ation. Based on the record in the present case, I conclude that the failure to designate a representative for the minor applicant could have influenced the entire decision. In deciding whether to grant a stay of deportation, the Board is required to take into account the best interests of the children. If a representative had been designated, and had made submissions or adduced evidence with respect to the best interests of the minor child, the Board would have been required to weigh these interests against the other factors before rendering its decision. In such circumstances, it is possible that the Board would have rendered a different decision with respect to the entire family, and not just the minor applicant. It is the responsibility of the Board to weigh the best interests of the child against the public policy interests of removing all or some of the applicants for failing to comply with the conditions upon which they entered Canada.

[15] Neither counsel recommended certification of a question. No question will be certified.

ORDER

[16] THIS COURT ORDERS THAT:

This application for judicial review is allowed, the decision of the Board dated August 3, 2004 is set aside, and the matter is remitted to a different panel of the Board for redetermination.

Application allowed.

Editor: Angela E. McKay/vnh

Pembina Institute For Appropriate Development, Canadian Nature Federation, Sierra Club of Canada, Alberta Wilderness Association, and Jasper Environmental Association (applicants) v. Minister of Fisheries and Oceans and Cardinal River Coals Ltd. (respondents)
(T-1488-04)

Pembina Institute For Appropriate Development, Nature Canada (formerly Canadian Nature Federation), Sierra Club of Canada, Alberta Wilderness Association, and Jasper Environmental Association (applicants) v. Minister of Fisheries and Oceans and Cardinal River Coals Ltd. (respondents)
(T-1946-04; 2005 FC 1123)

Indexed As: Pembina Institute for Appropriate Development et al. v. Canada (Minister of Fisheries and Oceans) et al.

Federal Court
Snider, J.
August 17, 2005.

Summary:

The applicants, various environmental organizations, applied for judicial review of an authorization issued by the Department of Fisheries and Oceans (DFO) pursuant to the Fisheries Act, which permitted Cardinal River Coals to begin construction of a coal mine. The applicants also challenged a decision of DFO not to conduct an environmental assessment under the Canadian Environmental Assessment Act of changes to the project.

The Federal Court dismissed the application.

Fish and Game - Topic 161

Fisheries - Regulation - General - [See **Pollution Control - Topic 1003**].

Pollution Control - Topic 1003

Licensing or approval - Effect of license or approval - The applicants applied for judicial review with respect to an authorization issued by the Department of Fisheries and Oceans (DFO) pursuant to the Fisheries Act, which permitted Cardinal River Coals (CRC) to begin construction of a coal mine - The applicants submitted that the Mine Pit Authorization issued under the Fisheries Act permitted CRC to deposit millions of tonnes of waste rock and materials into waters and other areas frequented by migratory birds, which was "contrary to law" within the meaning of s. 18.1(1)(4) of the Federal Courts Act because the deposit of such materials was prohibited under s. 35(1) of the Migratory Birds Regulations - The Federal Court rejected the argument - DFO's authorization was in respect of fish and fish habitat under the Fisheries Act - Nothing in the Fisheries Act required DFO to have regard to potential deleterious impacts on migratory birds - DFO had no ability to direct the management or operation of the mine - DFO, as a regulatory body, did not bear responsibility for the actions of CRC in the event that CRC breached s. 35(1) of the Migratory Birds Regulations - See paragraphs 77 to 95.

Pollution Control - Topic 1805

Environmental assessments or impact studies - Determination of whether hearing or study required - General - The applicants applied for judicial review with respect to an authorization issued by the Department of Fisheries and Oceans (DFO) pursuant to the Fisheries Act, which permitted Cardinal River Coals to begin construction of a coal mine - The applicants also challenged DFO's decision not to conduct an environmental assessment under the Canadian Environmental Assessment Act (CEAA) of changes to the project, including a haulroad - The applicants argued that s. 15(3) of the CEAA required that every environmental assessment under the CEAA include an assessment of modifications in relation to physical works that were proposed by the proponent - The Federal Court held that s. 15(3) of CEAA did not apply to require a further assessment of the mine project - Section 15(3) only had meaning when read together with s. 15(1) and it did not impose a free-standing obligation on a responsible authority to conduct an environmental assessment outside the scope of the project as determined under s. 15(1) - The use of the word "shall" in s. 15(3) had to be read in association with the scoping decision in s. 15(1) - The haulroad was not included in the scope of the project and no obligation to assess the haulroad arose from s. 15(3) - The haulroad was not a "modification" caught by s. 15(3) - A "modification" was one that could be identified at the time of the application - See paragraphs 18 to 40.

Pollution Control - Topic 1805

Environmental assessments or impact studies - Determination of whether hearing or study required - General - The applicants applied for judicial review with respect to an authorization issued by the Department of Fisheries and Oceans (DFO) pursuant to the Fisheries Act, which permitted Cardinal River Coals (CRC) to begin construction of a coal mine - The applicants also challenged DFO's decision not to conduct an environmental assessment under the Canadian Environmental Assessment Act (CEAA) of changes to the project, including a haulroad - The applicants argued that s. 15(3) of the CEAA required that every environmental assessment under the CEAA include an assessment of modifications in relation to physical works that were proposed by the proponent - The Federal Court held that s. 15(3) of CEAA did not apply to require a further assessment of the mine project - The court added that the conclusion that s. 15(3)

did not operate to require a re-opening of the assessment did not mean that CRC could carry out any manner of amendments without oversight - In some cases, a modification could, on its own or cumulatively with other projects, trigger an assessment under the CEAA - However, s. 5 of CEAA would be the operative provision and not s. 15(3) - Further, if, at the stage of review set out in s. 37(1.1), the responsible authority believed that the project was not "in conformity" with the "federal response", the authority could refuse to issue the authorization - See paragraph 34.

Pollution Control - Topic 1805

Environmental assessments or impact studies - Determination of whether hearing or study required - General - The applicants applied for judicial review with respect to an authorization issued by the Department of Fisheries and Oceans (DFO) pursuant to the Fisheries Act, which permitted Cardinal River Coals (CRC) to begin construction of a coal mine - The applicants also challenged DFO's decision not to conduct an environmental assessment under the Canadian Environmental Assessment Act (CEAA) of changes to the project, including a haulroad - The applicants argued that DFO erred by concluding that the haulroad did not trigger an environmental assessment under s. 5 of CEAA - They argued that the placing of fill and materials into Cheviot Creek to create a causeway over which the haulroad passed was a trigger and an assessment of the haulroad was required - The Federal Court held that the haulroad did not trigger an environmental assessment under the CEAA - If the causeway was constructed solely to support the haulroad, then s. 5 of CEAA would require an assessment of the haulroad proposal - However, the evidence demonstrated that the causeway was constructed to create the Cheviot Creek Pond - The creation of that pond was a component of the Cheviot Mine Pit which was assessed by a Joint Review Panel - The Mine Pit Authorization permitted the construction of the pond, including the causeway - The fact that CRC placed a haulroad on top of the causeway did not trigger another CEAA review - See paragraphs 41 to 51.

Pollution Control - Topic 1843

Environmental assessments or impact studies - Environmental assessment legislation - Whether provisions mandatory - [See first **Pollution Control - Topic 1805**].

Pollution Control - Topic 1846.2

Environmental assessments or impact studies - Environmental assessment legislation - Scope of project or assessment - [See first **Pollution - Control - Topic 1805**].

Pollution Control - Topic 1848

Environmental assessments or impact studies - Environmental assessment legislation - Imposition of mitigative or compensatory measures - The applicants applied for judicial review with respect to an authorization issued by the Department of Fisheries and Oceans (DFO) pursuant to the Fisheries Act, which permitted Cardinal River Coals to begin construction of a coal mine - DFO (with the approval of the Governor in Council) had issued a response to the report of a Joint Review Panel in which it concurred with the panel's recommendation that the project should receive regulatory approval - That response, referred to as the "federal response", also confirmed that mitigation measures would need to be implemented to reduce the adverse environmental effects of the project - The application raised the issue of whether the DFO erred in issuing the Mine Pit Authorization without ensuring the implementation of mitigation measures identified in the federal response, such that the authorization was not in conformity with the federal response as required by s. 37(1.1) of Canadian

Environmental Assessment Act (CEAA) - The Federal Court held that the decision to issue the Mine Pit Authorization was in conformity with the federal response - See paragraphs 52 to 76.

Pollution Control - Topic 1850

Environmental assessments or impact studies - Environmental assessment legislation - When study required - [See all **Pollution Control - Topic 1805**].

Pollution Control - Topic 4084

Water - Dumping - Deleterious substances - [See **Pollution Control - Topic 1003**].

Cases Noticed:

Alberta Wilderness Association et al. v. Cardinal River Coals Ltd., [1999] 3 F.C. 425; 165 F.T.R. 1 (T.D.), refd to. [para. 8].

Environmental Resource Centre et al. v. Canada (Minister of the Environment) et al. (2001), 214 F.T.R. 94; 45 C.E.L.R.(N.S.) 114 (T.D.), refd to. [para. 16].

West Vancouver (District) v. British Columbia (Minister of Transportation) et al. (2005), 273 F.T.R. 253; 2005 FC 593, refd to. [para. 16].

Bow Valley Naturalists Society et al. v. Canada (Minister of Canadian Heritage) et al., [2001] 2 F.C. 461; 266 N.R. 169 (F.C.A.), refd to. [para. 20].

Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment) et al. (1999), 163 F.T.R. 36 (T.D.), consd. [para. 27].

Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans) et al., [1998] 4 F.C. 340; 150 F.T.R. 161 (T.D.), affd. [2000] 2 F.C. 263; 248 N.R. 25 (F.C.A.), leave to appeal denied (1999), 262 N.R. 395 (S.C.C.), consd. [para. 27].

Tsawwassen Indian Band v. Canada (Minister of Finance) et al. (1998), 145 F.T.R. 1 (T.D.), refd to. [para. 32].

Milk Board (B.C.) v. Grisnich et al., [1995] 2 S.C.R. 895; 183 N.R. 39; 61 B.C.A.C. 81; 100 W.A.C. 81; 126 D.L.R.(4th) 191, refd to. [para. 39].

Friends of the Oldman River Society v. Canada (Minister of Transport and Minister of Fisheries and Oceans), [1992] 1 S.C.R. 3; 132 N.R. 321, refd to. [para. 41].

Ryan v. Law Society of New Brunswick, [2003] 1 S.C.R. 247; 302 N.R. 1; 257 N.B.R.(2d) 207; 674 A.P.R. 207, refd to. [para. 63].

Maldonado v. Minister of Employment and Immigration, [1980] 2 F.C. 302; 31 N.R. 34 (F.C.A.), refd to. [para. 69].

Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248; 2 N.R. 397, refd to. [para. 81].

Danyluk v. Ainsworth Technologies Inc. et al., [2001] 2 S.C.R. 460; 272 N.R. 1; 149 O.A.C. 1, refd to. [para. 81].

R. v. Ontario (Ministry of the Environment), [2001] O.J. No. 2581 (C.J.), consd. [para. 87].

Statutes Noticed:

Canadian Environmental Assessment Act, S.C. 1992, c. C-37, sect. 5 [para. 41]; sect. 15(3) [para. 22]; sect. 37 [para. 52].

Counsel:

Timothy J. Howard and Justin Duncan, for the applicants;

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dent, Minister of Fisheries & Oceans;
Fraser Milner Casgrain LLP, Edmonton, Alberta, for the respondent, Cardinal River Coals Ltd.

These applications were heard on June 14 and 15, 2005, at Edmonton, Alberta, before Snider, J., of the Federal Court, who delivered the following decision on August 17, 2005.

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[1] Snider, J.: These two applications for judicial review, which have been consolidated, concern the environmental assessment and regulatory approval of the Cheviot coal mine project located in Western Alberta. The Applicants, various environmental organizations, challenge the legality of an authorization issued by the Department of Fisheries and Oceans ("DFO") pursuant to the **Fisheries Act**, R.S.C. 1985, c. F-14 (the "**Fisheries Act**") which permits the Respondent, Cardinal River Coals ("CRC"), to begin construction of the coal mine. The Applicants also challenge the decision of DFO not to conduct an environmental assessment under the **Canadian Environmental Assessment Act**, S.C. 1992, C-37 ("**CEAA**" or the "**Act**") of changes to the project.

[2] Specifically, the Applicants seek:

(a) an order to quash the authorization, dated September 13, 2004 and issued by DFO pursuant to subsection 35(2) of the **Fisheries Act** (the "Mine Pit Authorization");

(b) an order of mandamus to require the preparation of an environmental assessment of the project changes, including a haulroad now proposed by CRC in association with its revised project; and

(c) a declaration that the issuance of the Mine Pit Authorization was contrary to subsection 35(1) of the **Migratory Birds Regulations**, C.R.C., c. 1035 (the "**Migratory Bird Regulations**").

BACKGROUND

[3] In 1996, CRC submitted a project application to the Alberta Energy and Utilities Board, the Alberta Department of Environment and DFO in which it proposed to develop a coal mine (the Cheviot project) located near the town of Hinton, Alberta. In particular, the project application called for:

(i) the development, operation and reclamation of an open-pit coal mine,

(ii) the construction, operation and decommissioning of a processing plant,

(iii) the construction of a shop and office complex,

(iv) the restoration of a rail line,

(v) the upgrading of an existing access road, and

(vi) the installation of a new transmission line and substation to supply electrical power to the Cheviot mine.

[4] The project, as put forward by CRC at that time, required three authorizations under subsection 35(2) of the **Fisheries Act** for "harmful alteration, disruption or destruction of fish habitat." The authorizations were required for works and undertakings relating to the construction of the processing plant and office complex (the "Industrial Complex"), the rail line, access road and transmission line (the "Access Corridor") and the mine pit.

[5] Pursuant to paragraph 5(1)(d) of **CEAA**, the authorizations could not be issued until an environmental assessment of the project had been completed. DFO, as the responsible authority under the **CEAA**, initiated an assessment of the project. Before its completion, DFO recommended to the Minister of Environment that a joint panel be established to conduct the environmental assessment. Accordingly, in late 1996, the Minister of Environment and the Alberta Energy and Utilities Board established a joint federal-provincial review panel (the "Joint Review Panel") to conduct the environmental assessment.

[6] In June 1997, the Joint Review Panel issued a report recommending that the Cheviot project receive regulatory approval from the Government of Canada subject to certain mitigation measures. DFO (with the approval of the Governor in Council) issued a response to the report in which it concurred with the panel's recommendation that the Cheviot project receive regulatory approval. This response is commonly referred to as the "federal response". The response also confirmed that mitigation measures would need to be implemented to reduce the adverse environmental effects of the project. Of significance to the applications before me are two aspects of the response:

- The federal government committed to partnering with provincial authorities to develop a mitigation plan in relation to grizzly bears and to participating in two provincial decision-making committees.

- Any conditions that Environment Canada considered necessary to address the protection of migratory birds would be included in the relevant authorizations issued under the **Fisheries Act**.

[7] On August 17, 1998, DFO issued to CRC an authorization pursuant to subsection 35(2) of the **Fisheries Act** for activities relating to the Access Corridor. Likewise, on September 28, 1998, DFO issued an authorization for activities relating to the Industrial Complex. No authorization was issued, at that time, for activities related to the mine pit.

[8] Four of the present Applicants sought judicial review of the first Joint Review Panel Report and the Access Corridor authorization. In his decision in **Alberta Wilderness Association et al. v. Cardinal River Coals Ltd.**, [1999] 3 F.C. 425; 165 F.T.R. 1 (T.D.), Justice Campbell found that the Joint Review Panel had not conducted the environmental assessment in compliance with the **CEAA** and its terms of reference because it had failed to address the cumulative effects of the Cheviot project. As a result, he quashed the Access Corridor authorization and recommended that the Minister of Environment reconvene the Joint Review Panel.

[9] The Joint Review Panel was reconvened and issued a second Joint Review Panel Report in September 2000. It again recommended that the Cheviot project receive regulatory approval. In April 2001, DFO (with approval of the Governor in Council) issued another federal response accepting the recommendations of the joint panel. However, the federal response noted that the project had been postponed temporarily by CRC and that any authorizations issued should be valid only for a limited period of time. DFO did not issue further authorizations following the release of the response and the Industrial Complex authorization expired on October 10, 2002.

[10] In August 2002, CRC announced that it would proceed with the Cheviot project in a modified form and on a much reduced scale. While the mine pit would remain the same, the Access Corridor and Industrial Complex were

eliminated. Coal was to be transported to an existing plant by a new haulroad. The revised project is compared to the original project in the following chart.

Aspect	Original Proposal	Revised Proposal
Coal Processing	At Cheviot minesite with new plant site	At Luscar minesite with existing plate site
Railroad	20 kilometers of new rail line built for Inland Cement involving several river crossings which were in creek structures. Furthermore there was associated disturbance of Harlequin Duck Habitat.	No new rail line built
Access Corridor	High speed public access road and 138 kV powerline	Coal haulroad and public access road with 69 kV powerline
Mining	Start with Cheviot Creek and then move to Harris and McLeod Developments	Same plan
Major Infrastructure	Large office/shop complex; Freshwater Dam; Tailings Dam	Small portable office; No freshwater or Tailings Dams
Other	Two coal products required for market place issues which required mining in 3 to 4 areas at once and delayed progressive reclamation.	One coal product required due to the new company ownership. Only need to mine in 1 to 2 areas at once and can mine in a more sequential fashion promoting progressive reclamation.
Water crossings	Culvert crossing in the Prospect and McLeod Rivers involving in-stream work and disturbances.	Open Span Structures not involving disturbance of the existing creek beds.

[11] DFO was provided with a copy of the haulroad proposal and concluded that no **Fisheries Act** authorizations were required in connection with that project. On December 5, 2003, the haulroad was approved by the Province of Alberta, Alberta Environment pursuant to Division 2, of Part 2 of the **Environmental Protection and Enhancement Act**, R.S.A. 2000, c. E-12. Accordingly, CRC proceeded with the construction of the haulroad. It has been in operation since October 2004.

[12] In December 2003, CRC requested an authorization from DFO for activities relating to the construction of the mine pit. The subsection 35(2) Mine Pit Authorization, which is the

subject of this judicial review, was issued on September 13, 2004, without further environmental assessment. It permits the installation of a water control structure at the junction of a creek so as to backflood the creek and form a sediment pond. It also provides for the diversion of two creeks around the open-pit mine.

ISSUES

[13] This application raises the following issues:

1. Was DFO under a duty to prepare an environmental assessment of the modifications made to the Cheviot project pursuant to subsection 15(3) of **CEAA**?

2. Did DFO err by concluding that the haul-road did not trigger an environmental assessment under section 5 of **CEAA**?

3. Did DFO err in issuing the Mine Pit Authorization without ensuring the implementation of mitigation measures identified in the federal responses, such that, as required by subsection 37(1.1) of **CEAA**, the authorization was not in conformity with the federal responses?

4. Did DFO act contrary to law in issuing an authorization that permits activities prohibited by the **Migratory Birds Convention Act** and the **Migratory Birds Regulations**?

[14] On April 20, 2005, CRC filed a notice of constitutional question in respect of section 6 of the **Migratory Birds Act** and subsection 35(1) of the **Migratory Birds Regulations**. This question need only be addressed if the Applicants are successful in their arguments under issue #4. The parties have agreed that submissions on this issue will be heard, if necessary, after any decision on the remaining issues in this case.

[15] The **CEAA** was subject to a number of amendments in 2003 (**An Act to Amend the Canadian Environmental Assessment Act**, S.C. 2003, c. 9). The parties agree that as a result of a transitional provision in the amending legislation (section 33), the amendments are not applicable to the issues raised in these applications. Accordingly, I will make reference to the pre-amended version of the **Act**.

STANDARD OF REVIEW

[16] The issues raised by the Applicants concern the interpretation of the **CEAA** as well as the exercise of discretion by the Minister of Fisheries and Oceans under the **Act**. This Court has held on a number of occasions that, in the context of the **CEAA**, questions relating to the interpretation of statutory provisions are subject to the standard of correctness, while questions relating to the exercise of discretion by a responsible authority pursuant to sections 15 and 16 are subject to the standard of reasonableness simpliciter. See, for example, **Environmental Resource Centre et al. v. Canada (Minister of the Environment) et al.** (2001), 214 F.T.R. 94; 45 C.E.L.R.(N.S.) 114 (T.D.); **West Vancouver (District) v. British Columbia (Minister of Transportation) et al.** (2005), 273 F.T.R. 253; 2005 FC 593.

[17] I have no doubt that the question of statutory interpretation is subject to a correctness standard. However, I note the Respondents' submissions that DFO's determination made pursuant to paragraph 37(1.1)(c) of **CEAA** is subject to the highest standard of review - that of patent unreasonableness. While their arguments have substantial merit, I will accept, without final determination, that the standard for DFO's decision under subsection 37(1.1) is that of reasonableness simpliciter.

ANALYSIS

Issue No. 1: Was the Minister under a duty to prepare an environmental assessment of the modifications made to the Cheviot project pursuant to subsection 15(3) of the CEAA?

(a) Scheme of CEAA

[18] Before addressing this issue, it is useful to summarize briefly the scheme of the **CEAA**. Paragraph 5(1)(d) of the **Act** requires an environmental assessment of a "project" before a responsible authority such as DFO grants regulatory approval for the project. A "project" is defined in paragraph 2(1)(a) as:

> "In relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work ..."

> "Réalisation -- y compris l'exploitation, la modification, la désaffectation ou la fermeture -- d'un ouvrage ..."

[19] Subsection 15(1) deals with the scope of a project for purposes of its assessment. The scope of the project is determined by the responsible authority or, where a project is referred to a mediator or review panel, by the Minister of Environment.

[20] All projects that trigger the application of the **Act** are to receive an appropriate degree of environmental assessment, depending on the scale and complexity of the likely effects of the project. (See **Bow Valley Naturalists Society et al. v. Canada (Minister of Canadian Heritage) et al.**, [2001] 2 F.C. 461; 266 N.R. 169 (F.C.A.), at para. 18). In this regard, there are three types of environmental assessments that can be undertaken: screening (section 18), comprehensive study (section 21) and panel review (section 25). A comprehensive study, as opposed to a screening, must be conducted if the project falls within a class listed in the **Comprehensive Study List Regulations**, SOR/94-638. An assessment may be completed by a review panel in the place of a comprehensive study or following the completion of a comprehensive study. Pursuant to section 25 of the **Act**, the responsible authority can request that the Minister of Environment refer the project to a panel review if the project may cause significant adverse environmental effects or if public concerns warrant a reference. Following the environmental assessment, the responsible authority makes a decision as to whether or not the authorization should be issued and the project allowed to proceed.

[21] In the case of a review panel, the **CEAA** prescribes an additional step. Subsection 37(1.1) requires that, upon receipt of the review panel's report, the responsible authority must, with the approval of the Governor in Council, issue a federal response to the report. The responsible authority must then take a course of action that is "in conformity" with the approval of the Governor in Council.

(b) Submissions of Applicants

[22] The Applicants submit that, when the provisions of the **CEAA** are read together, it is clear that DFO was under an obligation to prepare an environmental assessment of the haulroad modifications before it exercised its power to issue the **Fisheries Act** authorization. Their starting point is subsection 15(3) of **CEAA**, which reads:

> "Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction,

operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent ..."

"Est effectuée, dans l'un ou l'autre des cas suivants, l'évaluation environnementale de toute opération -- construction, exploitation, modification, désaffectation, fermeture ou autre -- constituant un projet lié à un ouvrage:

a) l'opération est proposée par le promoteur; ..."

[23] The Applicants' submission is that, on a plain language reading, subsection 15(3) requires, by using the mandatory imperative word "shall", that every environmental assessment under the **CEAA** include an assessment of modifications in relation to physical works that are proposed by the proponent. They contend that subsection 15(3) applies to all environmental assessments. In this case, their argument is that the Cheviot mine is the physical work and that the haulroad is a modification to that work. Accordingly, subsection 15(3) mandated DFO to prepare an environmental assessment of the road before it issued the Mine Pit Authorization.

[24] Accordingly, they assert, DFO should have carried out an assessment of the Cheviot project, as modified by CRC. To be helpful, the Applicants point out that section 24 of **CEAA** would provide an efficient means for updating the assessment. The relevant portions of section 24 read:

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

. . . . .

(b) in the case of the 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,

the responsible authority shall use that assessment and the report thereon to whatever extent is appropriate for the purposes of complying with section 18 (screening report) or 21 (comprehensive study).

. . . . .

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

"(1) Si un promoteur se propose de mettre en oeuvre, en tout ou en partie, un projet ayant déjà fait l'objet d'une évaluation environnementale, l'autorité responsable doit utiliser l'évaluation et le rapport correspondant dans la mesure appropriée pour l'application des articles 18 ou 21 dans chacun des cas suivants:

. . . . .

b) le projet est lié à un ouvrage à l'égard duquel le promoteur propose une réalisation différente de celle qui était proposée au moment de l'évaluation;

. . . . .

"(2) Dans les cas visés au paragraphe (1), l'autorité responsable veille à ce que soient apportées au rapport les adaptations nécessaires à la prise en compte des changements importants de circonstances survenus depuis l'évaluation et de tous renseignements importants relatifs aux effets environnementaux du projet."

[25] As stated by the Applicants in their oral submissions:

"So, at the end of the day, it's our submission that a plain language reading of **CEAA** would have led to the following outcome: Upon receipt of the haulroad application, [DFO] would have said, Hmm, this is a modification to the project; we have an extant, still-to-be-exercised regulatory power in relation to this project. 15(3) requires us to look at this modification and assess it. Section 24 permits us - or prescribes that we shall make any significant changes in the environment and the circumstances of the project. We will do all these things, paying particular attention to the road's impacts on matters within federal jurisdiction and concern."

[26] As confirmed in oral submissions, all of these arguments start with the premise that the haulroad is a "modification" to the Cheviot mine project within the meaning of the definition of "project" and subsection 15(3).

(c) Applicability of subsection 15(3)

[27] Section 15 of **CEAA**, in general, concerns the scope of the project for purposes of an environmental assessment. Scoping decisions of responsible authorities have been the subject of other judicial review applications (see, for example, **Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment) et al.**, [1999] F.C.J. No. 273; 163 F.T.R. 36 (T.D.); **Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans) et al.**, [1998] 4 F.C. 340; 150 F.T.R. 161 (T.D.), affd. [2000] 2 F.C. 263; 248 N.R. 25 (F.C.A.), application for leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 585; 262 N.R. 395 (referred to as "**Sunpine**")).

[28] In this case, the scope of the project was defined in the Joint Review Panel Reports as follows:

"The Cheviot Coal Project is a proposal by CRC for the construction, operation, and decommissioning of a coal processing plant; for the development, operation, and reclamation of an open-pit coal mine; for the restoration of the Mountain Park subdivision rail line; for the upgrading of the existing access road (Gravel Flats Road) into the Cheviot mine area; and for the installation of a new transmission line and substation to supply electrical power to the Cheviot mine."

[29] What is the purpose of subsection 15(3)? The Federal Court of Appeal in **Sunpine** considered this provision of the **CEAA**. Justice Rothstein, at paragraph 16, stated that "[s]ubsection 15(3) is subsidiary to subsection 15(1)". At paragraphs 19-20, he went on to consider the words "in relation to" in subsection 15(3) and concluded that "the words refer to construction, operation, modification, decommissioning, abandonment or other undertakings that pertain to the life cycle of the physical work itself or that are subsidiary or ancillary to the physical work that is the focus of the project as scoped" (emphasis added).

[30] Neither **Sunpine** nor any other jurisprudence considering this part of **CEAA** compels

the responsible authority to, in effect, re-open a completed environmental assessment. In my view, subsection 15(3) only has meaning when read together with subsection 15(1) and does not impose a free-standing obligation on a responsible authority to conduct an environmental assessment outside the scope of the project as determined under subsection 15(1). The use of the mandatory "shall" must be read in association with the scoping decision in subsection 15(1). In this case, the haulroad was not included in the scope of the project. Thus, no obligation to assess the haulroad arises from subsection 15(3).

[31] What does the word "modification" mean in the context of either the definition of "project" or subsection 15(3) of the **CEAA**? The Applicants urge that I consider the haulroad to be a "modification" caught by subsection 15(3). I do not agree. In this context, a "modification" is one that can be identified at the time of the application. For example, the application itself may involve modifying a structure or project, such as a bridge or mine. In this sense, the Cheviot mine project was a modification of an existing mine site. A project proponent for a mine might recognize, at the time he applied for approval of his project, that, upon recovery of a certain percentage of minerals from the site, a new or modified method of recovery would be put in place. These modifications would be considered as part of the overall assessment of the project.

[32] Adoption of the meaning suggested by the Applicants leads to the result that any type of modification to the project design, no matter how small or insignificant would obligate the responsible authority to redo the assessment. This is not logical. Environmental assessments are to be carried out "as early as practicable in the planning stages of the project" (**CEAA**, section 11). In **Tsawwassen Indian Band v. Canada (Minister of Finance) et al.**, [1998] F.C.J. No. 370; 145 F.T.R. 1 (T.D.), at paragraph 61, Justice Richard (as he then was) noted that the provisions of the **CEAA** make it clear that the **Act** "is intended only to apply to proposed projects which are still in the planning stages on or after January 19, 1995, and for which irrevocable decisions have not been made." Since projects are submitted for environmental assessment at an early stage of their development, final determinations of and amendments to project design and construction will continue well beyond the assessment stage. Provided that the environmental assessment is still applicable to the project, there is no need for a new assessment. The modifications may, in fact, reduce the environmental impacts. That is the situation of the Cheviot mine. As can be seen from the comparative chart above, the current Cheviot Mine project is a much smaller project than that reviewed by the Joint Review Panels.

[33] A further problem with the Applicants' submission is that it ignores subsection 37(1.1). Once a Joint Review Panel delivers its report, this section operates to require the preparation, with the approval of the Governor in Council, of a federal response and to require the responsible authority to take a course of action in conformity with the federal response.

[34] The conclusion that subsection 15(3) does not operate to require a re-opening of the assessment does not mean that CRC may carry out any manner of amendments without oversight. In some cases, a modification may, on its own or cumulatively with other projects, trigger an assessment under **CEAA**. However, section 5 of **CEAA** would be the operative provision and not subsection 15(3). Further, if, at the stage of review set out in subsection 37(1.1), the responsible authority believes that the project now before the department with many more of

the details known and disclosed is substantially different from (or not "in conformity" with) the federal response, the authority could simply refuse to issue the authorization.

(d) Application of section 24 of CEAA

[35] During cross-examination on her affidavit, Ms. Dorthy Majewski, an impact assessment biologist with DFO, identified section 24 as the provision of **CEAA** under which she was acting. In the Applicants' view, section 24 does not remove the fundamental duty imposed under the **Act** to prepare an assessment of modifications, rather it is concerned with how to accommodate pre-existing information into another environmental assessment. In particular, the Applicants submit that section 24 of the **Act** does not grant the responsible authority the discretion to refuse an assessment if it considers the modifications to the physical work to be insignificant.

[36] The Applicants are correct that section 24 of **CEAA** does not impose a duty to conduct a further assessment; it exists to avoid duplication and promote efficiency in environmental assessment.

[37] CRC submits that Ms. Majewski's reliance on section 24 was in error and that, in fact, the determination DFO was required to make was made pursuant to paragraph 37(1.1)(c) of **CEAA**. I agree; the provision in issue is not section 24. Rather, DFO's authority, given the existence of the Joint Review Panel Reports, is found in paragraph 37(1.1)(c).

[38] In my view, section 24 does not apply to the facts of this case. After the completion of a joint review panel report, the actions of the responsible authority are governed by subsection 37(1.1). First, with the approval of the Governor in Council, the responsible authority responds to the report; that is, the federal response is prepared and approved by the Governor in Council. The next step applicable in respect of this project is for the responsible authority to take a course of action that is in conformity with the federal response. The possible courses of action are set out in subsection 37(1). Reading the provisions of subsection 37(1) and paragraph 37(1.1)(c) in their context, in the case of the Cheviot project, the only applicable course of action would be to issue the authorization if (and only if) the project, as now presented is "in conformity with" the federal response.

[39] The error of Ms. Majewski in identifying the correct legislative provision is not, in this case, significant. While Ms. Majewski incorrectly identified the relevant section number, she also confirmed that her task was to ensure that the issuance of the Mine Pit Authorization was "in conformity" with the approval of the Governor in Council. As noted by the Supreme Court of Canada in **Milk Board (B.C.) v. Grisnich et al.**, [1995] 2 S.C.R. 895; 183 N.R. 39; 61 B.C.A.C. 81; 100 W.A.C. 81; 126 D.L.R.(4th) 191, at paragraph 20, "Courts are primarily concerned with whether a statutory power exists, not with whether the delegate knew how to locate it". Ms. Majewski, while misstating the statutory provision under which she was acting, understood the responsibilities of the responsible authority.

[40] In summary on this issue, I am satisfied that subsection 15(3) of **CEAA** does not apply to require a further assessment of the Cheviot mine project.

Issue No. 2: Did DFO err by concluding that the haulroad did not trigger an environmental assessment under section 5 of CEAA?

[41] When DFO first received information on the haulroad, the department reviewed the pro-

posal to determine whether the application triggered an environmental assessment pursuant to section 5 of **CEAA**. Briefly, the question was whether the haulroad engaged a valid head of federal power (**Friends of the Oldman River Society v. Canada (Minister of Transport and Minister of Fisheries and Oceans)**, [1992] 1 S.C.R. 3; 132 N.R. 321, at paras. 86-87). By letter dated January 7, 2003, DFO advised Sierra Legal Defence Fund that:

> "On the basis of information provided to date with respect to the current Cheviot Mine haulroad project proposal, DFO staff have concluded that this project will not likely result in harmful alteration, disruption or destruction of fish habitat. Therefore, there is no need for DFO to issue any **Fisheries Act** authorizations and as such, DFO would not be exercising any power, duty or function referred to in section 5 of **CEAA** or under any other statute or regulation pertaining to the current Cheviot Mine haulroad."

[42] While the Applicants rely on the first issue as their principal argument, they also assert that DFO has a trigger in relation to the haulroad and that, as an alternative, an assessment of the haulroad itself was required. The trigger, in their view, is the placing of fill and materials into Cheviot Creek to create a causeway over which the road passes. This action requires, they submit, authorization for an undertaking affecting fish habitat pursuant to the **Fisheries Act**. There do not appear to be any other triggers upon which a **CEAA** assessment would be required.

[43] The Respondents submit that the causeway was applied for and authorized as part of the original Cheviot project. As such, it was assessed by the Joint Review Panel. I agree with the Respondents.

[44] In considering this issue, I begin with the view that, if the causeway was constructed solely to support the haulroad, the Applicants are correct that section 5 of **CEAA** would require an assessment of the haulroad proposal. However, the evidence demonstrates, in my view, that the causeway or dam was constructed to create the Cheviot Creek Pond. The creation of this pond was a component of the Cheviot Mine Pit and, thus, was assessed as part of the Joint Review Panel Reports. The Mine Pit Authorization permits the construction of the pond, including the causeway.

[45] Mr. Dane McCoy, an environmental specialist and project manager of the Cheviot Creek project, was an affiant for CRC. In his affidavit, he states that the construction and operation of the haulroad "does not in any way modify or alter the work and undertakings associated with the Cheviot Creek Pit." Mr. McCoy was cross-examined on the haulroad application. The Applicants refer to the following exchange as support for their view that the causeway is a **CEAA** trigger:

> "Q. In the haulroad application the crossing of Cheviot Creek was identified. In the pit development application it was refined and specifically proposed with specific engineering drawings, correct?
> A. That's correct.
>
> Q. And that crossing as identified in detail in the pit application became the subject of a Fisheries authorization we just looked at [the Mine Pit Authorization that is the subject of this judicial review]?
> A. That's correct."

[46] In my view, this excerpt is not persuasive evidence that the causeway was built for the haulroad. The haulroad traverses Cheviot Creek by way of a causeway. However, a review of the

entire exchange between counsel for the Applicants and Mr. McCoy as well as the re-examination of Mr. McCoy by CRC's counsel provides a more complete picture that demonstrates that the causeway creates the Cheviot Creek pond. The role of this pond was explained by Mr. McCoy as follows:

> "The [Cheviot Creek] pond ... was required for the Cheviot creek pit development area to capture and contain and remove the suspended solvents from any of the surface runoff coming off the pit development area."

[47] In effect, it is not the crossing by the haulroad that is the subject of the Mine Pit Authorization. Rather, the causeway as a means of creating the Cheviot Creek pond is the subject of the Mine Pit Authorization and was assessed by the Joint Review Panels.

[48] The Applicants also refer to one sentence in a document entitled "Cheviot Creek Pit Water Management, January 2003", which was submitted by CRC as part of their filings with DFO. The sentence in question states that "the pond is created by the haulroad across the Cheviot valley with a 26 m wide road at the top". This sentence must, however, be placed into context. The sentence is part of a section entitled "Sediment Control Facilities". In this section, the authors describe the pond as one of several water management structures required as part of the Cheviot Creek pit development. Once again, I conclude that this evidence, when read as a whole, demonstrates that the primary purpose of the causeway is to create a pond as part of the Cheviot Mine pit.

[49] The necessity of settling ponds - such as the Cheviot Creek Pond - was discussed in the first Joint Panel Report. In particular, at page 44, the panel noted that:

> "A large surface mine in rugged terrain will create numerous sources of sediments. The Panel believes, however, the sediment control can be achieved through the use of diversions, sedimentation ponds and the careful addition of flocculants." (emphasis added)

[50] I am satisfied that the Cheviot Creek Pond is such a pond that was created by the construction of the causeway. As such, it was scoped into and reviewed as part of the Cheviot project. The fact that CRC places a haulroad on top of the causeway does not trigger another **CEAA** review.

[51] Accordingly, the haulroad does not trigger an environmental assessment under **CEAA**.

Issue No. 3: Did the Minister of Fisheries and Oceans err in issuing the Mine Pit Authorization without ensuring the implementation of mitigation measures identified in the federal responses?

(a) Section 37 of CEAA

[52] Once a joint panel report is considered and approved by the Governor in Council, section 37 becomes operative. The relevant portions of that provision are as follows:

> "(1)(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,
>
> (i) the project is not likely to cause significant adverse environmental effects, or
>
> (ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,
>
> the responsible authority may exercise any power or perform any duty or function that

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

. . . . .

"(1.1)(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)(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 circonstances, exercer ses attributions afin de permettre la mise en oeuvre totale ou partielle du projet;

. . . . .

"(1.1) l'autorité responsable prend alors la décision visée au titre du paragraphe (1) conformément à l'agrément."

[53] Briefly, the **CEAA** requires that, in the course of exercising its regulatory powers under paragraph 5(1)(d), a responsible authority is to ensure the implementation of any mitigation measures it considers appropriate. Moreover, pursuant to subsection 37(1.1), the responsible authority must take a course of action that is "in conformity" with the federal response. The determination of whether the current Cheviot mine proposal, as now proposed, was "in conformity" with that which was approved by the Governor in Council, as reflected in the second federal response, is a discretionary decision.

[54] For purposes of these reasons, I have assumed that the standard of review applicable to DFO's decision as to whether a project is in conformity is one of reasonableness simpliciter.

[55] In this case, the responsible authority was DFO since it is this department that was responsible for the issuance of any **Fisheries Act** approvals. Ms. Majewski bore the overall responsibility for ensuring compliance with the **CEAA** and the **Fisheries Act**. She has been associated with the Cheviot mine project since 2001.

(b) DFO section 37 response

[56] As noted, Ms. Majewski, headed up DFO's obligations with respect to the Cheviot mine project. Part of DFO's task was to ensure the coordination of all federal authorities. In this case, the federal authorities are those government departments or agencies (as defined in subsection 2(1) of **CEAA**) with specialist or expert information or knowledge with respect to the Cheviot project. In contrast to DFO whose obligation is to issue the authorization under a particular legislative provision, the federal authorities do not have a direct regulatory approval role. In this case, DFO was mandated to determine whether to issue the **Fisheries Act** authorization. This was a decision for DFO to make, not Environment Canada or Parks Canada.

[57] From July 2002, when CRC notified DFO that it was proceeding with an amended Cheviot mine project, DFO staff, under Ms. Majewski's direction began review of the information and undertook discussions and communications with other federal authorities, including Parks Canada and Environment Canada. In December 2003, when CRC submitted its application for the mine pit development, she asked DFO staff to review the application and consider appropriate terms that any authorization would include to be in conformity with the federal responses

to the Joint Review Panel recommendations in 1997 and 2000.

(c) Alleged errors

[58] The Applicants submit that DFO erred in two significant findings:

1. DFO did not condition its Mine Pit Authorization with "terms required by Environment Canada as necessary to protect migratory birds and their habitat", in particular, with respect to the Harlequin duck habitat. The first response provided that relevant authorizations issued under the **Fisheries Act** would contain such conditions.

2. DFO erred in issuing the Mine Pit Authorization because two provincial project management committees identified in the first response no longer existed. The federal government had committed to working with these committees for the purpose of developing and implementing mitigation measures with the respect to grizzly bears.

[59] I will consider each of these alleged fatal flaws.

(d) Harlequin Ducks

[60] The protection of Harlequin ducks and their habitat was addressed by the Joint Review Panel Reports and the federal responses. In the first Joint Review Panel Report, however, the panel concluded that it did not believe that the adverse environmental effects on Harlequin ducks would be significant and that the mitigation strategies committed to by CRC (and which were made a general condition in the Alberta approval of the mine construction and operation) were reasonable. The panel did not impose any specific conditions. In the first federal response, the government stated at page 9:

"The Government of Canada agrees with the Panel that ongoing monitoring of Harlequin ducks is warranted and that further inventories of area streams are needed and will work with AEP [Alberta Environment Protection] to assist in monitoring other area streams. The Government of Canada (Environment Canada) is currently a member of the CRC McLeod River Harlequin Study Group which is monitoring local Harlequin duck populations. Environment Canada will continue to work with the applicant and AEP to enhance monitoring by CRC to include reclaimed sites, to evaluate Harlequin duck response and hence the success of mitigation. Conditions that Environment Canada considers necessary to address this concern will be included in relevant authorizations issued pursuant to the **Fisheries Act**." (emphasis added)

[61] In its first federal response, at page 10, Canada also endorsed the use of "maximum setback distances" as an appropriate mitigation measure.

"The Government of Canada strongly supports these requirements [including, inter alia, maximizing setbacks from the McLeod River, Mackenzie Creek, and the Cardinal River systems wherever possible] and therefore, recommends using its Harlequin duck expertise to establish, with AEP, programs to ensure that impacts are avoided and/or mitigated to the greatest extent possible. The Government of Canada recommends that these requirements, especially the substitution of bridges for culverts and maximizing setback distances, apply to tributaries, in addition to the main stream channels as these tributaries may provide important nesting and early brood rearing habitat. The Government of Canada is particularly concerned about timing restrictions and disturbances resulting from construction or mining activities in critical nesting locations. Con-

ditions that Environment Canada considers necessary to address these concerns will be included in relevant authorizations issued pursuant to the **Fisheries Act**." (emphasis added)

[62] In the second Joint Review Panel Report, the panel confirmed its earlier conclusion that proposed mitigation measures for Harlequin ducks "would be sufficient to mitigate the adverse effects and render them insignificant." In its second federal response, while Canada did not explicitly restate its earlier commitment, it did state that "Canada adopts and confirms its original response, dated October 1997, to Panel's 1997 report". With respect to Harlequin ducks, the panel stated:

> "Specifically for Harlequin ducks, the Government of Canada maintains that the proponent should make use of every possible measure that would ensure the continued protection of the existing McLeod River Harlequin duck population. This would include the CRC Harlequin Duck Management Plan, the continuation of a long-term harlequin duck monitoring program and implementation of any additional appropriate mitigation and compensation for losses should monitoring reveal unforeseen impacts on harlequin ducks or that mitigation is deemed unsuccessful."

[63] Ms. Majewski deposes that, at the time the authorization was issued, she believed that Environment Canada no longer required conditions to be included in the authorization. The question is simply whether that conclusion and, hence, the decision to issue the authorization are reasonable. On a standard of review of reasonableness simpliciter, a decision will be unreasonable if it is "not supported be any reasons that can stand up to a somewhat probing examination" (**Ryan v. Law Society of New Brunswick**, [2003] 1 S.C.R. 247; 302 N.R. 1; 257 N.B.R.(2d) 207; 674 A.P.R. 207, at para. 48). How did Ms. Majewski reach her decision that the issuance of the **Fisheries Act** authorization would be in conformity with the federal responses and, most importantly, that Environment Canada did not require any conditions on the approval?

[64] I first note that there was never any certainty that Environment Canada would require conditions to be placed on the authorization. The first Joint Review Panel Report contained 18 conditions to be placed on CRC and the second contained a further seven conditions, but no such explicit condition was placed on the panel's approval in respect of Harlequin ducks. Canada recognized the possibility of conditions in its federal responses. Had either the panel or Canada felt that the project should not proceed without specific conditions addressing the Harlequin duck protection, such conditions could have been included. The absence of conditions in both Joint Review Panel Reports and the federal responses left open the possibility that no conditions would be required.

[65] The absence of conditions in the Mine Pit Authorization does not mean that Harlequin ducks are left unprotected. CRC, as a general condition of its provincial approval of the mine (EPEA No. 46972-00-00 issued September 29, 1998), is required to implement its Harlequin duck mitigation plan as described in its application. Included in CRC's mitigation plan are two strategies particularly relevant to the concerns of the Applicants in this proceeding: (a) it will plan construction activities around sensitive periods; and, (b) it will maximize setbacks from the relevant river systems. Further conditions related to monitoring were imposed by Alberta when the Cheviot haulroad was approved (Approval No. 46972-00-01, issued December 5, 2003).

[66] The evidence shows that Ms. Majewski initially put forward some suggested conditions in respect of Harlequin ducks in a draft authorization. In her affidavit, Ms. Majewski states that, based on a discussion with a certain representative from Environment Canada, she understood that the conditions were no longer required because of findings made in studies undertaken after the Joint Review Panel Reports, and as a result of design changes to the Cheviot project. The record includes numerous e-mails, letters, memoranda and meeting notes spanning the period from the reactivation of the project in 2002 to the issuance of the Mine Pit Authorization on September 13, 2004. Although Environment Canada was involved in the process of coordination of the various federal authorities, there is no record that Environment Canada ever provided a response that any conditions were to be included in the authorization.

[67] In summary, before Ms. Majewski was the following information:

- The Joint Review Panel found that, with the proposed mitigation measures, there would be no adverse, significant impact on Harlequin ducks;

- No conditions related to Harlequin ducks were imposed in either of the Joint Review Panel Reports or in either of the federal responses;

- Any conditions that were to be included were to be those required by Environment Canada;

- A series of suggested conditions were included in an early draft of the authorization and, hence, the inclusion of conditions had been flagged for Environment Canada by DFO; and

- No response was received from Environment Canada that it wished to include any conditions and, indeed, the record suggests that Environment Canada felt that its concerns were being effectively managed (perhaps through the provincial conditioning or CRC's commitments).

[68] On the basis of this information, Ms. Majewski concluded that Environment Canada did not require any conditions on the Mine Pit Authorization. In my view, based on the information that was before her at the time she issued the authorization, her decision to omit any conditions related to Harlequin ducks from the authorization was not unreasonable; it stands up to a somewhat probing examination. In other words, the issuance of the authorization without conditions was in conformity with the federal responses on the issue of the protection of Harlequin ducks.

[69] Subsequent events have, however, complicated the issue that is before me. It appears that, in October 2004, after the authorization was issued, Environment Canada informed Ms. Majewski that it had concerns about the impacts of the Cheviot project on migratory birds. However, as this is an application for judicial review, I must consider the facts that were before DFO at the time the decision was made to issue the authorization. The sworn affidavit of Ms. Majewski is the only evidence I have on this point. It is presumed to be true absent a reason to doubt its truthfulness (**Maldonado v. Minister of Employment and Immigration**, [1980] 2 F.C. 302; 31 N.R. 34 (F.C.A.)). Further, there is no allegation of bad faith on the part of Ms. Majewski. She held the responsibility for ensuring the receipt of and coordination of input from all federal authorities and for issuing the required authorization. Environment Canada bore the responsibility to communicate clearly its positions; it did not do so within a

reasonable time frame. As a result, Ms. Majewski reasonably believed, at the time she issued the authorization, that no conditions from Environment Canada were required.

[70] It is worth noting that DFO, through Ms. Majewski, has committed to amending the authorization should it be deemed necessary by Environment Canada. As I understand the process - although this matter is not before me - amendment to the authorization could be carried out at any time.

(e) Grizzly Bear Committees

[71] The grizzly bear population was a significant concern in both Joint Review Panel Reports. These concerns were reflected in the first federal response where Canada expressly, recognized at page 7 that the "[c]umulative effects of the proposed mine remain a threat to the viability of indicator species such as grizzly bears" and stated as follows:

> "The federal government must work in partnership with Alberta to ensure transboundary environmental effects which would threaten the long-term persistence of grizzly bear populations in Jasper National Park are mitigated.
>
> "To date, a process has been developed which provides for participation of federal government departments as members of two provincial decision-making committees which will determine detailed conditions and mitigation as individual elements of the project proceed."

[72] The second federal response was strong and clear on the requirement to continue joint efforts to protect grizzly bear habitat. Canada, in this response at page 2, stated its commitment to effective management and monitoring of environmental effects:

> "... through its continued participation in the regional initiatives and land use planning mechanisms in the Northeast Slopes Region. These include, but are not limited to, the Northeast Slopes Environmental Resource Committee, the Foothills Model Forest, the Cheviot Project Management Committee, the End-pit Lake Development Working Group, and the Selenium Working Group."

[73] At the time that CRC recommenced its project planning, two of the specifically-named committees - the Northeast Slopes Environmental Resource Committee and the Cheviot Mine Conservation and Reclamation Review Committee - had been disbanded. The Province of Alberta put forward an alternative proposal for the joint federal-provincial management of the project's impacts on grizzly bears.

[74] The Applicants assert that both Parks Canada and Environment Canada rejected Alberta's proposal. Hence, they submit, DFO's decision to issue the authorization without first ensuring that replacements were in place for the disbanded committees was not in conformity with the federal response.

[75] I first note that neither the Joint Review Panel Reports nor the federal responses conditioned the issuance of the authorization on the existence of these specifically named committees. Indeed, the second response specifically contemplated that mitigation could be accomplished through a number of committees and was not limited to those identified in the response. The essence of the federal responses was not the continuation of particular committees but, rather, joint federal-provincial initiatives to address the cumulative adverse impacts on the grizzly bear population and to implement the recommendations in the Joint Review Panel Reports.

[76] The affidavit and cross-examination of Ms. Majewski demonstrates that she had discussions with regulatory authorities in Alberta before issuing the authorization to ensure that replacement committees would be established to address mitigation measures. At that time, a number of working committees had already been struck and it was agreed that the parties would work together to establish an oversight steering committee. Based on the evidence before me, I am satisfied that DFO was taking the necessary steps to ensure that the mitigation measures identified in the federal responses would be implemented. The decision to issue the Mine Pit Authorization was in conformity with the federal responses on the issue of grizzly bear protection.

Issue No. 4: Did the Minister act contrary to law in issuing an authorization that permits activities prohibited by the Migratory Birds Convention Act and the Migratory Birds Regulations?

[77] The Applicants submit that the Mine Pit Authorization issued under the **Fisheries Act** permits CRC to deposit millions of tonnes of waste rock and materials into waters and other areas frequented by migratory birds. They claim that this is "contrary to law" within the meaning of paragraph 18.1(1)(4) of the **Federal Courts Act**, R.S.C. 1985, c. F-7 because the deposit of such materials is prohibited under subsection 35(1) of the **Migratory Birds Regulations**, C.R.C., c. 1035 ("**Migratory Birds Regulations**"), which provides that "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".

[78] This question was considered by the applications judge in the case of **Alberta Wilderness Association**. Although it was not necessary for the judge to decide the question, he agreed to do so for the benefit of the parties. He found that the waste rock that CRC proposed to deposit constituted a harmful substance. Further, at paragraphs 105 and 106, he stated:

> "The target of subsection 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 subsection 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, ... he or she is nevertheless liable under subsection 35(1) of the **MBCA Regulations** for so doing.
>
> "I agree with the applicants' argument that such liability makes the issuance of the authorization 'contrary to law' within the meaning of paragraph 18.1(4)(f) of the **Federal Court Act**."

[79] However, the judge declined to make a declaration or prohibit the issuance of further **Fisheries Act** authorizations because he was of the view that the Minister could obtain regulatory protection under subsection 35(2) of the **Migratory Birds Regulations**.

(a) Application of Res Judicata

[80] The Applicants take the view that the doctrine of issue estoppel (a subset of res judicata) applies on the basis of the conclusions made in **Alberta Wilderness Association** and that the Respondents should not be permitted to relitigate the issue in the present applications.

[81] The preconditions to the operation of issue estoppel were set out by the Supreme Court of Canada in **Angle v. Minister of National Rev-**

enue, [1975] 2 S.C.R. 248; 2 N.R. 397 at 254 [S.C.R.], and in **Danyluk v. Ainsworth Technologies Inc. et al.**, [2001] 2 S.C.R. 460; 272 N.R. 1; 149 O.A.C. 1, at para. 25 as follows:

> 1. that the same question has been decided;
>
> 2. that the judicial decision which is said to create the estoppel was final; and
>
> 3. that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[82] In my opinion, issue estoppel does not arise in the present case for the following reasons. First, the parties to this proceeding are not identical to those in the earlier application for judicial review. Sierra Club of Canada was not an Applicant in **Alberta Wilderness Association** and DFO was an intervener, not a respondent. Second, the Mine Pit Authorization that is the subject of the current challenge had not been drafted at the time of that decision. Therefore, the issues are not identical. Lastly, the Court's findings with respect to the **Migratory Birds Regulations** did not form the basis of the final judgment. Rather, the decision to allow the application for judicial review was based on the failure of the joint panel to conduct its environmental assessment in accordance with the **CEAA**. As discussed by Justice Dickson in **Angle** at page 255:

> "It will not suffice [for issue estoppel] if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment ... he question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceedings."

[83] I also note that, while the subject matter - the Cheviot mine - is the same, the project has been substantially reduced in scope. Further, I do not have before me the record that was before the Court in **Alberta Wilderness Association**. Five years of history on these matters have intervened and produced, I am quite certain, a substantially changed record. Beyond inferences that can be drawn from the judge's decision, I do not know what submissions were made to the Court. With a smaller project, changed record, different parties, a non-binding decision that was not fundamental to the decision, and new submissions, the situation is not one where either res judicata or issue estoppel is applicable.

[84] The Applicants urge me, even in the absence of a successful res judicata argument, to accord deference to the findings of the Court in **Alberta Wilderness Association**. However, a very significant difference is that the case before me deals with the mine pit rather than the entire access corridor. This is a material difference. One example of this difference involves the amount of rock to be deposited. In **Alberta Wilderness Association**, the Court concluded that the deposit of "millions of tonnes" of waste rock into creek beds "constitutes a threat to the preservation of migratory birds that nest there" and was thus "harmful" within the meaning of subsection 35(1) of the **Migratory Bird Regulations**. Given the large area covered by the Access Corridor authorization and the number of creeks in issue, his conclusion was no doubt supported by the record before the Court. However, while I have evidence before me that some rock will be deposited into Cheviot Creek to construct the dam that creates the Cheviot Pond, I have no evidence that suggests that the quantity of rock deposited will be in the "millions of tonnes".

[85] Accordingly, deference to or reliance on a conclusion that the deposit of rocks would be

harmful in the context of the Access Corridor authorization would be inappropriate in the context of the Mine Pit Authorization and on the basis of the limited facts before me.

(b) Applicability of subsection 35(1) of the Migratory Birds Regulations

[86] Since the doctrine of issue estoppel is not applicable, I will consider the question of the legality of the actions of DFO in issuing the Mine Pit Authorization on its merits.

[87] In submissions filed after the hearing of these applications, the Applicants referred to the case of **R. v. Ontario (Ministry of the Environment)**, [2001] O.J. No. 2581 (C.J.), (referred to as "**Deloro**") in support of their position. The case involved the abandoned Deloro mine site. In 1979, pursuant to the provincial **Environmental Protection Act** ("**EPA**"), the provincial Ministry of Environment took control of the mine site, to the same degree as a receiver or trustee in bankruptcy. In 1997, water and sediment samples taken from the vicinity of the former mine site showed high levels of contamination. The Ministry was charged with three counts of having discharged or permitted the discharge of a liquid contaminated with metals contrary to subsection 30(1) of the **Ontario Water Resources Act** ("**OWRA**") and five counts of permitting the deposit of a deleterious substance in a body of water frequented by fish, contrary to subsection 36(3) of the **Fisheries Act**. The key issue at trial was how the **OWRA** and the **Fisheries Act** could apply to the Ministry (described as the "remediator of last resort") who has control of the property under its obligations pursuant to the **EPA**.

[88] Justice Dorval found, at paragraph 154, that the Ministry "has permitted the discharge of liquid contaminated with metals in both the Moira River and Young's Creek and that such liquid had the ability to impair the quality of the water". In conclusion, however, she found that, while all elements of the offences were proven, the Ministry had exercised due diligence and was not guilty. The following passage from paragraphs 139 and 140 of that case illustrates Justice Dorval's view of the Ministry's role as a "remediator of last resort" and "intervening entity":

> "In my view the prosecution pursuant to any of these acts is not precluded by the obligations imposed on the defendant by the **E.P.A.** The acts are protective of the environment. The **E.P.A.** provides for Director's Orders to be issued and enforced. When a citizen or a corporation does not abide by the director's orders, the MOE enforces them and the citizen or corporation is liable to prosecution under all three acts. When the defendant assumes management and control over an abandoned property (or over a property still operated by an owner unwilling to act) it does so in order to protect the environment from further deterioration by the refusal to remediate. It must act accordingly. To limit the applicability of the **OWRA** and the **Fisheries Act** to new contamination or further contamination would essentially permit the entity who is intervening to ignore the historical problem as long as it did not add to the pollution. The remediator of last resort would have been given the authority to intervene, would be in control of the property yet could choose to act precisely in the same manner as the owner. In my view that is not an interpretation that is consistent with the common objective of the legislation.
>
> "Section 2 of the **OWRA** and section 3(2) of the **Fisheries Act** expressly set out that the acts bind the Crown. The intention of the legislator is quite clear. The intervening entity must proceed with the remediation of the property with due diligence. The entity is in-

deed immediately subject to prosecution for permitting discharges, which were not caused by it. The citizen who discharges a cup or even a teaspoon of contaminant without knowing its impact would be equally subject to prosecution. The status of the intervening party on the property, however, is a factor in assessing due diligence. The intervening party who is diligent would therefore not be successfully prosecuted."

[89] The Applicants submit that this authority applies to the case at bar. They argue that **Deloro** establishes that a Crown agency may be liable under parallel environmental protection legislation for acts undertaken in the course of the exercise of its statutory powers under its "primary legislation" - that being the **EPA**. They note that, in **Deloro**, permitting a discharge that caused harm to the environment was contrary to the law as stated in the **OWRA** and **Fisheries Act** and, accordingly, the Ministry was subject to prosecution. The Applicants urge me to draw the same conclusion on the basis that DFO is bound by the **Fisheries Act**, as its "primary legislation" and may not exercise its powers in a manner which breaches the prohibition contained in subsection 35(1) of the **Migratory Birds Regulations** because such exercise would be "contrary to law" within the meaning of paragraph 18.1(4)(f) of the **Federal Courts Act**.

[90] I do not accept the parallel between **Deloro** and the case before me that is urged by the Applicants. In my view, it is not sufficient to look solely at the fact that a government body was acting under the authority of another statute or "primary legislation" and draw from that fact the general conclusion that it is potentially liable under other legislation. I must consider the nature of the statutory authority under the "primary legislation". Is the government body, under that legislation, placed in a position of direct control or occupation of the property? Is it responsible for the day-to-day operations of a facility? Can it carry out activities or direct that activities be carried out on the property? If that is the nature of its authority, the government body may be viewed no differently than any operator of a property and may face liability for its actions or its failure to act, depending on the specific facts and the relevant legislation.

[91] Such was the situation faced by the Ministry in **Deloro**. Pursuant to the **EPA**, the Ministry assumed management and control over the abandoned mine site, with a direct role of protecting the environment from further deterioration. In the presence of provisions in both the **OWRA** and the **Fisheries Act** that set out that the Crown is bound by those acts, the Ministry could be prosecuted and convicted of offences under those statutes. In other words, the Ministry was in no different a position than any other private enterprise operating a mine site; it had effectively stepped into the shoes of the mine operator. **Deloro** does not stand for the proposition that, by granting an approval within its statutory mandate, DFO is "permitting a deposit" in the context of subsection 35(1) of the **Migratory Birds Regulations**.

[92] Not only is **Deloro** not authority for the proposition cited by the Applicants, it serves to highlight a distinction that must be drawn between a government entity acting as an authorizing body and one that is in actual management and control of a property. In the latter case, the government body that carries out the day-to-day management and directs activities on a property should be held accountable for its actions with respect to that property. But, where the government entity is carrying out its responsibilities of reviewing and, in compliance with any legislative guidance, issuing authorizations, it is not and should not be responsible for the conduct of a third-party operator where:

- The property is under the control and management of an entity independent of the governmental body;

- The conduct is not directly relevant to the authorization issued by or the mandate of the government entity in question; and

- The operator has failed to obtain authorization for the conduct pursuant to different legislation.

[93] In the situation before me, DFO has issued an authorization pursuant to subsection 35(1) of the **Fisheries Act**. DFO is not in control of the Cheviot mine site; CRC is. DFO's authorization was in respect of fish and fish habitat under the **Fisheries Act** and not in relation to migratory birds. Nothing in the **Fisheries Act** requires DFO to have regard to potential deleterious impacts on migratory birds. Beyond the four corners of the **Fisheries Act**, DFO has no ability to direct the management or operation of the Cheviot mine. Accordingly, I see no way that DFO, as a regulatory body, bears responsibility for the actions of CRC in the event that CRC breaches subsection 35(1) of the **Migratory Birds Regulations**.

[94] I agree with the Applicants that a government body may be liable under parallel environmental protection legislation for acts undertaken in the course of the exercise of its statutory powers under its "primary legislation". The case of **Deloro** is illustrative of this potential liability of the Crown. Thus, for example, it is possible (subject, of course, to the particular legislation in issue) that government departments or agencies who manage the operation of properties in their portfolios could be held liable in certain circumstances for incidents on those properties. If those bodies "permit" the deposit of "oil, oil wastes or any other substance harmful to migratory birds" into waters, one might be able to show, depending on the facts in any such incidents, a direct and sufficient connection that could constitute "permitting" under subsection 35(1) of the **Migratory Birds Regulations**. There is no such connection in the case before me.

[95] In issuing the Mine Pit Authorization under the **Fisheries Act**, DFO is not "permitting" CRC to deposit "millions of tonnes of waste rock and materials into waters and other areas frequented by migratory birds". Even if that were to be the result - which is far from proven - the actions of DFO in issuing the **Fisheries Act** authorization is not "contrary to law" within the meaning of paragraph 18.1(1)(4) of the **Federal Courts Act**, simply because the deposit of such materials may be prohibited under subsection 35(1) of the **Migratory Birds Regulations**.

[96] Given this conclusion, it is not necessary for me to consider whether the elements of an offence under subsection 35(1) of the **Migratory Birds Regulations** have been established. Indeed, I am reluctant to go any further in this analysis. If the activities of CRC are seen to be breaching the provisions of the **Migratory Birds Regulations**, charges may be laid against CRC. In such an event, a proper context and factual basis for the alleged offences would be before the appropriate court.

CONCLUSION

[97] For the foregoing reasons, Orders dismissing the applications for judicial review will be issued by this Court.

[98] In view of my determination that the issuance of the Mine Pit Authorization under the **Fisheries Act** is not contrary to law pursuant to section 35 of the **Migratory Birds Regulations**, there is no need to address the consti-

tutional question raised by CRC.

[99] If the parties cannot agree on the matter of costs, they will have until September 9, 2005 to file submissions on costs, such submissions not to exceed three pages, double spaced. All parties will have until September 16, 2005 to exceed one page.

Applications dismissed.

Editor: Angela E. McKay/vnh

Jacques Rice (demandeur) v. Procureur général du Canada (défendeur)
(T-247-05; 2005 CF 1188; 2005 FC 1188)

Indexed As: Rice v. Canada (Attorney General)

Federal Court
Harrington, J.
August 31, 2005.

Summary:

A parolee appealed a decision to issue a parole suspension warrant. The National Parole Board, Appeal Division, dismissed the appeal. The parolee applied for judicial review.

The Federal Court allowed the application, set aside the Board's decision and referred the matter to a differently constituted panel for rehearing and determination.

Administrative Law - Topic 2145

Natural justice - Administrative decisions or findings - Failure to consider evidence - Rice, a parolee, missed his curfew for several reasons, including that his car broke down and he believed that he was having a heart attack - His girlfriend called an ambulance - Rice asked her to call his halfway house - During a correctional officer's investigation, a hospital employee corroborated Rice's story but added that Rice had admitted to drinking a few beers and that his breath smelled of alcohol - A condition of Rice's parole prohibited alcohol consumption - The source of the alcohol consumption allegation was not disclosed to Rice - Rice objected and offered the results of his blood tests taken at emergency - A parole suspension warrant was issued based on, inter alia, Rice's attitude and earlier suspicions concerning alcohol consumption which had resulted in two negative urine analyses - The National Parole Board, Appeal Division, dismissed Rice's appeal without considering the blood tests - The Federal Court held that Rice was denied procedural fairness where the Board excluded and refused to consider a scientific analysis conducted at the hospital that might have exonerated Rice.

Criminal Law - Topic 5666.4

Punishments (sentence) - Imprisonment and parole - Parole hearing - Evidence - [See **Administrative Law - Topic 2145**].

Criminal Law - Topic 5667

Punishments (sentence) - Imprisonment and parole - Parole - Forfeiture, revocation or termination of - [See **Administrative Law - Topic 2145**].

Cases Noticed:

Mooring v. National Parole Board et al., [1996] 1 S.C.R. 75; 192 N.R. 161; 70 B.C.A.C. 1; 115 W.A.C. 1, refd to. [para. 10].

Canadian Union of Public Employees et al. v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539; 304 N.R. 76; 173 O.A.C. 38; 2003 SCC 29, refd to. [para. 15].

Cardinal and Oswald v. Kent Institution (Di-