IN THE MATTER OF THE JOINT REVIEW PANEL ("JOINT PANEL") ESTABLISHED TO REVIEW THE JOSLYN MINE NORTH PROJECT ("PROJECT") PROPOSED BY TOTAL E&P CANADA LTD. ("TOTAL")

AND IN THE MATTER OF ALBERTA ENERGY RESOURCES CONSERVATION BOARD ("ERCB") APPLICATION NO. 1445545

AND IN THE MATTER OF CANADIAN ENVIRONMENTAL ASSESMENT AGENCY ("AGENCY") REFERENCE NO. 08-05-37519

AND IN THE MATTER OF THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT* ("*CEAA*"), S.C. 1992, C. 37, S. 16

AND IN THE MATTER OF THE *OIL SANDS CONSERVATION ACT*, R.S.A. 2000, C. O-7, S. 10

AND IN THE MATTER OF THE *ENERGY RESOURCES CONSERVATION BOARD RULES OF PRACTICE,* ALTA. REG. 252/2007, S. 9

MOTION TO THE JOINT PANEL TO DIRECT TOTAL TO PERFOM AN ANALYSIS OF CUMULATIVE EFFECTS

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1. The Oil Sands Environmental Coalition ("OSEC") requests that the Joint Panel obtain or direct TOTAL to obtain the following information and analysis necessary to enable the Joint Panel to discharge its duty to assess the environmental effects of the Project:

    a. Incorporation of the Terrestrial Ecosystem Management Framework ("TEMF") developed by CEMA;

    b. Reasonable likely future activities, specifically forest fires and future forest harvesting.

2. OSEC further requests that that the Panel adjourn this Hearing until TOTAL has provided the requested information and analysis of the cumulative effects of the Project, provided notice to the parties to this Hearing that it has completed this study, and provided sufficient time for the Panel and the parties to this Hearing to evaluate the additional information.

3. The reasons for this request to the Joint Panel are:

    a. The Joint Panel is charged with conducting a reasonable, careful assessment, in a precautionary manner of the effect of the Project to ensure that the Project does not crease significant adverse effects pursuant to *CEAA*, s. 4 (**TAB 2**).

    b. The Joint Panel is required by statute to consider the environmental effects of the Project including any cumulative environmental effects that are likely to result from the Project in combination in the other **projects** or **activities** that have been or will be carried out and the significance of those effects, *CEAA*, s. 16(1)(a)-(b);

    c. The Terms of Reference for the Joint Panel require it to include the "reasonably likely future projects" in its cumulative effects assessment;

    d. The Terms of References for the Joint Panel require it to take in to considering the Canadian Environmental Assessment Agency's "Cumulative Effects Practitioner's Guide" (1999) and the Agency's Operational Policy Statement entitled "Addressing Cumulative Environmental Effects under the *CEAA*" (last updated in November 2007) (attached at **TAB 3**). These documents recommend reasonably likely future activities and projects be taken into account, but *likelihood* is a flexible statement influenced by other factors requiring a precautionary approach, such as "rapid development for area" and particular sensitivities and risks involved.

    e. The Terms of Reference issued by Alberta Environment, following public consultation, specifically identified forest fires as a biophysical activity to be taken into account to assess the cumulative impacts of the project, however the impact of forest fires has not just been assessed by TOTAL;

f. Forest harvesting is another future activity identified by the Joint Panel in its Additional Information Request which is also a "reasonably likely" future activity that will have effects in combination with the Project that have not been assessed;

g. The Terms of Reference issued by Alberta Environment (See Joint Panel Registry Document No. 6) required the cumulative effects assessment to include all publicly announced projects within six (6) months of filing the environmental impact assessment report and the UTS/Teck Cominco Equinox and Frontier mines were announced more than six (6) months prior to TOTAL submitting its revised and updated EIA in February 2010;

h. The Frontier and Equinox mines are reasonably likely future projects that have not been included in the cumulative effects assessment prepared by TOTAL; and

i. *CEAA*, s. 16(2) states that regional studies may be taken into account. The Terms of Reference issued by Alberta Environment Direct TOTAL to take into account research and studies by the Cumulative Effects Management Association ("CEMA") to predict effects. CEMA's study of regional effects of oil sands incorporated into the TEMF was accessible to TOTAL and supported by TOTAL but was not considered or included in the EIA and should be to the severity of impacts identified by CEMA and the useful guidance it provides on regional effects.

4. The Affidavit of Mr. Simon Dyer, Oil Sands Program Director of the Pembina Institute, a member of the Oil Sands Environmental Coalition and intervener at the Hearing, sets out the relevant facts for this motion.

Background

5. The Terms of Reference for the EIA for the Project were finalized on September 29, 2005 and the EIA filed in 2006 and deemed complete by Alberta Environment in July 2008.

6. A Joint Panel was formed pursuant to an agreement between Canada and the ERCB in October 2008. The agreement included terms of reference for the environmental assessment of the Project by the Joint Panel.

7. TOTAL requested that the Joint Panel hearing be delayed and it made significant changes to the Project. It filed an updated and revised EIA in February 2010.

8. In response to the an invitation for submissions on the adequacy of the information filed by TOTAL with the Joint Panel on March 16, 2010, various parties submitted that the implementation was inadequate, including OSEC. See letter from OSEC dated May 17, 2010 setting out 85 questions to TOTAL (See Joint Panel Registry Document No. 171).

9. OSEC submitted Information Requests to TOTAL on July 30, 2010 pursuant to the *Energy Resources Conservation Board Rules of Practice*, Alta. Reg. 252/2007, ss. 23-30 (**TAB 4**).

10. OSEC Information Request 09 asked TOTAL whether it incorporated the TEMF into its EIA, but TOTAL replied that, while it supports the TEMF approach, it had not used the TEMF in its EIA.

11. OSEC Information Request 041 asked TOTAL as follows:

> Reference: Cumulative Effects: Wildlife and vegetation: Page 29 of July 2010 Additional Information; Section 14.1.1.2; Table 14.1-2; Section 14.14.2.1; Table 14.14-3 of Additional Information February, 2010; Section 13.14.4 Table 13.14-4 of SI Project Update, 2007.
>
> (a) Did the cumulative environmental assessments of wildlife and vegetation include the modeled effects of future forest fires? If so please provide the assumptions and modeling results.
> (b) Did the cumulative environmental assessment of wildlife and vegetation include the projected effects of further forest harvest by forestry companies within the Regional Study Area? Please provide the details of the assumptions and assessment.

LEGAL GROUNDS FOR MOTION

Joint Review Panel Agreement

12. The Joint Review Panel Agreement (**TAB 1**), at s. 4.1, states that the, "Joint Panel shall conduct its review in a manner that discharges the responsibilities of the ERCB under the *Energy Resources Conservation Act*."

13. The Agreement further states, at s. 4.2, that the, "Joint Panel shall conduct its review in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act* and in the Terms of Reference ... that were fixed and approved by the Federal Minister of the Environment and the ERCB." [emphasis added]

CEAA

14. The fundamental purpose of the Joint Panel's mandate is statutory, and it set out in the *CEAA*, s. 4:

> **4.** (1) The purposes of this Act are
>
> (*a*) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;

(*b*) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

(*b.1*) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;

(*b.2*) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;

(*b.3*) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;

(*c*) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

(*d*) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

Duties of the Government of Canada

(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

15. The *CEAA* requires assessment by the Joint Panel of the cumulative effects of the Project and their significance - notably at s. 16(1)(a)-(b):

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*);

16. The *CEAA* also recognizes the importance of incorporating regional studies:

(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.

17. Section 34 of the *CEAA* states that, "[a] review panel shall, in accordance with any regulations made for that purpose and with its term of reference, (*a*) ensure that the information required for an assessment by a review panel is obtained and made available to the public; (*b*) hold hearings in a manner that offers the public an opportunity to participate in the assessment; (*c*) prepare a report setting out (i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and (ii) a summary of any comments received from the public; and (*d*) submit the report to the Minister and the responsible authority." [emphasis added]

18. To comply with section 34 of the *CEAA*, the Joint Panel must gain a robust understanding of the Project to make an informed decision, and, to gain such an understanding, the Joint Panel must have before it a thorough assessment of the effects of the Project. See, *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, (2008) C.E.L.R. (3d) 254 (F.C.), at para. 79 (**TAB 6**).

19. An essential aspect of a robust understanding is an evaluation of the cumulative effects of the Project as required by Section 16 of the *CEAA* and the Terms of Reference. See *Alberta Wilderness Association v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425 (T.D.), at para. 52 (**TAB 7**).

20. In *Alberta Wilderness Association v. Cardinal River Coals Ltd.*, *supra*, at para. 37, the Federal Court held that to discharge its obligations pursuant to s. 16 of CEAA the Joint Review Panel was required to perform to a high standard of care. The Panel, not the respondent, had a duty to gather information regarding forestry under *CEAA* s. 34(*a*). It was incumbent on the Panel to require the production of information which it knew existed, and which was apparently relevant to one or more of the s. 16 factors in order to meet the duty to use its production of evidence powers to the full extent necessary to make available all

information required for the conduct of its review. It was not sufficient to fill a gap in the evidence with subjective, albeit expert opinion, when actual information was known to be available.

Joint Panel Terms of Reference

21. The Terms of Reference of the Joint Panel (attached to the Agreement as an Appendix) state the following with respect to the cumulative effects assessment:

> The Panel shall identify and assess the project's cumulative effects. Cumulative effects are those changes to the environment due to the project combined with the existence of other works or other past, present and reasonably foreseeable future projects.
>
> The cumulative effects assessment should take into consideration the approach described in the Canadian Environmental Assessment Agency's *Cumulative Effects Assessment Practitioners Guide* (1999) and in the Agency's Operation Policy Statement entitled "Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act*" updated in November 2007.
>
> The Panel should focus its consideration of cumulative effects on key valued environmental components. Without limiting itself thereto, the following components may be considered: Water quality and quantity; Air quality; Current use of lands and resources for traditional purposes by aboriginal persons; Wildlife and wildlife habitat for key species;

Alberta Environment Terms of Reference

22. Alberta's *Environmental Protection and Enhancement Act* ("*EPEA*"), R.S.A. 2000, c. E-12, s. 48 (**TAB 5**) states that a project proponent must comply with the terms of reference for a project subject to an environmental impact assessment.

23. *EPEA*, s. 49(d) states that an environmental impact assessment shall include, "a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations."

24. Section 4.11 of the Terms of Reference requires participation in regional cooperative efforts:
"Describe how Deer Creek intends to use information from CEMA, WBEA, RAMP and Canadian Oil Sands Network for Research and Development (CONRAD) to design mitigation measures for project specific cumulative effects"

25. Section 5.1 of the Terms of Reference states that, "[t]he [Environmental Impact Assessment] will include the following basic environmental information requirements for three assessment scenarios," including, at s. 5.1(e), "information about ecological processes and natural forces that are expected to produce changes in environmental conditions, e.g., forest fires, flood or drought conditions and predator-prey population cycles."

26. Section 5.1 (f) and (g) of the Terms of Reference requires participation in regional cooperative efforts:
"the demonstrated use of appropriate predictive tools and methods, consistent with CEMA, WBEA and RAMP and other relevant initiatives, to enable quantitative estimates of future conditions with the highest possible degree of certainty;"

"The evaluation system will rank the consequences of the effects measured quantitatively against management objectives or baseline conditions, and described qualitatively with respect to the views of proponents and stakeholders"

27. Sections 5.6 (c), (g), and (j) of the Terms of Reference require that the EIA evaluate how the Project will effect current and future forestry and forest harvesting on the lands affected by the Project.

28. Section 5.4(a) of the Terms of Reference, states that the EIA should assess and discuss the cumulative effects of the Project along with other projects and activity in the area.

29. The Alberta Energy and Utilities Board, as the ERCB was then, published "Cumulative Effects Assessment in Environmental Impact Reports Required Under the Alberta Environmental Protection and Enhancement Act" (**TAB 4**) that stated with respect to cumulative effects that:

> "Cumulative effects are caused by the accumulation and interaction of multiple stresses affecting the parts and the functions of ecosystems. Of particular concern is the knowledge that ecological systems sometimes change abruptly and unexpectedly in response to apparently small incremental stresses. Numerous definitions of cumulative effects exist. While the nuances of the definitions vary, they all suggest that the assessment of cumulative effects presents some unique challenges that require a departure from conventional impact assessment methodologies. For the purposes of this document, cumulative effects are defined as **the changes to the environment caused by an activity in combination with other past, present, and reasonably foreseeable human activities.** The CEA component of an EIA report should document predicted changes to the environment that might be reasonably anticipated from a proposed activity in combination with other activities."

30. In light of the law submitted above, OSEC submits that a robust, reliable, and reasonable assessment of the Project's cumulative effects and its significance is not before the Joint Panel.

31. In order to comply with its enabling statute and to protect the environment from significant adverse effects, the Joint Panel must obtain further information and evaluation of the environmental effects of:

    a. Likely future projects, namely the Equinox and Frontier mines and an assessment of the potential additive effects;

    b. An assessment of the potential effects of forest fires;

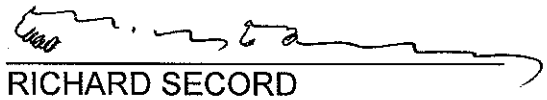
    c. A reasonable estimate of future forestry activity and assessment of its effects.

32. Additionally, TOTAL and the Joint Panel have available the research, modelling, and evaluation of the effects of regional development on terrestrial resources, particularly on wildlife, as compiled by CEMA and the TEMF. This information indicates that the Project's potential effects and contribution to the cumulative effects on fish and wildlife is unavoidable and significant. The TEMF, we request, must be incorporated into a new more realistic assessment of the cumulative effects because the development of the TEMF indicated that amount of development for 2008 as well as near future development was reducing or threatening wildlife populations and recommended immediate action. This indicates specific "substantiated risks" from the rapid development of oil sands and, therefore, a very conservative and cautious approach is required by the Joint Panel.

33. OSEC requests TOTAL be requires to prepare a new assessment incorporating the TEMF.

TAKE NOTICE THAT the Affidavit of Mr. Simon Dyer, Oil Sands Program Director of the Pembina Institute, a member of the Oil Sands Environmental Coalition and intervener at the Hearing, is tendered in support of this Motion.

ACKROYD LLP

Per: 

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TAB 1

AGREEMENT
To Establish a Joint Panel
for the Joslyn North Mine Project

Between
The Minister of the Environment, Canada

- and -

The Energy Resources Conservation Board, Alberta

PREAMBLE

WHEREAS the Energy Resources Conservation Board (the ERCB) has statutory responsibilities pursuant to the *Energy Resources Conservation Act*; and

WHEREAS the Minister of the Environment, Canada (the Federal Minister of the Environment) has statutory responsibilities pursuant to the *Canadian Environmental Assessment Act*; and

WHEREAS the Joslyn North Mine Project (the Project) requires a public hearing and approvals from the ERCB pursuant to the *Energy Resources Conservation Act*, and the *Oil Sands Conservation Act*, and is subject to an assessment under the *Canadian Environmental Assessment Act*; and

WHEREAS the Minister of Fisheries and Oceans has requested, in accordance with section 25 of the *Canadian Environmental Assessment Act*, that the Federal Minister of the Environment refer the Project to a review panel; and

WHEREAS the Federal Minister of the Environment has referred the Project to a review panel in accordance with section 29 of the *Canadian Environmental Assessment Act*; and

WHEREAS the Government of the Province of Alberta and the Government of Canada established a framework for conducting Joint Panels through the *Canada-Alberta Agreement on Environmental Assessment Cooperation (2005)* signed on May 17, 2005; and

WHEREAS the ERCB and the Federal Minister of the Environment have determined that a Joint Review Panel of the Project will ensure that the Project is evaluated according to the spirit and requirements of their respective authorities while avoiding unnecessary duplication, delays and confusion that could arise from individual reviews by each government or the ERCB; and

WHEREAS the ERCB and the Federal Minister of the Environment have determined that a Joint Review Panel of the Project should be conducted in a manner consistent with the provisions of Appendix 2 of the *Canada-Alberta Agreement on Environmental Assessment Cooperation (2005)*; and

WHEREAS the Federal Minister of the Environment has determined that a Joint Panel should be established pursuant to paragraph 40(2) of the *Canadian Environmental Assessment Act* to consider the Project; and

WHEREAS the ERCB agrees that a joint panel cooperative proceeding should be established and that the project should be considered in a cooperative proceeding with the ERCB and the Agency pursuant to section 22(2) of the *Energy Resources Conservation Act*;

THEREFORE, the ERCB and the Federal Minister of the Environment hereby establish a Joint Panel for the Project in accordance with the provisions of this Agreement and the Terms of Reference attached as an Appendix to this Agreement.

1. Definitions

For the purpose of this Agreement and of the Appendix attached to it,

"**Agency**" means the Canadian Environmental Assessment Agency established by the *Canadian Environmental Assessment Act*.

"**EIA Report**" means an environmental impact assessment report prepared in accordance with the Terms of Reference issued for the Project by the Director of Environmental Assessment, Alberta Environment.

"**Environment**" means the components of the Earth, and includes

a. land, water and air, including all layers of the atmosphere;
b. all organic and inorganic matter and living organisms; and
c. the interacting natural systems that include components referred to in (a) and (b).

"**Environmental Effect**" means, in respect of the Project,

a. any change that the Project may cause in the Environment, including any change it may cause to a listed wildlife species, its critical habitat or the residence of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,
b. any effect of any change referred to in paragraph (a) on
    i. health and socio-economic conditions
    ii. physical and cultural heritage
    iii. the current use of lands and resources for traditional purposes by aboriginal persons, or
    iv. any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or
c. any change to the Project that may be caused by the environment,

whether any such change or effect occurs within or outside Canada.

"**Federal Authority**" refers to such an authority as defined in the *Canadian Environmental Assessment Act*.

"**Report**" means the document produced by the Joint Panel, which contains decisions pursuant to the *Energy Resources Conservation Act* or the *Oil Sands Conservation Act*, and the Joint Panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program pursuant to the *Canadian Environmental Assessment Act* with respect to the environmental assessment (EA) of the Project.

"**Follow-up Program**" means a program for

a. verifying the accuracy of the EA of the Project, and
b. determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the Project.

"**Joint Panel**" refers to the Joint Review Panel established by the ERCB and the Federal Minister of the Environment through this Agreement.

"**Mitigation**" means, in respect of the Project, the elimination, reduction or control of the adverse environmental effects of the Project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means.

"**Parties**" means the signatories to this Agreement.

"**Public Registry**" means a repository to facilitate public access to the records relating to the EA of the Project in accordance with section 55 of the CEAA, that has been established by Fisheries and Oceans Canada and that will be maintained by the Agency until the submission of the Panel report.

"**Responsible Authority**" refers to such an authority as defined in the *Canadian Environmental Assessment Act*.

2. Establishment of the Panel

2.1. A process is hereby established to create a Joint Panel, pursuant to section 22 of the *Energy Resources Conservation Act* with the authorization of the Lieutenant Governor in Council of Alberta, and Sections 40, 41 and 42 of the *Canadian Environmental Assessment Act*, for the purposes of the review of the Project.

2.2. The ERCB and the Agency will make arrangements to coordinate the announcements of a joint review of the Project by both Alberta and Canada.

3. Constitution of the Panel

3.1. The Joint Panel will consist of three members. Two members, including the Joint Panel Chair, will be appointed by the Chair of the ERCB with the approval of the Federal Minister of the Environment. The third Joint Panel member will be appointed by the Federal Minister of the Environment in accordance with article 3.2 of this Agreement.

3.2. The Federal Minister of the Environment will select the third Joint Panel member and recommend the selected candidate as an individual who may serve as a potential acting member of the ERCB. If acceptable to the Lieutenant Governor in Council of

Alberta and the Chairman of the ERCB, the Lieutenant Governor in Council of Alberta will nominate this candidate to serve as an acting member of the ERCB and the Chairman of the ERCB will appoint this candidate as a member of the Joint Panel. The selected candidate will then be appointed by the Federal Minister of the Environment as a member of the Joint Panel.

3.3. The Joint Panel members shall be unbiased and free from any conflict of interest relative to the Project and are to have knowledge or experience relevant to the anticipated environmental effects of the Project.

4. Conduct of Assessment by the Panel

4.1. The Joint Panel shall conduct its review in a manner that discharges the responsibilities of the ERCB under the *Energy Resources Conservation Act.*

4.2. The Joint Panel shall conduct its review in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act* and in the Terms of Reference attached as an Appendix to this Agreement and that were fixed and approved by the Federal Minister of the Environment and the ERCB.

4.3. The Joint Panel hearing shall be public and the review will provide opportunities for timely and meaningful public participation.

4.4. The Joint Panel shall have all the powers and duties of a panel described in Section 35 of the *Canadian Environmental Assessment Act* and of a division of the ERCB described in Section 8 of the *Energy Resources Conservation Board Act.*

4.5. The Joint Panel shall conduct its public hearing in accordance with the ERCB Rules of Practice.

4.6 A majority of the Joint Panel members constitutes a quorum for the purposes of the environmental assessment to be conducted by the Joint Panel. When a hearing, public meeting, or other activity is conducted by the Joint Panel and a member of the Joint Panel for any reason does not attend on any day or part of a day, the other member or members who are sitting at the hearing, public meeting or other activity, if they constitute a quorum, may continue as fully and effectively as though the absent member or members were present.

5. Secretariat

5.1. Administrative, technical, and procedural support requested by the Joint Panel shall be provided by a Secretariat, which shall be the joint responsibility of the ERCB and the Agency.

5.2. The Secretariat will report to the Joint Panel and will be structured so as to allow the Joint Panel to conduct its review in an efficient and cost-effective manner.

5.3. The ERCB will provide its offices for the conduct of the activities of the Joint Panel and the Secretariat.

6. Record of Joint Review and Report

6.1. A public registry will be maintained by the Secretariat during the course of the review in a manner that provides for convenient public access, and for the purposes of compliance with section 55 and 55.4 of the *Canadian Environmental Assessment Act.*

6.2 Subject to subsections 35(4), and 35(4.1) and section 55.1,of the *Canadian Environmental Assessment Act*, the public registry will include all submissions, correspondence, hearing transcripts, exhibits and other information received by the Joint Panel and all public information produced by the Joint Panel relating to the review of the Project.

6.3 The responsible authority under the *Canadian Environmental Assessment Act* will make necessary arrangements with the Agency for the maintenance of the public registry, when the Joint Panel is announced. The registry will be maintained by the Agency during the course of the joint panel review in a manner that provides for convenient public access, and for the purposes of compliance with section 55 to 55.5 of *Canadian Environmental Assessment Act*.

6.4. On completion of the assessment of the Project, the Joint Panel will prepare a Report. The Report will be conveyed to the Government of Alberta and the Federal Minister of the Environment within ninety days of the close of hearing. Simultaneously, the Report will be published and made available to the public by the Joint Panel.

6.6. After the Report is submitted, the responsibility for the maintenance of the public registry will be transferred to the responsible authority. The ERCB will continue to maintain records of the proceedings and the Report, as per the ERCB Rules of Practice.

6.7. The Agency will be responsible for the translation of key documents prepared by the Joint Panel, including public notifications and releases and the Report, into both of the official languages of Canada. The Agency will use all reasonable efforts to expedite the translation of the Report.

7. Other Government Departments

7.1. The Joint Panel may request federal authorities and provincial authorities having specialist information or knowledge with respect to the Project to make that information or knowledge available to the Joint Panel in an acceptable manner.

7.2. Nothing in this Agreement will restrict the participation by way of submission to the Joint Panel by other federal or provincial government departments or bodies, subject to article 7.1, above, section 12(3) of the *Canadian Environmental Assessment Act* and the ERCB Rules of Practice.

8. Participant Funding

8.1. Decisions regarding participant funding by the Agency under the federal Participant Funding Program, and decisions on intervener funding by the ERCB as provided for in the *Energy Resources Conservation Act*, ERCB Rules of Practice and the ERCB

Guidelines for Energy Cost Claims (Guide 31A) will, to the extent practicable, take into account decisions of the other party.

9. Cost Sharing

9.1. The ERCB, as lead party, will develop a budget estimate of expenses agreeable to both parties prior to initiation of the Joint Panel activities.

9.2. The costs of the review will be apportioned between the ERCB and the Agency in the manner set out in articles 9.3, 9.4 and 9.5.

9.3. The ERCB will be solely responsible for the following costs:

- salaries and benefits of the Joint Panel Chairman and the member of the Joint Panel not appointed in accordance with article 3.2; and
- salaries and benefits of ERCB staff involved in the joint review.

9.4. The Agency will be solely responsible for the following costs:

- per diems of the Joint Panel member appointed in accordance with article 3.2;
- salaries and benefits of Agency staff involved in the joint review;
- all costs associated with the federal Participant Funding Program;
- translation of records and documents into the official languages of Canada other than translation required as outlined in section 9.5 of this Agreement; and
- costs associated with the public registry established pursuant to section 55.1 of the CEAA.

9.5. The ERCB and the Agency agree to share equally all those costs listed below, incurred as part of the joint review from the signing of this Agreement to the date the Report is issued by the Joint Panel. The shareable costs are as follow:

- travel-related expenses associated with the review incurred by Joint Panel members and Panel Secretariat staff;
- per diems and associated expenses of independent/non-government expert consultants, analysts and communications specialists retained by the Secretariat;
- language translation and interpretation services and facilities related to the evidence of applicants, participants and local interveners as required by the joint panel, but not including translation service referred to in Section 6.7 of this Agreement;
- printing of any reports and documents distributed by the Joint Panel necessary for the Panel's work;
- the publication of notices and releases;
- photocopying, including the reproduction of documents contained in the public registry, and postage related to the review;
- court reporting and transcripts as required by the Joint Panel;

- rental of hearing, public meeting and public information office facilities and equipment;
- audio and audio-visual services at the hearing and public meetings; and
- miscellaneous expenditures up to a maximum of five percent (5%) of the total budget for the review.

9.6. The Agency may only be responsible for contributing to shareable costs within the allowable limits of Treasury Board Secretariat directives.

9.7. Shareable costs of the joint review as detailed in article 9.5 will be incurred at the sole discretion of the Joint Panel with due regard to economy and efficiency.

9.8. All expenses not listed above will need prior approval of both parties if they are to be equally shared.

10.0 Invoicing

10.1 The ERCB will be responsible for advancing funds for the payment of the shareable costs and will invoice the Agency for the amounts owed under this Agreement, except for travel-related expenses of the Agency's staff which will be advanced by the Agency. In the event that the Agency is required to advance shareable funds directly, it will advance funds for payment and will invoice the ERCB as determined under this Agreement.

10.2 The invoicing will be done either at the end of each month or quarterly at the discretion of the ERCB. The invoice will cover all shareable costs paid by the ERCB.

10.3 Each invoice will be accompanied by a summary description of the shareable costs actually incurred and paid for the period covered by the invoice, in a form satisfactory to both Parties and will be approved by an official acceptable to both Parties. Detailed information about incurred costs will be retained and made available to either Party upon request.

10.4 Subject to compliance with the above requirements the Agency will pay to the ERCB the amount stated as being owed to it in the invoice within sixty (60) days of having received such invoice.

10.5 With respect to invoices covering the last period of any fiscal year (ending March 31), and the last invoice to be produced for the joint review panel, each Party may review and deduct from the invoice, any incurred shareable costs that have not been previously recovered, so as to determine a net transfer of shared costs from one Party to another. The payment will be made within thirty (30) days of having received such invoice. An accounting of the shared expenses incurred by the Agency will be sent with the year-end and final payments, or earlier as may be requested by the ERCB.

11.0 Audit

11.1 Subject to this Agreement, both Parties will keep open to audit and inspection by the Agency or the ERCB, or their duly authorized representative, all invoices, receipts, vouchers and documents of any nature or kind whatsoever that have been relied on by either of the two Parties to calculate the shared cost of conducting the public review.

11.2 The Party exercising its option to audit will be responsible for the cost of the audit.

11.3 Where an audit conducted by either Party in connection with this Agreement reveals discrepancies regarding the amount billed to the Agency, and where prompt resolution between the Parties is unattainable, an independent auditor acceptable to both Parties will resolve the issue.

12. Amending this Agreement

12.1. The terms and provisions of this Agreement may be amended by written memorandum executed by both the Federal Minister of the Environment and the Chairman of the ERCB. Subject to section 27 of the *Canadian Environmental Assessment Act*, upon completion of the joint review, this Agreement may be terminated at any time by an exchange of letters signed by both parties.

13. Signatures

WHEREAS the parties hereto have put their signatures

Original signed by	*Original signed by*
The Honourable John Baird Minister of the Environment	Dan McFadyen, P.Eng. Chairman Energy Resources Conservation Board
June 14, 2008	*July 30, 2008*
Date	Date

Appendix
Terms of Reference

Part I - Scope of Project

The Joslyn North Mine Project proposed by Total E&P Canada Ltd. includes the construction, operation, and reclamation of an oil sands surface mine and bitumen extraction facilities in the Fort McMurray area. The proposed mining project is to be located approximately 70 kilometres north of Fort McMurray on Oil Sands Leases. The proposed development includes an open pit, truck and shovel mine, ore handling facility, bitumen extraction facilities, tailings processing facilities, support infrastructure, water and tailings management plans, and an integrated reclamation plan. The Joslyn North Mine project is designed to produce a total of 15,900 cubic metres per day (100,000 barrels per day) of bitumen.

The project components which are part of the scope of this assessment include:

- Open pit, truck and shovel mine;
- Ore preparation and handling facility;
- Bitumen extraction facilities;
- Bitumen froth treatment plan;
- Bitumen products storage facilities;
- Tailings management and processing facilities;
- Joslyn Creek diversion and associated required infrastructures;
- Fish habitat compensation and any required infrastructures;
- Co-generation facility;
- All related works and activities including all temporary facilities required for the construction and operation of the above-mentioned facilities, namely
    - permanent and temporary access roads (new or modified);
    - construction or modification of any airstrip);
    - permanent and temporary work camps;
    - all temporary or permanent electrical power supply lines;
    - drinking water supply for camps;
    - water supply for the project, including water storage facilities
    - all temporary or permanent power supply for camps and worksites;
    - temporary control structures and diversion works;
    - treatment of wastewaters and waste management as well as the infrastructure required for this management;
    - any bridges and watercourse crossings (new or modified);
    - borrow pits and quarries;
    - construction worksites and storage areas;
    - management of excavation material;
    - handling and storage of petroleum products and hazardous materials

Part II - Scope of the Environmental Assessment

1. The Joint Panel will conduct an assessment of the Environmental Effects of the Project based on the Scope of Project (Part I).

2. The assessment will include a consideration of the factors listed in subsection 16(1)(a) to (d) and 16(2) of the *Canadian Environmental Assessment Act*, namely:
    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 including First Nations, Métis and aboriginal persons that are received during the review;
    d. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;
    e. the purpose of the Project;
    f. alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;
    g. the need for, and the requirements of, any follow-up program in respect of the Project; and
    h. 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.

3. Pursuant to subsection 16(1)(e) of the *Canadian Environmental Assessment Act*, the assessment by the Joint Panel will also include a consideration of the additional following matters:
    a. the need for the Project; and
    b. alternatives to the Project received during the review;

4. Pursuant to subsection 16.1 of the *Canadian Environmental Assessment Act*, the assessment by the Joint Panel may also include a consideration of the community knowledge and aboriginal traditional knowledge received during the review.

Part III – Scope of the factors

The Panel should consider the factors specified in the "Final Terms of Reference" for the preparation of the Environmental Impact Assessment Report for the Joslyn North Mine Project issued by Alberta Environment on September 29, 2005. The document is available on the Public Registry (document # 6).

In addition in accordance with section 16(3) of the *Canadian Environmental Assessment Act*, the Panel in conducting its consideration of the factors outlined in Part II should have regard for the following:

Cumulative Effects Assessment

The Panel shall identify and assess the project's cumulative effects. Cumulative effects are those changes to the environment due to the project combined with the existence of other works or other past, present and reasonably foreseeable future projects.

The cumulative effects assessment should take into consideration the approach described in the Canadian Environmental Assessment Agency's *Cumulative Effects Assessment Practitioners Guide* (1999) and in the Agency's Operation Policy Statement entitled "Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act*" updated in November 2007.

The Panel should focus its consideration of cumulative effects on key valued environmental components. Without limiting itself thereto, the following components may be considered:

- Water quality and quantity;
- Air quality;
- Current use of lands and resources for traditional purposes by aboriginal persons;
- Wildlife and wildlife habitat for key species;

Accidents & Malfunctions

The environmental assessment will consider the probability of potential accidents and malfunctions related to the project, including the potential consequences and environmental effects related to such events.

Potential accidents and malfunctions may include those associated with the following components:

- tailings management;
- waste management and disposal;
- use, handling or spills of chemicals and hazardous materials on-site;
- the increase in road traffic, and the risk of road accidents; and
- any other project components or systems that have the potential, through accident or malfunction, to adversely affect the natural environment.

The environmental assessment should consider the sensitive elements of the environment (e.g., communities, homes, natural sites of interest, areas of major use) that may be affected in the event of an accident or a major malfunction. The environmental assessment should consider the likelihood of occurrence of the accidents and malfunctions.

Detailed plans, measures and systems to reduce the potential occurrence of an accident or malfunction should be considered in the assessment and should indicate how they will reduce the effects or consequences of an accident or malfunction.

Effects of changes to the environment

To take into account the "environmental effects" defined by the *Canadian Environmental Assessment Act*, the environmental assessment will consider the effects of any changes to the environment caused by the project on the following factors:

- *Health and Socio-Economic Conditions*
- *Physical and Cultural Heritage*
- *Current use of lands and resources for traditional purposes by aboriginal persons*
- *Any structure, site or thing that is of historical, archaeological or architectural significance*

Change to the project caused by the environment

The environmental effects that may occur as a result of the environment acting on the Project should be assessed.

Environmental changes and hazards that may occur and may affect the Project shall be described (e.g., severe precipitation events, flooding, earthquakes). The assessment should take into account the potential influence of climate change scenarios (e.g., increased severity and frequency of storms and flooding). The influence that these environmental changes and hazards may have on the Project should be predicted and described.

Renewable Resources

The environmental assessment should consider whether the Project is likely to cause significant environmental effects on renewable resources and therefore compromise their capacity to meet present and future needs.

The environmental assessment should describe the renewable resources that may be affected by the Project and it shall clearly establish, taking into account the result of the assessment, whether these renewable resources are likely to be significantly affected following the implementation of proposed mitigation measures (residual significant environmental effects).

Should this be the case, the following points should be addressed:

- a brief description of the Project's environmental effects on the renewable resource;
- an indication as to the way in which the capacity of this resource was measured or evaluated;
- an indication of the temporal and geographic boundaries used to assess the capacity of the affected resource;
- a determination of the capacity of the resource to meet current needs;
- a determination of the capacity of the resource to meet future needs;

- a description of any other appropriate mitigation measures;
- a determination of the significance of the residual effects on the renewable resource and its capacity to meet the need of current and future generations;
- an identification of the risks and uncertainties that remain and the description of the next steps, if any, that will be required to address this effect.

Part IV – Review Process

The main steps of the joint review by the Panel will be as follows:

Review of the documentation

1. Once appointed, the Joint Panel will review the information available on the public registry and comments received from the public and determine whether the information available is sufficient to proceed to the public hearing phase of the process.
2. Should the Joint Panel identify deficiencies after reviewing the available information, the Joint Panel may require additional information from the Proponent. Any request for additional information shall be issued by the Joint Panel within 45 days of its appointment.
3. If the Joint Panel concludes that it has adequate information to proceed to hearing, it shall announce the hearing providing a minimum of 60 days prior to the commencement of the hearing.

Determination of Adequacy of Additional Information (if requested)

4. Upon receipt of the additional information, the Joint Panel will ensure that it is made available to the public for review and comment.
5. If after reviewing the additional information and any written comments from interested parties the Joint Panel concludes that it has adequate information to proceed to hearing, it shall announce the hearing within 45 days of receipt of the additional information, providing a minimum of 60 days prior to the commencement of the hearing.
6. If after reviewing the additional information and written comments from interested parties the Joint Panel is still of the view that it does not have adequate information to proceed to hearing, it shall inform the Proponent of outstanding information requirements, and indicate that the hearings will not be scheduled until that information is submitted.
7. If after reviewing the additional information and written submissions from interested parties the Joint Panel is of the view that the lack of information is minor in nature and the Joint Panel receives a commitment from the Proponent to provide the outstanding information prior to the hearing, the Joint Panel may proceed to hearings within 45 days of receipt of the response to the first request for additional information.

Public Hearings

8. The Joint Panel will hold hearing in locations determined by the Joint Panel and will endeavour to hold at least a portion of the hearing within the area likely to be affected by the Project, or in any area reasonably close to where the Project is proposed to be carried out, to provide convenient access for the potentially affected public.

Panel Report

9. The Joint Panel will deliver its report to the Federal Minister of the Environment within 90 days following the close of the hearing. The report will take into account and reflect the views of all Panel members.

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Canadian Environmental Assessment Act

Loi canadienne sur l'évaluation environnementale

S.C. 1992, c. 37

L.C. 1992, ch. 37

Current to August 24, 2010

À jour au 24 août 2010

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For greater certainty

(3) For greater certainty, any construction, operation, modification, decommissioning, abandonment or other undertaking in relation to a physical work and any activity that is prescribed or is within a class of activities that is prescribed for the purposes of the definition "project" in subsection (1) is a project for at least so long as, in relation to it, a person or body referred to in subsection 5(1) or (2), 8(1), 9(2), 9.1(2), 10(1) or 10.1(2) is considering, but has not yet taken, an action referred to in those subsections.

1992, c. 37, s. 2; 1993, c. 28, s. 78, c. 34, s. 18(F); 1996, c. 31, s. 61; 1998, c. 10, s. 164, c. 15, s. 50; 2002, c. 7, s. 122, c. 29, s. 137; 2003, c. 9, s. 1; 2010, c. 12, s. 2152.

tion du territoire domanial ou du fait d'en être propriétaire.

Précision

(3) Il est entendu que la réalisation — y compris l'exploitation, la modification, la désaffectation ou la fermeture — d'un ouvrage, ou l'exercice d'une activité désignée par règlement ou faisant partie d'une catégorie d'activités désignée par règlement pour l'application de la définition de « projet » au paragraphe (1), constituent un projet, au minimum, tant qu'une personne ou un organisme visés aux paragraphes 5(1) ou (2), 8(1), 9(2), 9.1(2), 10(1) ou 10.1(2) envisage mais n'a pas encore pris une mesure prévue à ces dispositions.

1992, ch. 37, art. 2; 1993, ch. 28, art. 78, ch. 34, art. 18(F); 1996, ch. 31, art. 61; 1998, ch. 10, art. 164, ch. 15, art. 50; 2002, ch. 7, art. 122, ch. 29, art. 137; 2003, ch. 9, art. 1; 2010, ch. 12, art. 2152.

HER MAJESTY

Binding on Her Majesty

3. This Act is binding on Her Majesty in right of Canada or a province.

SA MAJESTÉ

Sa Majesté

3. La présente loi lie Sa Majesté du chef du Canada ou d'une province.

PURPOSES

Purposes

4. (1) The purposes of this Act are

(*a*) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;

(*b*) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

(*b.1*) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;

(*b.2*) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;

(*b.3*) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;

(*c*) to ensure that projects that are to be carried out in Canada or on federal lands do not

OBJET

Objet

4. (1) La présente loi a pour objet :

a) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;

b) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;

b.1) de faire en sorte que les autorités responsables s'acquittent de leurs obligations afin d'éviter tout double emploi dans le processus d'évaluation environnementale;

b.2) de promouvoir la collaboration des gouvernements fédéral et provinciaux, et la coordination de leurs activités, dans le cadre du processus d'évaluation environnementale de projets;

b.3) de promouvoir la communication et la collaboration entre les autorités responsables et les peuples autochtones en matière d'évaluation environnementale;

c) de faire en sorte que les éventuels effets environnementaux négatifs importants des projets devant être réalisés dans les limites

cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

(*d*) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

Duties of the Government of Canada

(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

1992, c. 37, s. 4; 1993, c. 34, s. 19(F); 1994, c. 46, s. 1; 2003, c. 9, s. 2.

ENVIRONMENTAL ASSESSMENT OF PROJECTS

Projects to be Assessed

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

(*a*) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(*b*) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(*c*) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of

du Canada ou du territoire domanial ne débordent pas ces limites;

d) de veiller à ce que le public ait la possibilité de participer de façon significative et en temps opportun au processus de l'évaluation environnementale.

Mission du gouvernement du Canada

(2) Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence et les organismes assujettis aux dispositions de celle-ci, y compris les autorités fédérales et les autorités responsables, doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de la prudence.

1992, ch. 37, art. 4; 1993, ch. 34, art. 19(F); 1994, ch. 46, art. 1; 2003, ch. 9, art. 2.

ÉVALUATION ENVIRONNEMENTALE DES PROJETS

Projets visés

Projets visés

5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes :

a) une autorité fédérale en est le promoteur et le met en œuvre en tout ou en partie;

b) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en œuvre le projet en tout ou en partie un financement, une garantie d'emprunt ou toute autre aide financière, sauf si l'aide financière est accordée sous forme d'allègement — notamment réduction, évitement, report, remboursement, annulation ou remise — d'une taxe ou d'un impôt qui est prévu sous le régime d'une loi fédérale, à moins que cette aide soit accordée en vue de permettre la mise en œuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement;

c) une autorité fédérale administre le territoire domanial et en autorise la cession, notamment par vente ou cession à bail, ou celle de tout droit foncier relatif à celui-ci ou en transfère à Sa Majesté du chef d'une province l'administration et le contrôle, en vue de la mise en œuvre du projet en tout ou en partie;

d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en ver-

(*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.

1992, c. 37, s. 15; 1993, c. 34, s. 21(F).

b) l'autorité responsable ou, dans le cadre d'une médiation ou de l'examen par une commission et après consultation de cette autorité, le ministre estime l'opération susceptible d'être réalisée en liaison avec l'ouvrage.

1992, ch. 37, art. 15; 1993, ch. 34, art. 21(F).

Minister's power to establish scope of project

15.1 (1) Despite section 15, the Minister may, if the conditions that the Minister establishes are met, determine that the scope of the project in relation to which an environmental assessment is to be conducted is limited to one or more components of that project.

Pouvoir du ministre de définir la portée du projet

15.1 (1) Malgré l'article 15, le ministre peut, si les conditions qu'il fixe sont remplies, décider que la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée se limite à un ou plusieurs éléments du projet.

Availability

(2) The conditions referred to in subsection (1) must be made available to the public.

Accessibilité

(2) Les conditions visées au paragraphe (1) sont accessibles au public.

Delegation

(3) The Minister may, in writing and subject to any conditions that the Minister may specify, delegate to a responsible authority in relation to a project the power conferred on the Minister by subsection (1) in respect of that project.

Délégation

(3) Le ministre peut, par écrit et aux conditions qu'il fixe, déléguer à l'autorité responsable du projet le pouvoir que le paragraphe (1) lui confère relativement à ce projet.

Project or class of projects

(4) The delegation may be in respect of a project or a class of projects.

2010, c. 12, s. 2155.

Projet ou catégorie de projets

(4) La délégation peut viser un projet ou une catégorie de projets.

2010, ch. 12, art. 2155.

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

Éléments à examiner

16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;

b) l'importance des effets visés à l'alinéa *a*);

c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;

e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le

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.

ministre, après consultation de celle-ci, peut exiger la prise en compte.

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.

Éléments supplémentaires

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants :

a) les raisons d'être du projet;

b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

Determination of factors

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(*a*), (*b*) and (*d*) and (2)(*b*), (*c*) and (*d*) shall be determined

(*a*) by the responsible authority; or

(*b*) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

Obligations

(3) L'évaluation de la portée des éléments visés aux alinéas (1)*a*), *b*) et *d*) et (2)*b*), *c*) et *d*) incombe :

a) à l'autorité responsable;

b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

Factors not included

(4) An environmental assessment of a project is not required to include a consideration of the environmental effects that could result from carrying out the project in response to a national emergency for which special temporary measures are taken under the *Emergencies Act*.

1992, c. 37, s. 16; 1993, c. 34, s. 22(F).

Situations de crise nationale

(4) L'évaluation environnementale d'un projet n'a pas à porter sur les effets environnementaux que sa réalisation peut entraîner en réaction à des situations de crise nationale pour lesquelles des mesures d'intervention sont prises aux termes de la *Loi sur les mesures d'urgence*.

1992, ch. 37, art. 16; 1993, ch. 34, art. 22(F).

Community knowledge and aboriginal traditional knowledge

16.1 Community knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment.

2003, c. 9, s. 8.

Connaissances des collectivités et connaissances traditionnelles autochtones

16.1 Les connaissances des collectivités et les connaissances traditionnelles autochtones peuvent être prises en compte pour l'évaluation environnementale d'un projet.

2003, ch. 9, art. 8.

Regional studies

16.2 The results of a study of the environmental effects of possible future projects in a region, in which a federal authority partici-

Études régionales

16.2 Les résultats d'une étude des effets environnementaux de projets éventuels dans une région, faite hors du champ d'application de la

pates, outside the scope of this Act, with other jurisdictions referred to in paragraph 12(5)(*a*), (*c*) or (*d*), may be taken into account in conducting an environmental assessment of a project in the region, particularly in considering 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.

2003, c. 9, s. 8.

présente loi et à laquelle une autorité fédérale a collaboré avec des instances, au sens des alinéas 12(5)*a*), *c*) ou *d*), peuvent être pris en compte dans l'évaluation environnementale d'un projet à réaliser dans cette région, notamment dans l'évaluation des effets cumulatifs que la réalisation du projet, combinée à celle d'autres projets ou activités déjà complétés ou à venir, est susceptible de produire sur l'environnement.

2003, ch. 9, art. 8.

Publication of determinations

16.3 The responsible authority shall document and make available to the public, pursuant to subsection 55(1), its determinations pursuant to section 20.

2003, c. 9, s. 8.

Publication des décisions

16.3 L'autorité responsable consigne et rend accessibles au public, conformément au paragraphe 55(1), les décisions qu'elle prend aux termes de l'article 20.

2003, ch. 9, art. 8.

Delegation

17. (1) A responsible authority may delegate to any person, body or jurisdiction within the meaning of subsection 12(5) any part of the screening or comprehensive study of a project or the preparation of the screening report or comprehensive study report, and may delegate any part of the design and implementation of a follow-up program, but shall not delegate the duty to take a course of action pursuant to subsection 20(1) or 37(1).

Délégation

17. (1) L'autorité responsable d'un projet peut déléguer à un organisme, une personne ou une instance, au sens du paragraphe 12(5), l'exécution de l'examen préalable ou de l'étude approfondie, ainsi que les rapports correspondants, et la conception et la mise en œuvre d'un programme de suivi, à l'exclusion de toute prise de décision aux termes du paragraphe 20(1) ou 37(1).

Idem

(2) For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 20(1) or 37(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.

Précision

(2) Il est entendu que l'autorité responsable qui a délégué l'exécution de l'examen ou de l'étude ainsi que l'établissement des rapports en vertu du paragraphe (1) ne peut prendre une décision aux termes du paragraphe 20(1) ou 37(1) que si elle est convaincue que les attributions déléguées ont été exercées conformément à la présente loi et à ses règlements.

SCREENING

EXAMEN PRÉALABLE

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.

Examen préalable

18. (1) Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion établie par règlement pris en vertu de l'alinéa 59*c*), l'autorité responsable veille :

a) à ce qu'en soit effectué l'examen préalable;

b) à ce que soit établi un rapport d'examen préalable.

Source of information

(2) Any available information may be used in conducting the screening of a project, but where a responsible authority is of the opinion that the information available is not adequate to enable it to take a course of action pursuant to

Information

(2) Dans le cadre de l'examen préalable qu'elle effectue, l'autorité responsable peut utiliser tous les renseignements disponibles; toutefois, si elle est d'avis qu'il n'existe pas suffisamment de renseignements pour lui permettre

(*b*) public concerns warrant a reference to a mediator or a review panel,

the Minister may, after offering to consult with the jurisdiction, within the meaning of subsection 12(5), where the project is to be carried out and after consulting with the responsible authority or, where there is no responsible authority in relation to the project, the appropriate federal authority, refer the project to a mediator or a review panel in accordance with section 29.

Mackenzie Valley Resource Management Act

(2) Where a proposal is referred pursuant to paragraph 130(1)(*c*) of the *Mackenzie Valley Resource Management Act*, the Minister shall refer the proposal to a review panel.

1992, c. 37, s. 28; 1998, c. 25, s. 162.

indiquées, entraîner des effets environnementaux négatifs importants, soit que les préoccupations du public le justifient, peut faire procéder à une médiation ou à un examen par une commission conformément à l'article 29.

Loi sur la gestion des ressources de la vallée du Mackenzie

(2) Dans les cas où il en est saisi en vertu de l'alinéa 130(1)*c*) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*, le ministre est tenu de soumettre l'affaire à un examen par une commission.

1992, ch. 37, art. 28; 1998, ch. 25, art. 162.

MEDIATION AND PANEL REVIEWS

MÉDIATION OU EXAMEN PAR UNE COMMISSION

Initial referral to mediator or review panel

29. (1) Subject to subsection (2), where a project is to be referred to a mediator or a review panel, the Minister shall

(*a*) refer the environmental assessment relating to the project to

(i) a mediator, or

(ii) a review panel; or

(*b*) refer part of the environmental assessment relating to the project to a mediator and part of that assessment to a review panel.

Décision du ministre

29. (1) Sous réserve du paragraphe (2), dans le cas où un projet doit faire l'objet d'une médiation ou d'un examen par une commission, le ministre :

a) soit renvoie l'évaluation environnementale du projet à un médiateur ou à une commission;

b) soit renvoie une partie de l'évaluation environnementale du projet à un médiateur et une partie de celle-ci à une commission.

Condition on reference to mediator

(2) An environmental assessment or a part thereof shall not be referred to a mediator unless the interested parties have been identified and are willing to participate in the mediation.

Conditions

(2) Le ministre ne renvoie la totalité d'une évaluation environnementale ou une partie de celle-ci à un médiateur que si les parties intéressées ont été identifiées et acceptent de participer à la médiation.

Subsequent reference to a mediator

(3) The Minister may, at any time, refer any issue relating to an assessment by a review panel to a mediator where the Minister is of the opinion, after consulting with the review panel, that mediation is appropriate in respect of that issue.

Pouvoir du ministre

(3) À tout moment le ministre peut renvoyer une question relative à une évaluation environnementale soumise à l'examen par une commission à un médiateur si, après avoir consulté la commission d'examen, il estime que la médiation est indiquée relativement à cette question.

When mediation fails

(4) Where, at any time after an environmental assessment or part of an environmental assessment of a project has been referred to a mediator, the Minister or the mediator determines that the mediation is not likely to produce a result that is satisfactory to all the participants,

Pouvoirs du ministre

(4) Dans le cas où, à tout moment après le renvoi de l'évaluation environnementale d'un projet ou d'une partie de celle-ci à un médiateur, le ministre ou le médiateur estime que la médiation n'est pas susceptible de donner des

the Minister shall order the conclusion of the mediation.

1992, c. 37, s. 29; 2003, c. 9, s. 14.

résultats satisfaisants pour les parties, le ministre met fin à la médiation.

1992, ch. 37, art. 29; 2003, ch. 9, art. 14.

Appointment of mediator

30. (1) Where a reference is made under subparagraph 29(1)(*a*)(i) in relation to a project, the Minister shall, after consulting with the responsible authority and all parties who are to participate in the mediation,

(*a*) appoint as mediator any person who

(i) is unbiased and free from any conflict of interest relative to the project and who has knowledge or experience in acting as a mediator, and

(ii) may have been selected from a roster established pursuant to subsection (2); and

(*b*) fix the terms of reference of the mediation.

Nomination du médiateur

30. (1) S'il effectue le renvoi au médiateur visé à l'alinéa 29(1)*a*), le ministre, après consultation de l'autorité responsable et des parties qui doivent participer à la médiation :

a) nomme médiateur une personne :

(i) impartiale, non en conflit d'intérêts avec le projet et pourvue des connaissances ou de l'expérience voulues pour agir comme médiateur,

(ii) qui peut avoir été choisie sur la liste établie en vertu du paragraphe (2);

b) fixe son mandat.

Establishment of roster

(2) The Minister may establish a roster of persons to act as mediators to be appointed pursuant to paragraph (1)(*a*).

Liste

(2) Le ministre peut établir une liste de personnes qui peuvent être nommées médiateurs aux termes de l'alinéa (1)*a*).

Additional participants

31. The mediator may, at any time, allow an additional interested party to participate in a mediation.

Parties

31. Le médiateur peut, à tout moment, permettre à une partie intéressée supplémentaire de participer à la médiation.

Mediation report

32. (1) A mediator shall, at the conclusion of the mediation, prepare and submit a report to the Minister and to the responsible authority.

Rapport du médiateur

32. (1) Dès la fin de la médiation, le médiateur présente un rapport au ministre et à l'autorité responsable.

Privilege

(2) No evidence of or relating to a statement made by a mediator or a participant to the mediation during the course of and for the purposes of the mediation is admissible without the consent of the mediator or participant, in any proceeding before a review panel, court, tribunal, body or person with jurisdiction to compel the production of evidence.

1992, c. 37, s. 32; 2003, c. 9, s. 15(F).

Inadmissibilité en preuve des déclarations

(2) Sauf consentement du médiateur ou d'un participant à la médiation, les déclarations faites par l'un ou l'autre de ceux-ci dans le cadre de la médiation ne sont pas admissibles en preuve devant un organisme ou une personne habilités à contraindre des personnes à déposer en justice, notamment une commission ou un tribunal.

1992, ch. 37, art. 32; 2003, ch. 9, art. 15(F).

Appointment of review panel

33. (1) Where a project is referred to a review panel, the Minister shall, in consultation with the responsible authority,

(*a*) appoint as members of the panel, including the chairperson thereof, persons who

(i) are unbiased and free from any conflict of interest relative to the project and who have knowledge or experience relevant to the anticipated environmental effects of the project, and

(ii) may have been selected from a roster established pursuant to subsection (2); and

Commission

33. (1) Le ministre, en consultation avec l'autorité responsable, nomme les membres, y compris le président, de la commission d'évaluation environnementale et fixe le mandat de celle-ci. À cette fin, le ministre choisit des personnes :

a) impartiales, non en conflit d'intérêts avec le projet et pourvues des connaissances ou de l'expérience voulues touchant les effets environnementaux prévisibles du projet;

b) qui peuvent avoir été choisies sur la liste établie en vertu du paragraphe (2).

(*b*) fix the terms of reference of the panel.

Establishment of roster

(2) The Minister may establish a roster of persons, to act as members of any review panel to be established pursuant to paragraph (1)(*a*).

1992, c. 37, s. 33; 1993, c. 34, s. 28(F).

Liste

(2) Le ministre peut établir une liste de personnes qui peuvent être nommées membres d'une commission aux termes de l'alinéa (1)*a*).

1992, ch. 37, art. 33; 1993, ch. 34, art. 28(F).

Assessment by review panel

34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,

(*a*) ensure that the information required for an assessment by a review panel is obtained and made available to the public;

(*b*) hold hearings in a manner that offers the public an opportunity to participate in the assessment;

(*c*) prepare a report setting out

(i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and

(ii) a summary of any comments received from the public; and

(*d*) submit the report to the Minister and the responsible authority.

Commission d'évaluation environnementale

34. La commission, conformément à son mandat et aux règlements pris à cette fin :

a) veille à l'obtention des renseignements nécessaires à l'évaluation environnementale d'un projet et veille à ce que le public y ait accès;

b) tient des audiences de façon à donner au public la possibilité de participer à l'évaluation environnementale du projet;

c) établit un rapport assorti de sa justification, de ses conclusions et recommandations relativement à l'évaluation environnementale du projet, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public;

d) présente son rapport au ministre et à l'autorité responsable.

Powers of review panel

35. (1) A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to

(*a*) give evidence, orally or in writing; and

(*b*) produce such documents and things as the panel considers necessary for conducting its assessment of the project.

Pouvoirs de la commission

35. (1) La commission a le pouvoir d'assigner devant elle des témoins et de leur ordonner de :

a) déposer oralement ou par écrit;

b) produire les documents et autres pièces qu'elle juge nécessaires en vue de procéder à l'examen dont elle est chargée.

Enforcement powers

(2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and other things as is vested in a court of record.

Pouvoirs de contrainte

(2) La commission a, pour contraindre les témoins à comparaître, à déposer et à produire des pièces, les pouvoirs d'une cour d'archives.

Hearings to be public

(3) A hearing by a review panel shall be public unless the panel is satisfied after representations made by a witness that specific, direct and substantial harm would be caused to the witness or specific harm to the environment by the disclosure of the evidence, documents or other things that the witness is ordered to give or produce pursuant to subsection (1).

Audiences publiques

(3) Les audiences de la commission sont publiques sauf si elle décide, à la suite d'observations faites par le témoin, que la communication des éléments de preuve, documents ou objets qu'il est tenu de présenter au titre du paragraphe (1) lui causerait directement un préjudice réel et sérieux ou causerait un préjudice réel à l'environnement.

Non-disclosure

(4) Where a review panel is satisfied that the disclosure of evidence, documents or other things would cause specific, direct and substan-

Non-communication

(4) Si la commission conclut que la communication d'éléments de preuve, de documents ou d'objets causerait directement un préjudice

tial harm to a witness, the evidence, documents or things are privileged and shall not, without the authorization of the witness, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, documents or other things pursuant to this Act.

réel et sérieux au témoin, ces éléments de preuve, documents ou objets sont protégés; la personne qui les a obtenus en vertu de la présente loi ne peut sciemment les communiquer ou permettre qu'ils le soient sans l'autorisation du témoin.

Non-disclosure

(4.1) Where a review panel is satisfied that the disclosure of evidence, documents or other things would cause specific harm to the environment, the evidence, documents or things are privileged and shall not, without the authorization of the review panel, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, documents or other things pursuant to this Act.

(4.1) Si la commission conclut qu'un préjudice réel, pour l'environnement, résulterait de la communication d'éléments de preuve, de documents ou d'objets, ces éléments de preuve, documents ou objets sont protégés; la personne qui les a obtenus en vertu de la présente loi ne peut sciemment les communiquer ou permettre qu'ils le soient sans l'autorisation de la commission.

Non-communication

Enforcement of summonses and orders

(5) Any summons issued or order made by a review panel pursuant to subsection (1) shall, for the purposes of enforcement, be made a summons or order of the Federal Court by following the usual practice and procedure.

(5) Aux fins de leur exécution, les assignations faites et ordonnances rendues aux termes du paragraphe (1) sont, selon la procédure habituelle, assimilées aux assignations ou ordonnances de la Cour fédérale.

Exécution des assignations et ordonnances

Immunity

(6) No action or other proceeding lies or shall be commenced against a member of a review panel for or in respect of anything done or omitted to be done, during the course of and for the purposes of the assessment by the review panel.

(6) Les membres d'une commission d'examen sont soustraits aux poursuites et autres procédures pour les faits — actes ou omissions — censés accomplis dans le cadre d'un examen par la commission.

Immunité

1992, c. 37, s. 35; 2003, c. 9, s. 16.

1992, ch. 37, art. 35; 2003, ch. 9, art. 16.

Public notice

36. On receiving a report submitted by a mediator or a review panel, the Minister shall make the report available to the public in any manner the Minister considers appropriate to facilitate public access to the report, and shall advise the public that the report is available.

36. Sur réception du rapport du médiateur ou de la commission d'évaluation environnementale, le ministre en donne avis public et en favorise l'accès par le public de la manière qu'il estime indiquée.

Publication

DECISION OF RESPONSIBLE AUTHORITY

DÉCISION DE L'AUTORITÉ RESPONSABLE

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,

37. (1) Sous réserve des paragraphes (1.1) à (1.3), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou, si le projet lui est renvoyé aux termes du paragraphe 23(1), le rapport d'étude approfondie, prend l'une des décisions suivantes :

a) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circons-

Autorité responsable

(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.

tances, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux qui ne sont pas justifiables dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient permettre la mise en œuvre du projet en tout ou en partie.

Approval of Governor in Council

(1.1) Where a report is submitted by a mediator or review panel,

(*a*) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

(*b*) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (*a*), require the mediator or review panel to clarify any of the recommendations set out in the report; and

(*c*) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (*a*).

(1.1) Une fois pris en compte le rapport du médiateur ou de la commission, l'autorité responsable est tenue d'y donner suite avec l'agrément du gouverneur en conseil, qui peut demander des précisions sur l'une ou l'autre de ses conclusions; l'autorité responsable prend alors la décision visée au titre du paragraphe (1) conformément à l'agrément.

Agrément du gouverneur en conseil

Federal authority

(1.2) Where a response to a report is required under paragraph (1.1)(*a*) and there is, in addition to a responsible authority, a federal authority referred to in paragraph 5(2)(*b*) in relation to the project, that federal authority may act as a responsible authority for the purposes of that response. This subsection applies in the case of a federal authority within the meaning of paragraph (*b*) of the definition "federal authority" in subsection 2(1) if the Minister through whom the authority is accountable to Parliament agrees.

(1.2) Lorsqu'une autorité responsable a l'obligation, en vertu du paragraphe (1.1), de donner suite au rapport qui y est visé, toute autorité fédérale dont le rôle à l'égard du projet est prévu à l'alinéa 5(2)*b*) peut prendre part à l'exécution de cette obligation comme si elle était une autorité responsable. S'agissant d'une autorité fédérale visée à l'alinéa *b*) de la définition de « autorité fédérale », au paragraphe 2(1), elle peut s'acquitter de cette obligation avec l'agrément du ministre par l'intermédiaire duquel elle rend compte de ses activités au Parlement.

Application du paragraphe 5(2)

Approval of Governor in Council

(1.3) Where a project is referred back to a responsible authority under subsection 23(1)

(1.3) L'autorité responsable à laquelle le projet est renvoyé au titre du paragraphe 23(1)

Agrément du gouverneur en conseil

and the Minister issues an environmental assessment decision statement to the effect that the project is likely to cause significant adverse environmental effects, no course of action may be taken by the responsible authority under subsection (1) without the approval of the Governor in Council.

ne prend la décision visée au paragraphe (1) qu'avec l'agrément du gouverneur en conseil si le projet est, selon la déclaration du ministre, susceptible d'entraîner des effets environnementaux négatifs importants.

Responsible authority to ensure implementation of mitigation measures

(2) Where a responsible authority takes a course of action referred to in paragraph (1)(*a*), it shall, notwithstanding any other Act of Parliament, in the exercise of its powers or the performance of its duties or functions under that other Act or any regulation made thereunder or in any other manner that the responsible authority considers necessary, ensure that any mitigation measures referred to in that paragraph in respect of the project are implemented.

Précision

(2) L'autorité responsable qui prend la décision visée à l'alinéa (1)*a*) veille, malgré toute autre loi fédérale, lors de l'exercice des attributions qui lui sont conférées sous le régime de cette loi ou de ses règlements ou selon les autres modalités qu'elle estime indiquées, à l'application des mesures d'atténuation visées à cet alinéa.

Mitigation measures — extent of authority

(2.1) Mitigation measures that may be taken into account under subsection (1) by a responsible authority are not limited to measures within the legislative authority of Parliament and include

(*a*) any mitigation measures whose implementation the responsible authority can ensure; and

(*b*) any other mitigation measures that it is satisfied will be implemented by another person or body.

Mesures d'atténuation — étendue des pouvoirs

(2.1) Les mesures d'atténuation que l'autorité responsable peut prendre en compte dans le cadre du paragraphe (1) ne se limitent pas à celles qui relèvent de la compétence législative du Parlement; elles comprennent :

a) les mesures d'atténuation dont elle peut assurer l'application;

b) toute autre mesure d'atténuation dont elle est convaincue qu'elle sera appliquée par une autre personne ou un autre organisme.

Responsible authority to ensure implementation of mitigation measures

(2.2) When a responsible authority takes a course of action referred to in paragraph (1)(*a*), it shall, with respect to any mitigation measures it has taken into account and that are described in paragraph (2.1)(*a*), ensure their implementation in any manner that it considers necessary and, in doing so, it is not limited to its duties or powers under any other Act of Parliament.

Application des mesures d'atténuation

(2.2) Si elle prend une décision dans le cadre de l'alinéa (1)*a*), l'autorité responsable veille à l'application des mesures d'atténuation qu'elle a prises en compte et qui sont visées à l'alinéa (1.1)*a*) de la façon qu'elle estime nécessaire, même si aucune autre loi fédérale ne lui confère de tels pouvoirs d'application.

Assistance of other federal authority

(2.3) A federal authority shall provide any assistance requested by a responsible authority in ensuring the implementation of a mitigation measure on which the federal authority and the responsible authority have agreed.

Appui à l'autorité responsable

(2.3) Il incombe à l'autorité fédérale qui convient avec l'autorité responsable de mesures d'atténuation d'appuyer celle-ci, sur demande, dans l'application de ces mesures.

Prohibition: proceeding with project

(3) Where the responsible authority takes a course of action referred to in paragraph (1)(*b*) in relation to a project, the responsible authority shall publish a notice of that course of action in the Registry and, notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made under it shall be exercised or per-

Interdiction de mise en œuvre

(3) L'autorité responsable qui prend la décision visée à l'alinéa (1)*b*) à l'égard d'un projet est tenue de publier un avis de cette décision dans le registre, et aucune attribution conférée sous le régime de toute autre loi fédérale ou de ses règlements ne peut être exercée de façon à permettre la mise en œuvre, en tout ou en partie, du projet.

TAB 3

Canadian Environmental Assessment Agency | Agence canadienne d'évaluation environnementale

Operational Policy Statement

Addressing Cumulative Environmental Effects under the *Canadian Environmental Assessment Act*

Original: March 1999
Update: November 2007

Purpose

This operational policy statement provides clarification to responsible authorities on how cumulative environmental effects should be considered in environmental assessments conducted under the *Canadian Environmental Assessment Act* (the Act). It also highlights differences between the *Cumulative Effects Assessment Practitioners Guide* (the Practitioners Guide), the Act and previous Agency guidance on this subject. Finally, this document updates the Agency's position on the assessment of cumulative environmental effects as described in the 1994 Reference Guide.

Background

Subsection 16(1) of the Act requires every environmental assessment to include consideration of the environmental effects of a project, including "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."

Responsible authorities must determine appropriate means to satisfy this requirement as part of screenings and comprehensive studies.

Detailed guidance for doing so can be found in the following documents:

- *Cumulative Effects Assessment Practitioners Guide* (1999) prepared by The Cumulative Effects Assessment Working Group[1] and AXYS Environmental Consulting Ltd.
- *Reference Guide: Addressing Cumulative Environmental Effects* (1994)

The Agency recommends that responsible authorities consult these documents when determining how to take cumulative environmental effects into account as part of the environmental assessment of a project.

Cumulative Effects Practitioners Guide

The Agency sponsored and funded the development of the Practitioners Guide by an independent multi-stakeholder committee. It was the subject of broad consultations among federal authorities, other practitioners and the public prior to being finalized and published.

[1] The Cumulative Effects Assessment Working Group was an independent group of environmental assessment specialists, practitioners and academics.

The Practitioners Guide offers a "best practices" perspective on cumulative environmental effects assessment with emphasis on the assessment of cumulative biophysical effects. It is intended to be broadly applicable across Canadian jurisdictions and to projects of varying size and complexity in different industrial and development sectors.

The Practitioners Guide was not developed solely in reference to the assessment of cumulative environmental effects under the Act. Accordingly, with respect to projects undergoing a federal environmental assessment, responsible authorities should take the following information into account.

Definition of Cumulative Environmental Effects

"Cumulative environmental effects" are defined more narrowly in the Practitioners Guide than under the Act. While the Practitioners Guide is limited to cumulative biophysical effects, assessments of cumulative environmental effects under the Act can extend to the effects of such changes on health and socio-economic conditions, physical and cultural heritage, and other matters described in the definition of "environmental effects" in section 2 of the Act.

Responsible authorities should consider whether these factors, as well as biophysical effects, need to be examined in the cumulative environmental effects assessment.

Identifying Future Projects to Include in Cumulative Environmental Effects Assessment

According to the Practitioners Guide, the selection of future actions to consider in a cumulative environmental effects assessment should reflect "the most likely future scenario." Emphasis is given to projects with greater certainty of occurring; however, hypothetical projects might be discussed on a conceptual basis in some cases.

As stated above, the Act refers to the consideration of "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." Accordingly, in identifying future projects to include in the cumulative environmental effects assessment, responsible authorities should consider projects that are "certain" and "reasonably foreseeable", as recommended by the Practitioners Guide. The Act does not require consideration of hypothetical projects, but responsible authorities may choose to do so at their discretion. Information concerning the cumulative environmental effects of the project under assessment combined with hypothetical projects may contribute to future environmental planning; however, it should not be the determining factor in the environmental assessment decision under the Act.

The Agency's 1994 Reference Guide advised that the assessment of cumulative environmental effects in relation to future projects should focus exclusively on imminent projects, that is, projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval. It is now recognized that this approach may not always be adequate to understand the implications of development activities on the future well-being of the environment. Also, it may limit the ability of cumulative environmental effects assessment to contribute to informed environmental planning and decision making in the future in the project area.

To better reflect the broad objectives of the Act, the Agency position has evolved to include "certain" and "reasonably foreseeable" projects and, where appropriate those projects that are "hypothetical". This position is also consistent with the "best practices" approach of the Practitioners Guide.

Responsible authorities will need to exercise judgment in distinguishing between projects that are certain, reasonably foreseeable and hypothetical. The following definitions from the Practitioners Guide (p.18 and 19) can assist responsible authorities in this regard. Additional details are found in section 3.2.4.1. of the Practitioners Guide.

Definitions

Certain:

- The action will proceed or there is a high probability the action will proceed.

Reasonably Foreseeable:

- The action may proceed, but there is some uncertainty about this conclusion.

Hypothetical:

- There is considerable uncertainty whether the action will ever proceed.
- The conjecture is based on currently available information.

Level of Effort

The Practitioners Guide emphasizes approaches and issues associated with the cumulative environmental effects assessment of large projects; however, it also notes that this framework can be scaled down and adapted for use with smaller projects.

The level of effort directed to the assessment of cumulative environmental effects should be appropriate to the nature of the project under assessment, its potential effects and the environmental setting. For example, the practitioner should give particular attention to the selection of future projects to be considered in the cumulative environmental effects assessment where:

- certain and reasonably foreseeable projects may have an impact on the same valued ecosystem components as the project under assessment;
- rapid development of the project area is anticipated; or
- particular environmental sensitivities or risks are involved.

Regional Studies

Amendments to the Act that took effect in October 2003 recognize the use of regional studies as an important tool for the consideration of cumulative environmental effects. The Act now specifies, in section 16.2, that the results of a study of the environmental effects of possible future projects in a region may be taken into account, particularly for the consideration of any cumulative environmental effects that are likely to result from the project in combination with other projects or activities – past, present and future.

The Act encourages federal authorities to cooperate with provinces, land claim bodies or Aboriginal self-governing bodies in regional studies outside the scope of the Act.

Additional Information

For more information on this operational policy statement or on the requirements of the Act, please contact the Agency office in your region.

Head Office:
www.ceaa-acee.gc.ca/411/index_e.htm

Regional Offices:
www.ceaa.gc.ca/001/regions_e.htm

Additional Agency policies and guidance can be found on the Agency's Web site at:
www.ceaa-acee.gc.ca

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TAB 4

(Consolidated up to 154/2006)

ALBERTA REGULATION 101/2001

Alberta Energy and Utilities Board Act

ALBERTA ENERGY AND UTILITIES BOARD RULES OF PRACTICE

Table of Contents

may be directly and adversely affected by a decision of the Board on the proceeding,

(e) indicate that copies of the application and other documents filed in support of the application

(i) may be obtained from the applicant or the applicant's representative, and

(ii) are available for viewing at a location open to the public,

(f) indicate the name and address in Alberta of the applicant or the applicant's representative where the application and other documents filed in support of the application may be obtained,

(g) indicate the address of the location open to the public where the application and other documents are available for viewing and the hours during which they may be viewed, and

(h) contain any other information that the Board considers necessary.

(3) If a submission is filed, the Board may

(a) set the application down for a hearing, or

(b) grant the application if

(i) the Board considers the submission to be frivolous, vexatious or of little merit, or

(ii) the person filing the submission has not demonstrated that the person may be directly and adversely affected by a decision of the Board on the proceeding.

Notice of hearing

22(1) If the Board decides to set an application down for a hearing, the Board shall issue a notice of hearing.

(2) A notice of hearing must

(a) be in writing,

(b) briefly describe the subject-matter of the hearing,

(c) in the case of an oral or electronic hearing,

(i) indicate the date, time and place of the hearing, which must not be less than 10 days after the date of the notice, or

(ii) because of the complexity of the subject-matter of the proceeding, indicate that the date, time and place of the hearing will be set after the filing of submissions by any interveners,

(d) indicate if the hearing is to be held by examiners,

(e) indicate that copies of the application and other documents filed in support of the application

(i) may be obtained from the applicant or the applicant's representative, and

(ii) are available for viewing at a location open to the public,

(f) indicate the name and address in Alberta of the applicant or the applicant's representative where the application and other documents filed in support of the application may be obtained,

(g) indicate the address of the location open to the public where the application and other documents are available for viewing and the hours during which they may be viewed,

(h) contain a schedule showing the time limits for filing and serving submissions, responses to submissions, replies to responses to submissions, information requests, responses to information requests, documentary evidence and written argument, and

(i) contain any other information that the Board considers necessary.

Submission of intervener

23(1) A person who wishes to intervene in a proceeding shall file a submission and serve a copy of it on the other parties within the time set out in the notice of hearing.

(2) A submission must be in writing and contain the following:

(a) a concise statement indicating

(i) the manner in which the intervener's rights may be directly and adversely affected by a decision of the Board on the proceeding,

(ii) the nature and scope of the intervener's intended participation,

(iii) the disposition of the proceeding that the intervener advocates, if any,

(iv) the facts the intervener proposes to show in evidence,

(v) the reasons why the intervener believes the Board should decide in the manner that the intervener advocates, and

(vi) the intervener's efforts, if any, to resolve issues associated with the proceeding directly with the applicant;

(b) the name, address in Alberta, telephone number, fax number and, if available, e-mail address of the intervener;

(c) if the intervener is represented by a representative, the name, address in Alberta, telephone number, fax number and, if available, e-mail address of the representative;

(d) if the intervener is an unincorporated organization, the nature of the intervener's membership.

(3) The Board may, on receiving and examining a submission, do one or more of the following:

(a) direct the intervener to serve a copy of the submission on such other persons and in such a manner as the Board specifies;

(b) direct the intervener to provide additional information to the Board;

(c) direct the applicant or the intervener to make further submissions, either orally or in writing, on the original submission;

(d) decide that the intervener will not be heard because

(i) the submission is frivolous, vexatious or of little merit, or

(ii) the intervener has not shown that the decision of the Board in the proceeding may directly and adversely affect the intervener's rights;

(e) if the Board is of the view that any matter set out in the submission is not in response to the application or has implications of importance beyond the application, direct a revision of the application or the submission that the Board considers necessary.

Question of constitutional law

23.1 A person who intends to raise a question of constitutional law before the Board must give notice in accordance with section 12 of the *Administrative Procedures and Jurisdiction Act* and its regulation.

AR 154/2006 s8

Applicant to provide documents and material

24 After an intervener files a submission under section 23, the applicant shall provide the intervener with copies of any of the following documents and material that the applicant has not previously provided to the intervener:

(a) the application and any other documents filed in support of the application;

(b) any material filed as documentary evidence.

Late filing

25(1) A party who wishes to file a document, or a person who wishes to file a submission as an intervener, after the time limit set out in the notice of hearing has elapsed may request of the Board leave to file the document or submission, as the case may be.

(2) The Board may grant a request under subsection (1) on any terms that the Board considers appropriate.

Adjournments

26 The Board may, on its own initiative or on motion by a party, adjourn a hearing on any terms that the Board considers appropriate.

Information request

27(1) A party may request another party, within the time limit set out in the notice of hearing, to provide information necessary

(a) to clarify any documentary evidence filed by the other party,

(b) to simplify the issues,

(c) to permit a full and satisfactory understanding of the matters to be considered, or

(d) to expedite the proceeding.

(2) An information request under subsection (1) must

(a) be in writing,

(b) be directed to the party from whom a response is sought,

(c) contain specific questions for clarification about the party's evidence, documents or other material that is in the possession of the party and relevant to the proceeding,

(d) be filed and served as directed by the Board, and

(e) set out the date on which the information request is filed.

Response to information request

28(1) A party who is served with an information request under section 27 shall prepare a response that

(a) repeats each question in the information request,

(b) provides a full and adequate response to each question, and

(c) identifies the individual or individuals who were responsible for preparing the response.

(2) A response under subsection (1) must

(a) be in writing,

(b) be filed and served as directed by the Board, and

(c) set out the date on which the response is filed.

Partial or no response

29(1) If a party who is served with an information request under section 27 is not able or not willing to prepare a response in accordance with section 28, the party shall do one of the following:

(a) if the party contends that the information request is not relevant, file and serve on the party making the request a response in writing that sets out the specific reasons in support of that contention;

(b) if the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, file and serve on the party making the request a response in writing that

(i) sets out the specific reasons in support of that contention, and

(ii) contains such other information that the party considers would be of assistance to the party making the information request;

(c) if the party contends that the information requested is confidential, file and serve on the party making the request a response in writing that sets out the specific reasons why the information is confidential and any harm that may be caused if it were disclosed.

(2) If a party is not satisfied with a response under subsection (1), the party may bring a motion under section 9 requesting that the matter be settled by the Board.

Pre-hearing meeting

30 The Board may, on its own initiative or at the request of a party, direct that a pre-hearing meeting be held with the parties for one or more of the following purposes:

(a) to determine the issues in question and the position of the parties, including matters relating to costs;

(b) to recommend the procedures to be adopted with respect to the hearing;

(c) to determine whether the parties may benefit from a settlement meeting to discuss the issues;

(d) if an oral hearing or electronic hearing is to be held, to set the date, time and place for the oral hearing or electronic hearing and to fix the time to be allotted to each party to present evidence and argument;

(e) to decide any other matter that may aid in the simplification or the fair and most expeditious disposition of the proceeding.

Technical meeting

31 The Board may direct the parties to participate in a technical meeting for the purpose of

TAB 5

Province of Alberta

ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT

Revised Statutes of Alberta 2000
Chapter E-12

Current as of October 1, 2009

Office Consolidation

Alberta Queen's Printer
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Minister may order environmental impact assessment report

47 If the Minister is of the opinion that an environmental impact assessment report is necessary because of the nature of a proposed activity, the Minister may by order in writing direct the proponent to prepare and submit the report in accordance with this Division, notwithstanding that

(a) the Director has not ordered an environmental impact assessment report, or

(b) the proposed activity is the subject of an exemption under regulations under section 59(b).

1992 cE-13.3 s45

Terms of reference

48(1) Where a proponent is required to prepare an environmental impact assessment report, the proponent shall prepare proposed terms of reference for the preparation of the report in accordance with requirements specified by the Director and shall submit the proposed terms of reference to the Director.

(2) The proponent shall provide notice of the proposed terms of reference and make them available in accordance with the regulations.

(3) After allowing what the Director considers to be a reasonable time for the receipt of comments in respect of the proposed terms of reference, and after giving due consideration to those comments, the Director shall issue final terms of reference for the preparation of the report to the proponent.

(4) The Director shall make the final terms of reference available in accordance with the regulations.

1992 cE-13.3 s46

Contents of environmental impact assessment report

49 An environmental impact assessment report must be prepared in accordance with the final terms of reference issued by the Director under section 48(3) and shall include the following information unless the Director provides otherwise:

(a) a description of the proposed activity and an analysis of the need for the activity;

(b) an analysis of the site selection procedure for the proposed activity, including a statement of the reasons why the proposed site was chosen and a consideration of alternative sites;

TAB 6

Date: 20080305

Docket: T-535-07

Citation: 2008 FC 302

Ottawa, Ontario, March 5, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

**PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT,
PRAIRIE ACID RAIN COALITION,
SIERRA CLUB OF CANADA, and
TOXICS WATCH SOCIETY OF ALBERTA**

Applicants

and

**ATTORNEY GENERAL OF CANADA,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF ENVIRONMENT, and
IMPERIAL OIL RESOURCES VENTURES LIMITED**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by the applicants pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, respecting a report dated February 27, 2007 by the Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada (the "Panel") concerning an environmental impact assessment of the Kearl

Oil Sands Project (the "Kearl Project" or the "Project"), wherein the Panel recommended to the responsible federal authority, the Department of Fisheries and Oceans ("DFO"), that the Project receive authorization.

[2] The applicants, various non-profit organizations concerned about the environmental effects of the Kearl Project, submit that the environmental assessment conducted by the Panel did not comply with the mandatory steps in the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 ("CEAA") and in the Panel's Terms of Reference.

BACKGROUND

[3] Imperial Oil wishes to construct and operate the Kearl Project, an oil sands mine, in northern Alberta. This project includes the design, construction, operation and reclamation of four open pit truck and shovel mines and three trains of ore preparation and bitumen extraction facilities, as well as tailings management facilities and other supporting infrastructure. It will be capable of producing over 48,000 cubic metres of bitumen per day at full production in 2018, and will terminate mining operations in 2060.

[4] The Kearl Project will be located approximately 70 kilometres north of Fort McMurray. Further, it is situated in the upper Muskeg River Watershed, a tributary of the Athabasca River, which flows through Wood Buffalo National Park to the Mackenzie River drainage basin in the Northwest Territories.

[5] The Kearl Project requires an authorization from the federal Minister of Fisheries and Oceans under section 35(2) of the *Fisheries Act*, R.S.C., 1985, c. F-14. Before any federal approval can be given, an environmental assessment under the CEAA is required.

[6] Pursuant to the Canada-Alberta Agreement for Environmental Assessment Cooperation, the Canadian Environmental Assessment Agency notified Alberta that it wished to participate with Alberta in a cooperative environmental assessment of the Kearl Project. Federally, the Canadian Environmental Assessment Agency confirmed it would carry out the role of Federal Environmental Assessment coordinator, and DFO would be the responsible authority, with Environment Canada (EC), Health Canada (HC) and Natural Resources Canada (NRCan) providing DFO with specialist advice.

[7] Imperial Oil filed its Environmental Impact Assessment (EIA) relating to the Kearl Project in July 2005. Representatives of DFO, EC, HC and NRCan assessed the information provided by Imperial Oil as part of the joint environmental assessment with Alberta.

[8] On January 18, 2006, DFO recommended to the Minister of the Environment that the Kearl Project be referred to a review panel due to the potential for the proposed project to cause significant adverse environmental effects, including cumulative effects, over large areas and on a number of valued ecosystem components. Canada entered into an agreement with the government of Alberta to conduct a joint review panel. The Joint Panel would render a project approval *decision* on behalf of Alberta authorities and make an approval *recommendation* to the responsible federal authority.

[9] The Panel held 16 days of public hearings in November 2006. In addition to the EIA report filed by Imperial Oil, 20 parties filed submissions with the Panel, a number of which also gave oral evidence and were cross-examined at the hearing.

The Panel Report

[10] On February 27, 2007, the Panel issued its report, setting out its decision for the Alberta authorities and making recommendations to DFO regarding project authorization.

[11] The Panel reviewed the project as well as its purpose, need, project alternatives, and alternative means of implementation. The Panel reviewed the views of various stakeholder groups and summarized issues relating to social and economic effects, mine plan and resource conservation, tailings management, reclamation, air emissions, surface water, aquatic resources, Cumulative Environmental Management Association (CEMA) (a voluntary partnership of stakeholders charged with identifying environmental thresholds before irreversible damage occurs from oil sands development), traditional land use and traditional ecological knowledge, the need for follow-up, and human health.

[12] The Panel recommended that DFO approve the Project given its view that provided proposed mitigation measures and recommendations were implemented, the Project was not likely to cause significant adverse environmental effects.

LEGISLATIVE CONTEXT

[13] The law governing Environmental Impact Assessments is set out by the provisions of the CEAA as interpreted in the jurisprudence of the Federal Court, Federal Court of Appeal, and the Supreme Court of Canada.

[14] The CEAA establishes a two-step decision-making process. The first step is an environmental assessment where potentially adverse environmental effects of a project are analysed (s. 5). The second step involves decision-making and follow-up where a federal authority decides, taking into consideration that assessment, if a particular project should be authorized and what follow-up measures, if any, are required to verify the accuracy of the assessment and the effectiveness of mitigation measures (ss. 37 and 38).

[15] The purpose of environmental assessment was described by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 (QL), at para. 95. While the case involved assessment under the *Environmental Assessment and Review Process Guidelines Order*, S.O.R./84-467 (the "EARPGO", predecessor to the current CEAA), I find the general principles espoused to be particularly instructive:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., Environmental Rights in Canada (1981), 245, at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles,

> to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, Environmental Approvals in Canada (1989), at p. 1.2, (SS) 1.4; D. P. Emond, Environmental Assessment Law in Canada (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making. [...]

The First Step: Environmental Assessment

[16] With respect to the first step, the CEAA contemplates three "levels" of assessment: screening (ss. 18-20), comprehensive study (ss. 21-24), and mediation and panel reviews (ss. 29-36).

[17] Mediation and panel reviews are the most stringent level of assessment and are to be carried out upon a referral to the Minister by the responsible authority *after consideration of a screening report and any comments filed* where: 1) the responsible authority is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects; 2) the responsible authority is of the opinion that, 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; or 3) public concerns warrant a reference to this type of procedure (s. 20).

[18] Further, s. 25 of the CEAA indicates that the responsible authority may also refer the project to the Minister for a panel review *at any time* where it is of the opinion that the project, taking into

account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or where public concerns warrant a reference to this type of procedure.

[19] Pursuant to s. 40 of the CEAA, joint review panels involving federal and provincial authorities may be constituted by agreement or arrangement. This agreement or arrangement shall provide that the "environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement" (s. 41). Further, s. 41(c) indicates that "the Minister shall fix or approve the terms of reference for the panel." The "terms of reference" shall determine the scope of certain factors to be taken into consideration by a review panel in its assessment (s. 16(3)(b)). These terms of reference may significantly increase the obligations incumbent upon the Panel (see *Alberta Wilderness Assn. v. Cardinal River Coals (T.D.)* [1999] 3 F.C. 425, [1999] F.C.J. No. 441 (QL)).

[20] Specifically, the general duties that a review panel is mandated to fulfill are four-fold (s. 34). First, it must ensure that the information required for an assessment is obtained and made available to the public (s. 34(a)). Second, the panel is required to hold hearings in a manner that offers the public an opportunity to participate in the assessment (s. 34(b)). Third, the panel is charged with fulfilling a reporting function whereby it must prepare a report setting out "the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program" as well as a summary of public

comments received (s. 34(c)). Finally, it must submit that report to the Minister and the responsible authority (s. 34(d)).

[21] Within the ambit of these general duties, a review panel shall include a consideration of the various specific factors enumerated in ss. 16(1) and (2). These factors include the environmental effects of a project including effects of accidents and malfunctions, cumulative environmental effects, the significance of environmental and cumulative effects, public comments, technically and economically feasible mitigation measures, and any other matter relevant to a review panel assessment that the Minister, after consulting with the responsible authority, may require to be considered (s. 16(1)). Furthermore, the purpose of the project, alternative means of carrying it out, the need for and requirement of any follow-up programs, and 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 are also to be considered (s. 16(2)).

[22] With respect to assessing the significance of environmental effects, the jurisprudence reveals that this assessment is not a wholly objective exercise but rather contains "a large measure of opinion and judgement." The Federal Court of Appeal has asserted that "[r]easonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results [...]" (*Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (QL), at para. 10).

[23] The adequacy and completeness of the evidence must be evaluated in light of the preliminary nature of a review panel's assessment. In *Express Pipelines*, *supra*, at para. 14, Hugessen J.A. discussed the predictive and preliminary nature of the panel's role:

> The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

This view was echoed in *Inverhuron & District Ratepayers' Association v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (QL), at para. 55, by Sexton J.A. Therefore, given the predictive function of an environmental assessment and the existence of follow-up mechanisms envisioned by the CEAA, the Panel's assessment of significance does not extend to the elimination of uncertainty surrounding project effects.

[24] Similarly, it is evident that the assessment of environmental effects, including mitigation measures, is not to be conceptualized as a single, discrete event. Instructively, in *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 F.C. 325, [1996] F.C.J. No. 1373 (QL), Mackay J. indicated, at para. 32 that he was not persuaded that the CEAA requires that all the details of mitigating measures be resolved before the acceptance of a screening report. He further asserted that the nature of the process of assessment was "ongoing and dynamic" with continuing dialogue between the proponent, the responsible authorities and interested community groups.

[25] Moreover, jurisprudence relating to the EARPGO is also instructive as to the content of the legal duty to consider mitigation measures. In *Tetzlaff v. Canada (Minister of the Environment (F.C.A.)*, [1991] 1 F.C. 641, at p. 657, Iacobucci C.J.A. described the assessment of mitigation measures in s. 12(c) of the EARPGO in the following terms: "If the initial assessment procedure reveals that the potentially adverse environmental effects that may be caused by the proposal "are insignificant or mitigable with known technologies" the proposal [...] may proceed or proceed with mitigation, as the case may be." In the case of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1990), 31 F.T.R. 1, at p. 12, the decision which was upheld by the Court in *Tetzlaff*, Muldoon J. analysed s. 12(c) of the EARPGO and asserted that "since the Minister did not identify any known technologies but only vague hopes for future technology, it is not possible to consider that the recited adverse water quality effects are mitigable". Thus, in the context of a panel assessment, the possibilities of future research and development do not constitute mitigation measures.

[26] I note also that s. 16(1)(d) of the CEAA (the equivalent of s. 12(c) of the EARPGO), the provision mandating consideration of mitigation measures, adds the proviso that mitigation measures must be technically *and economically* feasible as opposed to solely technically feasible ("known technologies" in the wording of the EARPGO). This second condition, in effect, imposes an additional requirement for measures to be classified as mitigating under the CEAA: under the current Act mitigation measures must also be economically feasible in order to qualify as such.

The Second Step: Decision and Follow-up

[27] Once the panel report is completed, the federal authority responsible for the decision must take the report into consideration, and shall take a course of action that is in conformity with the approval of the Governor in Council (s. 37(1.1)). 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, either where the project is not likely to cause significant adverse environmental effects, or where it is likely to cause significant adverse environmental effects that can be justified in the circumstances (s. 37(1)).

[28] Where a federal authority decides to authorize a project following a panel review, it is mandated to design a follow-up program for the project and ensure its implementation (s. 38(2)). The results of the follow-up program may be used to implement adaptive management measures or to improve the quality of future environmental assessments (s. 38(5)).

Guiding Tenets

[29] The powers associated with the administration of the CEAA are to be exercised "in a manner that protects the environment and human health and applies the precautionary principle" (s. 4(2)).

[30] In recent amendments to the CEAA, acting in a manner consistent with the precautionary principle was specifically introduced in s. 4 as a duty bearing upon "the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities" in the administration of the CEAA.

[31] In the case of *114957 Canada Lteé (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42 (QL), at para. 31, the Supreme Court of Canada cited the definition of the precautionary principle from the Bergen Ministerial Declaration on Sustainable Development (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[32] An approach that has developed in conjunction with the precautionary principle is that of "adaptive management". In *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] F.C.J. No. 703, at para. 24, Evans J.A. stated that "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge" and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle. Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.

[33] Accordingly, the scope of the duties incumbent upon a panel must be viewed through the prism of these guiding tenets: the precautionary principle and adaptive management. As an early

planning tool, environmental assessment is tasked with the management of future risk, thus a review panel has a duty to gather the information required to fulfill this charge.

[34] In sum, the CEAA represents a sophisticated legislative system for addressing the uncertainty surrounding environmental effects. To this end, it mandates early assessment of adverse environmental consequences as well as mitigation measures, coupled with the flexibility of follow-up processes capable of adapting to new information and changed circumstances. The dynamic and fluid nature of the process means that perfect certainty regarding environmental effects is not required.

ISSUES

[35] This application involves the determination of whether the Panel committed reviewable errors by failing to consider the factors enumerated in ss. 16(1) and 16(2) of the CEAA, more particularly by relying on mitigation measures that were not technically and economically feasible and by failing to comply with the requirement to provide a rationale for its recommendations pursuant to s. 34(c)(i) of the CEAA.

[36] The applicants focus on these reviewable errors in relation to the following three issues:

A) Cumulative Effects Management Association (CEMA), Watershed Management and Landscape Reclamation;

B) Endangered Species; and

C) Greenhouse Gas Emissions

STANDARD OF REVIEW

[37] All parties agree that to the extent that the issues posed involve the interpretation of the CEAA, as questions of law, they are reviewable on a standard of correctness (*Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] F.C. 263, [1999] F.C.J. No. 1515 (QL), at para. 10; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, [2001] F.C.J. No. 18 (QL), at para. 55). However, issues relating to weighing the significance of the evidence and conclusions drawn from that evidence including the significance of an environmental effect are reviewed on the standard of reasonableness *simpliciter* (*Bow Valley*, *supra*, at para. 55; *Inverhuron*, *supra*, at paras. 39-40).

[38] The crux of the standard of review determination in the present case involves the *characterization* of the alleged errors. According to the applicants, the Panel report contains numerous legal errors relating to the interpretation of the CEAA that are reviewable on the standard of correctness. However, the respondents indicate that these alleged errors are in fact errors relating to the conclusions drawn from the evidence before the Panel and therefore are reviewable on the standard of reasonableness.

[39] As noted by Campbell J. in *Cardinal River Coals Ltd.*, *supra*, at para. 24, "it is important to appropriately characterize a perceived failure to comply [with the requirements of the CEAA] as a question of law or merely an attack on the "quality" of the evidence and, therefore the "correctness" of the conclusions drawn on that evidence" (see also *Express Pipelines Ltd.*, *supra*, at para. 10).

[40] With respect to the arguments relating to the Panel's reliance on mitigation measures that were not technically and economically feasible, there is no indication in the Report that the Panel misunderstood the legal interpretation of technically and economically feasible mitigation measures. In essence, what the applicants are challenging is the underlying completeness or quality of the evidence which in their view was not sufficient to allow the Panel to conclude as it did given the uncertainties that still remained regarding the Project. Thus, this question is reviewable on the standard of reasonableness *simpliciter*.

[41] With respect to the question of providing a "rationale" for the conclusions and recommendations of the Panel, this question relates to the interpretation of the requirements of s. 34(c)(i) of CEAA. The applicants do not attack the rationale provided but rather question whether any rationale at all was put forth by the Panel. Whether or not the Panel has provided a rationale for its conclusions and recommendations is question of law, reviewable on a standard of correctness.

ANALYSIS

A) CEMA, Watershed Management and Landscape Reclamation

i. CEMA

[42] The applicants submit that while the Panel recognized that CEMA was vital in addressing the cumulative impacts of oil sands development and had the responsibility to address most of the critical cumulative effects challenges in the Athabasca oil sands region, it also expressed deep concern at the inability of CEMA "to establish and maintain priority for critical items such as the

Water Management Framework for the Athabasca River, the Muskeg River Watershed Integrated Management Plan, and the Regional Terrestrial and Wildlife Management Framework" and cited specific examples of CEMA failing to meet timelines and complete its work.

[43] The respondent, Imperial Oil, argues that the applicants' assertion is based on a narrow reading of the Report restricted to that portion dealing solely with integrated watershed planning which is only one of the many issues addressed by the Panel. I agree.

[44] The Panel's discussion of CEMA was tied closely to regional watershed management planning. As a regional association comprised of industry and government representatives as well as community and civil society stakeholders, CEMA is expected to address the objectives of watershed management planning. Given this important role in regional effects management, it was therefore appropriate for the Panel to raise concerns regarding CEMA's functioning. Based on the Report, I could not conclude that the Panel considered CEMA as a mitigation measure, but rather as the proper vehicle for the development of environmental management frameworks.

[45] While the Panel discussed CEMA extensively and highlighted the numerous problems associated with its functioning, it also made detailed recommendations regarding its operation in order to ensure that CEMA would function properly in years to come, and to provide the ultimate decision-maker with a concrete evaluation of this key stakeholder association. I note also the Panel's comments with respect to regulatory backstopping by Alberta Environment ("AENV") in the event that CEMA is unable to meet its timelines for management frameworks. I find this to be

consistent with the precautionary principle in that if CEMA is unable to complete a management plan by March 2008, the regulator should be engaged to prevent potentially adverse environmental consequences.

ii. Watershed Management

[46] With respect to Watershed Management, I am satisfied that the Panel took into consideration mitigation measures that were both technically and economically feasible. A fair reading of the Report shows that the Panel addressed the issue of surface water extensively. In fact, the Panel considered the issue under three distinct subheadings: in-stream flow needs, integrated watershed planning, and water quality, and additionally under fish and fish habitat.

[47] Contrary to the applicants' assertion that there was no evidence or the scantest evidence upon which to evaluate the existence, nature and effectiveness of the mitigation measures, the Panel's recommendations on the issue of water quality refer to mitigation measures contained in Imperial Oil's EIA as well as the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "EPEA") approval conditions. The Panel concludes:

> [...] the Joint Panel believes that by implementing a comprehensive monitoring plan, the suggested *EPEA* approval conditions, the Joint Panel's recommendation, and the mitigations identified by Imperial Oil in its EIA, the KOS [Kearl Oil Sands] Project is unlikely to result in significant adverse environmental effects on water quality. [Emphasis added] (p. 83 of the Report)

Further, as pertains to aquatic resources, the Panel concluded:

> [...] The Joint Panel concludes that with the implementation of Imperial Oil's mitigation measures, the completion of an NNLP [No Net Loss Plan] satisfactory to DFO, and the Joint Panel's recommendations, the KOS

> Project is unlikely to result in significant adverse environmental effects on aquatic resources. [Emphasis added] (p. 86 of the Report)

[48] Specifically, the mitigation measures identified by Imperial Oil in its EIA for managing groundwater include the following:

(a) Recycling of process-affected waters and runoff within the Kearl Project footprint in a closed-circuit system during operations;

(b) Directing Muskeg drainage and overburden waters to polishing ponds equipped with oil separation capability, if required;

(c) Diverting natural headwater flow around construction and mining areas and discharging it into receiving streams without contact with oil sands or process-affected waters;

(d) Using a perimeter ditch and pumping system to capture seepage and runoff from the external tailings area and pumping back into the process during operations;

(e) Using a drainage system to capture and direct seepage and runoff from the external tailings area to wetlands and terminal lakes with sufficient residence time after reclaiming the external tailings area;

(f) Using wetlands and pit lakes during and after closure to provide biological remediation and settling of particulate materials in reclamation waters prior to discharge;

(g) Designing pit lakes with sufficient residence time to enhance settling and biological remediation of reclamation waters;

(h) Using reclamation waters that collect in the pit as process water until the start of the closure management system;

(i) Placing of tailings only in the central pit lake which has a large volume and long residence time;

(j) Maintaining naturally occurring, low permeability material between Kearl Lake and its surrounding mine pits to minimize seepage into the lake.

- EIA, Volume 6, at p. 5-38 and 5-39 [Imperial's Record, Vol 2, Tab 4(b) at pp. 312 and 313]

[49] Further, with respect to aquatic resources, Imperial Oil identified mitigation measures in its EIA which included the following:

a) Compensation habitat will be provided by the development of new habitat area in accordance with requirements and guidance through the appropriate regulators, such as DFO;

b) Potential changes in flow sections of the Muskeg River downstream of the Project development area will be minimized during the operational phases of the Project by flow augmentation;

c) Permanent diversion channels and drainage systems will be designed to facilitate development of sustainable aquatic ecosystems in order to mitigate losses of natural water courses habitats;

d) Drainage patterns in Wapasu Creek will be designed to mitigate flows that could change channel regime or increase downstream sedimentation or total suspended solids; and

e) The Kearl Project will include a system of environmental management protocols and construction practices designed to minimize possible effects to the aquatic environment.

- EIA, Volume 6, at p. 6-36 to 6-38 [Imperial's Record, Vol. 2, Tab 4(c) at pp. 314 to 316]

[50] Thus, contrary to the applicants' submissions, I am satisfied that there was evidence upon which the Panel could reasonably assess technically and economically feasible measures that would mitigate any significant adverse environmental effects arising from the Project on the Muskeg watershed and fish and fish habitat.

[51] When pressed at the hearing to provide specific cases of mitigation measures considered by the Panel that were not technically and economically feasible, the applicants pointed to the consolidated tailings technology and end pit lakes as two such examples.

[52] First, with respect to consolidated tailings, the applicants contend that the Panel found this measure to be technically viable but not economically feasible; nevertheless, it proceeded to rely on this technology in its assessment, in contravention of the CEAA.

[53] However, as explained by Imperial Oil's counsel, Mr. Ignasiak, and as indicated by a fair reading of the hearing transcript, it is clear that the Panel was concerned not by the tailings technology, but by one of the enhancements, a tailings thickener, proposed by Imperial Oil in order to improve on the existing technology that is used at other facilities. It is this tailings thickener, not the underlying consolidated tailings technology that has not been commercially demonstrated. The Panel then concluded that by implementing the tailings technology, of which a thickener was but a proposed enhancement, significant adverse environmental effects were unlikely to occur.

[54] Thus, I disagree with the applicants that the Panel was relying on a technology that was yet to be developed. As the respondent, Imperial Oil, aptly pointed out, if the applicants' arguments are to be accepted, it would mean that under the CEAA process, proponents must provide the Panel with only those technologies that have been used in the past. In my view this would stifle innovation in the field, which could potentially result in future benefits to the environment.

[55] Second, with respect to end pit lakes, the applicants submit that by recommending further testing of modelling predictions, the Panel erred in determining that this mitigation measure was technically and economically feasible. I cannot accept this argument. In my view, the Panel took a precautionary approach by demanding that an operator validate modelling predictions by testing end pit lake technology.

[56] Indeed, this approach is broadly consistent with the principles of adaptive management. As Evans J.A asserted in *Canadian Parks and Wilderness Society*, *supra*, at para. 24, "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge." The same holds true for the assessment of mitigation measures. While there does exist some uncertainty with respect to end pit lake technology, the existing level of uncertainty is not such that it should paralyze the entire project.

[57] Thus, based on the information that was before it, including the modelling predictions, the Panel accepted the measure as technically and economically feasible. The fact that uncertainty

remained regarding end pit lakes in the oil sands region is understandable given that they will only become operational upon mine site closures. Thus, the Panel recommended the validation of modelling results, including a physical test case and continued research, well in advance of the slated closure date in 60 years.

[58] In my opinion, the Panel is permitted and indeed mandated to make these kinds of recommendations regarding the proposed Project, which should include recommendations for continued study of potential impacts on valued environmental components and the development of further mitigation strategies. This is consistent with the ongoing and dynamic nature of environmental assessment referred to above and ensures that new information is obtained which facilitates the adaptation of project implementation as required.

iii. Reclamation

[59] The applicants further submit that the mitigation of certain aspects of oil sands mining, e.g., reclamation of peatlands, is not even known in general terms. Follow-up programs are not intended to replace mitigation measures under the CEAA or to be treated as vehicles for designing future mitigation measures. The applicants find support in the case of *Union of Nova Scotia Indians*, *supra*. In that particular case, mitigation measures were generally known, but the details of the specific measures had yet to be determined. For the applicants, relying on adaptive management to

address uncertainty and future risk requires at least some general understanding initially of the mitigation system in play.

[60] The respondents submit that the dynamic nature of follow-up measures and adaptive management will resolve initial uncertainties. Further, sufficient information was available to the Panel which enabled it to reasonably conclude as it did. I agree. The recommendations are not necessarily flawed because the evidence was insufficient to eliminate all uncertainty. The Panel had before it information indicating that while the reclamation of peat-accumulating wetlands remained uncertain, there is considerable experience with respect to wetland and marsh reconstruction and that Imperial Oil's closure plan called for the reconstruction of approximately 900 hectares of marsh. This type of replacement is consistent with s. 2(1) of the CEAA which defines mitigation as including "restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means".

[61] Again, I note that the Federal Court of Appeal explained in *Express Pipelines Ltd.*, *supra*, that as the nature of the Panel's task is predictive, finality and certainty in environmental assessment can never be achieved. Hugessen J. stated at para. 10:

> No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did, a high degree of expertise in environmental matters. In addition, the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future

> results and about the significance of such results without thereby raising questions of law.

And further at para. 14, he states:

> Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

It would be impossible for a review panel to conduct the environmental assessment early in the planning stages of a project if the Panel was required to eliminate all uncertainty and precluded from commenting on follow-up activities.

[62] Thus, while uncertainties with respect to reclamation of peat-accumulating wetlands remained, they could be addressed through adaptive management given the existence of generally known replacement measures contained in Imperial Oil's mine closure plan. Indeed, it is worth noting that the Panel cited with approval the reclamation milestones from Imperial Oil's Project Application in its Report.

B) Endangered Species

[63] The applicants argue that the Panel failed to consider the significance of adverse environmental effects on endangered species, particularly the Yellow Rail (listed in the *Species at Risk Act*, S.C. 2002, c.29 ("SARA")), failed to provide the responsible authority with the requisite information in this regard, failed to consider mitigation measures that were technically and economically feasible, and failed to provide a rationale for its conclusion.

[64] The applicants reference the Federal Government's written submission to the Kearl Panel wherein it indicated that:

> There are 1093 [hectares] of graminoid fen within the Kearl Project area that could provide suitable habitat for Yellow Rails. It is not known how large or widely distributed the local population is, and therefore it is difficult to draw conclusions on potential impacts to the species, or to make recommendations for mitigation actions.

Based on the information before it, the Panel recommended that Alberta conduct a regional review of cumulative impacts on Yellow Rail within the next two years.

[65] For the applicants s. 79 of the SARA imposes requirements, in addition to those contained in the CEAA, on authorities mandated to ensure that an environmental assessment is conducted to "identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, [to] ensure that measures are taken to avoid or lessen those effects and to monitor them."

[66] The federal respondent submits that the Panel clearly set out its concerns regarding the Yellow Rail and made recommendations for a regional review of cumulative impacts to determine

mitigation options as well as the implementation of predevelopment surveys by Imperial Oil. Given the ongoing and dynamic nature of the environmental assessment process, complete details need not be provided at this stage: the Panel raised concerns, provided information, and made recommendations, and the final decision rested with DFO. Imperial Oil echoes the federal respondent and indicates that based on the evidence, the Panel's conclusions and recommendations were informed and rational.

[67] While I note that the Panel could have included more information regarding Environment Canada's concerns with respect to the Yellow Rail, particularly, that suitable habitat for the Yellow Rail is found in localized patches throughout the region and that this habitat cannot be reclaimed with current technology, I find the assessment of the significance of environmental effects in the Panel report to be reasonable. In my view, the Panel met its duty in the present case by acknowledging that Environment Canada expressed concern regarding the effect on the Yellow Rail due to the intensity of regional development. It made no further assessment as the information upon which such assessment could be based was not before it.

[68] The Panel recommended that in the next two years AENV in collaboration with Environment Canada, coordinate a regional review of the cumulative impacts on the Yellow Rail in the oil sands region, using appropriate regional nocturnal surveys in areas of potentially suitable habitat and that this initiative should determine the mitigation options to minimize impacts on the Yellow Rail. The Panel went on to recommend that AENV establish requirements within any *EPEA* approval to implement the findings of the Yellow Rail initiative for surveys, determination of

effects, and mitigation strategies where appropriate. The Panel expressed its expectation that Imperial Oil would implement effective Yellow Rail predevelopment surveys and habitat mitigation strategies in its reclamation plans, unless these matters were dealt with on a regional basis. Finally, the Panel recommended that AENV require Imperial Oil to avoid land clearing during the period of April 1 to August 30 of each year due to potential impacts on migratory bird species.

[69] Thus, while I agree with the applicants' assertion that further studies of the Yellow Rail population do not constitute mitigation measures, I do not believe that the Panel's recommendation was meant to be a mitigation measure. The Panel adopted an approach that was consistent with the dynamic nature of the assessment process; it highlighted concerns and made recommendations consistent with the information before it. I find the approach employed to manage the existing uncertainty to be reasonable.

C) Greenhouse Gas Emissions

[70] The applicants submit that the Panel erred by failing to provide a cogent rationale for its conclusion that the adverse environmental effects of the greenhouse gas emissions of the Project would be insignificant, and by failing to comment on the effectiveness of intensity-based "mitigation". According to Imperial Oil's EIA, the Project will be responsible for average emissions of 3.7 million tonnes of carbon dioxide equivalent per year, which equals the annual greenhouse gas emissions of 800,000 passenger vehicles in Canada, and will contribute 0.51% and 1.7% respectively, of Canada and Alberta's annual greenhouse gas emissions (based on 2002 data).

[71] The respondent, Imperial Oil, argues that the EIA that was before the Panel set out the annual greenhouse gas emissions, as well as the intensity of greenhouse gas emissions on a per barrel basis for the Project during the operating period. Further, the Project Application sets out Imperial Oil's approach to greenhouse gas management including the requirement that the most energy efficient, commercially proven and economic technology be selected to minimize emissions. There is no evidence to suggest that the Panel failed to consider all the evidence that was before it, and while it did not comment specifically on the effects of the greenhouse gas emissions, pursuant to *Cantwell v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 27, the EARPGO (predecessor to the CEAA) does not specify a particular form for the report and thus, it is not the role of this Court to insist on a particular form in the present case. At the hearing, Imperial Oil's counsel added that for the Panel to comment on the proposed intensity based mitigation measures would shift its role into the realm of policy recommendation.

[72] While I agree that the Panel is not to engage in policy recommendation, nevertheless, it is tasked with conducting a science and fact-based assessment of the potential adverse environmental effects of a proposed project. In the absence of this fact-based approach, the political determinations made by final decision-makers are left to occur in a vacuum.

[73] I recognize that placing an administrative burden on the Panel to provide an in-depth explanation of the scientific data for all of its conclusions and recommendations would be disproportionately high. However, given that the Report is to serve as an objective basis for a final

decision, the Panel must, in my opinion, explain in a general way why the potential environmental effects, either with or without the implementation of mitigation measures, will be insignificant.

[74] Should the Panel determine that the proposed mitigation measures are incapable of reducing the potential adverse environmental effects of a project to insignificance, it has a duty to say so as well. The assessment of the environmental effects of a project and of the proposed mitigation measures occur outside the realm of government policy debate, which by its very nature must take into account a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on project related environmental impacts. In contrast, the responsible authority is authorized, pursuant to s. 37(1)(a)(ii), to permit the project to be carried out in whole or in part even where the project is likely to cause significant adverse environmental effects if those effects "can be justified in the circumstances". Therefore, it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval.

[75] I am fully aware of the level of expertise possessed by the Panel. The record shows that they had ample material before them relating to the issue of greenhouse gas emissions and climate change, and thus any articulated conclusions drawn from the evidence should be accorded a high measure of deference. However, this deference to expertise is only triggered when those conclusions are articulated. Instructively, in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116 (QL), at para. 62, Iacobucci J. cited with approval the following excerpt from Kerans, R. P., *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994), p. 17 which dealt with deference to "expertise":

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. [Emphasis added]

Thus, deference to expertise is based on the cogent articulation of the rationale basis for conclusions reached.

[76] In the present case, the Panel indicated its expectation that Imperial Oil would follow through on its commitment to:

- reduce NO_x emissions through combustion controls using low-NO_x burners for stationary sources,
- purchase and operate low-NO_x mine equipment as soon as it is commercially available, and
- participate in AENV's BATEA [Best Available Technology Economically Available] study and implement its findings. (p. 58 of the Report)

Further, the Panel agreed with EC and encouraged Imperial Oil to implement the use of ultra-low-sulphur diesel fuel for all of its construction and mining activities ahead of any mandatory requirements (p. 59 of the Report).

[77] Finally, the Panel supported Alberta developing appropriate *EPEA* approval requirements to address greenhouse gas emission intensity targets:

> The Joint Panel supports Alberta developing appropriate *EPEA* approval requirements to address:
>
> - fugitive emissions control (LDAR [leak detection and repair] program),
> - continuous benzene and acrolein monitoring,

- VOC [volatile organic compounds] emissions monitoring,
- participation in CEMA and WBEA [Wood Buffalo Environmental Association] work to address trace air contaminants, including but not limited to benzene and acrolein,
- participation in regional acid deposition and eutrophication monitoring programs, and
- GHG [greenhouse gas] emission intensity targets.

The Panel then concluded that:

> The KOS Project is not likely to result in significant adverse environmental effects to air quality, provided that the mitigation measures and recommendations proposed are implemented. (p. 60 of the Report)

[78] The evidence shows that intensity-based targets place limits on the amount of greenhouse gas emissions per barrel of bitumen produced. The absolute amount of greenhouse gas pollution from oil sands development will continue to rise under intensity-based targets because of the planned increase in total production of bitumen. The Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance. Without this vital link, the clear and cogent articulation of the reasons behind the Panel's conclusion, the deference accorded to its expertise is not triggered.

[79] While I agree that the Panel is not required to comment specifically on each and every detail of the Project, given the amount of greenhouse gases that will be emitted to the atmosphere and given the evidence presented that the intensity based targets will not address the problem of greenhouse gas emissions, it was incumbent upon the Panel to provide a justification for its recommendation on this particular issue. By its silence, the Panel short circuits the two step decision making process envisioned by the CEAA which calls for an *informed decision* by a responsible

authority. For the decision to be informed it must be nourished by a robust understanding of Project effects. Accordingly, given the absence of an explanation or rationale, I am of the view that the Panel erred in law by failing to provide reasoned basis for its conclusion as mandated by s. 34(c)(i) of the CEAA.

[80] As this error relates solely to one of the many issues that the Panel was mandated to consider, I find that it would be inappropriate and ineffective to require the entire Panel review to be conducted a second time (*Nanda v. Canada (Public Service Commission Appeal Board)*, [1972] F.C. 277, at para. 55). Accordingly, the application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

[81] As it was agreed upon at the hearing, the parties shall make representations in writing on the issue of costs. The applicants should file and serve their representation within 15 days from the date of this judgement. The respondents should file and serve their representations within 15 days from the date of service of the applicants' representations.

JUDGMENT

THIS COURT ORDERS that

The application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

"Danièle Tremblay-Lamer"
Judge

TAB 7

1999 CarswellNat 511, [1999] 3 F.C. 425, 165 F.T.R. 1, 15 Admin. L.R. (3d) 25, 30 C.E.L.R. (N.S.) 175, 3 F.C. 425, [1999] F.C.J. No. 441

1999 CarswellNat 511, [1999] 3 F.C. 425, 165 F.T.R. 1, 15 Admin. L.R. (3d) 25, 30 C.E.L.R. (N.S.) 175, 3 F.C. 425, [1999] F.C.J. No. 441

Alberta Wilderness Assn. v. Cardinal River Coals Ltd.

Alberta Wilderness Association, Canadian Nature Federation, Canadian Parks and Wilderness Society, Jasper Environmental Association and Pembina Institute for Appropriate Development, Applicants and Cardinal River Coals Ltd., Respondent

Federal Court of Canada — Trial Division

Campbell J.

Heard: March 1, 2, 3 and 26, 1999
Judgment: April 8, 1999[FN*]
Docket: T-1790-98

Counsel: *Stewart A.G. Elgie* and *Jerry V. DeMarco*, for Applicants.

Dennis R. Thomas, Q.C., and *Allan E. Domes*, for Respondent Cardinal River Coals Ltd.

James A. Baird and *Mary King*, for Respondent Minister of Fisheries and Oceans in T-2354-97.

Robert D. Heggie, for Intervenor Cheviot Coal Project Review Panel in T-2354-97.

Subject: Public; Environmental

Environmental law --- Statutory protection of environment — Approvals, licences and orders — Miscellaneous issues

Respondent proposed to construct open pit coal mine — Joint federal and provincial review panel recommended approval — Applicants applied for judicial review to challenge authorization and environmental assessment conducted as precondition — Application granted — Authorization quashed — Panel breached duty under joint panel agreement to obtain all available information about likely forestry and mining in vicinity of project — Panel failed to meet requirements of s. 16(2)(b) of Canadian Environmental Assessment Act as report failed to consider effects of alternative means of mining — Panel breached duty of due process in failing to consider two documents it had accepted for consideration — Minister's actions in issuing Fisheries Act authorization would be contrary to law under s. 35 of Migratory Birds Regulations and subject to judicial review — Discretion to prohibit issuance of further authorizations not exercised as Minister could obtain regulatory protection to avoid liability — Canadian Environmental Assessment Act, S.C. 1992, c. 37 s. 16(2)(b) — Fisheries Act, R.S.C. 1985, c. F-14 — Migratory Birds Regulations, C.R.C. 1978, c. 1035, s. 35.

The respondent proposed to construct an open pit coal mine 23 km long and 3.5 km wide, within 2.8 km of a national park. The Federal Minister of the Environment and the Alberta Energy and Utilities Board recommended approval of the project following a joint review held pursuant to their joint panel agreement. The applicants applied for judicial review to challenge the authorization and the environmental assessment, which was a precondition to its issuance.

Held: The application was granted and the authorization was quashed.

As a result of the joint review panel's breaches of duty and error in due process, the environmental assessment was not conducted in compliance with the requirements of the *Canadian Environmental Assessment Act* and therefore the authorization was issued without jurisdiction.

Pursuant to the Act, the review panel must ensure that all information required for an assessment is obtained and made available and must hold hearings to foster public participation. The panel must conduct an environmental assessment of the project including consideration of cumulative environmental effects and their significance, mitigation measures, alternative means of carrying out the project and their environmental impact, and prepare a report of their conclusions and recommendations.

Pursuant to the joint panel agreement, the panel amplified its obligations under the Act to create a duty to obtain all available information about likely forestry and mining in the vicinity of the project, to consider it with respect to cumulative environmental effects and to substantiate conclusions in its report. In considering the ungulate habitat in the project area, the panel operated on the apparently erroneous assumption that forest cover would be maintained and in so doing breached its duty. The panel failed to compel production of mining information because it misconstrued its power to do so and misconceived that it had the obligation to decide on its relevance once produced and in so doing breached its duty.

The report failed to meet the requirements of s. 16(2)(b) of the Act. While the report generally considered the alternative means of underground mining, the effects were not meaningfully considered.

As a result of breach of due process based on legitimate expectations, the panel committed a reviewable error in not considering two documents it had accepted for consideration.

The issuance of the *Fisheries Act* authorizations would result in deposit of harmful substances in areas frequented by migratory birds and thus the actions of the Minister of Fisheries and Oceans would be "contrary to law" under s. 35 of the *Migratory Birds Regulations* and subject to judicial review under s. 18.1(4)(f) of the *Federal Court Act*. Discretion to prohibit the issuance of further *Fisheries Act* authorizations was not exercised as the Minister has the option of obtaining regulatory protection to avoid liability.

Cases considered by *Campbell J.*:

Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans) (1998), 152 F.T.R. 49 (Fed. T.D.) — considered

Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans) (1998), [1999] 1 F.C. 483, 29 C.E.L.R. (N.S.) 21 (Fed. C.A.) — considered

Alberta Wilderness Assn. v. Express Pipelines Ltd. (1996), 201 N.R. 336, 137 D.L.R. (4th) 177, 42 Admin. L.R. (2d) 296 (Fed. C.A.) — considered

Borowski v. Canada (Attorney General), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232 (S.C.C.) — considered

Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans), 150 F.T.R. 161, [1998] 4 F.C. 340, 28 C.E.L.R. (N.S.) 97 (Fed. T.D.) — considered

Lor-Wes Contracting Ltd. v. R. (1985), 85 D.T.C. 5310, [1986] 1 F.C. 346, [1985] 2 C.T.C. 79, 60 N.R. 321 (Fed. C.A.) — considered

National Bank of Greece (Canada) c. Katsikonouris, (sub nom. *Panzera v. Simcoe & Erie Cie d'assurance)* [1990] I.L.R. 1-2663, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* 74 D.L.R. (4th) 197, (sub nom. *National Bank of Greece (Canada) v. Katsikonouris)* [1990] 2 S.C.R. 1029, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 115 N.R. 42, (sub nom. *National Bank of Greece (Canada) c. Simcoe & Erie General Assurance Co.)* 32 Q.A.C. 25, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* [1990] R.D.I. 715, (sub nom. *Panzera c. Simcoe & Érié Cie d'assurance)* 50 C.C.L.I. 1 (S.C.C.) — considered

Stubart Investments Ltd. v. R., [1984] C.T.C. 294, 84 D.T.C. 6305, [1984] 1 S.C.R. 536, 10 D.L.R. (4th) 1, 53 N.R. 241 (S.C.C.) — considered

Statutes considered:

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

s. 2(1) "environmental assessment" — considered

s. 2(1) "environmental effect" — considered

s. 2(1) "environmental effect" (a) — considered

s. 2(1) "environmental effect" (b) — considered

s. 2(1) "mitigation" — considered

s. 4(a) — considered

s. 5(1)(d) — considered

s. 11(1) — referred to

s. 15 — referred to

s. 16 — considered

s. 16(1) — considered

s. 16(1)(a) — considered

s. 16(1)(b) — considered

s. 16(1)(c) — considered

s. 16(1)(d) — considered

s. 16(1)(e) — considered

s. 16(2) — considered

s. 16(2)(b) — considered

s. 16(2)(d) — considered

s. 24 — considered

s. 24(1)(a) — considered

s. 24(2) — considered

s. 34 — referred to

s. 34(a) — considered

s. 34(b) — considered

s. 34(c) — considered

s. 35 — considered

s. 37(1) — considered

s. 37(1)(a) — referred to

s. 41 — considered

s. 41(c) — considered

s. 42 — considered

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

s. 18.1(3)(b) [en. 1990, c. 8, s. 5] — considered

s. 18.1(4)(f) [en. 1990, c. 8, s. 5] — considered

Fisheries Act, R.S.C. 1985, c. F-14

s. 35(2) — considered

Migratory Birds Convention Act, 1994, S.C. 1994, c. 22

Generally — referred to

s. 4 — considered

s. 12 — considered

s. 12(1)(h) — considered

s. 12(1)(i) — considered

s. 35(1) — considered

s. 35(2) — considered

Treaties considered:

Migratory Birds Convention, S.C. 1994, c. 22, Sched.

Preamble — considered

Treaty No. 8, 1899, T8 1899

Generally — referred to

Regulations considered:

Migratory Birds Convention Act, 1994, S.C. 1994, c. 22

Migratory Birds Regulations, C.R.C. 1978, c. 1035

Generally

s. 35(1)

s. 35(2)

APPLICATION for judicial review of decision of Federal Department of Fisheries and Oceans authorizing respondent to construct open pit coal mine.

***Campbell J.*:**

1 In March 1996, Cardinal River Coals Ltd. ("CRC") submitted applications to obtain Alberta regulatory approvals and a Federal Department of Fisheries and Oceans ("DFO") authorization to construct a 23 km. long and 3.5 km. wide open pit coal mine in its mine permit area located 2.8 km. east of the Jasper National Park boundary.

2 The applicants have voiced substantial concerns about the Cheviot Coal Project ("the Project"), and commenced this judicial review to challenge the DFO authorization ("the Authorization") issued which allows work to begin on the Project. The challenge attacks the Authorization itself, and the environmental assessment which is a pre-condition to its issuance, with the intention of having the public environmental assessment process reopened to address environmental concerns which, they argue, were not properly considered.

I. Factual Background and Issues

3 The Project involves excavating a series of 30 or more open pits, and the construction of associated infrastructure which includes roads, rail lines and the installation of a new transmission line for the supply of electricity. The undertaking will generate millions of tonnes of waste rock which will be deposited on site in stream valleys and other areas.

4 The Project, being undertaken on the Eastern Slopes of the Rocky Mountains close to the eastern boundary of Jasper National Park, is located in an environmentally rich area that is home to a variety of wildlife. It is argued that the construction and operation of the Project, which is expected to be in operation for 20 years, will have a dramatic impact on the immediate and surrounding environment.

5 Section 35(2) of the federal *Fisheries Act*[FN1] requires that an authorization be obtained from the Minister prior to the alteration, disruption, or destruction of fish habitat. In May 1996, CRC applied to DFO for the appropriate authorizations required under the *Fisheries Act*, in connection with the Project. However, before the Minister of Fisheries and Oceans (the "Minister") may issue an authorization for a project in compliance with the *Fisheries Act*, an environmental assessment must be conducted pursuant to s.5(1)(d) of the *Canadian Environmental Assessment Act*[FN2] (*CEAA*) Accordingly, the Minister became the responsible authority for the project pursuant to s.11(1) of *CEAA*.

6 A comprehensive study was commenced but, before it was completed, the Minister concluded that the Project may potentially result in significant adverse environmental effects and, therefore, should be referred to a panel under *CEAA*. Since an environmental review was also required under Alberta legislation, the federal Minister of Environment and the Alberta Energy and Utilities Board ("EUB") agreed to hold a joint federal and provincial review as is provided for under *CEAA*, and, to that end, signed the "Agreement for the Cheviot Coal Project", dated October 24, 1996 ("Joint Panel Agreement").

7 The Joint Panel Agreement set out the terms of reference for the EUB-*CEAA* Joint Review Panel ("the Joint Review Panel"), including the factors that they were required to consider in conducting the environmental assessment.

8 The Project was referred to the Joint Review Panel in the fall of 1996 and hearings were conducted from January 13, 1997 to February 20, 1997, with an additional hearing date on April 10, 1997.

9 On June 17, 1997, the Joint Review Panel issued its report and recommendations entitled "*Report of the EUB-CEAA Joint Review Panel: Cheviot Coal Project, Mountain Park Area, Alberta*" ("the Joint Review Panel Report") which recommended that the Minister approve the Project by providing CRC with the necessary regulatory authorizations under the *Fisheries Act*.

10 On October 2, 1997, the Minister, with the approval of the Governor in Council, published the "*Federal Government Response to the Environmental Assessment Report of the AEUB-CEAA Joint Review Panel on the Cheviot Coal Project*" (the "Federal Response"). The Federal Response outlined the Government of Canada's reply to the Joint Review Panel Report and indicated that authorizations for the Project would be issued under the *Fisheries Act*.[FN3]

11 On October 31, 1997, the applicants filed an application for judicial review of the Joint Review Panel Report (T-2354-97). At that time, the Minister had not yet taken a course of action pursuant to the recommenda-

tions contained in that report.[FN4]

12 The application for judicial review of the Joint Review Panel Report was heard before McKeown J. on April 29-30, 1998. In a decision dated June 12, 1998 [reported *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)* (1998), 152 F.T.R. 49 (Fed T.D.)], McKeown J. dismissed the application for judicial review on the ground that the failure of the applicants to challenge the Federal Response operated as a barrier to the application for judicial review of the Joint Review Panel Report. The applicants appealed this decision.

13 On August 17, 1998, the Minister, pursuant to s.35(2) of the *Fisheries Act*, issued the Authorization, which is the first of a series of authorizations required for the Project. The Authorization allowed CRC to begin construction of the access corridor for the Project.

14 The applicants sought to have the Authorization added to the record in their appeal from McKeown J.'s decision in T-2354-97. Isaac C.J.A., in an Order dated September 4, 1998, refused this application on the ground that the Authorization had been issued after the date of McKeown J.'s decision and, therefore, could not form part of the appeal from that decision.

15 On September 16, 1998, the applicants filed the present application for judicial review (T-1790-98) of the Authorization and sought to quash it, and to prohibit the issuance of further authorizations.[FN5]

16 On December 1, 1998, the Appeal Division of this Court (in A-430-98) [reported *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)* (1998), [1999] 1 F.C. 483 (Fed. C.A.)] set aside the decision of McKeown J. (T-2354-97) and ordered that the proceeding be referred back to the Trial Division "for determination on its merits".[FN6] On February 8, 1999, Richard, A.C.J., granted intervener status to the Minister, and also ordered that the application for judicial review in T-2354-97 be heard together with the application for judicial review in T-1790-98.[FN7]

17 The following three issues have been framed by the applicants:

> (i) Did the Joint Review Panel err in law and jurisdiction, in purporting to carry out an environmental assessment of the Project, without complying with s.4(a), s.16 and s.34 of *CEAA* and with the Joint Panel Agreement?

This most significant issue will be addressed by first establishing the duties of the Joint Review Panel, and then determining whether a duty has been breached.

> (ii) Did the Joint Review Panel conduct its public hearings in accordance with the principles of procedural fairness, the procedural requirements of *CEAA* and the Joint Panel Agreement, and the legitimate expectations of the applicants?

This issue concerns the apparent failure of the Joint Review Panel to consider a submission filed by the applicant Canadian Nature Federation.

> (iii) Is the Minister prohibited from issuing *Fisheries Act* authorizations for aspects of the Project that will contravene the *Migratory Birds Regulations*?[FN8]

This final issue concerns whether an apparently lawful authorization is in fundamental conflict with certain reg-

ulatory provisions.

II. Legal Context

A. The provisions of CEAA

18 An overview of duties[FN9] under *CEAA* is conveniently expressed as follows:

• **Information-gathering**: the review panel must ensure that all information required for an assessment is obtained and made available (s.34(a)) and hold hearings to foster public participation (s.34(b)).

• **Considerations**: the panel must conduct an environmental assessment (EA) of the project which includes, *inter alia*, an assessment of all related operations and undertakings (s.15), and consideration of cumulative environmental effects and their significance (ss.16(1)(a) and (b)), mitigation measures (s.16(1)(d)), the need for and alternatives to the project (s.16(1)(e)), alternative means of carrying out the project and the environmental effects of those alternatives (s.16(2)(b)), and the capacity of affected renewable resources to be sustained (s.16(2)(d)).

• **Report**: the panel must prepare a report which includes the rationale, conclusions, and recommendations of the panel regarding the matters considered in the EA, and a summary of any public comments (s.34(c)).

• **Decision**: the responsible authority (RA) must respond to the report, with the approval of the Governor in Council (s.37(1)(a)). Then, the RA (in this case the Minister of Fisheries and Oceans) may take a course of action under s.37(1), i.e. make a decision. If the project is likely to cause significant adverse environmental effects, the RA may approve the project only if its effects "can be justified in the circumstances" (s.37(1)(a)).[FN10]

19 By s.2(1) of *CEAA*, an "environmental assessment" is defined as follows:

2.(1) ..."environmental assessment" means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;

20 The definition of "environmental effect" found in s.2(1) of *CEAA* and the important duties on the Joint Review Panel found in s.4(a), s. 16(1) and s.16(2) of *CEAA* are central to this application. These provisions are as follows:

2.(1) ..."environmental effect" means, in respect of a project,

(a) any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, and

(b) any change to the project that may be caused by the environment, whether any such change occurs within or outside Canada;

. . . . .

4. The purposes of this Act are

(a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;...

. . . . .

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.

(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.

B. Precedent interpreting the provisions of CEAA

21 Two decisions clearly define the legal importance of the environmental assessment and the standard to be applied respecting its sufficiency.

1. The Appeal Division decision in A-430-98 respecting T-2354-97[FN11]

22 Adapted to the present application, the points that emerge from Sexton J.A.'s decision are these: the environmental assessment carried out by the Joint Review Panel in accordance with *CEAA* is a pre-condition to the issuance of the Authorization; the assessment must be conducted in accordance with the *CEAA*, including the re-

quirements of s.16; and a "proper" assessment is one conducted in accordance with *CEAA*. I take this last statement to mean that an assessment which is not conducted in accordance with *CEAA* is one conducted in error of law.

2. Alberta Wilderness Assn. v. Express Pipelines Ltd.[FN12]

23 The principle that an environmental assessment can be challenged and found not to be in accordance with *CEAA* on an error in law was previously established in *Alberta Wilderness Assn. v. Express Pipelines Ltd.*

24 Adapted to the present application, the points that emerge from Hugessen J.A.'s decision are these: the Joint Review Panel's failure to comply with a requirement of s.16 of *CEAA* can constitute an error of law; it is important to appropriately characterize a perceived failure to comply as a question of law or merely an attack on the "quality" of the evidence and, therefore, the "correctness" of the conclusions drawn on that evidence; if a perceived failure is in the latter category, no question of law arises and, therefore, the conclusions of the Joint Review Panel stemming from an uncontested high degree of expertise in environmental matters, must not lightly be interfered with; determining the "significance" of an environmental effect under s.l6(1)(b) of *CEAA* involves a subjective determination by the Joint Review Panel and does not involve an interpretation leading to possible error in law; the "alternative means" to be considered under s.16(2)(b) are circumscribed by the scope of the environmental assessment set by the Joint Panel Agreement; and mitigation measures and environmental effects are properly considered together.

25 It is important to note that, in *Alberta Wilderness Assn. v. Express Pipelines Ltd.* the Appeal Division found that the joint review panel in that case conducted a "full and thorough environmental assessment". This is, therefore, a qualitative finding which, as a practical matter, contributed to arguments on the sufficiency of the panel report to be rejected. In effect, the Appeal Division found that the panel in that case met its statutory duties of information gathering and reporting.

26 Therefore, the primary question is whether the Joint Review Panel in the present case has met its statutory information gathering and reporting duties. If a duty is found to be breached, as a misinterpretation of a legal requirement, it is an error of law. It is uncontested that if such a finding is made, the standard of review of the error is correctness.[FN13]

III. The Joint Review Panel: Duties

A. The Alberta and Federal approval processes

27 The following excerpt from the Joint Review Panel Report outlines the Alberta regulatory approval process:

> **1.2 Approval Process**
>
> In Alberta, the development of a coal mine is based upon a two-stage approval process. The first provincial approval (or permitting) stage deals primarily with the conceptual plans for the mine project as a whole. This stage is carried out under the disclosure requirements of the Coal Development Policy for Alberta, the EIA [Environmental Impact Assessment] requirements of Alberta Environmental Protection (AEP), and the permit requirements of the EUP [Alberta Energy and Utilities Board]. In the case of the Cheviot Coal Project, a federal approval from the DFO is also required. These various processes are described in greater

detail below.

The second stage of the approval process, generally referred to as the licensing stage, is designed to examine, on an individual basis and in much greater detail, the specific components of the project. These include licenses from the EUB for individual pits and rock dumps, as well as more detailed approvals from AEP for air and water emissions and reclamation plans.

The two-stage approval process for coal mine projects is designed to first look at, on a broad-scale basis, the full range or likely environmental and technical issues associated with a project, and in so doing, set abroad boundaries for acceptable development scenarios. The second stage is intended to allow for site-specific changes to the broader conceptual plans approved during the first stage. The presence of the second stage recognizes the inherent difficulty for a company in predicting the optimal pit, highwall, waste dump, and reclamation program designs prior to accurately establishing the actual extent and distribution of the coal resources. The presence of the licensing stage helps to ensure that both resource conservation and environmental protection are optimized in a manner not possible during the permitting stage.

1.2.1 Coal Development Policy for Alberta (1976)

The Coal Development Policy for Alberta is designed to bring about and maintain the maximum benefits of the province's coal resources for the people of Alberta. A fundamental principle of the Coal Development Policy is that no development will be permitted unless the Alberta Government is satisfied that it may proceed without irreparable harm to the environment and with satisfactory reclamation of any disturbed land.

The Coal Development Policy provides a classification of provincial lands into four categories based on: their relative environmental sensitivity; the range of alternate land uses; the potential coal resources; and the extent of existing development of townsites and transportation facilities.

The Coal Development Policy also provides for a four-step screening and approval process for coal mines which includes:

(1) preliminary disclosure to government,

(2) disclosure by the applicant to the public,

(3) consideration of a formal application through a public hearing, and

(4) a final decision by the government.

CRC submitted a preliminary disclosure, as required by the Coal Development Policy, to the Government of Alberta and in December 1985 received approval in principle to proceed to the next stage of the approval process.

1.2.2 Alberta Environmental Protection

The Cheviot Coal Project includes both a surface mine producing a projected 3.2 million tonnes of coal per year and a coal processing plant. As a result, it is a mandatory project as set out under the Environmental Assessment Regulations of the AEPEA and so requires the preparation of an EIA.

A draft Terms of Reference for the EIA was developed jointly between both the federal and provincial governments and CRC. These were made available to the public for review in October 1994. After receipt of comments, the Terms of Reference were finalized and published by the Alberta Director of Environmental Assessment on 23 January 1995. The EIA was submitted by CRC in March 1996 to the EUB as one component of its application. Following the review of the EIA, AEP's Director of Environmental Assessment advised the EUB on 18 September 1996 that the EIA now addressed the requirements set out in Section 47 of the AEPEA and in the final Terms of Reference. The Director also advised the EUB that the EIA report was complete pursuant to Section 51 of the AEPEA.

1.2.3 Alberta Energy and Utilities Board

Under Section 10(1)(b) of the Coal Conservation Act, no person shall develop a mine site without first applying for, and obtaining, a permit from the EUB. Similarly, under Section 23(1)(a) of the Coal Conservation Act, no person shall construct or begin operations at a new coal processing plant without applying for, and obtaining, an approval from the EUB. A permit and licence from the EUB are also required under Sections 12, 14, and 17 of the Hydro and Electric Energy Act in order to construct and operate a new transmission line and to operate a new substation.

The processing of applications made by companies to the EUB is guided by the requirements of the Energy Resources Conservation Act (ERCA) and the associated Rules of Practice. Section 29(2) of the ERCA requires that, if it appears to the EUB that its decision on an application may directly and adversely affect the rights of a person, the EUB provide: (1) notice of the application; (2) an opportunity for learning the facts regarding the application; and (3) an opportunity to cross-examine the applicant and to present evidence and argument to the EUB.

The Rules of Practice provide direction on procedures, including the provision of notice, submissions by interveners, and the presentation of submissions. By agreement between the EUB and the Canadian Environmental Assessment Agency (CEAA), the EUB Rules of Practice governed the procedures followed by the Panel in addressing these applications.

1.2.4 Federal Department of Fisheries and Oceans/Federal Department of the Environment/Canadian Environmental Assessment Agency

Section 35(2) of the Fisheries Act requires that an authorization be obtained from the Minister of Fisheries and Oceans prior to the alteration, disruption, or destruction of fish habitat. Under the CEA Act, prior to issuing such an authorization, an environmental assessment of the project must be undertaken. Following notification by CRC as to its intention to apply for the above authorization, the DFO, as a Responsible Authority under the CEA Act, initiated a review of the proposed project. In a letter dated 26 August 1996 to the Minister of the Environment, the Minister of Fisheries and Oceans stated that, following a review of CRC's environmental information, the DFO had determined that the project may potentially result in significant adverse environmental effects. In order to expedite the review process, the Minister of Fisheries and Oceans recommended that the Cheviot Coal Project should be referred by the Minister of the Environment for review by a panel and further recommended, in the spirit of the 1993 Canada/Alberta Harmonization Agreement for Environmental Assessment, that the CEAA attempt to integrate this panel review through a Joint Review Panel, with any hearing process required by the EUB.

Sections 40 and 41 of the CEA Act provide for the establishment and appointment of a Joint Review Panel

and for the factors to be considered by a Joint Review Panel.[FN14]

B. Decision making and recommendation duty

28 As can be seen, the two distinct Alberta and Federal regulatory processes set different obligations for the Joint Review Panel to meet. The difference between the two is clearly set out in the following passage from the Joint Review Panel Report:

> There are significant differences worth noting in the role of the Panel in a combined provincial and federal decision-making process. Under the Alberta provincial statutes, the Panel is charged with determining whether a proposed energy development is in the public interest. In making its determination as to whether a project is in the public interest, the Panel is required to consider a range of factors, including resource conservation, safety, economic and social impacts of the project, and effects on the environment. Its decision, including reasons, is documented in a Decision Report.
>
> Under the CEA Act, the Panel is required to submit to the Minister of the Environment and to the Responsible Authority (in this case DFO) a report which provides its rationale, conclusions, and recommendations relating to the environmental assessment of the project, including any mitigation measures and follow-up programs. No decision on federal issues is made by the Panel. Section 37 of the CEA Act authorizes the Responsible Authority to exercise its power to allow a project to proceed if, taking into account the report submitted by a review panel and any mitigation measures, its adverse environmental effects are deemed to be insignificant or, if they are significant, felt to be justified in the circumstances.
>
> As per the agreement between the EUB and CEAA, the Panel intends to issue a single Decision Report designed to meet the requirements of both levels of government.[FN15]

29 Therefore, in the present case, the Joint Review Panel has two roles to fulfill: Alberta decision making, and Federal recommending. The statutory schemes leading to the review reflects this difference. The Alberta scheme has the Joint Review Panel decision as the last step in a process which has first tested for deficiencies in the Environmental Impact Assessment (EIA) produced by CRC, whereas the Federal process has the Joint Review Panel recommendation as the first step in the decision making to be conducted thereafter. Under *CEAA*, apart from the determination that the project may result in significant adverse environmental effects, prior to the Joint Review Panel's review activities, no pre-determination of sufficiency had occurred.[FN16]

30 Therefore, the essential point is that, to satisfy the Minister's concern about the Project, the *CEAA* information gathering investigation can reasonably be expected to go farther than that necessary to meet Alberta requirements.

C. Consideration, information gathering, and reporting duties under CEAA and the Joint Panel Agreement

1. Consideration duty

31 The general duty set out in s.16(1) and s.16(2) is as follows:

> 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:...
>
> s.16.(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:... [Emphasis added]

32 Section 41 of *CEAA* requires that a joint panel agreement include the factors required to be considered under s.16(1) and (2), and also provides that additional "requirements" can be set out. This section reads as follows:

41. An agreement or arrangement entered into pursuant to subsection 40(2) or (3), and any document establishing a review panel under subsection 40(2.1), shall provide that the assessment of the environmental effects of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement and shall provide that

(a) the Minister shall appoint or approve the appointment of the chairperson or appoint a co-chairperson, and shall appoint at least one other member of the panel;

(b) the members of the panel are to be unbiased and free from any conflict of interest relative to the project and are to have knowledge or experience relevant to the anticipated environmental effects of the project;

(c) the Minister shall fix or approve the terms of reference for the panel;

(d) the review panel is to have the powers provided for in section 35;

(e) the public will be given an opportunity to participate in the assessment conducted by the panel;

(f) on completion of the assessment, the report of the panel will be submitted to the Minister; and

(g) the panel's report will be published.

33 With regard to the scope of the consideration to be undertaken by the Joint Review Panel, s.41(c) of *CEAA* requires that the Minister "shall fix or approve the terms of reference for the panel". Schedule 1 to the Joint Panel Agreement in the present case, named "Terms of Reference for the Panel of the Cheviot Coal Project", sets out the terms of reference for consideration of the Project, and requires that:

2. The Panel will include in its review of the Cheviot Coal Project consideration of the factors identified in Appendix 1. The Joint Review Panel's consideration of the factors listed in Appendix 1 shall be reflected in the Final Report.[FN17]

34 With regard to the s.16 *CEAA* factors to be considered by the Joint Review Panel, it is not contested that, in somewhat different wording, Appendix 1 to Schedule 1 of the Joint Panel Agreement requires that the factors listed in the following sections of *CEAA* are to be considered by the Joint Review Panel: s.16(1)(a): environmental effects, including cumulative effects; s.16(1)(b): significance of the effects; s.16(1)(c): public comments; s.16(1)(d): mitigating measures; s. 16(1)(e): need for the project and alternatives to the project; and s.16(2)(b): alternative means of carrying out the project.[FN18]

35 In addition, the opening words of Appendix 1 to the Joint Panel Agreement require as follows:

> For the purposes of the EUB, the Panel shall determine whether the Cheviot Coal Project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment and shall consider but not be limited to the factors itemized below. These factors will also be considered by the Panel in developing and substantiating conclusions and recommendations for federal decision makers:...[FN19]

36 I find that in the present case, given the Minister's conclusion that "the project may potentially result in significant adverse environmental effects"[FN20], and the just identified need for information to be gathered to meet *CEAA* requirements as opposed to Alberta requirements, to meet the "consideration" duty in s.16 of *CEAA* the Joint Review Panel is required to perform to a high standard of care.

2. Information gathering duty

37 A mandatory requirement of a *CEAA* environmental assessment is set out in s.34(a) as follows:

> s.34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,
>
> (a) ensure that *the information required for an assessment by a review panel is obtained* and made available to the public;... [Emphasis added]

38 However, Schedule 1 of the Joint Panel Agreement states:

> 4. The Panel will ensure that *all information required for the conduct of its review is obtained* and made available to the public, which will include, but is not necessarily limited to:
>
> a) existing technical, environmental or other information relevant to the review, including documents filed in connection with applications No. 960313, and 960314 to the EUB and comments and critique on these documents,
>
> b) supplementary information including a description of any public consultation program, its nature and scope, issues identified, commitments made, and outstanding issues,
>
> c) the terms of reference for the EIA, dated January 23, 1995, for the Cheviot Coal Project and documentation generated by the proponent, and other interested parties, in response to these terms of reference,[FN21]
>
> d) *any other available information that is required to assess the significance of the Environmental Effects*.[FN22] [Emphasis added]

39 I find that the italicized words of paragraph 4 of Schedule 1 have an amplifying effect on the requirements of s.34(a) of *CEAA* and create a clear and onerous evidence gathering duty on the Joint Review Panel in the present case, being the duty to obtain *all available information* that is required to conduct the environmental assessment.

40 Respecting the use of the phrase "all information required" in paragraph 4, with respect to the *CEAA* aspect of the Joint Review Panel's duty, I find that what is "required" is that which will meet the just found high standard of care respecting consideration of the s.16 factors, and the onerous evidence gathering duty on the

Joint Review Panel.[FN23]

41 I also find that the information gathering duty of the Joint Review Panel does not depend on the Project proponent CRC's information gathering success, nor does it depend on that of any intervenor or interested party. The duty is the Joint Review Panel's to meet.

42 The Joint Review Panel is provided with ample powers to compel the production of evidence. Section 35 of *CEAA* reads as follows:

> 35.(1) A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to
>
> (a) give evidence, orally or in writing; and
>
> (b) produce such documents and things as the panel considers necessary for conducting its assessment of the project.
>
> (2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and other things as is vested in a court of record.
>
> (3) A hearing by a review panel shall be public unless the panel is satisfied after representations made by a witness that specific, direct and substantial harm would be caused to the witness by the disclosure of the evidence, documents or other things that the witness is ordered to give or produce pursuant to subsection (1).
>
> (4) Where a review panel is satisfied that the disclosure of evidence, documents or other things would cause specific, direct and substantial harm to a witness, the evidence, documents or things are privileged and shall not, without the authorization of the witness, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, documents or other things pursuant to this Act.
>
> (5) Any summons issued or order made by a review panel pursuant to subsection (1) shall, for the purposes of enforcement, be made a summons or order of the Federal Court by following the usual practice and procedure.
>
> (6) No action or other proceeding lies or shall be commenced against a member of a review panel for or in respect of anything done or omitted to be done, during the course of and for the purposes of the assessment by the review panel.

3. Reporting duty

43 The opening words of Appendix 1 to the Joint Panel Agreement quoted above require that "[the factors listed in Appendix 1] will also be considered by the [Joint Review] Panel in developing and *substantiating conclusions* and recommendations for federal decision makers". Therefore, by these words, I find it is reasonable to conclude that the Joint Review Panel is required to substantiate the recommendations made for the purposes of *CEAA*.

44 In addition, the terms of reference set for the Joint Review Panel to follow, by paragraphs 2 and 4 of

Schedule 1 to the Joint Panel Agreement quoted above, require that the process of information gathering be transparent. Similarly, as the Joint Review Panel Report must reflect the Joint Review Panel's consideration of the s.16 factors, I find the reporting must be transparent as well.

45 Obviously, the Joint Review Panel Report has a multifaceted advisory purpose. First, the public has a right to know the basis for recommendations made in order to know how to respond legally or politically; similarly, federal decision makers must know the evidentiary basis for any recommendation made in order to assign it weight in formulating an appropriate response.

46 Granted, there might be gaps in the evidence about cumulative environmental effects. Where such is the case, the *Canadian Environmental Assessment Act Responsible Authority Guide*[FN24] properly suggests that the professional expertise of the panel members can be applied to fill the gaps.

47 However, in my opinion, the suggestion that gaps in the evidence can be filled by expert opinion only applies where the evidence is not available; that is, where either it does not exist or is inaccessible.

48 By the provisions of s.35 of *CEAA*, which provide production of evidence powers, including confidential evidence, I find that the Joint Review Panel has a duty to use these powers to the full extent necessary to, in the words of paragraph 4 of Schedule 1, obtain and make available "all information required for the conduct of its review".

49 I find that to meet this duty it is incumbent on the Joint Review Panel to require the production of information which it knows exists, and which is apparently relevant to one or more of the s.16 factors. In my opinion, it is not sufficient to withdraw from this duty to fill a gap in the evidence with subjective, albeit, expert opinion, when actual information is known to be available.

50 During the course of the hearing, CRC argued that the "Joint Review Panel Report" is a combination of the Joint Review Panel Report itself, and all the evidence obtained in the course of the environmental assessment. Therefore, it is argued, it is not necessary that the Joint Review Panel Report detail the evidence relied upon, but, rather, it is enough to draw conclusions and merely state them based on that evidence, filling gaps with expert evidence where required. I do not accept this argument.

51 I find that to meet its reporting obligations, the Joint Review Panel must clearly state its recommendations in the Joint Review Panel Report, including the evidence it has relied upon in reaching each recommendation. I also find that if the Joint Review Panel decides to fill a gap in the evidence with its own expert opinion, it must clearly state this to be the case and give an explanation for why doing so is necessary. In this way, the *CEAA* decision maker, and the public, will be able to decide the weight to be placed on each recommendation reached.

C. The Joint Review Panel's approach to complying with s.16 of CEAA

52 In *Alberta Wilderness Assn. v. Express Pipelines Ltd.*[FN25], the argument was made that the factors listed in s.16 should be considered in sequence and, therefore, environmental effects should be considered before mitigating measures. This argument was rejected, essentially on the basis that expert analysis requires the application of expert knowledge, and there is no mandatory ordering of a s.16 analysis, and the approach should be for the panel to determine. However, whatever the approach, it is clear that, from the provisions of *CEAA* and the Joint Panel Agreement, s.16 factors must still be "considered" as I have found.

53 The Joint Review Panel approved the approach CRC adopted in its EIA in assessing the significance of any adverse environmental effects potentially resulting from the Project.[FN26] With respect to the issue of approach, the applicant has objections respecting the following elements considered. I reject these objections for the reasons given.

1. Valued Environmental Components (VEC's)

54 The Joint Review Panel endorsed the CRC's approach to considering environmental effects through considering "those environmental attributes associated with the proposed project development, which have been identified to be of concern by either the public, government, or the professional community".[FN27] I find that this decision to focus consideration of environmental effects through the lens of physical, biological and social/economic components of the environment is clearly within the expertise of the Joint Review Panel to make. However, choice of this approach does not limit the Joint Review Panel's duty to meet the requirements of s. 16.

2. Significance of environmental effects

55 Section 16(1)(a) of *CEAA* requires a consideration of the environmental effects of the Project, and s. 16(1)(b) requires the Joint Review Panel to make findings respecting the significance of the effects so considered. In my opinion, the Joint Review Panel is first required to define and describe the environmental effects, and then to make a finding respecting the weight to be placed on each effect, or in the words of the provision, to consider the "significance" of each effect.[FN28]

56 In the process of ascribing weight, mitigation of an effect is an important factor to be taken into consideration.[FN29] By s.16(1)(d), the Joint Review Panel is charged with a duty to consider measures that are "technically and economically feasible" to mitigate any significant adverse environmental effect. In my opinion, the use of "significant" in this subsection requires different judgement than that used in s. 16(1)(b). That is, if a defined and described environmental effect is considered "adverse" and "significant", that is substantial, then mitigation of this effect by practical means is important to consider. Once considered, the conclusion reached then becomes a feature of the environmental effect, about which a decision can be made respecting the weight to be placed on it in the governmental decision making process.

57 I find the approach used by the Joint Review Panel with respect to significance and mitigation is within the Joint Review Panel's expertise and is in accord with the requirements of s. 16 of *CEAA*.

IV. The Joint Review Panel: Breach of Duty?: *Cumulative Effects*

A. Extent of the duty to consider cumulative effects

1. CEAA and Joint Panel Agreement requirements

58 The duty set under *CEAA* is contained in s.16(1)(a) as follows:

> 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;... [Emphasis added]

59 In addition, paragraph 3 of Appendix 1 of the Joint Panel Agreement reads as follows:

> The Environmental Effects of the Cheviot Coal Project including the Environmental Effects of malfunctions or accidents that may occur in connection with the Cheviot Coal Project and any cumulative Environmental Effects that are likely to result from the Cheviot Coal Project in combination with other projects or activities that have been or *are likely to be carried out*. [Emphasis added]

60 By comparing the above two provisions it can be seen that the requirements of *CEAA* are amplified by the Joint Panel Agreement: that is, in the former, the cumulative effects that are likely to result from the Project are to be considered in combination with others that "have been or *will be carried out*", while in the latter, cumulative effects are to be considered in combination with others that "have been or *are likely to be carried out*". Thus, the Joint Panel Agreement requires that certain projects which have not yet been approved are to be considered.

2. Federal concerns

61 In its submission to the Joint Review Panel, the DFO clearly stated that one of its concerns relating to the Project is "the loss/degradation of stream habitat due to mine development which in conjunction with creation of multiple pit lakes in the area may affect the function and integrity of the aquatic ecosystems involved".[FN30] In particular, DFO cited as an effect of loss/alteration of stream habitat the cumulative impacts of "multiple developments (e.g., the proposed mine development and forestry)".[FN31]

62 The Joint Review Panel Report acknowledges that Parks Canada expressed concern that "the Cheviot Coal Project, as proposed, clearly has the potential to adversely impact the ecological integrity of Jasper National Park". In this respect Parks Canada recommended that "the cumulative effects/core area assessment should be expanded to include other planned or foreseeable human activities (eg. timber harvesting, mineral and oil and gas exploration and development, recreation, etc.) in the larger analysis area..."[FN32].

63 Therefore, the Joint Review Panel was certainly on notice that consideration of cumulative effects should include forestry and other mining development. On the basis of the above analysis of the requirements of *CEAA* in combination with the Joint Panel Agreement, I find that the Joint Review Panel had a duty to obtain all available information about likely forestry and mining in the vicinity of the Project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel Report.

B. Meeting the duty

1. Forestry

64 Respecting forestry activities in the vicinity of the Project, the Joint Review Panel made the following statement:

> The Panel also notes that CRC, in attempting to carry out an assessment of potential cumulative effects (CEA), stated that it was unable to obtain the necessary information from other industry sources, particularly forestry. The Panel can appreciate the difficulty that this creates for an applicant. Given that a CEA is a requirement of both the provincial and federal EIA process, the Panel believes that the government has a

responsibility for ensuring either that needed data can be collected or alternatively, that the current legislation is amended to recognize the limitations that lack of cooperation between industry sectors or companies within a sector can create for a CEA. In this particular case, the Panel notes that CRC was able to use data from the Tri-Creeks watershed as a surrogate measure of the likely effects of modern forestry practices on both discharge rates and water quality, and found little evidence of impact. Therefore, the Panel does not expect the cumulative effects of coal mining and forestry at present/predicted levels to have a significant impact on regional fisheries resources, or reduce their capacity as renewable resources, to meet either present or future needs.[FN33]

65 I find that this statement proves two facts: the Joint Review Panel did not obtain "necessary information", and the Joint Review Panel determined that it was not its obligation to obtain the information.

66 In fact, information respecting likely future forestry activities in the vicinity of the Project site is available. Subsequent to the judicial review hearing of T-2354-97 before McKeown J., the Appeal Division allowed the filing of new evidence to prove this point.[FN34]. The same evidence has been filed in the present application.[FN35]. The evidence conclusively proves that extensive logging and road building activities are likely to the northeast, east and southeast of the mine site over at least the next seven years.

67 With respect to ungulates, the Panel found as follows:

Based on the evidence provided, the Panel is prepared to accept CRC's estimates of the expected effects of the development and operation of the surface mine and coal processing plant on ungulate populations as reasonable. The Panel accepts that during site clearing, mine and plant construction, and mine and plant operations, habitat will be lost and ungulate populations displaced. Furthermore, normal movement patterns by ungulates across the mine site will be disrupted, possibly extensively. While some impacts can be expected to extend beyond the life of the mine (i.e. 20+ years), the Panel does believe that ungulate populations can be re-established progressively within a reasonable time frame, thus lessening the impact, particularly given the CRC's commitment to enhancement. The Panel also believes that ungulates in general will be better able to adapt to human activities within the active mine areas, provided they are not harassed, than some other wildlife species such as wolves or grizzly bears. As a result, during active mine development, the Panel believes that CRC's prediction that ungulates will continue to use undisturbed habitat at the periphery of and within the surface mine is reasonable, provided these areas are properly managed.

. . . . .

A fourth source of impacts on the success of CRC's program to mitigate impacts on ungulates would be the cumulative effect from the loss of forest cover in areas surrounding the mine site. *The Panel believes that preservation of these areas, until adequate tree cover is established on the mine site itself, will likely be a key component for successful re-establishment of ungulate populations*. The Panel notes that all four sources of impacts on ungulates described above (i.e. human use patterns of non-lease areas during mining, the impacts of relocation of human use from the mine lease, the re-establishment of human use of the mine lease following mining, and the loss of ungulate habitat adjacent to the mine lease) are all, to some degree, beyond the direct control of CRC.[FN36]

[Emphasis added]

68 From these statements it is evident that the Joint Review Panel, while displaying concern about ungulate

habitat in the mine area, operated on the apparently erroneous assumption that forest cover would be maintained in that area.

69 Therefore, I find that the Joint Review Panel breached its duty to obtain all available information about likely forestry in the vicinity of the Project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Panel Report.[FN37]

2. Mining

70 Of primary concern in this application is the cumulative environmental effects of coal mining on carnivores. The geographic area about which concern exists is called the "Coal Branch" planning area, which is a large area on the eastern slopes of the Rocky Mountains which contains the Project's "Carnivore Cumulative Effects Assessment" area, which in turn contains the Project mine site.

71 Alberta government information describes coal mining in the Coal Branch as follows:

> Coal - Coal development in the Coal Branch dated back to the turn of the century and increased until the 1950's when railways converted to diesel fuel. Major coal development then occurred, as the demand for both metallurgical and thermal coal grew in the late 60's and 70's. Coal production in 1984 was just under eight million tonnes (about half metallurgical coal and half thermal). The extent of existing coal deposits presently proven in the planning area contains a total of nearly three billion tonnes of coal. Much of the coal rights are under disposition. Today, there are three, coal-mines operating in the Coal Branch. Two other projects have been issued mine permits and are awaiting growth and stabilization of both world and domestic coal markets. Preliminary disclosures of six coal projects have been recognized by the government as being consistent with government policies or intentions for these areas. With exploration, the more promising coal deposits are proven and reserves are increased.
>
> The Coal Branch area is important for the development of high quality coals because of geology and the existing infrastructure.[FN38]

72 With respect to coal mining interest in the Coal Branch, and with respect to the two permits that have been granted in the area, the applicants submit the following evidence:

> 7. Integrated resource planning, the process that produced the *Coal Branch Sub-Regional Integrated Resource Plan* ("IRP"), is the mechanism through which the *Eastern Slopes Policy* is implemented by providing more detailed and comprehensive land use allocations and guidance. The IRP indicates that six (6) "approvals in principle" have been given by the Government of Alberta for new coal projects in the planning region where the proposed Cheviot Coal Mine Project is located. The IRP also notes that there are three coal mines operating in the region and two others which have been issued permits already but have not yet begun operations (p. 9). A copy of the relevant portion of the IRP is attached hereto and marked as Exhibit "3".
>
> 8. The two projects for which permits have already been granted are initiatives of Manalta Coal Ltd., and are known as the Mcleod River and Mercoal projects. At the time of the Review Panel's environmental assessment, these two approved mines had not yet got underway. However, information on the nature of these planned projects and their location was available at the time of the Review Panel's hearing for the Cheviot Coal Project because applicants are required under the Preliminary Disclosure process to submit information

relating to the "scope, timing, and overview of environmental impact" of a project prior to receiving an 'approval in principle" (which precedes the permitting stage) (see Exhibit "1", *Coal Development Policy*, p. 32). Because these projects had been approved, their cumulative effects in combination with the environmental effects of the Cheviot Coal Project on the aquatic and terrestrial ecosystem and valued environmental components of the area should have been considered in the Review Panel's report but were not.[FN39]

73 The Project and another CRC mine are included in the six approvals in principle. With regards to the remaining five, the applicants have submitted the following evidence:

12. The AWA Coalition asked the Review Panel to compel the Government of Alberta to produce the "approvals in principle" for the other five (5) planned mine projects so it could consider them in its review. At a minimum, the AWA Coalition wanted the Review Panel to compel the disclosure of at least the names of the companies, the location of the coal leases involved and what volumes of coal they were looking to produce. The AWA Coalition believed that this information was relevant and necessary to the Review Panel's environmental assessment under the *Canadian Environmental Assessment Act*.[FN40]

74 About the application to compel the "approvals in principle", the Joint Review Panel said this:

The AWA Coalition requested that the Panel require the Government of Alberta to produce copies of the preliminary disclosure documents, prepared under the requirements of the Coal Development Policy of Alberta, for a number of other surface coal mines which had been proposed in the region. The Government of Alberta advised the Panel that those documents had, in its view, been submitted in confidence and so could not be released, except perhaps under a request under the Freedom of Information and Protection of Privacy Act. The Government also noted that the documents were dated, with some being submitted in the mi-1970's, and that without someone to speak to them, it would not be possible to determine if the various proposals remained relevant.

The Panel determined that, given the expectation of the parties that the documents were submitted in confidence and, more importantly, the inability of anyone, including the applicant, to test the relevance of the documents, it was not prepared to attempt to compel that the documents be submitted to the hearing.[FN41]

75 I find that this statement proves that the Joint Review Panel failed to compel the production of the mining information because it misconstrued its power to do so, and it misconceived that it has the obligation to decide on its relevance once produced.

76 Therefore, with respect to the two projects for which permits have been granted and the five projects which have received approvals in principle, I find that the Joint Review Panel breached its duty to obtain all available information about likely mining in the vicinity of the Project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel Report.

V. The Joint Review Panel: Breach of Duty?: *Alternate Means*

A. Extent of the duty to consider alternate means

77 Section 16(2)(b) provides as follows:

s.16.(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:

. . . . .

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

78 In the present case, with respect to the method of mining, I find that the requirements of this section are properly restricted to the alternate means to open pit mining being underground mining. About this factor, the Joint Review Panel said the following:

With regard to its existing mining operations, the Panel is prepared to accept CRC's contention that the Luscar mine is approaching the end of its economic life and that, for CRC to continue operations in the Hinton region, an alternative source of metallurgical coal will be needed. The Panel also believes that CRC has made a reasonable effort to evaluate and assess feasible alternatives to the proposed project. The Panel notes that no other lease holder came forward during the hearings to advise that it was willing to provide CRC with access to another source of coal or to propose an alternative to the Chevoit Coal Project. The Panel also accepts CRC's reticence and that of its employees to move to underground mining techniques or, given the concerns expressed by the Hamlet of Cadomin, to develop Cadomin East at this time, particularly given the relatively small amount of reserves associated with either option. The Panel also notes that development of the other coal leases currently held by CRC, even if economic, would also have associated environmental and social issues. The Panel does believe, despite the contention of the AWA Coalition, that it was provided with sufficient evidence to test whether the proposed alternatives were technically and environmentally feasible.[FN42]

. . . . .

With regard to the need for and alternatives to the Cheviot Coal Project, the Panel concludes that CRC has established that, subject to receiving the necessary federal and provincial approvals, it has the right to carry out extraction of the coal resources within the applied for mine permit boundary. The Panel believes that CRC has adequately considered other potential sources of metallurgical coal, and that the Cheviot Coal Project provides CRC, from an economic perspective, with an optimal combination of coal reserves, coal quality, and access to infrastructure. The Panel also concludes that, under reasonable economic assumptions, the Chevoit Coal Project is economically viable, and will provide significant economic benefits to both the region and to the province.[FN43]

79 With respect to alternative means, the quoted passages of the Joint Review Panel Report prove that the Joint Review Panel limited its consideration because of CRC's practical and economic concerns and, consequently, the terms of its proposal. As noted above, CRC applied for Alberta regulatory approval for an open pit coal mine, and the scope of its Environmental Impact Assessment (EIA) was limited accordingly. It appears that, as a result of this limitation, the Joint Review Panel's consideration was similarly limited.[FN44]

80 While the alternative means of underground mining is generally considered in the Joint Review Panel Report, the effects of this alternative means, as compared to the effects of open pit mining, are not considered in any meaningful way. I agree with the applicant's argument that simply identifying potential "alternative means" without discussing their comparative environmental effects fails to provide any useful information to decision

makers, and fails to meet the requirements of s. 16(2)(b) of *CEAA*.

81 While it is true that, as the Joint Review Panel asserts[FN45], CRC has the right to carry out the extraction of the coal resources within the applied for mine permit boundary, I find that it does not have the right to do it by open pit mine.[FN46]

82 Thus, I find that a comparative analysis between open pit mining and underground mining at the Project site is required to comply with the provisions of s.16(2)(b).

83 During the course of the hearing, counsel for CRC tactfully pointed out that, prior to the Joint Review Panel's consideration of the Project under *CEAA*, all detailed Alberta regulatory approvals leading to a final decision had been given. The point made was that, in the face of these approvals, the Minister's concern and, therefore, the requirements of *CEAA* are incidental to this almost completed process. My response to this assertion is that *CEAA*, as well as Alberta resource and environmental protection legislation, serves the interests of Albertans, and consequently, its terms must be met as framed.

VII. The Joint Review Panel: Breach of Duty?: *Procedural Fairness*

84 The sole procedural fairness argument in this case arises from what appears to be an oversight on the part of the Joint Review Panel Secretariat.

85 The evidence submitted on behalf of the Canadian Nature Federation proves to my satisfaction that a legitimate expectation was created that its submissions entitled "The Canadian Nature Federation's Response to the Environmental Impact Assessment of the Proposed Cheviot Mine Project" and "The Canadian Nature Federation's Response to Norwest's Overview of Rock Waste Disposal Cheviot Mine Plan" would be placed, by the Joint Review Panel's Secretariat, before the Joint Review Panel for consideration. Since neither document is referred to in the Joint Review Panel Report nor noted on the Joint Review Panel's exhibit list, I find it to be circumstantially correct on a balance of probabilities, that neither document was submitted to the Joint Review Panel for consideration.[FN47]

86 Therefore, I find that, as a result of a breach of due process based on legitimate expectations, the Joint Review Panel has committed a reviewable error in that it did not consider information it accepted for consideration.

VIII. Conclusion to Sections II to VII

A. With respect to the present application T-1790-98:

87 For the reasons provided, I find that, as a result of the Joint Review Panel's breaches of duty and error in due process, the environmental assessment in the present case was not conducted in compliance with the requirements of *CEAA*, and therefore, the Minister's Authorization was issued without jurisdiction. Accordingly, it is quashed.

B. With respect to: T-2354-97:

88 Concerning non-compliance with the requirements of *CEAA* found in the Joint Review Panel Report, during the course of argument, many opinions were expressed as to whether the Joint Review Panel Report, or at least the conclusions and recommendations expressed in it, can be set aside and referred back to the Joint Re-

view Panel for further consideration under s.18.1(3)(b) of the *Federal Court Act*.[FN48] The precedents referred to above give no clear direction on this issue.

89 Also during the course of argument, I expressed the opinion that, if the environmental assessment conducted by the Joint Review Panel is found not to be in compliance with the requirements of *CEAA*, the least intrusive approach to reaching compliance would be adopted.

90 In my opinion, the most appropriate approach to reaching compliance is that suggested by counsel for the Minister which involves reliance on the provisions of s.24 of *CEAA* which read as follows:

> 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 may use or permit the use of that assessment and the report thereon to whatever extent it is appropriate for the purpose of complying with section 18 or 21.
>
> (2) Where a responsible authority uses or permits the use of 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.

91 In view of my findings, within the terms of s.24(1)(a), it is clear that the Project cannot proceed until the Joint Review Panel's environmental assessment is conducted in compliance with *CEAA*. Therefore, as argued by counsel for the Minister, in my opinion, under s.24(2) the Minister has authority and responsibility to direct the Joint Review Panel to reconvene and, having regard to my findings, direct that it do what is necessary to make adjustments to the Joint Review Panel Report so that the environmental assessment conducted can be found in compliance with *CEAA*. For this result to occur, in my opinion, the following directions must be met:

> (1) Obtain all available information about likely forestry in the vicinity of the Project, consider this information with respect to cumulative environmental effects, and, accordingly, reach conclusions and make recommendations about this factor, and substantiate these conclusions and recommendations in the Joint Review Panel Report;
>
> (2) Obtain all available information about likely mining in the vicinity of the Project, consider this information with respect to cumulative environmental effects, and, accordingly, reach conclusions and make recommendations about this factor, and substantiate these conclusions and recommendations in the Joint Review Panel Report;
>
> (3) With respect to alternative means, do a comparative analysis between open pit mining and underground

mining at the Project site to determine the comparative technical and economic feasibility and comparative environmental effects of each, consider this information, reach conclusions and make recommendations about this factor, and substantiate these conclusions and recommendations in the Joint Review Panel Report.

(4) Consider the documents "The Canadian Nature Federation's Response to the Environmental Impact Assessment of the Proposed Cheviot Mine Project" and "The Canadian Nature Federation's Response to Norwest's Overview of Rock Waste Disposal Cheviot Mine Plan".

92 In view of my findings and order with respect to the present application (T-1790-98), I decline to exercise my discretion to grant relief in T-2354-97.

IX. With Respect to T-1790-98: Is the Authorization "Contrary to Law" under S.18.1(4)(f) of the Federal Court Act?[FN49]

93 Since the Authorization in the present case is quashed, the answer to the question posed might be considered moot. However, I have been asked by both the Applicants and the Respondent to answer the question because it will certainly require an answer respecting authorizations which, unlike the one in the present application, will allow rock to be deposited in stream beds.

94 The test for whether the "contrary to law" issue is moot, and, if it is, whether I should nevertheless answer the question, is found in the following words of Sopinka J. in *Borowski v. Canada (Attorney General)* [FN50] where at 353 he says:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Secondly, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. *In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may none the less elect to address a moot issue if the circumstances warrant.* [Emphasis added]

95 I find that a "live controversy" respecting the question exists and, therefore, I should answer the question.

96 The issue in this challenge to the Minister's Authorization concerns the correct interpretation to be

placed on the words of s.35(1) of the *Migratory Birds Convention Act Regulations* (the "*MBCA Regulations*") [FN51] as established by the *Migratory Birds Convention Act, 1994* (the "*MBC Act*")[FN52]. With respect to this issue, the applicant's written argument is very clear and concise, and to state the issues to be resolved, I can do no better than to cite it, without references, as follows:

Issue 1: Is the MFO prohibited from issuing Fisheries Act authorizations for aspects of the Project that will contravene the MBCA Regulations?

32. The *Federal Court Act*, R.S.C. 1985, c. F-7 ("*FCA*") provides:

> 18.1(4)(f) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal... acted in any other way that was *contrary to law*.

33. The MFO, through the issuance of *Fisheries Act* authorizations for the Cheviot Coal Project, would permit the deposition of millions of tonnes of waste rock and materials in areas frequented by migratory birds, particularly harlequin ducks. This would be "contrary to law". The *MBCA Regulations* provide:

> 35.(1) Subject to subsection (2), *no person shall deposit* or permit to be deposited oil, oil wastes, or *any other substance harmful to migratory birds in* any waters or *any area frequented by migratory birds*.
>
> (2) Subsection (1) does not apply to the deposit of a substance of a type, in a quantity and under conditions authorized by
>
> (a) regulations made by the Governor in Council under any Act for any waters in respect of which those regulations apply; or
>
> (b) the Minister for scientific purposes.

34. The Panel Report sets out the following findings of fact concerning the Project and its impacts on harlequin ducks and other migratory birds:

> (i) The Project as proposed, and as approved by the MFO and Governor in Council, specifically calls for the deposition of large quantities of waste materials in areas frequented by migratory birds. The mining process will involve the removal of millions of tonnes of waste rock, debris and other materials, much of which will be deposited into creek valleys on the project site. The deposition of this waste will permanently bury at least three creeks and valley bottom areas that are important habitat used by harlequin ducks and other migratory birds for nesting, rearing and other purposes.
>
> (ii) CRC's proposed mining operations, by its own admission, "would result in the *permanent loss of two probable nesting areas* [for harlequin ducks] (Cheviot and Thornton Creeks) and portions of MacKenzie Creek [also an identified nesting area] and one of its tributaries. As well, Harris Creek, a possible nesting site, would be modified." As a result of the loss of these nesting areas, the Panel concluded, "some reductions in the current size of the breeding population [of harlequin ducks] ... *will occur*, and furthermore, there is a significant risk that the population may not recover to its current size due to the permanent loss of some habitat." These population reductions "may be of local, regional or even provincial significance".
>
> (iii) Harlequin ducks are endangered or significantly declining throughout their North American range,

and habitat destruction is a major cause of their decline.

(iv) Harlequin ducks are a 'nest loyal' species: i.e. they return to the same stream each year to nest. They are "particularly sensitive to disturbance".

(v) The harlequin duck population in the vicinity of the Cheviot mine (the Macleod River population) is regionally important and is the second largest breeding population of harlequins found to date in Alberta.

(vi) The diversity of other migratory bird species in the area of the proposed Cheviot mine site is also "notably high". Many of the migratory bird species that use the Cheviot site are declining in Alberta, particularly due to the loss of riparian (i.e. stream side) habitat.

(vii) The Panel concluded that "the development of the Cheviot Coal Project will have a significant adverse effect" on many of the migratory bird species that use the area.

35. Based on the clear findings of the Panel Report, and the evidence of Environment Canada (the expert agency responsible for migratory birds), the issuance of *Fisheries Act* authorizations for the proposed mine operations will result in the deposit of harmful substances in areas frequented by migratory birds. Thus, the actions of the MFO will be "contrary to law" (s.35 of the *MBCA Regulations*) and subject to judicial review under section 18.1(4)(f) of the *FCA*.[FN53]

A. Interpretation of the phrase: "any other substance harmful to migratory birds"

96 The principle objective is to establish the intention of Parliament. The respondent argues that this intention can be established by use of the *ejusdem generis* rule of statutory interpretation, and that application of the rule will result in a narrow interpretation of the words "any other substance" as meaning "any other substance *similar to oil*".[FN54]

97 The rule is set out in *National Bank of Greece (Canada) c. Katsikonouris*,[FN55] where at 203 LaForest J. says:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will *normally* be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. [Emphasis added]

98 La Forest J.'s use of the term "normally" is instructive. I find it to mean that a general rule of construction is useful unless the intention of Parliament is otherwise clear. I find such to be the case here and, therefore, put no weight on the respondent's argument.

99 The purpose of the *MBC Act* is stated in s.4 as follows:

> 4. The purpose of this Act is to implement the Convention by protecting migratory birds and nests.

100 The Convention referred to in s.4, which was concluded in 1916, is a Schedule to the *MBC Act* and in the preamble reads:

> His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions bey-

ond the seas, Emperor of India, and the United States of America, being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects, and to the end of concluding a convention for this purpose have appointed as their respective plenipotentiaries:...

101 Regarding the *MBCA Regulations*, s. 12 of the *MBC Act* specifies that the Governor in Council may make regulations necessary to carry out the purposes and provisions of the *MBC Act* and the Convention, including the following:

s.12.(1)...

(h) for prohibiting the killing, capturing, injuring, taking or disturbing of migratory birds or the damaging, destroying, removing or disturbing of nests;

(i) prescribing protection areas for migratory birds and nests, and for the control and management of those areas;...

102 I find on the basis of these provisions that there is a clear intention expressed to provide wide protection to migratory birds, and, therefore, the phrase under consideration should be given a similarly wide interpretation. Therefore, I find that *any* substance, including oil and oil wastes, is capable of being prohibited if it is "harmful".

103 Respecting what substances are "harmful" to migratory birds, I find that the interpretation of this word depends on the facts of each case. While rock might indeed be inert, as the respondent contends, I agree with the applicant's argument that millions of tonnes of it deposited into creek beds constitutes a threat to the preservation of migratory birds that nest there, and, therefore, in such circumstances is "harmful" and, thus, within the meaning of that term as used in s.35(1) of the *MBCA Regulations*.

B. Application of s. 35(1) to the Minister

104 The target of s.35(1) of the *MBCA Regulations* is any person who deposits or permits the deposit of harmful substances. It might very well be that while the Minister is acting under lawful authority to issue an authorization under s.35(2) of the *Fisheries Act* to "allow the harmful alteration, disruption or destruction of fish habitat" as, for example, the Authorization in the present case provides[FN56], he or she is nevertheless liable under s.35(1) of the *MBCA Regulations* for so doing.

105 I agree with the applicant's argument that such liability makes the issuance of the Authorization "contrary to law" within the meaning of s.18.1(4)(f) of the *Federal Court Act*.

106 But there is a way that this result of apparently conflicting legislative provisions can be avoided. Under s.35(2) of the *MBCA Regulations* as above quoted, the Minister can avoid all liability for contravention of s.35(1) of the *MBCA Regulations* by the passage of appropriate regulations. Were the Authorization in the present case made within jurisdiction, and were regulations passed under s.35(2) before the Authorization was acted upon, the applicant's present argument could not be successfully made.

107 Although I have answered the question posed, I decline to exercise my discretion to make a declaration or prohibit the issuance of further *Fisheries Act* authorizations since the Minister has the ready option of obtain-

ing regulatory protection to avoid liability. Obviously, if such protection is not obtained, any further authorizations issued without it are subject to judicial review and order at the discretion of the Court.

Application granted.

Appendix 1

The following are the relevant portions of Sexton J.A.'s decision in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] F.C.J. No. 1746:

> The crux of this appeal is whether the existence of an unchallenged federal response should bar the appellant from seeking prohibition against the Minister for future authorizations. In my view, the Applications Judge was in error in accepting the respondents' argument that the response supersedes the report.
>
> In a preliminary motion prior to this appeal, the respondents sought to strike out the appellants' original application on the basis that it was time-barred. Hugessen J., starting at paragraph 3, made the following comments:
>
> > Rather I think the Report should be seen as an essential statutory preliminary step required by the *Canadian Environmental Assessment Act* prior to a decision by the Minister to issue an authorization under section 35 of the *Fisheries Act*.
> >
> > That decision has not been made and I think it is a fair reading of the Applicants' Originating Notice of Motion that it seeks primarily to prohibit the Minister from making it on the grounds that the Panel Report is fatally defective.
> >
> > Prohibition (like mandamus and quo warranto) is a remedy specifically envisaged in section 18 of the *Federal Court Act* and like them it does not require that there be a decision or order actually in existence as a prerequisite to its exercise.
>
> I agree with the view presented in this passage, which was adopted by Gibson J. in *Friends of the West Country Association v. Canada (Ministry of Fisheries and Oceans)*, [1998] F.C.J. No. 976 (T.D.)[Q.L.] at page 7.
>
> The view that the panel report is an essential statutory pre-requisite to the issuance of approvals is supported by previous case law. I agree with the decisions of *Bowen v. Canada*, [1997] F.C.J. No. 1526 (T.D.)[Q.L.], *Friends of West Country, supra*, and *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), 22 C.E.L.R. (N.S.) 293 (F.C.T.D.) which hold that an environmental assessment carried out in accordance with the Act is required before a decision such as the Minister's authorization in the present case can be issued. This view is reinforced by the decision in Friends of the *Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.) which confirmed that the guidelines that were a pre-cursor to *CEAA* (the *Environmental Assessment and Review Process Guidelines Order* SOR/84-467) were mandatory rather than directory in nature and, thus, failure to comply with them would deny the responsible authority the jurisdiction to proceed.
>
> The requirements of *CEAA* are legislated directions that are explicit in mandating the necessity of an envir-

onmental assessment as a pre-requisite to Ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. It is equally clear that any assessment must be conducted in accordance with the Act, including for example, the requirement imposed under s. 16 of *CEAA*. The fact that a federal response has been issued and remains unchallenged does not change these requirements. Thus, the appellants are entitled to argue the merits of their case.

The appellants are entitled to seek prohibition against the Minister on the basis that the panel report is materially deficient. The fact that the federal response was not challenged is irrelevant to the appellants' claim. In my view, the federal response does not supersede the panel report, nor can it, as the respondents suggest, potentially cure any deficiencies in the panel report. The two are separate statutory steps with distinct purposes and functions.

Section 37 of *CEAA* dictates that the Minister must consider the panel report before embarking on a course of action. Paragraph 34(c)(l) establishes that this report must set out the "rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project". Subsection 34(d) makes it clear that it is this report that contains the results of the environmental assessment that must be submitted to the Minister. Finally, s. 2 defines "environmental assessment" as "as assessment of the environmental effects of the project that is conducted in accordance with this Act". Thus the report that must be submitted to the Minister pursuant to s. 34(d) must contain, pursuant to s. 34(c)(l) and s. 2, the results of an environmental assessment conducted in compliance with the requirements of *CEAA*.

In sum, the combined effect of sections 34(c), 34(d), 2 and 37 is that before taking a course of action, the Minister must consider an environmental assessment, that was conducted in accordance with the Act. Therefore, the appellants are entitled to bring into question report and are not barred from doing so because they did not challenge the federal response.

I believe that the proper approach of the Applications Judge should have been, on the assumption that an environmental assessment in accordance with *CEAA* was an essential pre-requisite to the issuance of any authorizations of the Minister, to proceed to analyze the arguments advanced by the appellants, in order to decide whether a proper environmental assessment had been conducted by the Joint Panel.

Appendix 2

The following describes the approach used by the Joint Review Panel in considering the factors in s.16(1) and s.16(2) of *CEAA* as found in the Joint Panel Report [Applicant's Application Record, Vol. II, T-2354-97, pp.588-592]:

1.5.2 Environmental Assessment Process

The Agreement between the EUB and CEAA (Appendix B) provides a brief outline of the issues which are expected to be considered by the Panel. However, a number of terms (e.g. the spatial and temporal boundaries of environmental effects; cumulative environmental effects; and the significance of environmental effects) are not defined. In its application, CRC set out in some detail the approach it had adopted in assessing the significance of any adverse environmental effects potentially resulting from the Cheviot Coal Project, as well as their temporal and spatial boundaries and the cumulative environmental effects of their proposed project in conjunction with other activities in the region. Many of CRC's views and assumptions were ques-

tioned at the hearing by various interveners. As well, CRC, in its EIA, has made use of the concept of Valued Environmental Components (VECs) in its analysis of environmental effects. In order to ensure that there is a common understanding of the Panel's interpretation of these concepts, a brief discussion of each was felt appropriate.

It is worth noting that the Panel does not believe that the discussion below either can or should be binding on future tribunals tasked with addressing public interest issues. While the Panel believes that the approach taken here is valid to the Cheviot Coal Project, clearly other approaches to assessing the environmental effects of a project may be equally if not more appropriate.

Valued Environmental Components

VECs have been defined by CRC as "those environmental attributes associated with the proposed project development, which have been identified to be of concern by either the public, government, or the professional community". Physical (e.g. groundwater, air quality), biological (e.g. fish, vegetation, ungulates), and social/economic (e.g. forestry, public health, recreation) components of the environment were included by CRC in its selection of VECs, in part in response, CRC noted, to the broad-based definition of environmental effects found in both provincial and federal legislation. The use of VECs was intended to help ensure that the EIA process is focused on relevant issues.

The Panel believes that the use of VECs is appropriate for the Cheviot Coal Project. In particular, the Panel accepts that their use can minimize unnecessary effort to assess issues of likely little relevance, and ensure that the efforts of the applicant, the interested publics, and the government review agencies alike are focused on key questions. Furthermore, the results of analyses of VECs, if properly done, can reasonably be expected to be applicable to a broader range of environmental parameters.

Spatial and Temporal Boundaries

CRC noted that the Cheviot Coal Project has the potential to affect various VECs over a range of distances from the actual sources of disturbance as well as over a number of time periods of various lengths. In preparing the EIA, CRC indicated that it has generally attempted to describe the aerial extent of a predicted impact (i.e. its spatial boundary), as well as the time period over which CRC predicted that such impacts will occur (i.e. its temporal boundary). The Panel notes that while CRC initially attempted to provide some broader definitions of these two terms, it is evident from the EIA that both the spatial and temporal boundaries of environmental effects ultimately tended to be highly specific to: first, the actual components of the Cheviot Coal Project (e.g. the transportation and utilities corridor, the coal processing plant, or the surface mine); second, the project phase (e.g. construction, operation, or decommissioning); and third, the particular VEC under consideration (e.g. water quality, vegetation, or carnivores). The Panel, therefore, has also not attempted to set broad definitions for either the spatial or temporal boundaries of environmental effects, but rather has considered the evidence as presented for each VEC.

Significance of Environmental Effects

While recognizing that this is somewhat of an over simplification, the Panel believes that the environmental effects arising from the Cheviot Coal Project can be placed, for all practical purposes, into one of three general categories. These are:

(1) changes to the numbers of organisms, including both flora and fauna, found in the environment and their relative proportions to each other;

(2) changes to the physical properties, including water, air, and soil, of the environment and their interactions; and

(3) changes to the human use of the environment, for aesthetic, spiritual, recreational, economic, or any other purpose.

For each of these three categories, the parameters which define when an environmental effect is significant are clearly different. In assessing whether an environmental effect of the Cheviot Coal Project is significant, the Panel has, when appropriate, used the following general criteria:

(1) For organisms, an environmental effect was generally considered to be significant when the changes induced by the Cheviot Coal Project are beyond the normal range of natural variation in the population size of that organism or group of organisms **and** the effects on population size will continue beyond the life of the Cheviot Coal Project into the foreseeable future. The term population is based on the biological definition of population; that is, a geographically distinct assemblage of members of a species, usually capable of successful reproduction.

(2) For the physical properties of the environment, an environmental effect of the Cheviot Coal Project would normally be considered to be significant when either the mean value of the physical property or its normal range of variation is altered to the point that this results in either a reduced carrying capacity of the environment for biological VECs, or a risk to human health or safety.

(3) For human use, an environmental effect resulting from the Cheviot Coal Project would usually be considered to be significant if it results in a permanent loss of an area or region where an activity was historically carried out and where other comparable areas cannot be readily substituted.

Where particular issues did not clearly fall into any of the above categories, the Panel has used its professional judgement in its assessment of the significance of environmental effects. For example, an environmental effect may be deemed significant if it precludes organisms from returning to an area where they previously occurred or alternatively precludes some reasonably likely future human use. Clearly a greater degree of judgement regarding whether these alternative events have a reasonable probability of occurring and their importance, if they did, must be applied. It is worth noting that while all of the environmental effects described above result in negative impacts, the same model can be applied when the environmental effects result in a net positive change.

In its application, CRC stated that it had considered the effects of its mitigation measures prior to determining environmental significance, an approach which was questioned by some parties at the hearing. The Panel, in its assessment of the Cheviot Coal Project, believes that the significance of environmental effects can only be realistically determined after mitigation has been incorporated into the project design. In this case, this would include the mitigation measures required by the Panel and other regulatory agencies in addition to those proposed by CRC.

Cumulative Environmental Effects

Both provincial and federal EIA legislation require a proponent to assess the cumulative environmental effects of its proposed project. In recent years, a considerable amount of debate has occurred regarding how cumulative environmental effects should be defined and assessed, but a number of questions remain. In this case, CRC's approach to addressing cumulative effects was also challenged by some interveners.

For the purposes of this review the Panel believes that, ideally, in order to carry out a cumulative effects assessment (CEC) of the Cheviot Coal Project, it is necessary to first have some knowledge of the historic status of each VEC that may be affected by the project (e.g. what was its past distribution and occurrence? Were these attributes stable or variable?). The second step is to understand its current status (e.g. has its distribution and occurrence changed? Are these attributes more or less variable?). The third step is to ascertain why those changes, if any, have occurred (e.g. are they caused by normal biological, physical, or social processes? Or, are they due to anthropogenic or some other unique forces?).

Based upon this description of existing conditions, the fourth step in the process is to estimate the likely incremental effects of the proposed project on the VEC, both in absolute terms as well as on its degree of variability. The final step is to identify any other reasonable factors, particularly other projects or developments which, if they also occur, will also have an effect on the VEC, and what their incremental effects either alone or combined might be.

In carrying out its review, the Panel has, either explicitly or implicitly, applied the above criteria to the information provided by CRC in its application. In those cases where the data base is incomplete or of questionable quality, the Panel has used its professional judgment as appropriate. The Panel has then attempted to assess, within the context of the full range of project benefits and costs:

(1) whether the incremental changes in a VEC created by the Cheviot Coal Project are significant;

(2) if they are significant, whether they are justified from a public interest perspective; and

(3) if they are justified, whether the incremental changes in a VEC create a significant risk that other development opportunities may need to be foregone.

...I feel that for the practical reasons given by the appellants, the matter should be remitted to the Trial Division and heard together with the application for judicial review in T-1790-98. These cases raise the same issues and are based on the same facts. We note that at the hearing of the appeal the appellants agreed to expedite the hearing of T-1790-98 if this court was inclined to follow their suggestion that these applications be heard together. This is the proper course to follow, as it would reduce any prejudice to the respondent on account of delay. The appeal is allowed, the decision of the Applications Judge set aside and the matter referred back to the Trial Division *for determination on the merits*. [Emphasis added]

42. Where the Minister establishes a review panel jointly with a jurisdiction referred to in subsection 40(1), the assessment conducted by that panel shall be deemed to satisfy any requirements of this Act and the regulations respecting assessments by a review panel.

When there is insufficient information on future projects or activities to assess their cumulative environmental effects with the project being proposed, best professional judgement should be used. [Applicants Book of Authorities, Vol II: T-1790-98, Tab 81, p. 138.]

"mitigation" means, in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

It seems clear from these cases that older authorities are no longer to be absolutely relied upon. The only principle of interpretation now recognized is a words-in-total-context approach with a view to determining the object and spirit of the taxing provisions.

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking this into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

FN* A corrigendum issued by the court on October 19, 1999 has been incorporated herein.

FN1 *Fisheries Act*, R.S.C. 1985, c. F-14.

FN2 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

FN3 During the course of the hearing of this application, I ruled that the Federal Response is irrelevant to the issues to be determined.

FN4 The Minister and CRC, by separate notices of motion filed November 18 and November 26, 1997, applied to strike out the applicants' originating notice of motion on the ground, *inter alia*, that it had been filed out of time with respect of the Joint Review Panel Report. By way of a cross-motion filed November 27, 1997, the applicants applied for an extension of the 30-day limit. The motions by the Minister and CRC were dismissed by Mr. Justice Hugessen on December 2, 1997. On March 24, 1998, I granted Wayne Roan (acting on his own behalf) and all other members of the Smallboy Camp, intervener status and on April 15, 1998, Prothonotary Hargrave granted Treaty 8 First Nations intervener status. Although both the Smallboy Camp and Treaty 8 First Nations participated in the initial judicial review hearing, neither participated in the subsequent re-hearing before me.

FN5 The application in T-1790-98 requests relief respecting this authorization "and any other authorization or approvals that may be issued by the Minister of Fisheries and Oceans for the Cheviot Coal Project or portion thereof prior to the hearing of this matter". On September 29, 1998, a further authorization was issued and in their written argument the Applicants argue for relief respecting it as well. In oral argument, however, counsel for the Applicants advised that this issue would not be pressed, and, accordingly, I decline to accept jurisdiction over the September 29, 1998 authorization.

FN6 During the hearing CRC argued that I should consider its argument that the applicants were out of time for the filing of their application on T-2354-97, and, therefore, they cannot raise the argument respecting the sufficiency of the Joint Review Panel Report required as a pre-condition to the Authorization in either judicial review application. I dismissed this argument from the bench since it was presented to the Appeal Division on the appeal of T-2354-97, and I conclude that by Sexton J.A.'s words as follows that it was not accepted:

I find, therefore, that jurisdiction is complete in both T-2354-97 and T-1790-98.

FN7 During the hearing of the application before me, counsel agreed that T-1790-98 should be heard first as a decision respecting *CEAA* under it will determine the challenge under T-2354-97.

FN8 *Migratory Birds Regulations*, C.R.C. 1978, c. 1035.

FN9 As set out in detail below, the duties on a review panel conducting an environmental assessment exclusively under *CEAA* are the same for the Joint Review Panel in the present case conducting an environmental assessment under *CEAA* and Alberta legislation.

FN10 Applicant's Application Record (Memorandum of Fact and Law): T-1790-98, p. 22.

FN11 Attached as Appendix 1 are the relevant passages of the decision.

FN12 *Alberta Wilderness Assn. v. Express Pipelines Ltd.* (1996), 137 D.L.R. (4th) 177 (Fed. C.A.).

FN13 In *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [1998] 4 F.C. 340 (Fed. T.D.), at 360, Gibson J. made a finding to the same effect. With respect to the exercise of discretion he found that the standard of review is reasonableness. In the present case the respondent argues that the standard of review for discretionary decisions should be patent unreasonableness, based, in part, on an argument that s.42 of *CEAA*, which reads as follows, constitutes a privative clause:

I reject this argument because s.42 is incapable of this construction; it is a provision which simply establishes that an assessment by a joint review panel satisfies statutory requirements respecting assessments by non-joint review panels. No standard of review is set by the provision. In any event, as will become evident in the analysis to follow, the review in the present case concerns only errors of law.

FN14 Applicant's Application Record, Vol II: T-2354-97, pp.582-584.

FN15 Applicant's Application Record, Vol II: T-2354-97, p.586.

FN16 This fact is in sharp contrast with the Alberta regulatory process which, as above described, first obtains a high level of government approval. Evidence on this point comes from the testimony before the Joint Review Panel of Mr. Robert L. Stone, Director of Environmental Assessment, Alberta Environmental Protection, who in a letter dated September 18, 1996, stated: "In my opinion, [CRC's] Environmental Impact Assessment (EIA) report is complete pursuant to Section 51 of the *Environmental Protection and Enhancement Act*". [Application Record of the Respondent, Vol. I: T-2354-97, p.373] With respect to the meaning of this approval, during public hearings, the Chair of the Joint Review Panel asked the following question of Mr. Stone: "...can I take it from that AEP believes that Cardinal River Coals has adequately dealt with cumulative effects of their project in their environmental assessment?", to which Mr. Stone responded: "Yes, you can". [*Ibid*, p.136]

FN17 Applicant's Application Record, Vol II: T-2354-97, p. 767.

FN18 *Ibid.* at 768.

FN19 *Ibid.*

FN20 *Ibid.* at 584.

FN21 During the course of the hearing of the application in the present case, CRC argued that the terms of reference for the *CEAA* environmental assessment were set by the process which set the terms of reference for the EIA; that is, they are one and the same, and therefore, the environmental assessment is limited to considering the effects of only an open pit coal mine. It is clear that this argument must be rejected because paragraph 4(c) of the "Terms of Reference for the Panel of the Cheviot Coal Project" defines the terms of reference of the EIA as only an item of information to be taken into consideration.

FN22 Applicant's Application Record, Vol II: T-2354-97, p.767.

FN23 During the course of the hearing in the present case, with particular respect to "alternate means", counsel for CRC argued that the scope of the factors to be considered in the assessment were those set for the EIA, therefore, with reference to "alternate means", the scope of the assessment should be considered limited to an open pit mine. I reject this argument since the words of the Joint Panel Agreement place no such limitation, and, indeed, ensure the scope is as expanded as possible.

FN24 *Canadian Environmental Assessment Act Responsible Authority Guide*, Canadian Environmental Assessment Agency, Nov. 1994. The relevant portion of this reference reads:

FN25 supra

FN26 Attached as Appendix 2 is the Joint Review Panel's description of this approach.

FN27 Applicant's Application Record, Vol II: T-2354-97, p. 589.

FN28 This interpretation was essentially agreed to by counsel for the applicants in the course of hearing, but the concern remained about including "mitigation" in the determination of weight.

FN29 Mitigation is defined in s.2(1) of *CEAA* as follows:

With respect to mitigation, the applicants argue that, within the Joint Panel's consideration of the environmental effects on carnivores, the enforcement of a monitoring program called the "Carnivore Compensation Program" does not meet the statutory definition of "mitigation". I give no weight to this argument as I find that, on the facts of this application, monitoring is a control measure.

FN30 Submission of Department of Fisheries and Oceans, Applicant's Application Record, Vol. I: T-2354-97, p. 500.

FN31 *Ibid.* at 501.

FN32 Applicant's Application Record, Vol II: T-2354-97, p. 663

FN33 Applicant's Applications Record, Vol II: T-2354-97, p. 636.

FN34 Affidavit of Dianne Pachal, February 19, 1998: Applicant's Supplementary Application Record, Vol. III: T-2354-97, p.1

FN35 Affidavit of Dianne Pachal, October 13, 1998: Applicant's Application Record, (Documents and Evidence): T-1790-98, p. 20

FN36 Applicant's Application Record, Vol II: T-2354-97, pp. 679, 681.

FN37 During the presentation of the Respondent's case in the present application, reference was made to evidence, both in the EIA and otherwise produced, regarding forestry activities in the Project area. However, as found above, the fact that some information exists does not relieve the Joint Review Panel of the duty to consider this, and other available information, in meeting its reporting obligations. That some information was presented does not alter the fact that all available information was not gathered, nor does the Joint Review Panel's use of a "surrogate measure of likely effects" rectify this deficiency.

FN38 Applicant's Application Record (Documents and Evidence), T-1790-98, p. 48.

FN39 *Ibid.* at 22.

FN40 *Ibid.* at 23.

FN41 Applicant's Application Record, Vol. II: T-2354-97, p. 595.

FN42 Applicant's Application Record, Vol. II: T-2354-97, p. 600.

FN43 *Ibid.* at 736.

FN44 While the Applicants also argue that the Joint Review Panel Report does not adequately deal with the environmental effects of the transportation and utilities system, and coal processing plant, given the Joint Review Panel's findings at pages 26 and 29 of the Joint Review Panel Report [Applicant's Application Record, Vol. II: T-2354-97, pp.607 and 609], I find that this concern is an attack on the quality of evidence considered and, therefore, does not concern a reviewable error.

FN45 Applicant's Application Record, Vol. II: T-2354-97, p.600

FN46 Although the applicants used the mentioned assertion as the basis for an argument that the Joint Review Panel failed to meet the requirements of s.16(1)(e), I give it no weight. The public and private need for the project was established by the Alberta regulatory approvals given prior to the Joint Review Panel's consideration, and, within this reality, the Joint Review Panel made substantiated findings that CRC established a need of the Cheviot Coal Project. [see Applicant's Application Record, Vol. II: T-2354-97, p.600-601] Therefore, I find the Joint Review Panel has met its duty under s.16(1)(e).

FN47 The source of evidence for his finding is the affidavit of Anne Kendrick, sworn February 4, 1998: Application Record of the Respondent, Vol 1: T-2354-97, p.15, at p.16.

FN48 Section 18.1(3)(b) of the *Federal Court Act* reads: "On an application for judicial review, the Trial Division may ... (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".

FN49 Section 18.1(4)(f) of the *Federal Court Act* reads: "The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal...(f) acted in any other way that was contrary to law".

FN50 *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.).

FN51 *Migratory Birds Regulations*, C.R.C. 1978, c. 1035, Applicant's Book of Authorities Vol. 1: T-1790-98, Tab 12.

FN52 *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22, Applicant's Book of Authorities Vol. 1: T-1790-98, Tab 11.

FN53 Applicant's Application Record (Memorandum of Fact and Law): T-1790-98, p. 10-12.

FN54 With respect to the objective, the "modern rule" of statutory interpretation was enunciated by E.A. Driedger as follows, in *Construction of Statutes*, (2nd ed., 1983) at 87:

This principle was adopted by the Supreme Court of Canada in *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 at 578, [1984] C.T.C. 294 (S.C.C.), at 316, per Estey J., and by the Federal Court of Appeal as a "words-in-total-context" approach in *Lor-Wes Contracting Ltd. v. R.* (1985), 60 N.R. 321 at 325, [1985] 2 C.T.C. 79 at 83, [1986] 1 F.C. 346 (Fed. C.A.) at 352 wherein MacGuigan J., delivering the court's judgment, concluded:

In *Driedger on the Construction of Statutes*, (R. Sullivan, 3rd ed., 1994) at 131, the author further elaborated on the "modern rule" as follows:

FN55 *National Bank of Greece (Canada) c. Katsikonouris* (1990), 74 D.L.R. (4th) 197 (S.C.C.).

FN56 Applicant's Application Record (Documents and Evidence): T-1790-98, p. 10.

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