLY ARGUMENT OF

ENBRIDGE GAS DISTRIBUTION INC.

Overview

1. The Applicant, Enbridge Gas Distribution Inc. ("**EGD**" or "**Enbridge**"), responds to the submissions of Ontario Energy Board Staff ("**Board Staff**") and Harten Consulting ("**HGRA**") both received on February 12, 2010. Enbridge concurs with Board Staff's conclusion that there are no outstanding issues. Therefore, Enbridge's reply will focus on the submissions of HGRA.

2. Enbridge will rely on its evidence and previous submissions and will not repeat its previously stated positions on issues unless the comments made by HGRA warrant a further response or clarification from Enbridge.

3. The Ontario Power Authority ("**OPA**") conducted a request for proposals for a peaking generation facility pursuant to a Ministerial Directive issued on January 31, 2008. Aird &

Berlis provided the OPA with legal advice in respect of the procurement procedure. The OPA received submissions from four developers for six projects located in the Township of King, Township of East Gwillimbury and the Township of West Gwillimbury. The York Energy Centre LP ("**YEC LP**") was the selected proponent. Independent of the OPA process, Aird & Berlis was retained to advise Enbridge in respect of the leave to construct application. These are separate matters and there is no conflict.

Applicable Regulatory Regime

4. The provincial regulatory regime provides the Ontario Energy Board (the "**Board**") with specific powers and jurisdiction as set out in the *Ontario Energy Board Act, 1998*[1] and within such areas the Board has exclusive jurisdiction. This includes oversight of the leave to construct process. Enbridge has followed the appropriate regulatory process for the approval and construction of a natural gas pipeline in Ontario. No party has indicated a specific provision of any regulatory requirement that Enbridge has failed, or will fail, to satisfy.

5. The *Environmental Assessment Act*[2] does not apply to hydrocarbon pipelines. The Ministry of the Environment has responsibility for the Environmental Assessment Act. The court in *Power Workers Union, et al v. Ontario Energy Board, et al*[3], included as Appendix A to these Reply Submissions, upheld the Board's decision which stated:

> "....the law is clear that jurisdiction on environmental matters associated with the power station falls under the Environmental Assessment Act administered by the Ministry of the Environment not the Ontario Energy Board." (p. 17).

[1] S.O. 1998, c. 15 (Schedule B).
[2] R.S.O. 1990, c. E-18.
[3] (2006) Canlii 25267 (ON S.C.D.C.).

6. The Board was clear that this hearing was about the Enbridge proposed pipeline facilities and not the YEC Facility – such position being entirely consistent with the court's decision in these matters. The provincial legislative regime is clear and there is no issue regarding the scope of the project.

7. HGRA has issues with the design of the provincial regulatory regime applicable to the project. HGRA's primary concern is not Enbridge's compliance with the existing provincial regulatory requirements. The design of the regulatory regime is an issue for the legislature of the Province of Ontario and not an issue to be determined in this proceeding.

Mining Watch not Applicable

8. The reliance on the Supreme Court of Canada's decision in *Mining Watch Canada v. Canada (Fisheries and Oceans)*[4] ("**Mining Watch**"), included as Appendix B to these Reply Submissions, is not appropriate.

9. This decision dealt with the level of discretion available to the "Responsible Authority" to scope a project differently than had been originally proposed by the project proponent. As background, the provincial environmental assessment or review processes are proponent led and the project proponent characterizes the project. However, under *Canadian Environmental Assessment Act*[5] ("CEAA"), the project proponent provides the original scope of the project which determines the procedural track under which the Responsible Authority completes the review.

[4] 2010 SCC 2 (Canlii 32797).
[5] S.C. 1992, c.37.

10. In Mining Watch, the proponent Red Chris Development Company Ltd. proposed a mining project in British Columbia that was originally scoped by the proponent in such a manner that it was subject to the Comprehensive Study List under CEAA – the highest level of scrutiny. The project was subsequently scoped again by the "Responsible Authority"[6] within the federal government, and based upon previous decisions of the federal court, the Responsible Authority eliminated certain elements from the project scope as those specific elements did not require federal approvals outside of the environmental assessment process. As a result of the reduced scope, the trigger for the comprehensive study was no longer present and the review could be completed by a screening process.

11. Mining Watch challenged whether the scoping of the project by the Responsible Authority was permitted. The Supreme Court of Canada ruled that the Responsible Authority did not have the legal authority to conduct the second scoping of the project in the manner in which it was completed. The scoping of the project as proposed by the proponent was appropriate.[7]

12. First, Enbridge would note that CEAA is not applicable to the proposed YEC Pipeline as there are no applicable triggers of the CEAA process. Second, the scoping issues that arose under CEAA are not relevant because the jurisdiction and decision making responsibilities of the Board and the Ministry of the Environment are clear.

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[6] CEAA, includes the following definition: ""responsible authority", in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted". The federal system of environmental assessment is different than the provincial system in that the provincial system is carried out by the project proponent while the Responsible Authority is the obliged to carry out the federal process in compliance with the legal requirements.

[7] *Mining Watch*, *supra* note 4, at para 2 and 35.

Environmental

13. Enbridge would also note the YEC Pipeline is not within the geographic area of the Toronto Region Conservation Authority (TRCA) as suggested by HGRA, but rather within the Lake Simcoe Region Conservation Authority (LRSCA) with whom Enbridge has been communicating.

14. Enbridge has undertaken a significant level of review – the environmental assessment, the archaeological assessment, hydrological assessment, and the hydrogeological assessment – and demonstrated its proposed mitigation to ensure compliance with the applicable regulatory requirements. There has been no specific evidence offered as to how or where Enbridge has failed to meet any of the applicable requirements.

Authority

15. HGRA is making submissions in respect of the Township of King (the "**Township**") and the York Region District School Board ("**YRDSB**"). Enbridge submits that it is improper for HGRA to make submissions on behalf the Township and the YRDSB where there have been no evidence that HGRA has been authorized by those entities to make such statements.

16. The Interim Control By-law passed by the Township applies to power generating facilities but does not apply to pipelines. The rights and obligations of Enbridge to locate pipelines within a municipal road allowance are different than those of a developer siting a power generating facility. As noted above, the Board's jurisdiction is limited to the pipeline.

Ratepayers Protection

17. Enbridge acknowledges the pipeline and the YEC Facility are linked through the Gas Delivery Agreement. The Gas Delivery Agreement appropriately protects the interests of ratepayers in respect of timing and financial risk issues associated with the completion of the YEC Pipeline. The provisions of the Gas Delivery Agreement protect Enbridge and ratepayers during the planning, construction and operation of the YEC Pipeline. Board Staff is in agreement that the Gas Delivery Agreement provides adequate protection for ratepayers.

18. Enbridge does have an obligation to serve and will comply with such obligation as confirmed by Enbridge in response to HGRA or Harten IR#7.

Pipeline Design

19. As previously stated, the design of the YEC Pipeline adheres to the requirements of Ontario Regulation 210/01, Oil and Gas Pipeline Systems, under the *Technical Standards and Safety Act, 2000*[8] and the CSA Z662-07 Oil and Gas Pipeline Systems standard. The TSSA has raised no issues and the attached letter, see Appendix C, received from the TSSA confirms the acceptability of Enbridge's design.

20. Enbridge does have comparable pipelines in Ontario. Enbridge's response to Board Staff IR#1 included a map showing other high pressure and extra high pressure pipelines within the area. Enbridge would note that HGRA's reference in paragraph 11 to 186,000$m^{3/}$hr is incorrect and it should read **136,000m^3/hr**. The Board is aware

[8] S.O. 2000, c. 16.

through other proceedings that Enbridge operates a large and extensive distribution network, including pipelines of larger diameter and higher pressure than in the present application that serves over 1.8 million customers. Recently, Enbridge has applied to the Board, and been granted leave to construct, for pipelines and facilities with a similar or larger size and/or pressure including the following:

Project	Length	Size	MOP	Board Proceeding
Toronto Portlands Project (North) Toronto Portlands Project (South)	6,500 m 2,900 m	NPS 36 NPS 20	XHP (4500 kPa)	EB-2006-0305
Goreway Pipeline Project	6,500 m	NPS 24	XHP (4500 kPa)	EB-2005-0539
Scarborough Pipeline Project – Phase II	7,800 m	NPS 16	XHP (4500 kPa)	EB-2007-0913
Thorold (Northland) Cogen Pipeline Project	2,900 m	NPS 12	XHP (4500 kPa)	EB-2008-0065
Georgian Bay Reinforcement Project	20,000 m	NPS 12	XHP (4500 kPa)	EB-2007-0782

Draft Conditions of Approval

21. The comments of HGRA in paragraph 17 are inconsistent. HGRA, while purporting to agree with Enbridge, misquotes Enbridge's position. Enbridge has stated that **construction** [emphasis added] will not commence until third party approvals are received. Traditionally, the Board has granted a conditional leave to construct, which

Enbridge submits is appropriate. Board Staff and Enbridge are in agreement with the suggested wording of the conditions of approval.

Conclusion

22. Enbridge agrees with Board Staff's submissions that there are no outstanding issues.

23. Enbridge requests the Board determine the Pipeline is in the public interest and to issue the order(s) granting leave to construct and approval of the form of easement.

24. Enbridge notes that it reserves its rights to make submissions in respect of any claim for cost awards by the intervenors.

DATED February 22, 2010 at Toronto, Ontario.

ENBRIDGE GAS DISTRIBUTION INC.
By its counsel

AIRD & BERLIS LLP

Scott Stoll

COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, E. MACDONALD & CAMERON JJ.

B E T W E E N:	
POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS	*Andrew K. Lokan*, for the Appellant, Power Workers Union, CUPE Local 1000 *Paul H. Manning*, for the Appellant, Society of Energy Professionals
Appellants	
- and -	*M. Philip Tunley*, for the Respondent, Ontario Energy Board *Gordon Cameron*, for the Respondent, Union Gas Limited
ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP	*Patrick Moran & Jennifer Teskey*, for the Respondent, Greenfield Energy Centre Limited Partnership *Michael D. Schafler*, for the Intervenor, Enbridge Gas Distribution Inc.
Respondents	
	HEARD: June 6 & 7, 2006

BY THE COURT:

NATURE OF PROCEEDING

[1] The appellants appeal from two decisions of the Ontario Energy Board, dated November 7, 2005 and January 6, 2006. The Board allowed applications for leave to construct a gas pipeline to the proposed Greenfield Energy Centre near Sarnia, Ontario.

[2] The applications were made to the Board, pursuant to the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 ("*OEBA*").

[3] The appellants are the Power Workers' Union ("PWU") and the Society of Energy Professionals ("SEP"). The appellants are labour unions whose members are employed at a number of coal-fired generating stations, including the Lambton Generating Station ("Lambton").

[4] The two decisions appealed from may be summarized as follows:

- **Decision on the Merits – January 6, 2006**: The Board granted leave to construct the gas pipeline to the Greenfield Energy Centre ("GEC") to two applicants who had filed competing applications to the Board. These successful applicants are the respondents in the case at bar: Green Field Energy Centre Limited Partnership ("GEC LP") and Union Gas Ltd. ("Union Gas").

- **Motion Decision – November 7, 2005**: The Board excluded certain "pre-filed" evidence sought to be adduced by the appellant SEP.

[5] Section 96 of the *OEBA* directs the Board to make an order granting leave to construct a work where the Board is of the opinion that the construction "of the proposed work is in the public interest". The central issue to be determined on this appeal is whether the Board properly limited the scope of its jurisdiction under this section. The Board chose to limit its public interest consideration to the *effects of the actual pipeline construction*; it declined to consider the *effects of the GEC itself*, including the closing of the Lambton coal-fired plant.

BACKGROUND

The Greenfield Energy Centre ("GEC")

[6] In June, 2005, GEC LP entered into a twenty-year, standard Clean Energy Supply contract with the Ontario Power Authority to construct, operate, and supply electricity to Ontario's power grid from the GEC.

[7] The GEC is a proposed 1,005 MW gas-fired generating station to be located in Courtright, south of Sarnia. The GEC is intended to replace the 1975 MW coal-fired Lambton under the provincial government's coal replacement plan. The GEC is to be located about three km. south of Lambton.

The Applications to Construct the Pipeline

[8] GEC LP filed an application with the Board, pursuant to s. 90 of the *OEBA*, on July 20, 2005, for leave to construct a natural gas pipeline for the GEC:

Leave to construct hydrocarbon line

90. (1) No person shall construct a hydrocarbon line without first obtaining from the Board an order granting leave to construct the hydrocarbon line if . . .

(c) any part of the proposed hydrocarbon line,

(i) uses pipe that has a nominal pipe size of 12 inches or more, and

(ii) has an operating pressure of 2,000 kilopascals or more; or

. . .

[9] The pipeline proposed by GEC LP would by-pass the distribution system of Union Gas, which holds the municipal franchise and certificate rights to distribute natural gas in the area. On August 30, 2005, Union Gas also filed an application to build a pipeline to serve the GEC. Its proposed pipeline would connect the GEC directly to Union Gas' Courtright Station.

[10] With respect to the competition between GEC LP and Union Gas, the issue was whether Union Gas was entitled to a monopoly on the supply of gas pursuant to its franchise and Board jurisprudence, or if the GEC LP should be permitted to construct its own by-pass gas pipeline.

[11] The Board's "Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario" ("Guidelines") required GEC LP and Union Gas to file an environment review report. The respondents complied with this requirement.

[12] The Board heard the applications in a combined proceeding. The PWU and the SEP were granted intervenor status in the proceeding before the Board. The SEP and the PWU sought to make submissions on the effects of the GEC itself, including air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic and environmental impacts consequent on the closure of Lambton.

The Application by the PWU and the SEP to the Ministry of the Environment

[13] The PWU and the SEP also requested on July 8, 2005 that the GEC construction be elevated to a full environmental assessment under the *Environmental Protection Act*. The Minister of Environment denied that request on November 18, 2005. The Minister's position was that the GEC qualifies for an exemption from the *Environmental Assessment Act* under the

Electricity Projects Regulation, O. Reg. 116/01. This decision is the subject of a separate pending judicial review application before the Divisional Court.

The Motion to Exclude Evidence

[14] Prior to the hearing before the Board, the SEP filed documents relating to the need for the pipeline, the impact upon consumers, and environmental matters. By Notice of Motion dated October 5, 2005, GEC LP moved for an order excluding the documents. The Board heard submissions from the SEP, the PWU, Union Gas and GEC LP. In the Motion Decision dated November 7, 2005, the Board excluded three of the documents. It stated:

> In deciding whether to grant leave to construct, the Board must determine whether the pipeline itself is in the public interest, not whether facilities connected to it will be in the public interest... In considering the leave to construct application, it is not within the Board's jurisdiction to determine whether the generating station is in the public interest. (p. 6)

[15] In accepting certain of the SEP's materials as relevant to the issue of cumulative effects of the pipeline, the Board stated that "it remains an open question as to the appropriate use and weight to be accorded to this material during the hearing"

The Decision on the Merits

[16] The hearing took place over nine days. The Board was required to consider the following provision of the *OEBA*:

> **Order allowing work to be carried out**
>
> 96. (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

[17] The Board found that the public interest would not be well served if GEC LP's application for a pipeline were denied, since it is in the public interest for gas customers to have access to the services they require. As GEC LP could not currently access adequate services from Union Gas, it was in the public interest to allow GEC LP to pursue those services directly through the option of bypassing Union Gas. None of the parties had established that Union Gas or its customers would suffer direct harm due to the approval of GEC LP's application.

[18] The Board approved the competing applications of both GEC LP and Union Gas. However, Union Gas was approved on the condition that it obtain the GEC as a customer.

[19] On the issue of the "need" for the proposed pipelines, the Board concluded that should the GEC proceed, the pipeline would clearly be needed in order to supply natural gas.

[20] The Board found that the GEC's (as opposed to the pipeline's) environmental effects that were raised by the SEP and the PWU could not be tied back to some effect of pipeline construction. The Board determined that such effects were not within the realm of "cumulative effects" as contemplated in the Guidelines. The Board stated:

> To be clear, only those effects that are additive or interact with the effects that have already been identified as resulting from the pipeline construction are to be considered under cumulative effects. (p. 10)

[21] It stated further that it had no jurisdiction to consider the arguments of the intervenors:

> ... the law is clear that jurisdiction on environmental matters associated with the power station falls under the *Environmental Assessment Act* administered by the Ministry of the Environment, and not the Ontario Energy Board. (p. 17)

COURT'S JURISDICTION

[22] The Divisional Court has jurisdiction to hear this appeal, pursuant to s. 33 of the *Ontario Energy Board Act, 1998*, s.O. 1998, c. 15, Sched. B:

> 33.(1) An appeal lies to the Divisional Court from,
>
> (a) an order of the Board;
>
> . . .
>
> (2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

STANDARD OF REVIEW

[23] The parties disagree on the applicable standard of review. Under the pragmatic and functional approach espoused in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the court is required to examine the following factors in determining the appropriate standard of review:

> **Privative Clause:** The *OEBA* does not contain a privative clause. There is a statutory right of appeal only upon a question of law or jurisdiction.

Expertise: As per this Court in *Consumers' Gas Co. v. Ontario Energy Board*, [2001] O.J. No. 5024, the Board has a "high level of expertise" on issues such as economic forecasting and the viability of a monopolistic utility. The *OEBA* provides the Board with exclusive jurisdiction to hear and determine all questions of law and fact, and its decisions on fact are not open to review.

Purpose of the *OEBA*: The objectives of the *OEBA* with respect to gas are listed in s. 2. These objectives are policy-laden and require specialized knowledge of the industry, which suggests deference is owed where the Board is required to engage these objectives:

> **Board objectives, gas**
>
> 2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
>
> 3. To facilitate rational expansion of transmission and distribution systems.
>
> 4. To facilitate rational development and safe operation of gas storage.
>
> 5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
>
> 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
>
> 6. To promote communication within the gas industry and the education of consumers.

Nature of the Problem: The appellants and the intervenor agree that the issue is a question of law: what is the scope of the Board's jurisdiction under the public interest test in s. 96 of the *OEBA*? Some of the respondents characterize the issue

as one of the Board's discretionary decision-making powers to determine what considerations are relevant to its assessment.

Conclusions: In our view, the standard of patent unreasonableness is not appropriate in light of the Supreme Court of Canada's comments in *Voice Construction Ltd. v. Construction General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, where Major J. described the "rare" circumstances in which the patent unreasonableness standard is to apply, at para. 18:

> A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard.

The issue is essentially a question of law, requiring a determination of the scope of the Board's jurisdiction. This requires a consideration of the proper interpretation of the jurisdiction-conferring provisions in the statute and the appropriate level of deference to be accorded to other decision-makers that may have concurrent jurisdiction over certain issues. In my view, these are issues of law on which the court has more expertise than the Board. Absent a privative clause and in light of the express appeal right on questions of law and jurisdiction, the appropriate standard is correctness.

KEY ISSUES

1. Did the Board err in concluding it had no jurisdiction to assess the environmental and socio-economic effects of the end use of natural gas?

2. Did the Board err in excluding some of the SEP's evidence?

TWO COMPETING PIPELINE APPLICATIONS

[24] The appellants were granted intervenor status under s. 96 of the *OEBA*. The Board is directed to make an order granting leave to construct a work where the Board is of the opinion that the construction of "the proposed work is in the public interest".

[25] The Board has published guidelines outlining many of the matters it may take into consideration, such as cumulative effect and social consequences of implementing each route site or alternative. The guidelines for pipelines deal mainly with physical environmental effect.

[26] The Board in its decision also considered the physical effect of another pipeline, the placement and building of the GEC in a relatively small area.

THE JURISPRUDENCE

[27] The appellants rely on *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, [2005] F.C.J. No. 1895 (C.A.) for authority that the Board should consider the end use of the gas. The factual issue in that case is substantially different in that the power plant was to be built in the U.S. No Canadian authority would have reviewed the plant. Here, of course, the Ministry of the Environment gave its approval and by correspondence with the appellants, dealt with the concerns raised by them.

[28] The National Energy Board ("NEB") is expressly permitted to "have regard to all considerations which appear to it to be relevant".

[29] The OEB does not have such broad authority. *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 may be distinguished again on the broader powers of the NEB.

[30] *Nakina Twp. v. Canadian National Railway* 1986 F.C.J. 426 (F.C.A.), cited by the appellants, found the Commission had improperly limited its jurisdiction by failing to consider the public interest when considering the effect of a run through.

[31] In this case, the OEB has refused to consider the effects of a project outside the applications before the Board. Cases such as *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C.S. No. 18 (C.A.) and *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* 1999 F.C.S. No. 1515 (C.A.) are not helpful as they rely upon a comprehensive scheme for assessing the environmental impacts of projects under federal jurisdiction.

[32] The federal scheme as well includes an initial (scoping) under s. 15 and detailed instructions under s. 16. These sections allow a broader jurisdiction under the federal legislation.

ANALYSIS

[33] When dealing with the competing pipeline applications did the Board apply the wrong test? It confirmed a need by finding a long-term demand for the facility and the natural gas. It refused to consider whether or not the end use, power generation, is required by the province. In doing so, it found such a decision was a question for the government of the day.

[34] It concluded as well that the construction of the pipeline would not have an adverse impact on Union Gas' consumers.

[35] To accept the task as suggested by the appellants, including the effects of the closure of the Lambton coal-fired plant, would have set the Board upon a complex and virtually limitless task.

[36] The term "public interest" is confined to a consideration of the specific project, in this case, the pipeline.

[37] The Supreme Court in *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.C. 4 was dealing with a case of broader jurisdiction from a "public interest" mandate and stated, at para. 49:

> As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme.

[38] It is conceded that there is no statutory requirement to be met for the closure of the Lambton plant.

[39] While one can have sympathy with the question of possible job losses, it was, in our view, not improper for the Board, to limit its jurisdiction to the questions before it. As well, it accepted or deferred to the policy role of the government and ruling of the Ministry of the Environment on the assessment of the plant. The appeals are dismissed.

[40] The appeal as to the refusal of the Board to accept the evidence relating to matters it found beyond its jurisdiction is dismissed as the evidence was not relevant to the issue dealt with by the Board.

[41] Costs are payable at $17,500 each to Union Gas and Greenfield Energy Centre Limited Partnership payable by the appellants. The amount was agreed to by counsel. No costs are sought by the Intervenor or the Board.

MEEHAN J.

MACDONALD J.

CAMERON J.

Released: 20060724

COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, MACDONALD & CAMERON JJ.

B E T W E E N:

POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS

Appellants

- and -

ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP

Respondents

JUDGMENT

BY THE COURT

Released: 20060724

SUPREME COURT OF CANADA

CITATION: MiningWatch Canada *v.* Canada (Fisheries and Oceans), 2010 SCC 2

DATE: 20100121
DOCKET: 32797

BETWEEN:

MiningWatch Canada
Appellant
and
Minister of Fisheries and Oceans,
Minister of Natural Resources and
Attorney General of Canada
Respondents

AND BETWEEN:

MiningWatch Canada
Appellant
and
Red Chris Development Company Ltd. and
BCMetals Corporation
Respondents
- and -
Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Canadian Environmental Law Association, West Coast Environmental Law Association, Sierra Club of Canada, Quebec Environmental Law Centre, Friends of the Earth Canada and Interamerican Association for Environmental Defense
Interveners

CORAM: Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 53) — Rothstein J. (Binnie, LeBel, Fish, Abella, Charron and Cromwell JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

MININGWATCH CANADA *v.* CANADA

MiningWatch Canada *Appellant*

v.

Minister of Fisheries and Oceans, Minister of Natural Resources and Attorney General of Canada *Respondents*

- and -

MiningWatch Canada *Appellant*

v.

Red Chris Development Company Ltd. and BCMetals Corporation *Respondents*

and

Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Canadian Environmental Law Association, West Coast Environmental Law Association, Sierra Club of Canada, Quebec Environmental Law Centre, Friends of the Earth Canada and Interamerican Association for Environmental Defense *Interveners*

Indexed as: MiningWatch Canada *v.* Canada (Fisheries and Oceans)

Neutral citation: 2010 SCC 2.

File No.: 32797.

2009: October 16; 2010: January 21.

Present: Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Environmental law — Federal environmental assessment process — Comprehensive study — Scope of project — Project as proposed by mining company requiring comprehensive environmental study — Responsible authority excluding certain aspects from scope of project — Comprehensive study no longer necessary and assessment proceeding by way of screening — Whether environmental assessment should have proceeded by way of screening or comprehensive study — Whether federal environmental assessment track is determined by project as proposed by proponent or by discretionary scoping decision of responsible authority — Meaning of the word "project" — Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 15, 21.

Administrative law — Judicial review — Remedy — Federal environmental assessment process — Project as proposed by mining company requiring comprehensive environmental study

— Responsible authority excluding certain aspects from scope of project — Comprehensive study no longer necessary and assessment proceeding by way of screening — Public interest litigant filing application for judicial review — Substantive decisions made by responsible authority not challenged — Judicial review brought as test case to determine federal government's obligations under s. 21 of Canadian Environmental Assessment Act — Federal Court setting aside decision to proceed by way of screening, quashing decision to issue permits and approvals to proceed with the project and prohibiting issuance of such permits and approvals until completion of comprehensive study — Whether Federal Court granted broader relief than was appropriate — Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(3).

In order to develop a copper and gold open pit mining and milling operation in British Columbia, a mining company submitted a project description to the BC Environmental Assessment Office. Public comment was sought and the Office subsequently determined that the project was not likely to cause significant adverse, environmental, heritage, social, economic or health effects and issued a provincial environmental assessment certificate. The company also submitted to the federal Department of Fisheries and Oceans applications for dams required to create a tailings impoundment area. Initially, the Department stated that a comprehensive study was required because the project fell within the provisions of the *Comprehensive Study List Regulations* ("CSL") promulgated under the *Canadian Environmental Assessment Act* ("*CEAA*"). It subsequently scoped the project as to exclude the mine and mill and, given this, concluded that a comprehensive study was no longer necessary and that the assessment would proceed by way of screening. Additional public comment was not sought and the screening instead relied on information collected through the cooperative federal/provincial environmental assessment process. The federal screening report

concluded that the project was not likely to cause significant adverse environmental effects and the responsible authority made the decision to allow the project to proceed. MiningWatch filed an application for judicial review of the decision to conduct a screening rather than a comprehensive study. The Federal Court allowed the application, concluding that the responsible authority had breached its duty under the *CEAA* by scoping the environmental assessment so that it only required a screening. The court quashed the decision to issue permits and approvals and prohibited further action by the responsible authority until it had conducted public consultation and completed a comprehensive study pursuant to s. 21 of the *CEAA*. The Federal Court of Appeal set aside the decision.

Held: The appeal should be allowed.

The *CEAA* and regulations require that the environmental assessment track be determined according to the project as proposed; it is generally not open to a responsible authority to change that level. An interpretation which provides that the word "project" in s. 21 of the *CEAA* means "project as proposed" by the proponent, rather than "project as scoped" by the responsible authority, is consistent with the statutory definition of that word in s. 2 of the *CEAA*, the language of the relevant regulations, and with Parliament's intent as found in the respective roles of the responsible authority and the Minister in conducting environmental assessments under the *CEAA*. Where, as here, a project as proposed is listed on the CSL, the requirements in s. 21 are mandatory.

Tracking and scoping are distinct steps in the *CEAA* process. While the responsible authority does not have the discretion to determine the assessment track, once the appropriate track

is determined, it has the discretion to determine the scope of the project for the purposes of assessment under s. 15(1)(*a*) of the *CEAA*. In the event that the project is referred to a mediator or a review panel under s. 21.1(1)(*b*), the scope of the project is determined by the Minister after consulting with the responsible authority pursuant to s. 15(1)(*b*). The presumed scope of the project to be assessed is the project as proposed by the proponent but, as an exception to this general proposition, the responsible authority or Minister may enlarge the scope in the circumstances set out in s. 15(2) or (3). The responsible authority or Minister cannot reduce the scope of the project to less than what is proposed by the proponent. For a project subject to a comprehensive study, the responsible authority can, and should, minimize duplication by using the coordination mechanisms provided for in the *CEAA*. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments.

In the present case, the federal environmental assessment should have been conducted for the project as proposed by the proponent. Since the proposed project was described in the CSL, the requirements of s. 21 applied. The responsible authority was free to use any and all federal-provincial coordination tools available, but it was still required to comply with the provisions of the *CEAA* pertaining to comprehensive studies. By conducting a screening, the responsible authority acted without statutory authority.

In exercising his discretion to grant the relief he did, the trial judge did not take account of a number of relevant and significant considerations and granted broader relief than was appropriate. MiningWatch has no proprietary or pecuniary interest in the outcome of the proceedings and did not participate in the environmental assessment conducted by the provincial

authority. No evidence of dissatisfaction with the environmental assessments conducted by the BC Environmental Assessment Office or the responsible authority and no evidence of dissatisfaction with the assessment process from anyone else was brought forward. MiningWatch has brought this judicial review as a test case of the federal government's obligations under s. 21. They made a strategic decision not to challenge the substantive scoping decision. When all the relevant considerations are taken into account, the appropriate relief is to allow the application for judicial review and declare that the responsible authority erred in failing to conduct a comprehensive study. No further relief is warranted. The focus of MiningWatch's interest as a public interest litigant is the legal point to which the declaration will respond and there is no justification in requiring the proponent of the project to repeat the environmental assessment process when there was no challenge to the substantive decisions made by the responsible authority.

Cases Cited

Referred to: *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, aff'g 2004 FC 1265, 257 F.T.R. 212; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *Canada (Citizenship and Immigration) v. Khosa*,

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APPEAL from a judgment of the Federal Court of Appeal (Desjardins, Sexton and Evans JJ.A.), 2008 FCA 209, [2009] 2 F.C.R. 21, 379 N.R. 133, 36 C.E.L.R. (3d) 159, [2008] F.C.J. No. 945 (QL), 2008 CarswellNat 1699, setting aside a decision of Martineau J., 2007 FC 955, [2008] 3 F.C.R. 84, 33 C.E.L.R. (3d) 1, 318 F.T.R. 160, [2007] F.C.J. No. 1249 (QL), 2007 CarswellNat 3169. Appeal allowed.

Gregory J. McDade, *Q.C.*, and *Lara Tessaro*, for the appellant.

Kirk N. Lambrecht, *Q.C.*, and *Michele E. Annich*, for the respondents the Minister of Fisheries and Oceans, the Minister of Natural Resources and the Attorney General of Canada.

Brad Armstrong, *Q.C.*, *Diana Valiela* and *Heather M. Cane*, for the respondents the Red Chris Development Company Ltd. and the BCMetals Corporation.

Gary A. Letcher and *Laura M. Gill*, for the interveners the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia.

Richard D. Lindgren and *Kaitlyn Mitchell*, for the interveners the Canadian Environmental Law Association, the West Coast Environmental Law Association, the Sierra Club

of Canada, the Quebec Environmental Law Centre, Friends of the Earth Canada and the Interamerican Association for Environmental Defense.

The judgment of the Court was delivered by

ROTHSTEIN J. —

1. Introduction

[1] The *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("*CEAA*" or the "Act") is a detailed set of procedures that federal authorities must follow before projects that may adversely affect the environment are permitted to proceed. The Act and its regulations provide for different levels of intensity with which environmental assessments are to be performed depending upon the nature of the project under scrutiny. In practice, the intensity with which an environmental assessment should be conducted determines the "track" on which the assessment proceeds, whether by screening, comprehensive study, mediation or review panel.

[2] The issue in this appeal is whether the environmental assessment track is determined by the project as proposed by a proponent or by the discretionary scoping decision of the federal authority. In my opinion, the Act and regulations require that the environmental assessment track be determined according to the project as proposed; it is generally not open to a federal authority to change that level.

2. Facts

[3] Red Chris Development Company and BCMetals Corporation ("Red Chris") seek to develop a copper and gold open pit mining and milling operation in north-western British Columbia. The appellant (MiningWatch) is a non-profit society interested in the environmental, social, economic, health and cultural effects of mining and in particular its effects on indigenous people.

A. *The Provincial Assessment Process*

[4] On October 27, 2003, Red Chris submitted a project description to the BC Environmental Assessment Office ("BCEAO"). The BCEAO issued an order stating that the project would require an environmental assessment certificate before proceeding. The BC assessment proceeded smoothly. Red Chris prepared terms of reference covering all aspects of the project and made them available for comment by a working group (which included provincial and federal agencies, and the local First Nations groups). Red Chris also sought public comment on the project through several open house meetings. Once Red Chris submitted its application, the BCEAO posted the application online for public comment. Members of the public submitted several comments in response to the proponent's application. On July 22, 2005, the BCEAO released its environmental assessment concluding that the project "is not likely to cause significant adverse, environmental, heritage, social, economic or health effects". On August 24, 2005, the province issued an assessment certificate.

B. *The Federal Assessment Process*

[5] On or about May 3, 2004, Red Chris triggered the federal environmental assessment process under ss. 5(1)(*d*) and 5(2) of the *CEAA* by submitting to the Department of Fisheries and Oceans ("DFO") applications for dams required to create a tailings impoundment area (an area in a small valley to be used for the permanent storage of mining effluent). DFO concluded that a federal environmental assessment would be required. On or about May 21, 2004, a "Notice of Commencement of an environmental assessment" was posted on the Canadian Environmental Assessment Registry website stating that DFO, as a "responsible authority" ("RA"), would conduct a comprehensive study of the project and described the project as an

> OPEN PIT MINE WITH ASSOCIATED INFRASTRUCTURE INCLUDING TAILINGS IMPOUNDMENT AREA, ACCESS ROADS, WATER INTAKE, TRANSMISSION LINES AND ACCESSORY BUILDINGS (E.G. MAINTENANCE, CAMPSITE) The scope of the project will be added when available.

In a letter from DFO to other federal departments, DFO stated that a comprehensive study was required because the project's proposed ore production was great enough that it fell within the provisions of the *Comprehensive Study List Regulations*, SOR/94-638 ("CSL"), promulgated under the *CEAA*.

[6] On June 2, 2004, Natural Resources Canada (NRCan) responded to this letter and announced that it was also a RA in addition to DFO because Red Chris required an approval under the *Explosives Act*, R.S.C. 1985, c. E-17. DFO and NRCan prepared to conduct a comprehensive study until December 9, 2004, when DFO wrote a letter to the Canadian Environmental Assessment Agency advising that it had scoped the project such that it excluded the mine and the mill. DFO later finalized the scope of the project as only including the tailings impoundment area and the water

diversion system with ancillary facilities and the explosives storage and/or manufacturing facility. As a result, DFO determined that, as the mine and mill were no longer included in the project as scoped for environmental assessment, a comprehensive study was not necessary and the assessment would proceed by way of screening. On December 14, 2004, the online notice of commencement was retroactively amended to indicate that the project would be subject to a screening rather than a comprehensive study.

[7] On or about April 16, 2006, the federal screening report was released. The report stated that it was "based on information collected through the cooperative federal/provincial EA [environmental assessment] process". The RAs did not seek additional public comment, relying instead on the BC environmental assessment and the public notice and responses under it. The report concluded that the project is not likely to cause significant adverse environmental effects. On May 2, 2006, the RAs made their decision to allow the project to proceed. A few days after this decision, the Screening Report was posted on the Canadian Environmental Assessment Registry website.

C. *Application for Judicial Review*

[8] On June 9, 2006, MiningWatch Canada filed an application in the Federal Court for judicial review of the decision to conduct a screening rather than a comprehensive study. It alleged a breach of the duty under the *CEAA* to conduct a comprehensive study and to consult the public on the scope of the assessment.

3. Judicial History

A. *Federal Court*, 2007 FC 955, [2008] 3 F.C.R. 84

[9] Martineau J. allowed the application for judicial review. He concluded that DFO had been correct in first determining that the project required a comprehensive study. He found that the language of s. 21 of the *CEAA*, as amended in 2003, made public consultation mandatory for comprehensive studies and that DFO and NRCan had breached their duty under the *CEAA* by scoping the environmental assessment to include only those aspects of the project that fell under federal jurisdiction.

[10] Martineau J. quashed the decision of DFO to issue permits and approvals to Red Chris and prohibited further action by DFO and NRCan until they had conducted public consultation under s. 21, completed a comprehensive study and complied with all other prerequisites to permit the project to be carried out.

B. *Federal Court of Appeal*, 2008 FCA 209, [2009] 2 F.C.R. 21

[11] Desjardins J.A., writing for a unanimous Federal Court of Appeal, allowed the appeal. The Court of Appeal found that "project" for federal environmental assessment purposes means "project as scoped" by a federal RA. Accordingly, a comprehensive study and public consultation are only mandatory where a project as scoped by the RA is listed in the CSL. Desjardins J.A. relied on the Federal Court of Appeal's earlier decisions in *Friends of the West Country Assn. v. Canada*

(Minister of Fisheries and Oceans), [2000] 2 F.C. 263 ("*Sunpine*"), and *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610 ("*TrueNorth*"), and its conclusion that "project" in s. 5(1)(*d*) and s. 15(3) of the Act means "project as scoped". Despite a recent amendment to s. 21, Desjardins J.A. found that *TrueNorth* was still binding because the introductory text in s. 21(1) was not altered by the amendment. The Federal Court of Appeal allowed the appeal, set aside Martineau J.'s order and dismissed the application for judicial review.

4. Issue

[12] The issue in the present case is whether DFO and NRCan as responsible authorities under the *CEAA* have been conferred discretion under the *CEAA* to determine whether an environmental assessment proceeds by way of a screening or comprehensive study.

5. Analysis

[13] The relevant legislative and regulatory provisions are attached in the Appendix.

A. *Procedural Options Under the CEAA*

[14] The *CEAA* is, in the words of its formal title, "[a]n Act to establish a federal environmental assessment process". It provides a process for integrating environmental considerations into planning and decision making (*CEAA*, Preamble; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 71). In broad overview, the Act

sets forth five potential procedural options or tracks for environmental assessment depending upon the nature of the project, i.e., the physical work or physical activity to be reviewed. These five tracks vary in levels of intensity of assessment:

1. No Assessment
2. Screening
3. Comprehensive Study
4. Mediation
5. Review Panel

1) No Assessment

[15] Section 7 provides that if a project is described on the *Exclusion List Regulations, 2007*, SOR/2007-108, or is required in response to an emergency, no environmental assessment need be carried out. Projects on this list are considered to have insignificant environmental effects. Projects in the *Exclusion List Regulations, 2007* include, for example, the proposed maintenance or repair of a physical work (so long as it is not carried out in a national park, park reserve, national historic site or historic canal) (*Exclusion List Regulations, 2007*, Sch. 1, s. 1).

2) Screening

[16] The least intense environmental assessment track is termed a "screening". If a proposed project does not appear in the exclusion list or the comprehensive study list (discussed below), then

a screening is required pursuant to s. 18 of the Act. Projects requiring a screening are those considered to have some potential for adverse environmental effects, but those effects are not considered to be significant enough to warrant the more intense assessments discussed below.

3) Comprehensive Study, Mediation, and Review Panel

[17] Finally, comprehensive studies, mediation and review panels all arise from the listing of a proposed project in the CSL. Under s. 21.1(1) of the Act, if a project is described in the CSL the Minister of the Environment has three options. One is to refer the project to a RA (generally a federal department or agency) to proceed with a comprehensive study. A second is to refer the project to a mediator if all interested parties agree. A third is to refer the project to a review panel. Projects in the CSL are those considered likely to have significant adverse environmental effects (CSL Preamble). A mine or mill with a proposed capacity above the specified threshold is listed in the CSL (CSL, Sch., s. 16).

[18] Some of the more important requirements pertaining to projects in the CSL that do not apply to projects that require only a screening assessment are:

1) Mandatory public consultation at the outset and throughout the environmental assessment process (ss. 21 to 23).

2) A government funding program to facilitate public participation in the environmental assessment process (s. 58(1.1)).

3) Determination by the Minister as to whether the environmental assessment should be conducted as a comprehensive study by the RA or be referred to mediation or to a review panel (s. 21.1).

4) Determination by the Minister rather than a RA as to whether the project will cause significant adverse effects to the environment (s. 23).

5) Assessment of the purpose of the project and consideration of alternative means of carrying out the project and the environmental effects of the alternatives (s. 16(2)).

6) The need for a follow-up program (s. 16(2)).

7) The capacity of affected renewable resources to meet present and future needs (s. 16(2)).

Generally speaking, in comparison to a screening, projects in the CSL are subjected to more intensive assessment, Ministerial oversight and mandatory public consultation.

B. *Interpretation of Section 21*

[19] The provision under scrutiny in the present appeal is s. 21 of the *CEAA*. Section 21 initiates the set of procedures that RAs must follow when a project is listed in the CSL. The relevant portion of the section reads as follows:

> **21.** (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

[20] The decision of the Federal Court of Appeal and the positions of the government and Red Chris on the proper interpretation of s. 21 are largely based on their interpretation of the application of s. 15(1) of the *CEAA*. They argue that s. 15(1), which grants the discretion to "scope" the project, i.e. define what aspects of the project will be included in the federal environmental assessment, includes the discretion to "track" the project (i.e. determine the level of assessment). In other words, they argue that determining the assessment track and determining the scope of the project are the same step in the assessment process. The "scoping" provision, s. 15(1), provides:

> **15.** (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
>
> (*a*) the responsible authority; or
>
> (*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

[21] Red Chris and the government argue that s. 15(1) is of "general application" and confers on a RA the discretion to determine the scope of the project in relation to which an environmental assessment is to be conducted. Therefore, even though a project as proposed by a proponent (in this case a mine and mill) appears in the CSL, it is open to a RA to scope the project for federal environmental assessment purposes in a more limited way. The result is that the project as scoped by the RA is not in the CSL and therefore requires only a screening and not a comprehensive study.

They, therefore, support the approach taken in this case by DFO and NRCan which scoped the project as the tailings impoundment area, water diversion system and explosives storage/manufacturing facility, none of which are listed in the CSL.

[22] They further point out that ss. 18 to 20 which set out the screening process and ss. 21 to 24 which set out the comprehensive study process follow s. 15. Section 18(1) commences with the words "[w]here a project is not described in the comprehensive study list". Section 21 commences with the words "[w]here a project is described in the comprehensive study list" (Red Chris factum, at para. 72). Red Chris and the government argue that these "screening" and "comprehensive study" provisions follow directly after the "general" provisions which include s. 15(1). Therefore, the reference to "project" in ss. 18 and 21 is subject to the scoping discretion in s. 15(1). In other words, s. 15(1) gives RAs the discretion to scope a project *and* determine the track for assessment. (Red Chris factum, at para. 73).

[23] Red Chris and the government also argue that their interpretation provides the RAs with the flexibility required to address the specific circumstances of each project. This flexibility allows for the consideration of the nexus between the assessment and the federal authority, the area of expertise of the RA, the provincial assessment process, the coordination between the province and federal authorities, and the elimination of duplication (Red Chris factum, at para. 97, and government factum, at para. 77). They argue that the appellant's interpretation, which provides that "project" means "project as proposed by the proponent", leads to a rigid, inflexible and arbitrary approach to environmental assessment (Red Chris factum, at para. 85).

[24] There is perhaps a rationale for the interpretation proposed by Red Chris and the government. Where projects are subject to environmental assessment by both provincial and federal authorities, it is not unreasonable to think that such projects should not be subject to two, duplicative, environmental assessments. Duplication could be minimized by scoping the project for federal environmental assessment purposes on a more limited basis than the project as proposed by the proponent, and by focussing on matters within federal jurisdiction and the specific approvals sought from the federal government by the proponents of the project.

[25] However, s. 12(4) of the *CEAA* provides that in such cases, a federal RA may cooperate with the province in respect of the environmental assessment. Detailed provisions for coordination are set out in the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, the *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (2004), and similar provincial-federal harmonization agreements across the country. Thus, Red Chris and the government's policy arguments regarding duplication and coordination have been recognized in the *CEAA* and its regulations.

[26] Red Chris and the government rely heavily on two prior Federal Court of Appeal decisions, *TrueNorth* and *Sunpine*. In reaching its conclusion, the Federal Court of Appeal also relied on these prior decisions. However, I am of the opinion that the approach of the Federal Court of Appeal and that advocated by Red Chris and the government cannot be sustained. To the extent that the decisions relied on by Red Chris, the Government and the Federal Court of Appeal are inconsistent with the analysis that follows, these reasons now govern.

[27] The duty of this Court is to interpret the Act based on its text and context. A close reading of the relevant provisions of the *CEAA* leads to the conclusion that it is not within the discretion of the RA to conduct only a screening when a proposed project is listed in the CSL.

[28] The starting point in the statutory interpretation exercise is the definition section, s. 2, of the *CEAA*. "[P]roject" in relation to a physical work is defined in English as "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work". "*Projet*" is defined in French as "Réalisation — y compris l'exploitation, la modification, la désaffectation ou la fermeture — d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59*b*)". The English definition of "project" expressly uses the word "proposed" and therefore means "project as proposed by the proponent". Although the French definition does not use the word "proposed", implicit in the French meaning of the word "*projet*" is the notion of proposal: [TRANSLATION] "Idea of something one proposes to accomplish ... the word *projet* relates to something done before the project is carried out, unlike the English word, which covers both senses." (*Multidictionnaire de la langue française* (5e éd. 2009), at p. 1313. In any event, even if "*projet*" were broader than the English equivalent, the common meaning would favour the more restricted meaning (see *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 56, *per* LeBel J.). Therefore, the starting point of this analysis is that the statutory definition of project is "project as proposed".

[29] It is certainly possible that this definition may not apply to every use of the term

"project" in the statute — particularly in the case of the *CEAA* where the term "project" appears well over 300 times. But, displacement of the defined term requires express words or necessarily implied context that Parliament did not intend for the definition to apply to that particular use of the term (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 15(2); *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, at p. 400; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 215). There is nothing in s. 18 or 21 to suggest that the term "project" as defined is not applicable or is displaced by the project as scoped by the RA under s. 15.

[30] The CSL itself provides some further support that "project" in s. 21 does not mean "project as scoped" by the RA. The English version of the CSL describes projects in terms of proposals. For example, the Schedule states:

> **16.** The proposed construction, decommissioning or abandonment of
>
> (*a*) a metal mine, other than a gold mine, with an ore production capacity of 3 000 t/d or more;...

The French equivalent reads:

> **16.** Projet de construction, de désaffectation ou de fermeture:
>
> (*a*) d'une mine métallifère, autre qu'une mine d'or, d'une capacité de production de minerai de 3 000 t/d ou plus;...

Inclusion of the word "proposed" in the English version of the CSL suggests that the opening words of s. 21 should be interpreted as "where a project 'as proposed' is described in the CSL" and not "where a project 'as scoped by the RA' is described in the CSL". While again the French regulation does not expressly refer to "proposed", as discussed above, implicit in the French definition of

"*projet*" is the notion of proposal. In any case, there is certainly nothing in the term "*projet*" that suggests it means "project as scoped".

[31] While it would be inappropriate to solely rely on regulations to interpret a provision of the governing legislation, the language in the regulations in the present case is consistent with the interpretation gleaned from the Act itself. In addition, the CSL is tightly linked to the *CEAA*. The CSL is one of the "[f]our regulations ... needed to make the Act work" (B. Hobby et al., *Canadian Environmental Assessment Act: An Annotated Guide* (1997), at p. III-1), and the proclamation of ss. 1 to 60, 71, 72, 74, 76 and 77 of the *CEAA* was delayed until the CSL and other key regulations were already in force (*Order Fixing January 19, 1995 as the Date of the Coming into Force of Certain Sections of the Act*, SI/95-11. *CSL* Registration date: October 7, 1994). In these circumstances it is appropriate to consider the regulations when interpreting the governing statute because "[w]hen regulations are made to complete the statutory scheme, they are clearly intended to operate together and to be mutually informing." (Sullivan, at p. 370). See also Binnie J. in *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 26, and Deschamps J. in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 35).

[32] A further indication that this interpretation is consistent with the intent of Parliament is found in the respective roles of the RA and the Minister in conducting environmental assessments under the *CEAA*. The *CEAA* grants the Minister the authority to prescribe that certain projects or classes of projects are subject to a comprehensive study. Section 58(1)(*i*) provides:

58. (1) For the purposes of this Act, the Minister may

...

> (*i*) make regulations prescribing any project or class of projects for which a comprehensive study is required where the Minister is satisfied that the project or any project within that class is likely to have significant adverse environmental effects.

Red Chris and the government's interpretation of s. 21 would render this authority subject to the overriding authority of the RA, presumably under s. 15(1), to determine on a case-by-case basis whether the project would be subject to a comprehensive study. In other words, decisions of the Minister would be subordinate to decisions of the RA. The presumption in Canada, with a democratically elected responsible government, must be the other way around.

[33] I am unable to agree with the Federal Court of Appeal's finding that there is "nothing in the context of the CEAA which indicates ... a different interpretation than [project-as-scoped by the RA]" (para. 49). The CSL includes classes of projects which the Minister has determined are likely to have significant adverse environmental effects (*CEAA*, s. 58(1)(*i*); CSL Preamble). It would follow that by authorizing the Minister to make such regulations and thereby determine which projects require a comprehensive study, Parliament intended the Minister to determine which projects did or did not require comprehensive study, not the RA. The *Regulatory Impact Analysis Statement*, SOR/94-636, supports that view:

> The Comprehensive Study List (CSL) supplies greater certainty and efficiency by identifying which major projects will automatically be assessed more extensively.

[34] In sum, subject to my comments below about s. 15(2) and (3), when the term "project" in ss. 18 and 21 is considered in context, the correct interpretation is "project as proposed" and not

"project as scoped". This means that the determination of whether a project requires a comprehensive study is not within the discretion of the RA. If the project as proposed is listed in the CSL, a comprehensive study is mandatory.

C. *The Discretion to Scope*

[35] How, then, does the discretion conferred on the RA or Minister under s. 15(1) to determine the scope of a project for the environmental assessment fit within the scheme of the Act? I am of the opinion that tracking and scoping are distinct steps in the *CEAA* process. Generally, the RA *does not* have the discretion to determine the assessment track. However, once the appropriate track is determined, the RA *does* have the discretion to determine the scope of the project for the purposes of assessment.

[36] In the case of a project not in the CSL a screening is conducted in accordance with the scope of the project as determined by the RA under s. 15(1)(*a*), subject to the requirements of s. 15(2) and (3). The RA's scoping decision is determinative.

[37] In the case of a project in the CSL, the answer is not as clear. However, I think it can be described in the following way. The RA, in its discretion under s. 15(1), and after ensuring public consultation in accordance with s. 21(1), determines the proposed scope of the project for purposes of the comprehensive study. Under s. 21(2)(*a*), the RA reports to the Minister on its determination of the scope of the project for the comprehensive study (and on the other matters on which the public was consulted under s. 21(1)) and recommends to the Minister to continue with the

environmental assessment by means of a comprehensive study to be conducted by the RA, or alternatively that the Minister refer the project to a mediation or review panel under s. 21(2)(*b*).

[38] The Minister may remit the project to the RA to conduct the comprehensive study in accordance with its report on the scoping of the project under s. 21.1(1)(*a*), or refer the project to a mediator or to a review panel under s. 21.1(1)(*b*). In the event that the project is referred to a mediator or a review panel under s. 21.1(1)(*b*) the scope of the project is determined by the Minister after consulting with the RA pursuant to s. 15(1)(*b*).

D. *Limits on the Discretion to Scope a Project*

[39] Regardless of the assessment track, the RA or Minister's discretion to scope a project and to scope the environmental assessment is outlined in s. 15. Section 15(1) grants the discretion to scope to either the Minister, in the case of mediation or a review panel, or the RA. However, the exercise of this discretion is limited by s. 15(3). Section 15(3) provides that an environmental assessment of a physical work shall be conducted in respect of every "construction, operation, modification, decommissioning, abandonment or other undertaking" in relation to the project. Consistent with the view that the "project as proposed by the proponent" is to apply in the absence of text or context to the contrary, the scoping of the project performed by the RA or Minister under s. 15(1) is subject to s. 15(3). In other words, the minimum scope is the project as proposed by the proponent, and the RA or Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project. The RA or Minister is also granted further discretion by s. 15(2) to combine related proposed projects into a single project for the purposes of assessment. In sum,

while the presumed scope of the project to be assessed is the project as proposed by the proponent, under s. 15(2) or (3), the RA or Minister may enlarge the scope in the appropriate circumstances.

[40] It follows, then, that the scoping discretion under s. 15(2) and (3) acts as an exception to the general proposition that the level of assessment is determined solely based on the project as proposed by the proponent. The Act assumes that the proponent will represent the entirety of the proposed project in relation to a physical work. However, as noted by the government, a proponent could engage in "project-splitting" by representing part of a project as the whole, or proposing several parts of a project as independent projects in order to circumvent additional assessment obligations (see Government factum, at para. 73). Where the RA or Minister decides to combine projects or to enlarge the scope under s. 15(2) or (3), it is conceivable that the project as proposed by the proponent might have only required a screening. However, when the RA or Minister considers all matters in relation to the project as proposed, the resulting scope places the project in the CSL. Where this occurs, the project would be subject to a comprehensive study.

[41] I should note that while, for federal environmental assessment purposes, a project will include the entire project as proposed, the RAs can, and should, minimize duplication by using the coordination mechanisms provided for in the Act. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments (s. 58(1)(*c*) and (*d*)). Full use of this authority would serve to reduce unnecessary, costly and inefficient duplication. Cooperation and coordination are the procedures expressed in the *CEAA* (see s. 12(4)).

[42] In the present case, the federal environmental assessment should have been conducted

for the project as proposed by Red Chris. The proposed project was described in the CSL. Therefore, the requirements of s. 21 applied. The RAs were free to use any and all federal-provincial coordination tools available, but they were still required to comply with the provisions of the *CEAA* pertaining to comprehensive studies. The RAs in this case acted without statutory authority by conducting a screening.

6. Remedy

[43] The remedy awarded by the trial judge was pursuant to the discretion conferred upon him under s. 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Section 18.1(3) provides:

> (3) On an application for judicial review, the Federal Court may
>
> (*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

The question here is whether this Court may and should intervene with respect to remedy. The test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given weight to all relevant considerations. See *Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404, *Friends of the Oldman River Society*, at pp. 76-77, and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at pp. 587-88.

[44] In my respectful view, in exercising his discretion to grant the broad relief he did, the

learned trial judge did not take account of a number of relevant and significant considerations. Because of this, he granted broader relief than was appropriate.

[45] Martineau J. set aside the RAs' decision to proceed by way of screening and prohibited the issuing of permits and approvals under s. 5(1)(*d*) and s. 5(2) until the completion of a comprehensive study pursuant to s. 21 and, based thereon, a decision whether to permit the project to be carried out in whole or in part pursuant to s. 37. In simple terms, the parties have been ordered to substantially re-do the environmental assessment. I do not think such relief is warranted.

[46] First, at para. 292, the trial judge states that "[i]t is not entirely clear to the Court why, once it had been determined the Project, as described by the RCDC, was included in the CSL, the decision was subsequently made to downgrade the extent of the assessment required to that of a screening." While he says that he does not define the scoping decision to be "capricious and arbitrary" (para. 294), his reasons indicate a suspicion of the motive of the RAs. However, it is apparent that the environmental assessment was converted to a screening assessment on or about December 9, 2004, because of new information and because of the issuance of the *TrueNorth* decision by the Federal Court on September 16, 2004 (2004 FC 1265. 257 F.T.R. 212), after the initial scoping decision had been made. Indeed, the trial judge, in his reasons, quoted a letter of DFO dated December 9, 2004 to the Canadian Environmental Assessment Agency explaining that the RAs were influenced by new information and by the *TrueNorth* decision (para. 108). Yet, he still questioned the motives of the RAs in scoping. It is difficult to fault the RAs for following a decision of the Federal Court on the very matter with which they were dealing.

[47] Second, the trial judge does not appear to have considered that, although it is Red Chris that will be prejudiced by incurring further delay and costs as a result of his order, Red Chris did nothing wrong. The approach to the environmental assessment was determined by the government.

[48] Third, according to the evidence, Red Chris cooperated fully with the environmental assessment conducted by the BCEAO. It proposed terms of reference for a working group which included federal and provincial agencies and local First Nation groups. Red Chris sought public comment on the project through several open house meetings. Once Red Chris submitted its application for a provincial environmental assessment certificate, the BCEAO posted the application online for public comment, and members of the public submitted several comments in response to the Red Chris application. These facts do not appear to have been considered by the trial judge in exercising his discretion to grant relief.

[49] Further, in a letter to the Deputy Minister of Natural Resources Canada dated August 24, 2006, MiningWatch stated that it "brought this application as a test case of the federal government's obligations under section 21". It would be incorrect to say that the parties in test cases may not still be interested in preserving their claims that gave rise to the litigation in the first place. However, this is not such a case.

[50] MiningWatch says it has no proprietary or pecuniary interest in the outcome of the proceedings (affidavit of Joan Kuyek, A.R. vol. 2, p. 1, at para. 32). MiningWatch did not participate in the environmental assessment conducted by the BCEAO. Its first involvement was in commencing judicial review in the Federal Court. It has not brought forward any evidence of

dissatisfaction with the environmental assessments conducted by the BCEAO or the RAs; nor is there evidence of dissatisfaction with the assessment process from anyone else. MiningWatch says it has brought this judicial review as a test case of the federal government's obligations under s. 21. Indeed, they made a strategic decision not to challenge the substantive scoping decision. This is an appropriate case in which to take the position expressed by MiningWatch at face value. A declaration as to the proper interpretation of s. 21 and the obligations of the federal government achieves MiningWatch's stated objective and grants a substantial portion of the relief it requested.

[51] In my opinion, the appropriate relief in this case would be to allow the application for judicial review and declare that the RAs erred in failing to conduct a comprehensive study. Pursuant to s. 18.1(3) of the *Federal Courts Act*, I would decline to grant any further relief.

[52] I acknowledge that in exercising discretion to grant declaratory relief without requiring the parties to substantially redo the environmental assessment, the result is to allow a process found not to comply with the requirements of the *CEAA* to stand in this case. But the fact that an appellant would otherwise be entitled to a remedy does not alter the fact that the court has the power to exercise its discretion not to grant such a remedy, or at least not the entire remedy sought. However, because such discretionary power may make inroads upon the rule of law, it must be exercised with the greatest care. See H. W. R. Wade, *Administrative Law* (10th ed. 2009), at p. 599 and *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at p. 361. In the exercise of that discretion to deny a portion of the relief sought, balance of convenience considerations are involved. See D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-88 and 3-89, referred to by Binnie J. in *Canada (Citizenship and Immigration) v.*

Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 36. Such considerations will include any disproportionate impact on the parties or the interests of third parties (Brown and Evans, at p. 3-88, footnote 454). In my respectful opinion, that is the situation here. The focus of MiningWatch's interest as a public interest litigant is the legal point to which the declaration will respond. On the other hand, I can see no justification in requiring Red Chris to repeat the environmental assessment process when there was no challenge to the substantive decisions made by the RAs.

7. Disposition

[53] I would allow the appeal with costs throughout on a party and party basis, allow the application for judicial review and issue a declaration that the RAs erred in failing to use the project as proposed by Red Chris to determine whether the *CEAA* was triggered under s. 5, whether the *Exclusion List Regulations, 2007* applied, and if a federal environmental assessment was to be conducted, whether it was to proceed by way of a comprehensive study if the project was listed in the CSL and if not, by way of screening. I would decline to grant any further relief. Although requested by MiningWatch, this is not a case for solicitor-client costs. There is no misconduct or other reason for an award other than the usual party-party award of costs that normally follows the event.

APPENDIX

Canadian Environmental Assessment Act, S.C. 1992, c. 37

[Preamble]

...

WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

2. (1) In this Act,

...

"project" means

(*a*) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or

(*b*) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(*b*);

...

« projet » Réalisation — y compris l'exploitation, la modification, la désaffectation ou la fermeture — d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59b).

"responsible authority", in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted;

[Projects requiring environmental assessment]

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

...

(*d*) under a provision prescribed pursuant to paragraph 59(*f*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

[Projects requiring approval of Governor in Council]

(2) Notwithstanding any other provision of this Act,

(*a*) an environmental assessment of a project is required before the Governor in Council, under a provision prescribed pursuant to regulations made under paragraph 59(*g*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part;

[Exclusions]

7. (1) An assessment of a project is not required under section 5 or sections 8 to 10.1, where

(*a*) the project is described in an exclusion list;

(*b*) the project is to be carried out in response to a national emergency for which special temporary measures are being taken under the *Emergencies Act*; or

(*c*) the project is to be carried out in response to an emergency and carrying out the project forthwith is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.

...

12. ...

[Cooperation with other jurisdictions]

(4) Where a screening or comprehensive study of a project is to be conducted and a jurisdiction has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part thereof, the responsible authority may cooperate with that jurisdiction respecting the environmental assessment of the project.

[Scope of project]

15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(*a*) the responsible authority; or

(*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

[Same assessment for related projects]

(2) For the purposes of conducting an environmental assessment in respect of two or more projects,

(*a*) the responsible authority, or

(*b*) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

may determine that the projects are so closely related that they can be considered to form a single project.

[All proposed undertakings to be considered]

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

(*a*) the responsible authority, or

(*b*) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

[Factors to be considered]

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(*b*) the significance of the effects referred to in paragraph (*a*);

(*c*) comments from the public that are received in accordance with this Act and the regulations;

(*d*) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(*e*) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the

Minister after consulting with the responsible authority, may require to be considered.

[Additional factors]

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(*a*) the purpose of the project;

(*b*) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(*c*) the need for, and the requirements of, any follow-up program in respect of the project; and

(*d*) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

[Screening]

18. (1) Where a project is not described in the comprehensive study list or the exclusion list made under paragraph 59(*c*), the responsible authority shall ensure that

(*a*) a screening of the project is conducted; and

(*b*) a screening report is prepared

[Public consultation]

21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

[Report and recommendation]

(2) After the public consultation, as soon as it is of the opinion that it has sufficient information to do so, the responsible authority shall

(*a*) report to the Minister regarding

(i) the scope of the project, the factors to be considered in its assessment and the

scope of those factors,

(ii) public concerns in relation to the project,

(iii) the potential of the project to cause adverse environmental effects, and

(iv) the ability of the comprehensive study to address issues relating to the project; and

(*b*) recommend to the Minister to continue with the environmental assessment by means of a comprehensive study, or to refer the project to a mediator or review panel in accordance with section 29.

[Minister's decision]

21.1 (1) The Minister, taking into account the things with regard to which the responsible authority must report under paragraph 21(2)(*a*) and the recommendation of the responsible authority under paragraph 21(2)(*b*), shall, as the Minister considers appropriate,

(*a*) refer the project to the responsible authority so that it may continue the comprehensive study and ensure that a comprehensive study report is prepared and provided to the Minister and to the Agency; or

(*b*) refer the project to a mediator or review panel in accordance with section 29.

[Decision final]

(2) Despite any other provision of this Act, if the Minister refers the project to a responsible authority under paragraph (1)(*a*), it may not be referred to a mediator or review panel in accordance with section 29.

[Public notice]

22. (1) After receiving a comprehensive study report in respect of a project, the Agency shall, in any manner it considers appropriate to facilitate public access to the report, publish a notice setting out the following information:

(*a*) the date on which the comprehensive study report will be available to the public;

(*b*) the place at which copies of the report may be obtained; and

(*c*) the deadline and address for filing comments on the conclusions and recommendations of the report.

[Public concerns]

(2) Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusions and recommendations and any other aspect of the comprehensive study report.

[Decision of Minister]

23. (1) The Minister shall, after taking into consideration the comprehensive study report and any comments filed pursuant to subsection 22(2), refer the project back to the responsible authority for action under section 37 and issue an environmental assessment decision statement that

(*a*) sets out the Minister's opinion as to whether, taking into account the implementation of any mitigation measures that the Minister considers appropriate, the project is or is not likely to cause significant adverse environmental effects; and

(*b*) sets out any mitigation measures or follow-up program that the Minister considers appropriate, after having taken into account the views of the responsible authorities and other federal authorities concerning the measures and program.

[More information required]

(2) Before issuing the environmental assessment decision statement, the Minister shall, if the Minister is of the opinion that additional information is necessary or that there are public concerns that need to be further addressed, request that the federal authorities referred to in paragraph 12.3(*a*) or the proponent ensure that the necessary information is provided or actions are taken to address those public concerns.

[Time for statement]

(3) The Minister shall not issue the environmental assessment decision statement before the 30th day after the inclusion on the Internet site of

(*a*) notice of the commencement of the environmental assessment;

(*b*) a description of the scope of the project;

(*c*) where the Minister, under paragraph 21.1(1)(*a*), refers a project to the responsible authority to continue a comprehensive study,

(i) notice of the Minister's decision to so refer the project, and

(ii) a description of the factors to be taken into consideration in the environmental assessment and of the scope of those factors or an indication of how such a description may be obtained; and

(*d*) the comprehensive study report that is to be taken into consideration by a responsible authority in making its decision under subsection 37(1) or a description of

how a copy of the report may be obtained.

[Use of previously conducted environmental assessment]

24. (1) Where a proponent proposes to carry out, in whole or in part, a project for which an environmental assessment was previously conducted and

(*a*) the project did not proceed after the assessment was completed,

(*b*) in the case of a project that is in relation to a physical work, the proponent proposes an undertaking in relation to that work different from that proposed when the assessment was conducted,

(*c*) the manner in which the project is to be carried out has subsequently changed, or

(*d*) the renewal of a licence, permit, approval or other action under a prescribed provision is sought,

the responsible authority shall use that assessment and the report thereon to whatever extent is appropriate for the purpose of complying with section 18 or 21.

[Necessary adjustments]

(2) Where a responsible authority uses an environmental assessment and the report thereon pursuant to subsection (1), the responsible authority shall ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project and any significant new information relating to the environmental effects of the project.

[Decision of responsible authority]

37. (1) Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

(*a*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit

the project to be carried out in whole or in part; or

(*b*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

[Powers to facilitate environmental assessments]

58. (1) For the purposes of this Act, the Minister may

...

(*c*) enter into agreements or arrangements with any jurisdiction within the meaning of paragraph 40(1)(*a*), (*b*), (*c*) or (*d*) respecting assessments of environmental effects;

(*d*) enter into agreements or arrangements with any jurisdiction, within the meaning of subsection 40(1), for the purposes of coordination, consultation, exchange of information and the determination of factors to be considered in relation to the assessment of the environmental effects of projects of common interest;

...

(*i*) make regulations prescribing any project or class of projects for which a comprehensive study is required where the Minister is satisfied that the project or any project within that class is likely to have significant adverse environmental effects.

...

[Participant funding]

(1.1) For the purposes of this Act, the Minister shall establish a participant funding program to facilitate the participation of the public in comprehensive studies, mediations and assessments by review panels established under either subsection 33(1) or 40(2).

Comprehensive Study List Regulations, SOR/94-638

[Regulations Prescribing Those Projects and Classes of Projects for Which a Comprehensive Study is Required]

Whereas the Governor in Council is satisfied that certain projects and classes of projects are likely to have significant adverse environmental effects;

...

GENERAL

3. The projects and classes of projects that are set out in the schedule are prescribed projects and classes of projects for which a comprehensive study is required.

SCHEDULE

PART V: MINERALS AND MINERAL PROCESSING

16. The proposed construction, decommissioning or abandonment of

(*a*) a metal mine, other than a gold mine, with an ore production capacity of 3 000 t/d or more;

...

(*c*) a gold mine, other than a placer mine, with an ore production capacity of 600 t/d or more;

16. *Projet de construction, de désaffectation ou de fermeture :*

(a) d'une mine métallifère, autre qu'une mine d'or, d'une capacité de production de minerai de 3 000 t/d ou plus;

Exclusion List Regulations, 2007, SOR/2007-108

Whereas the Governor in Council is satisfied that the environmental effects of certain projects in relation to physical works are insignificant;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of the Environment, pursuant to subparagraph 59(c)(ii) of the *Canadian Environmental Assessment Act*, hereby makes the annexed *Exclusion List Regulations, 2007*.

...

2. The projects and classes of projects that are set out in Schedule 1 and to be carried out in places other than a national park, park reserve, national historic site or historic canal are exempted from the requirement to conduct an assessment under the Act.

SCHEDULE 1

EXCLUSION LIST FOR PLACES OTHER THAN NATIONAL PARKS, PARK RESERVES, NATIONAL HISTORIC SITES OR HISTORIC CANALS

PART 1

GENERAL PROJECTS

1. The proposed maintenance or repair of a physical work.

Federal Courts Act, R.S.C. 1985, c. F-7

[Application for judicial review]

18.1...

[Powers of Federal Court]

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Interpretation Act, R.S.C. 1985, c. I-21

[Application of definitions and interpretation rules]

15. (1) Definitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation.

[Interpretation sections subject to exceptions]

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed

(*a*) as being applicable only if a contrary intention does not appear; and

(*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.

Appeal allowed with costs.

Solicitors for the appellant: Ecojustice Canada, Vancouver.

Solicitor for the respondents the Minister of Fisheries and Oceans, the Minister of Natural Resources and the Attorney General of Canada: Department of Justice Canada, Edmonton.

Solicitors for the respondents the Red Chris Development Company Ltd. and the BCMetals Corporation: Lawson Lundell, Vancouver.

Solicitors for the interveners the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia: Edwards, Kenny & Bray, Vancouver.

Solicitors for the interveners the Canadian Environmental Law Association, the West Coast Environmental Law Association, the Sierra Club of Canada, the Quebec Environmental Law Centre, Friends of the Earth Canada and the Interamerican Association for Environmental Defense: Canadian Environmental Law Association, Toronto.

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October 15, 2009

File: SR 119434

Ms. Bonnie Jean Adams
Regulatory Coordinator
Enbridge Gas Distribution.
500 Consumers Rd.
North York ON M2J 1P8

Re: Enbridge Gas Distribution Inc. Proposed NPS 16 Natural Gas Pipeline to Serve the Proposed York Energy Centre.

Dear Ms. Adams:

This is in response to your letter of September 24, 2009, about the proposed construction of the referenced pipeline. We reviewed the Final Report prepared by Jacques Whitford Stantec Limited, July 16, 2009 and additional information submitted, including the design specification for the NPS 16 pipeline.

This project meets the requirements of the Ontario Regulation on Oil and Gas Pipeline Systems (O. Reg. 210/01) and the codes enforced by this regulation. According to the design and pipe specification information provided, the pipeline will be operated at a MOP of 4500 kPa (653 psig). The stress level at MOP for this pipeline will be below 30%SMYS, placing this line within the scope of section 12 of the CSA Z662-07, Gas Distribution Systems.

The strength test and leak test also meet the CSA Z662-07 and O. Reg. 210/01.

We found the report and specifications acceptable.

Yours truly,

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