

---

# Manitoba'S Future Forest Alliance v. Canada (Minister of The Environment), 1999 CanLII 8362 (FC)

Date: 1999-06-18  
Docket: T-434-98  
Parallel citations: 170 FTR 161  
URL: <http://canlii.ca/t/4710>  
Citation: Manitoba'S Future Forest Alliance v. Canada (Minister of The Environment), 1999 CanLII 8362 (FC), <<http://canlii.ca/t/4710>> retrieved on 2012-07-03  
Share:     
Noteup: [Search for decisions citing this decision](#)  
Reflex Record [Related decisions, legislation cited and decisions cited](#)

---

**Date: 19990618**

**Docket: T-434-98**

## **BETWEEN:**

**MANITOBA"S FUTURE FOREST ALLIANCE and**

**DONALD V. SULLIVAN**

**Applicants**

**- and -**

**THE MINISTER OF THE ENVIRONMENT, THE**

**MINISTER OF FISHERIES AND OCEANS and**

**TOLKO MANITOBA INC.**

**Respondents**

**REASONS FOR JUDGMENT**

**NADON J.:**

[1] The Applicants seek to set aside a decision approving the construction of the Sewap Creek Bridge<sup>1</sup> in Manitoba pursuant to [section 5](#) of the *Navigable Waters Protection Act*<sup>2</sup> ("NWPA").

## **THE FACTS**

[2] The facts of this case are as follows: The Respondent Tolko Manitoba Inc. ("Tolko") is a division of Tolko Industries Ltd., a Canadian forest products company. Tolko acquired its Manitoba operations from Repap

Enterprises Inc. ("Repap") in August 1997. Repap had previously acquired those operations from the Province of Manitoba in 1989. These operations have been in existence under various forms of ownership since 1969.

[3] Tolko's projects encompass the conversion and expansion of an existing pulp mill, the construction of a new pulp mill, the construction of hundreds of kilometres of all-season and seasonal logging roads across dozens of navigable waterways, and other related forestry activities across 11 million hectares of land in Manitoba.

[4] In December 1995, Repap applied for licences pursuant to the *Environment Act* (Manitoba) for its 1997-2009 Forest Management Plan ("13 year F.M.P.") and for the construction of a new bleached chemothermomechanical pulp ("BCTMP") mill. The application for the licence in regard to the BCTMP mill has not been pursued.

[5] Pursuant to the Canada-Manitoba Harmonization Agreement of January 1996, the province of Manitoba gave notice to the Canadian Environmental Assessment Agency (the "Assessment Agency") of Repap's application for licences for the 13 year FMP and BCTMP mill and, in due course, provided copies of all relevant documents to the Assessment Agency.

[6] Before completion of the 13 year FMP licencing process, Repap was required to apply for an additional licence under the *Environment Act* for its 1997 annual harvest and renewal plan (the "Annual Plan").

[7] Repap's Annual Plan was submitted in the fall of 1996. In December 1996, the province of Manitoba provided copies thereof to the Assessment Agency, the Department of Fisheries and Oceans - Habitat Management ("DFO"), the Canadian Coast Guard ("CCG") and Canadian Heritage. The Sewap Creek Bridge was proposed for development in Repap's Annual Plan.

[8] Repap received its licence from the Province of Manitoba under the *Environment Act* for the Annual Plan. The licence included conditions which required Repap to provide to the federal government department responsible for administering the *NWPA* all relevant information with respect to proposed stream crossings, and to submit to the responsible federal government department administering the *Fisheries Act*<sup>3</sup> information relating to, *inter alia*, the Sewap Creek crossing. Repap complied with these conditions.

[9] As part of the licencing process under the *Environment Act*, the Annual Plan was circulated among various federal and provincial governmental departments for review and comments including those of the Canadian Coast Guard ("CCG"), which identified Sewap Creek as a navigable waterway.

[10] On February 19, 1997, Repap submitted an application to the CCG for approval pursuant to [subsection 5\(1\)](#) of the *NWPA* to construct a bridge across Sewap Creek. The approval process triggered an environmental assessment pursuant to [paragraph 5\(1\)\(d\)](#) of the *Canadian Environmental Assessment Act*<sup>4</sup> ("*CEAA*"). By letter dated June 18, 1997, Repap was advised by the CCG that it was reviewing the application for the Sewap Creek Bridge under the *NWPA*, and that the *CEAA* would be applied prior to making any decision.

[11] I should note that, while the CCG and other involved federal departments were reviewing the Sewap Creek Bridge application, they were in possession of the relevant documents in connection with Repap's Annual Plan and Repap's 13 year FMP. These authorities were also in receipt of an environmental impact statement prepared in connection with Repap's 13 year FMP. No doubt the authorities had an opportunity to review Repap's operations in light of environmental issues and thus, raise concerns which may have stemmed from that review. In the event, no environmental assessment was triggered pursuant to [section 5\(1\)](#) of the *CEAA*, save in respect of the Sewap Creek Bridge application.

[12] I should also point out that since Repap's applications regarding the 13 year FMP and the BCTMP mill, nor the licences subsequently issued, required a federal authority to exercise a power or perform a duty or function in respect of a project as set out in [section 5\(1\)](#) of the *CEAA*, nor authorized Repap to do anything that would require a federal authority to exercise a power or perform a duty or function in respect of a project as set in [section 5\(1\)](#) of the *CEAA*, no environmental assessment was triggered pursuant to [section 5\(1\)](#) of the *CEAA*.

[13] In screening the application for the Sewap Creek Bridge submitted by Repap, the CCG determined the scope of the project pursuant to [subsection 15\(1\)](#) of the *CEAA* to be "the construction of the bridge along with its

approaches and accesses directly relating to the bridge". The CCG, in screening the application, referred all relevant information concerning the project, pursuant to [subsection 12\(3\)](#) of the *CEAA*, to those federal departments "in possession of specialist or expert information or knowledge with respect to" the project.

[14] Pursuant to [subsection 15\(3\)](#) of the *CEAA*, the CCG determined the scope of the environmental assessment to include "the environmental effects at and downstream of the bridge site, identified in [paragraph 16\(1\)\(a\)](#) and [section 2](#) of *CEAA*, of the bridge and any works related to the construction, operation and maintenance of the bridge". Further, the CCG concluded that the cumulative effects of the project

"are limited to hydraulic impacts of the project in combination with other works along the waterway and within the confines of the Sewap Creek. Upstream, within 5 km of the crossing site, there are no crossings of the Sewap Creek. Flood intensification effects of the structure are insignificant and have been addressed by the design of the bridge structure itself."

[15] The Department of Fisheries and Oceans ("DFO"), after reviewing the information and documents relating to the proposed Sewap Creek Bridge, concluded that the project was "not likely to cause significant adverse effects on fish and fish habitat after taking into account the implementation of appropriate mitigation measures". DFO further concluded that no authorization under [subsection 35\(2\)](#) of the *Fisheries Act* was required and that, as a result, DFO would not be a "responsible authority" under the *CEAA*. The Department of Indian and Northern Affairs also concluded that the Sewap Creek Bridge would have no adverse effect on any First Nation or lands selected by First Nations under their treaty land entitlement.

[16] The CCG, after receipt and consideration of all the information received from the federal departments that screened the Sewap Creek Bridge application, concluded that the project would not likely cause significant adverse effects and that, consequently, an approval under [subsection 5\(1\)](#) of the *NWPA* was in order.

[17] On August 15, 1997, the CCG, on behalf of the Minister of Fisheries and Oceans<sup>5</sup>, approved the application for the Sewap Creek Bridge under the *NWPA*. Construction of the Sewap Creek Bridge began shortly thereafter, and was completed in late August, 1997. The Sewap Creek Bridge is now in use.

[18] On March 17, 1998, the Applicants filed the present application for judicial review. In their revised memorandum of fact and law, at page 45, the applicants set out the relief which they seek:

- 1) A declaration that the Respondent Ministers have unlawfully and invalidly failed to require a single environmental assessment of the proposed project by Tolko Manitoba Inc. ("Tolko") to modify and expand an existing pulp mill, construct a new pulp mill, construct over 800 km of new all-weather roads and infrastructure, and carry out related undertakings, as required by [s. 15\(3\)](#) of the *Canadian Environmental Assessment Act*;
- 2) An order in the nature of *certiorari* quashing the *Navigable Waters Protection Act* permit issued to Tolko for its Sewap Creek bridge, for the failure of the Respondent Minister of Fisheries and Oceans to comply with the requirements of the *Canadian Environmental Assessment Act*, [s. 15\(3\)](#);
- 3) An order granting the Applicants their costs in this application.

[19] As it appears from the relief sought by the applicants, the applicants seek more than judicial review of the Sewap Creek Bridge project. With regard to the relief sought in regard to matters other than the Sewap Creek Bridge, I can do no better than to refer to paragraphs 77, 78 and 79 of the Ministers' memorandum where counsel submits the following:

77. The Applicants have taken the position that various former and present plans, proposals and applications related to Repap and Tolko's forestry operations within the Province of Manitoba are relevant to this application for judicial review of the decision to approve the Sewap Creek Bridge.

78. The respondent Ministers submit that the only issue in this application is the interpretation and application of [s. 15\(3\)](#) of the *CEAA* to the environmental assessment carried out with respect to the Sewap Creek Bridge. The facts and arguments advanced by the Applicants with respect to other proposals and

projects are of little or no assistance in determining this matter.

79. Of all of the failures alleged against federal authorities, the only one subject to review by the court is the decision by the CCG to issue the Sewap Creek permit. The Applicants are seeking to quash that permit. All of the representations of the Applicants must be taken in this context.

[20] In the introductory paragraph to their memorandum, counsel for Tolko put their submission on this point as follows:

The applicants seek different and wide ranging forms of relief, including orders of certiorari and prohibition in various declarations. It must be kept in mind that this Application is founded on [section 18.1](#) of the *Federal Court Act* and specifically judicial review of one particular decision to approve of the construction of the Sewap Creek Bridge. The application is not a review of other decisions or events about which the applicants complain extensively in their material, such as alleged deficiencies in provincial licences granted to Tolko; alleged failures of various federal Ministers to act on other alleged "triggers" under the *Canadian Environmental Assessment Act*; events dating back many years in relation to developments that never went ahead and at a time when different legislation was in effect; or alleged failures by federal ministries or Tolko in the course of the hearings by the Manitoba Clean Environment Commission. If the applicants had wished to challenge any of these other matters, they should have done so at an appropriate time and in the proper forum. They are irrelevant to a judicial review of the particular decision in question, namely the approval under [Section 5](#) of the *Navigable Waters Protection Act* in respect of the Sewap Creek Bridge.

[21] I agree entirely with the view taken by the respondents that the only decision which is the proper subject of the judicial review application before me is the decision made to allow the Sewap Creek Bridge project to go forward.

#### THE ISSUE

[22] The issue in this matter is whether the environmental assessment, which led to the approval of Repap's application to construct a bridge across Sewap Creek, was made in accordance with [subsection 15\(3\)](#) of the *CEAA*.

#### PARTIES' POSITIONS

[23] The Applicants submit that the CCG interpreted [subsection 15\(3\)](#) too narrowly and should have included within its environmental assessment various former and present plans, proposals and applications related to Repap and Tolko's forestry operations such as the proposed logging road from the bridge, the application for the 1997-2009 Forest Management Plan ("13 year FMP") pursuant to which Repap could harvest in the aggregate two million cubic metres annually of hardwood and would construct 859 kms. of all-weather roads and the new 500 tonnes per day bleached chemo-thermomechanical pulp ("BCTMP") mill<sup>6</sup>.

[24] The Respondents submit that the CCG correctly applied [subsection 15\(3\)](#) of the *CEAA*.

#### LEGISLATION

[25] The *NWPA* and the *CEAA* are both relevant to the determination of the issue before me. In [Section 3](#) of the *NWPA*, "work" is defined as follows:

"work" includes

(a) any bridge, boom, dam, wharf, dock, pier, tunnel or pipe and the approaches or other works necessary or appurtenant thereto,

"ouvrages" Sont compris parmi les ouvrages\_:

a) les ponts, estacades, barrages, quais, docks, jetées, tunnels ou conduites ainsi que les abords ou autres ouvrages nécessaires ou accessoires;

[26] [Subsection 5\(1\)](#) of the *NWPA* provides for federal approval of a "work" built across navigable waters:

5. (1) No work shall be built or placed in, on, 5. (1) Il est interdit de construire ou de placer un ouvrage dans

over, under, through or across any navigable water unless  
des eaux navigables ou sur, sous, au-dessus ou à travers de telles eaux à moins que:

(a) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;  
a) préalablement au début des travaux, l'ouvrage, ainsi que son emplacement et ses plans, n'aient été approuvés par le ministre selon les modalités qu'il juge à propos;

(b) the construction of the work is commenced within six months and completed within three years after the approval referred to in paragraph (a) or within such further period as the Minister may fix; and  
b) la construction de l'ouvrage ne soit commencée dans les six mois et terminée dans les trois ans qui suivent l'approbation visée à l'alinéa a) ou dans le délai supplémentaire que peut fixer le ministre;

(c) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (a).  
c) la construction, l'emplacement ou l'entretien de l'ouvrage ne soit conforme aux plans, aux règlements et aux modalités que renferme l'approbation visée à l'alinéa a).

[27] [Section 2](#) of the *CEAA* defines the terms "project" and "responsible authority" as follows:

"project" means "projet" Réalisation

(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or  
y compris l'exploitation, la modification, la désaffectation ou la fermeture " d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59b).

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

"responsible authority", in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted;  
"autorité responsable" L'autorité fédérale qui, en conformité avec le paragraphe 11(1), est tenue de veiller à ce qu'il soit procédé à l'évaluation environnementale d'un projet.

[28] [Section 4](#) of the *CEAA* sets out the purposes of the *CEAA*:

4. The purposes of this Act are 4. La présente loi a pour objet:

(a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;  
a) de permettre aux autorités responsables de prendre des mesures à l'égard de tout projet susceptible d'avoir des effets environnementaux en se fondant sur un jugement éclairé quant à ces effets;

(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) 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) 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.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;

- |  |  |
|--|--|
| (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 | c) de faire en sorte que les éventuels effets environnementaux négatifs importants des projets devant être réalisés dans les limites du Canada ou du territoire domanial ne débordent pas ces limites; |
| (d) to ensure that there be an opportunity for public participation in the environmental assessment process.   | d) de veiller à ce que le public ait la possibilité de participer au processus d'évaluation environnementale.  |

[29] [Subsection 5\(1\)](#) of the [CEAA](#) sets out what projects are to be assessed under the [CEAA](#):

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

- |   |  |
|---|--|
| (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;   | a) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;   |
| (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; | b) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en oeuvre 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 oeuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement; |
| (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 those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or  | 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 oeuvre du projet en tout ou en partie;  |
| (d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.   | d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.   |

[30] Sections 11 and 12 deal with the "responsible authority" referred to in [section 5](#):

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in <a href="#">section 5</a> in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.	11. (1) Dans le cas où l'évaluation environnementale d'un projet est obligatoire, l'autorité fédérale visée à l'article 5 veille à ce que l'évaluation environnementale soit effectuée le plus tôt possible au stade de la planification du projet, avant la prise d'une décision irrévocable, et est appelée, dans la présente loi, l'autorité responsable de ce projet.
---	---

(2) A responsible authority shall not exercise any power or perform any duty or function referred to in [section 5](#) in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(a) or 37(1)(a). (2) L'autorité responsable d'un projet ne peut exercer ses attributions à l'égard de celui-ci que si elle prend une décision aux termes des alinéas 20(1)a) ou 37(1)a).

12. (1) Where there are two or more responsible authorities in relation to a project, they shall together determine the manner in which to perform their duties and functions under this Act and the regulations. 12. (1) Dans le cas où plusieurs autorités responsables sont chargées d'un même projet, elles décident conjointement de la façon de remplir les obligations qui leur incombent aux termes de la présente loi et des règlements.

(2) In the case of a disagreement, the Agency may advise responsible authorities and other federal authorities with respect to their powers, duties and functions under this Act and the manner in which those powers, duties and functions may be determined and allocated among them. (2) En cas de différend, l'Agence peut conseiller les autorités responsables et les autres autorités fédérales sur leurs obligations communes et sur la façon de les remplir conjointement.

(3) Every federal authority that is in possession of specialist or expert information or knowledge with respect to a project shall, on request, make available that information or knowledge to the responsible authority or to a mediator or a review panel. (3) Il incombe à l'autorité fédérale pourvue des connaissances voulues touchant un projet de fournir, sur demande, les renseignements pertinents à l'autorité responsable ou à un médiateur ou à une commission.

(4) Where a screening or comprehensive study of a project is to be conducted and a jurisdiction has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part thereof, the responsible authority may cooperate with that jurisdiction respecting the environmental assessment of the project. (4) L'autorité responsable peut, dans le cadre de l'examen préalable ou de l'étude approfondie d'un projet, coopérer, pour l'évaluation environnementale de celui-ci, avec l'instance qui a la responsabilité ou le pouvoir d'effectuer l'évaluation des effets environnementaux de tout ou partie d'un projet.

(5) In this section, "jurisdiction" means (5) Dans le présent article, "\_instance\_" s'entend:

(a) the government of a province; a) du gouvernement d'une province;

(b) an agency or a body that is established pursuant to the legislation of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a project; b) d'un organisme établi sous le régime d'une loi provinciale ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet;

(c) a body that is established pursuant to a land claims agreement referred to in [section 35](#) of the [Constitution Act, 1982](#) and that has powers, duties or functions in relation to an assessment of the environmental effects of a project; or c) d'un organisme, constitué aux termes d'un accord sur des revendications territoriales visé à l'[article 35](#) de la [Loi constitutionnelle de 1982](#), ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet;

(d) a governing body that is established pursuant to legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a project. d) d'un organisme dirigeant, constitué par une loi relative à l'autonomie gouvernementale des Indiens, ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet.

[31] [Subsection 15\(1\)](#) of the [CEAA](#) provides that the scope of the project is to be determined by the responsible authority:

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

15. (1) L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.

(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.

[32] Subsection 15(2) of the *CEAA* gives discretion to the responsible authority to consider two or more projects to form a single project:

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

(a) the responsible authority, or

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

(2) Dans le cadre d'une évaluation environnementale de deux ou plusieurs projets, l'autorité responsable ou, si au moins un des projets est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, peut décider que deux projets sont liés assez étroitement pour être considérés comme un seul projet.

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

[33] Subsection 15(3) of the *CEAA* sets out the scope of the environmental assessment in the following terms:

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

(3) 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) the responsible authority, or a) l'opération est proposée par le promoteur;

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

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.

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

[34] Section 16 of the *CEAA* sets out those factors to be considered by the responsible authority in assessing a project:

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:

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

(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](#).

(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.

I wish to point out that [subsection 16\(3\)](#) provides that the scope of the factors which appear in paragraphs (1)(a), (b) and (d) and (2)(b), (c) and (d) are to be determined by the responsible authority.

[35] [Section 59](#) of the [CEAA](#) confers upon the Governor in Council the power to make regulations in regard to a number of matters. More particularly, [paragraph 59\(f\)](#) provides as follows:

59. The Governor in Council may make regulations 59. Le gouverneur en conseil peut, par règlement:

... ..

(f) prescribing the provisions of any Act of Parliament or any regulation made pursuant thereto that confer powers, duties or functions on federal authorities the exercise or performance of which requires an environmental assessment under [paragraph 5\(1\)\(d\)](#); f) déterminer les dispositions législatives ou réglementaires fédérales prévoyant les attributions des autorités fédérales relativement à un projet dont l'exercice rend nécessaire une évaluation environnementale en vertu de l'[alinéa 5\(1\)d\)](#);

[36] Pursuant to [paragraph 59\(f\)](#), the Governor in Council enacted the [Law List Regulations](#), SOR-74/636 which specifies the statutory and regulatory provisions which trigger the requirement for an environmental assessment. [Paragraph 5\(1\)\(a\)](#) of the [NWPA](#) is a trigger listed in the [Law List Regulations](#).

## ANALYSIS

[37] I begin my analysis with the definition of "project" found in [section 2](#) of the [CEAA](#), which I again set out for ease of reference:

"project" means "projet" Réalisation

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

y compris l'exploitation, la modification, la désaffectation ou la fermeture " d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'[alinéa 59b\)](#).

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

[38] In the present instance, I am only concerned with paragraph (a) of the definition of "project" as the project at issue is one that relates to a physical work, i.e. the Sewap Creek Bridge. Since the environmental trigger was [subsection 5\(1\)](#) of the [NWPA](#), the CCG became responsible for the environmental assessment. The CCG, as the responsible authority, determined, pursuant to [subsection 15\(1\)](#) of the [CEAA](#), that the scope of the project was "the construction of the bridge along with its approaches and accesses directly relating to the bridge". The respondents argued that this determination was reasonable and that it was within the discretion conferred upon the responsible authority under [subsection 15\(1\)](#) of the [CEAA](#). In light of the evidence before me, I can find no error on the part of the CCG in regard to its determination of the scope of the project.

[39] Before turning to [subsection 15\(3\)](#) of the *CEAA*, I note in passing that the responsible authority may, pursuant to [subsection 15\(2\)](#) of the *CEAA*, consider two or more projects to constitute a single project. In the event, the CCG did not make any determination under [subsection 15\(2\)](#).

[40] [Subsection 15\(3\)](#) of the *CEAA* deals with the scope of the environmental assessment of the project. The CCG determined the scope of the environmental assessment to include "the environmental effects at and downstream of the bridge site, identified in [paragraph 16\(1\)\(a\)](#) and [section 2](#) of *CEAA*, of the bridge and any works related to the construction, operation and maintenance of the bridge". Finally, under [paragraph 16\(1\)\(a\)](#) of the *CEAA*, the CCG determined the cumulative effects of the bridge project to be as follows:

"are limited to hydraulic impacts of the project in combination with other works along the waterway and within the confines of the Sewap Creek. Upstream, within 5 km of the crossing site, there are no crossings of the Sewap Creek. Flood intensification effects of the structure are insignificant and have been addressed by the design of the bridge structure itself."

[41] After taking into account the information received from the federal departments that screened Repap's application, the CCG concluded that the Sewap Creek Bridge would not likely cause significant effects on the environment such that the project under 5(1) of the *NWPA* should be allowed to go further. As part of the information received by the CCG, was the advice received from DOF and the Department of Indian and Northern Affairs.

[42] For the reasons that follow, I have not been persuaded that the CCG erred in its determination of the scope of the assessment pursuant to [subsection 15\(3\)](#) of the *CEAA*. Consequently, there is no basis, either in fact or in law, to interfere with the impugned decision.

[43] The event which triggered the application of the *CEAA* is Repap's application for the construction of the Sewap Creek Bridge. The bridge is, no doubt, a physical work and, consequently, the relevant part of the definition is that which appears at paragraph (a) of the definition of "project" in [section 2](#) of the *CEAA*.

[44] The project includes the bridge itself and, to use the wording of [section 2](#), "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, ...". In attempting to construe the meaning of the words "or other undertaking in relation to that physical work", counsel for the Ministers argued that the word "undertaking" in the definition could only mean undertakings which related to the life cycle of the physical work, i.e. in this case the Sewap Creek Bridge. I agree.

[45] Counsel referred me to the Federal Court of Appeal's decision in *Consumers Association of Canada v. Canada (Postmaster General)*, (1975) 11 N.R. 181, where the Court of Appeal was faced with a problem of statutory interpretation concerning the meaning of "of other associations" in the phrase "a fraternal, trade, professional or other association".

[46] At pages 186 and 187, the Court makes the following comments:

The rule of construction generally known as the "*ejusdem generis*" rule was cited by counsel for the Applicant as applicable to if not decisive in this case. This rule is designed to assist in ascertaining the true intention of Parliament and is often a thoroughly sound guide. Looking at all the terms in the paragraph which describe specific kinds of organizations, all of which have meanings quite limited in scope, and particularly at the words "fraternal, trade, professional", we cannot think that Parliament meant, by simply adding the words "or other association", to bring every conceivable kind of association of human beings within the provisions of the paragraph. If that had been the intention of Parliament there would have been no need to spell out several specific kinds of associations. Words like "any kind of association whatever" would have been sufficient. Or, if it was thought desirable to name some specific associations, the addition of words like "or any other association, whether "*ejusdem generis*" with the foregoing or not" would have sufficed to make the intention clear.

[47] The words "or other undertaking in relation to that physical work" follow the words "any proposed construction, operation, modification, decommissioning, abandonment". I agree with counsel for the Ministers that, in the context of the definition, the words "or other undertaking in relation to that physical work" must mean undertakings which are within the same class as those undertakings which are specifically mentioned, i.e.

construction, operation, modifications, decommissioning, abandonment. These undertakings, as counsel submits, are possible events in the life cycle of a physical work. Consequently, the words "or other undertaking in relation to that physical work" can only mean undertakings which relate to, in this case, the life cycle of the Sewap Creek Bridge. In my view, the wording of the definition cannot give rise to any other possible interpretation.

[48] I find comfort in the French version of the definition which is as follows:

"project" means "projet" Réalisation

(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or y compris l'exploitation, la modification, la désaffectation ou la fermeture " d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'[alinéa 59b](#)).

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

[49] In the French version, the word "ouvrage" is the equivalent of the words "physical work" found in the English version. The French version is drafted in more simple terms and, in my view, makes it clear that the words "other undertaking in relation to that physical work" found in the English version can only mean undertakings within the class of those undertakings specifically mentioned in the definition.

[50] I agree entirely with counsel for the Ministers when he submits, at paragraph 29 of his memorandum that:

The french [*sic*] version supports the argument that only undertakings related to the life cycle of the physical work comprise the project, by using the word "réalisation" as the core of the definition and then identifying as sub-components a class of undertakings. The relevant portion translated reads: The carrying out - including the operation, modification, decommissioning, or the closure - of a physical work. The class and chronology are fully supportive of the position advanced with respect to the english [*sic*] text. In fact, the use of the word "réalisation" excludes the argument that other undertakings, not within the carrying out of the physical work, can or ought to be included in the "project".

[51] Thus, with regard to the Sewap Creek Bridge project, the term project means, in my view, the bridge itself and all undertakings in relation to the life cycle of the bridge. Consequently, it is the scope of that project which the CCG had to determine under [subsection 15\(1\)](#).

[52] I now turn to [subsection 15\(3\)](#) of the *CEAA*. For ease of reference, I again reproduce the subsection:

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

(3) 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) the responsible authority, or a) l'opération est proposée par le promoteur;

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

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.

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

[53] As the Sewap Creek Bridge project is undoubtedly in relation to a physical work, the subsection is highly relevant. The wording of [subsection 15\(3\)](#) is very similar to the wording used in [section 2](#) to define the word "project". The only difference between the two wordings is that, under [subsection 15\(3\)](#), the responsible authority shall conduct an environmental assessment not only in regard to undertakings in relation to the physical work proposed by the proponent but also in regard to those undertakings which, in the opinion of the responsible authority, are "likely to be carried-out in relation to that physical work". However, with respect to the nature of the undertakings subject to the responsible authority's environmental assessment, the wording of [subsection 15\(3\)](#) cannot be distinguished from that of the wording used in [section 2](#) to define "project". In other words, the responsible authority must assess all undertakings which relate to the life cycle of the physical work, i.e. in the present matter, the Sewap Creek Bridge. I cannot put it better than counsel for the Ministers when he submits, at paragraph 40 of his memorandum that:

The effect of [s. 15\(3\)](#), making use of the concept of "project", as defined in [s. 2](#), and as supported by the french [*sic*] language version of both sections, is that the scope of the assessment of a physical work project may be increased beyond what is proposed in the project itself, in order to take into account the environmental effects of the undertakings the responsible authority believes are likely to be carried out to carry the project through its life cycle.

[54] The French language version of [subsection 15\(3\)](#) reads as follows:

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

(3) 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) the responsible authority, or a) l'opération est proposée par le promoteur;

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

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.

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

[55] In the French version, the word "opération" is equivalent to the word "undertaking" found in the English version. I agree with counsel for the Ministers that the French language version supports the view that he has put forward regarding the construction of [subsection 15\(3\)](#).

[56] The position taken by the Ministers, with which I agree entirely, seems to find support in the 1995 annotated *Canadian Environmental Assessment Act* where the learned author writes the following at page 666:

**Subsections 15(1) and (3)** -- deal with the tasks of defining the project and project undertakings. Adopting the position that [section 15](#) deals with the "project subject to assessment", [subsection 15\(1\)](#) says that this project is what the responsible authority says it is; or, where the project is referred to the Minister, the project is what the Minister says it is. This approach would appear to determine the approach to dealing with the assessment of multiple activities of projects. [Section 5](#) of the CEAA repeatedly refers to projects "in whole or in part", Having regard to the definition of "project", one part of a project would be a single activity related to the project, such as constructing the project, while another part of the project would be operating the project. Each of these activities in respect of a project may be subject to the Act and potentially subject to separate assessment. As [subsection 15\(1\)](#) provides that the federal decision maker determines the scope of the project, this decision maker would appear to have power to combine or separate different activities associated with the same project. However, [subsection 15\(3\)](#) appears to approach the matter of projects undertakings differently than [subsection 15\(1\)](#). It requires the responsible authority or the Minister to carry out the environmental assessment of any physical work by considering every undertaking "likely to be carried out in relation to that physical work". Relating this approach

back to [section 5](#), if a federal authority is faced with a construction project that requires prior federal environmental assessment, [subsection 12\(3\)](#) would require the responsible authority dealing with the assessment of the project to consider all other undertakings likely to be carried out with the project such as operation and abandonment. [Subsection 12\(3\)](#) provides the responsible authority or the Minister with the power to make the decision on the undertakings subject to assessment, but it also appears to require assessment of any undertaking proposed by the proponent in relation to the physical work.<sup>7</sup>

[57] The applicants argued that the change in terminology from the definition of "project" in [section 2](#) which says that a project means "any proposed construction" to the terminology used in [subsection 15\(3\)](#) which says that an environmental assessment shall be conducted in respect of "every construction ... proposed by the proponent" suggests an expansive approach to be taken in an environmental assessment. The applicants, in my view, have failed to recognize that both expressions are qualified by the phrase "in relation to that physical work" which restricts the scope of the assessment to those undertakings that are related to the physical work.

[58] Consequently, I cannot accept the applicants' submissions that the CCG ought to have conducted an environmental assessment with regard to Tolko's forestry operations, and in particular with regard to the modification and expansion of an existing pulp mill, the construction of a new pulp mill and the construction of 800 kilometres of new all weather roads and infrastructure. Tolko's forestry operations are not, in my view, undertakings in relation to the Sewap Creek Bridge nor are they undertakings which are "likely to be carried out" in relation to the Sewap Creek Bridge.

[59] In screening the Sewap Creek Bridge project, the CCG gave consideration to [subsection 16\(1\)](#) of the *CEAA* which requires it to include for consideration a certain number of factors. In that respect, the CCG considered the environmental effects of the bridge and any work related to the construction, operation and maintenance of the bridge, including the environmental effects of malfunctions or accidents that might occur in connection with the project and any cumulative environmental effects that were likely to result from the project in combination with other projects or activities that have been or will be carried out at and downstream of the bridge site. The CCG concluded that the cumulative environmental effects of the Sewap Creek Bridge project were

"are limited to hydraulic impacts of the project in combination with other works along the waterway and within the confines of the Sewap Creek. Upstream, within 5 km of the crossing site, there are no crossings of the Sewap Creek. Flood intensification effects of the structure are insignificant and have been addressed by the design of the bridge structure itself."

[60] [Subsection 16\(3\)](#) provides in clear terms that the determination of the scope of the factors under [subsection 16\(1\)](#) is to be determined by the responsible authority. In the present instance, the CCG made a determination regarding the scope of the factors and, in my view, that determination was open to the CCG. Hence, I see no basis for intervention in regard to that determination. In *Union of Nova Scotia Indians v. Canada (Attorney General)* [1996 CanLII 3847 \(FC\)](#), (1997) 1 F.C. 325, my colleague McKay J., at pages 348-349, made the following comments, with which I agree, regarding the nature of the decisions made under the *CEAA* and the Court's duty to defer to the statutory decision-maker:

Yet it must be remembered that the decision of the Ministers under the *CEAA* is not a scientific decision; it is a decision made in the exercise of judgment that takes into account appropriate scientific, economic, political and social considerations. In *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (C.A.) (QL), the Court of Appeal described the process under *CEAA* as follows [at paragraph 10]:

No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes ... 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.

The very nature of the decision means that in judicial review proceedings, the Court must inevitably defer to the statutory decision maker, unless persuaded that the decision is patently unreasonable, in the sense that it cannot rationally be justified in light of all the information available to the decision maker at the time of the decision. So long as there is information on which the decision could be rationally based, the Court will not intervene.

[61] The CCG then went on to conclude that the Sewap Creek Bridge project was "not likely to cause significant adverse effects on fish habitat after taking into account the implementation of appropriate mitigation matter". Hence, Tolko's project was approved. On the basis of what I believe to be the true construction of [subsections 15\(3\), 16\(1\) and 16\(3\)](#) of the *CEAA*, it is my view that the decision made by the CCG is entirely reasonable.

[62] The applicants rely on the decision of Gibson J. in *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)* [1998 CanLII 7113 \(FC\)](#), [1998] 4 F.C. 340 for their proposed interpretation of [subsection 15\(3\)](#) of the *CEAA*. The applicants submit that Gibson J.'s interpretation of [subsection 15\(3\)](#) of the *CEAA* is correct and that I should adopt it. For the reasons that follow, I cannot agree with Gibson J.'s interpretation.

[63] The facts in *Friends of the West Country* were similar to the facts of the present case: an application for an approval pursuant to [subsection 5\(1\)](#) of the *NWPA* to construct two bridges triggered a requirement for an environmental assessment under the *CEAA*. Following public consultation and the completion of screening environmental assessment reports, the responsible authority, the CCG, determined that the bridges were not likely to cause significant adverse environmental effects. Hence, the CCG gave approvals on behalf of the Minister of Fisheries and Oceans. The applicants, the nonprofit organization "The Friends of the West Country Association", filed an application for judicial review of the approvals arguing that the bridges and related roads, known as the "Mainline Road", were integrally related to the proponent's proposal for extensive new forestry operations and that, as a result, the environmental effects of both the roads and the forestry operations ought to have been assessed. Gibson J. set aside the approvals and referred the matter back to the responsible authority for reconsideration.

[64] Gibson J. began his analysis by stating that he was of the view that a broad interpretation "of the application of the *CEAA* is mandated, [...]". Gibson J. came to that view on the basis of [section 4](#) of the *CEAA*, which sets out the purposes of the Act and certain comments made by Mr. Justice La Forest (as he then was) in *Friends of the Old Man River Society v. Canada (Minister of Transport)* (S.C.C.), [1992 CanLII 110 \(SCC\)](#), (1992) 1 S.C.R. 3. At page 361 (paragraph 30), Gibson J. sets out his position as follows:

I am satisfied that a similarly broad interpretation of the application of the *CEAA* is mandated, particularly when the preamble thereto and the purposes of the Act enunciated in [section 4](#) [as am. by S.C. 1994., c.46, s. 1] are read together with other provisions of the Act, as they must be. Mr. Justice La Forest continued at page 71:

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. Jeffrey, *Environmental Approvals in Canada* (1989), at p. 1.2 " 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.

[65] Gibson J. then went on to conclude that "the independent utility test"<sup>8</sup> should serve as a guide to interpreting the provisions of the *CEAA*, in particular [section 15](#) thereof. Gibson J. came to that view on the basis of American jurisprudence and the *Canadian Environmental Assessment Act Responsible Authorities' Guide*<sup>9</sup> (the "Guide"). After quoting a number of passages from the *Guide*, Gibson J., at page 366, concluded that part of his analysis as follows:

These elements of the Guide would appear to interpret the *CEAA* to extend the independent utility

principle, on a mandatory basis, to defining the scope of the assessment, nor merely the scope of the project. Further, they clearly identify the reality that a "generous interpretation" of the CEAA leads a responsible authority into examination of the environmental effects of related works and undertakings that, in themselves, might fall entirely outside the legislative competence of Parliament. This result is clearly contemplated by subsection 12(4) and the definition "jurisdiction" contained in subsection 12(5) of the CEAA.

The Guide, of course, does not have the force of law. It is not binding on responsible authorities, nor is it binding on, or enforceable by, this Court. That being said, I find the quoted portions apt to the circumstances before me and entirely consistent with the CEAA and the position enunciated by Mr. Justice Iacobucci on behalf of the Supreme Court in *Quebec (Attorney General) v. Canada (National Energy Board)*, *supra*. I am satisfied that the quoted portions reflect the principles enunciated in the preamble to the CEAA, the purposes enunciated in section 4 thereof, and the principles enunciated by Mr. Justice La Forest in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, *supra*. While the CEAA is, in general terms, administered under the authority of the Minister of the Environment, responsible authorities may be found in any department or agency of the Government of Canada and beyond that Government. It therefore makes eminent sense that such a guide was published to achieve some degree of uniformity in the application of the CEAA, and its pronouncements should therefore be treated both by responsible authorities and courts with a reasonable degree of deference as an interpretive tool, to the extent that they are not inconsistent with law.

The analysis that follows will be guided by the foregoing general principles and by reference to the independent utility principle, as reflected in the foregoing quotations from the Guide which I find to be consistent with the provisions of the CEAA.

[66] Thus, having established the foundation to his proposed interpretation of the CEAA, Gibson J. then went on to apply the statutory provisions to the relevant facts. Firstly, Gibson J. made it clear that the CCG's determination of the scope of the projects was entirely within the discretion conferred upon it under subsection 15(1) and that, on the evidence before him, the determination was entirely open to the responsible authority. Consequently, Gibson J. saw no basis for intervention in respect of the CCG's determination under subsection 15(1). At pages 367 and 368, Gibson J. says:

The responsible authority, in this case, the Canadian Coast Guard, Navigable Waters Protection Division, determined the projects in respect of which the proponent sought approval, that is, the two bridges, to be not so closely related that they could be considered to form a single project. Each bridge was determined to be a separate project. While I or others might have reached a different conclusion, that is not the test. I am satisfied that it was reasonably open to the responsible authority to treat the bridges as separate projects for purposes of the conduct of environmental assessments.

The responsible authority determined the scope of the Ram River bridge project to be as follows:

The scope of the Ram River Bridge project includes: the construction and maintenance of a two lane dual span bridge [later modified to a single span bridge] over the Ram River, including associated approaches and related works, storage areas or other undertakings directly associated with the construction of this bridge. The project involves preparation of the construction site, construction of a centre pier [later deleted], abutments and the bridge structure.

The scope of the Prairie Creek bridge project was defined in essentially identical terms to the scope of the Ram River bridge project as modified.

[67] Gibson J. emphasized the discretionary nature of the determination made by the CCG under subsection 15(1). At page 368, he stated:

I have emphasized in the quotation from the Guide appearing above on the application of the principle [*sic*] project/accessory test the use of the permissive "may" in determining whether other physical works or physical activities are accessory to the principle [*sic*] project. That discretion recommended to responsible authorities is consistent with the discretion granted to them by section 15 of the CEAA. I can find no reviewable error in the manner in which the responsible authority here exercised its discretion in defining the projects subject to environmental assessment review. More specifically, I find no error on the part of the responsible authority in



failing to include within the scope of the bridge projects the road to which the principal projects, that is to say the bridges and their related abutments, could be said to be accessory and the proposed forestry operations to which the bridges might also, on the facts of this matter, be considered to be accessory.

[68] However, with regard to the CCG's determinations under [subsections 15\(3\) and 16\(1\)](#) of the *CEAA*, Gibson J. concluded that the CCG had made two reviewable errors. The essence of Gibson J.'s reasoning in so concluding is found at pages 369-371:

In sum, [subsection 15\(3\)](#) requires the responsible authority, where a project is in relation to a physical work, to conduct the relevant environmental assessment in respect not merely of the project as defined but also in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to the physical work that constitutes the project that is proposed by the proponent or that is, in the opinion of the responsible authority, "likely to be carried out [by any person other than the proponent] in relation to [the physical work that constitutes the project]."

Here, it was not in dispute before me that the construction of the road to which the bridges, the physical works constituting the defined projects, could be said to be accessory and the forestry operations to which the bridges might also be said to be accessory were "proposed by the proponent", and not by some other person or persons. Thus, I conclude that the responsible authority was obliged by [subsection 15\(3\)](#) to include within the scope of the environmental assessment the road, and perhaps, the forestry operations, if they were "in relation to" the projects, that is to say the bridges and their related abutments. The responsible authority was without discretion. I interpret the discretion provided by the closing words of [subsection 15\(3\)](#) to only come into play where a proposed project is likely to be carried out in relation to the defined project by some other person. [Subsection 15\(3\)](#) clearly reflects, on the facts of this case without discretion to the responsible authority, an obligation to apply the independent utility principle in the definition of the scope of the assessment.

[...]

I read [subsection 16\(1\)](#) to require a responsible authority to include within an environmental screening the environmental effects that may occur in connection with the project as defined and also those that are likely to result from the project in combination with other projects or activities that have been or will be carried out. There can be no doubt that the construction of the road will be carried out. Indeed, the evidence before me indicated that it had already, at least to a very substantial degree, been carried out the time of the hearing before me. Similarly, the evidence before me would appear to indicate that, with the approvals under [subsection 5\(1\) NWPA](#), the proponent's proposed forestry operations in the West Country will also be carried out. Once again, I conclude that [subsection 16\(1\)](#) clearly reflects, on the facts of this case, an obligation on the part of the responsible authority to apply the independent utility principle in the definition of the scope of the assessment.

It was not in dispute before me that the scope of the environmental assessments here under review did not extend to the environmental effects of the road construction project, or to the environmental effects of that project and the forestry operations including the operations on the roads including the bridges.

In *R. v. Hydro-Québec*, Mr. Justice La Forest, writing for the majority and by reference to the first quotation cited above from his reasons in *Friends of the Oldman River Society*, *supra*, wrote:

This Court has in recent years been increasingly called upon to consider the interplay between federal and provincial legislative powers as they relate to environmental protection. Whether viewed positively as strategies for maintaining a clean environment, or negatively as measures to combat the evils of pollution, there can be no doubt that these measures relate to a public purpose of superordinate importance, an one in which all levels of government and numerous organs of the internal community has become increasingly engaged.

Taking into account the totality of the evidence before me and the provisions of the *CEAA* to which I have referred, in the absence of a direct constitutional challenge to those provisions, and there is none here, I conclude that the environmental assessments conducted were deficient in two fundamental respects: first, they were not conducted in respect of a construction or other undertaking, namely, the Mainline Road, that was a construction or other undertaking "in relation to" the projects, as defined, and that was proposed by the proponent; and, secondly, they failed to include consideration of the cumulative environmental effects likely to result from each project in combination with another project that had been or would be carried out, once

again, the Mainline Road.

These deficiencies constituted errors of law in the essential statutory preliminary steps to the issuance of the approvals under the [NWPA](#). They are errors reviewable against a standard of correctness. Against that standard, they are errors which justify the intervention of this Court in respect of the decisions under review.

I make no finding with respect to the question of whether the scope of the environmental assessments should have extended to the environmental effects of the proponent's proposed forestry operations and the operations on the road and bridges because I need not do so. That being said however, it would appear clear that a generous reading of the [CEAA](#) would require the extension of the environmental effects of those operations as well.

[69] As I have already indicated, I do not share Gibson J.'s interpretation of [subsection 15\(3\)](#). In my view, in construing [subsection 15\(3\)](#) as he did, Gibson J. disregarded the plain wording of the subsection. Gibson J. gave the word "undertaking" a meaning which is not contemplated by the subsection and, more particularly, when read with the definition of "project" found in [section 2](#).

[70] On the basis of my proposed interpretation of [subsection 15\(3\)](#) of the [CEAA](#), the "Mainline Road" which Gibson J. considered in *Friends of the West Country* to be "a construction or other undertaking" in relation to "the projects, as defined, ..." was not an undertaking in relation to the projects, i.e. the Ram River Bridge project and the Prairie Creek Bridge project<sup>10</sup>. Since the "Mainline Road" was not, in my view, an undertaking in relation to the projects, the responsible authority was under no duty to conduct an environmental assessment in regard thereto. The "Mainline Road" was not an undertaking within the class of undertakings specifically set out in [subsection 15\(3\)](#) and in the definition of "project" found in [section 2](#). In my respectful view, although Gibson J. clearly held that he could not interfere with the responsible authority's determination regarding the scope of the projects, he, in effect, recharacterized the scope of the projects through his analysis of the scope of the environmental assessments under [subsection 15\(3\)](#). That, in my view, was not open to the learned judge.

[71] Gibson J. based his expansive view of the scope of the environmental assessments under [subsection 15\(3\)](#) on, *inter alia*, "the independent utility test" for which he found support in American jurisprudence and in the *Guide*.

[72] Firstly, Gibson J. referred to a decision of the United States Court of Appeal for the Ninth Circuit, in *Thomas v. Peterson*, 753 F. (2d) 754 (Ninth Cir. 1985). That decision is not relevant, in my view, since the American legislative scheme bears no similarity to the [CEAA](#). However, if there is a similarity, it is a similarity that goes to [subsections 15\(1\)](#) and (2) of the [CEAA](#) which deal with the responsible authority's discretion with regard to the determination of the scope of the project and, where there are two or more projects, to combine them into one. The regulations referred to in the American decision were regulations issued by the Council of Environmental Quality (the "CEQ Regulations")<sup>11</sup>

12 40 C.F.R. 158.19(a).<sup>12</sup> These regulations required that "connected actions" be considered together in a single environmental impact statement ("E.I.S."). "Connected actions" are defined as actions that fall into the following categories:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

The delineation of "connected actions" in the CEQ Regulations helps to elucidate [subsections 15\(1\)](#) and (2) of the [CEAA](#). Gibson J., however, applied the concept of "connected actions" to [subsection 15\(3\)](#).

[73] Secondly, I turn to Gibson J.'s use of the *Guide* to justify, in part, his interpretation of [subsection 15\(3\)](#) and, in particular, to support his view that the independent utility principle was relevant in interpreting [subsection 15\(3\)](#). At pages 364 and 365, Gibson J. refers to the *Guide* and quotes portions thereof:

At page 17 of the *Guide* under the heading "Scope of the project", the following appears:

Under the Act, the RA must determine the scope of the project in a screening or comprehensive study. The scope of the project refers to those components of the proposed development that should be considered part of the project for the purposes of the EA.

At page 18, under the heading "The principal project/accessory test", the Guide continues:

The Act does not provide direction to RAs in determining which physical works should be included within the scope of a project. To ensure consistency in scope of the project determinations, RAs should consider applying the "principal project/accessory" test. This test consists of two steps.

First, what is the principal project? The principal project is always either the undertaking in relation to a physical work or the physical activity for which a power, duty, or function is being exercised (therefore triggering the need for an EA under the Act [*sic*]). The principal project must always be included as part of the scoped project.

Second, are other physical works or physical activities accessory to the principal project? If so, then these may be included as part of the scoped project. Those physical works or physical activities not accessory to the principal project may not be included as part of the scoped project. To determine what is accessory to the principal project, the RA should apply the following two criteria:

**interdependence:** If the principal project could not proceed without the undertaking of another physical work or activity, then that other physical work or activity may be considered as a component of the scoped project.

**linkage:** If the decision to undertake the principal project makes the decision to undertake another physical work or activity inevitable, then that other physical work or activity may be considered as a component of the scoped project. [Emphasis added]

[74] Gibson J. commented the above passages by stating that they reflected "the "independent utility" principle enunciated in *Thomas v. Peterson, supra*, particularly in determining the scope of the project that will form the subject of an environmental assessment". He put it as follows at page 366:

These elements of the Guide would appear to interpret the CEAA to extend the independent utility principle, on a mandatory basis, to defining the scope of the assessment, not merely the scope of the project. Further, they clearly identify the reality that a "generous interpretation" of the CEAA leads a responsible authority into examination of the environmental effects of related works and undertakings that, in themselves, might fall entirely outside the legislative competence of Parliament.

[75] Although conceding that the *Guide* did not have the force of law, and hence was not binding on responsible authorities, nor binding or enforceable by this Court, Gibson J. then went on to state that the *Guide* "and its pronouncements" should be treated both by the responsible authority and the Court with a reasonable degree of deference as an interpretive tool "to the extent that they are not inconsistent with law".

[76] With the greatest of respect, I cannot see how I can agree with my colleague. The *Guide* was prepared by the Canadian Environmental Assessment Agency, not by Parliament. The *Guide* simply reflects the thoughts of the Canadian Environmental Assessment Agency, an administrative body, regarding the implementation of the Act. On the first page of the *Guide*, the purpose thereof is set out in the following terms:

The **Responsible authority's Guide** is one part of the **Canadian Environmental Assessment Act Procedural Manual**, a set of reference materials designed to provide guidance on the application of the *Canadian Environmental Assessment Act (Act)* to federal government departments and agencies, provincial and municipal governments, private sector proponents of projects requiring federal funding or decisions, and members of the public interested in environmental assessment.

The guide interprets the legal framework established by the *Act* and provides guidance to responsible authorities (RAs) for conducting environmental assessments (EAs) of projects in compliance with the *Act*. It is designed for those within federal departments and agencies who are required to plan, manage, conduct, review or otherwise participate in federal environmental assessments.

[77] In reading Gibson J.'s reasons, it would appear that the *Guide*, and hence the "independent utility" principle, take precedence over the wording of the *CEAA*. That, obviously, cannot be correct. The responsible authorities have a duty to follow and implement the *CEAA* and not the *Guide*. Although the *Guide* may be helpful, it cannot oust the statute.

[78] In any event, it is my view that Gibson J.'s interpretation of the *Guide* is, in fact, inconsistent with what the *Guide* actually says. Gibson J. applied that part of the *Guide* entitled "scope of the project" to aid his interpretation of [subsection 15\(3\)](#). At page 365, Gibson J. writes that:

This passage<sup>12</sup> would appear to be a paraphrasing of [subsection 15\(3\)](#) of the *CEAA*. If I am correct in this, this guidance would appear to more properly relate to the scope of the assessment than to the scope of the project but in all other respects it appears to be an accurate reflection of the law.

[79] The passage from the *Guide* cited by Gibson J. in the above quote is, on its own wording, relevant to the responsible authority's discretion regarding the determination of the scope of the project. The passage, however, is not relevant, in my view, to [subsection 15\(3\)](#), i.e. the determination of the scope of the assessment. In the present instance, there is no real challenge to the CCG's determination under [subsection 15\(1\)](#). In *Friends of the West Country*, Gibson J. concluded that the responsible authority, the CCG, had not made a reviewable error in making its determinations under [subsections 15\(1\)](#) and [15\(2\)](#).

[80] I also cannot agree with Gibson J. in regard to what physical works are accessory to the principal project using the criteria enunciated in the *Guide*: "interdependence" and "linkage". At page 18 of the *Guide*, these concepts are explained as follows:

" **interdependence** : If the principal project could not proceed without the undertaking or another physical work or activity, then that other physical work or activity may be considered as a component of the scoped project.

" **linkage** : If the decision to undertake the principal project makes the decision to undertake another physical work or activity inevitable, then that other physical work or activity may be considered as a component of the scoped project.

[81] In applying the "linkage" criterion, Gibson J. found as a fact that the building of the bridges made the building of the Mainline Road "inevitable". I understand the term "inevitable" used in relation to the "linkage" criterion to mean that the building of the principal project renders "inevitable" the building of another physical work. It cannot be said, in my view, that the building of the Ram River and Prairie Creek Bridges rendered the building of the Mainline Road "inevitable". Perhaps it made no sense to build the bridges without a road leading to and from the bridges but the plain fact is that the building of the bridges did not require the building of roads. Whether or not the decision to build the bridges without the roads made sense from a financial, administrative or managerial perspective is not the issue. Rather, the issue is whether the construction of a physical work renders the construction of another physical work, in a physical sense, "inevitable".

[82] With respect to the "interdependence" criterion, it is clear that the Sewap Creek crossing is the "principal" project. Surely, the "principal project" can proceed without undertakings regarding the construction of roads or of a paper mill. Consequently, the roads and the paper mill cannot, in my view, be considered as components of the scoped project.

[83] Both the "linkage" and "interdependence" criteria make it clear that the intent thereof is to address not the determination of the environmental assessment but rather the determination of the scope of the project.

[84] [Subsection 15\(1\)](#) makes it clear, in my view, that the environmental assessment which is to be conducted by the responsible authority is an assessment of the project as determined by that responsible authority under [subsection 15\(1\)](#). In other words, the scope of the assessment cannot be a pretext to modify or amend the project as determined under [subsection 15\(1\)](#). It is the project as determined by the responsible authority and its environmental effects which are to be examined by the responsible authority. The introductory paragraph to [subsection 15\(1\)](#) makes this clear. It provides:

The scope of the project **in relation to which** an environmental assessment is to be conducted shall be determined by [...] [Emphasis added]

[85] The only caveat to the above is, that under [subsection 15\(3\)](#), the responsible authority must conduct an environmental assessment not only of the project but of other undertakings "likely to be carried out in relation to that physical work". Undertakings "likely to be carried out in relation to that physical work" necessarily mean undertakings which fall within the class of those undertakings specifically mentioned in the definition of "project" found in [section 2](#) of the *CEAA*.

[86] At paragraph 67 of its memorandum of fact and law, the respondent Tolko makes the following submission with which I am in entire agreement:

This Court should also consider what the practical effects would be if it were to accept the arguments the Applicants advance. What happens if a city within Canada, or a province for that matter, decides to build a bridge? When they seek approval under [Section 5](#) of the *NWPA*, does everything that city or province does become one big "project" which must be environmentally assessed under the *CEAA*? Surely not, but this might well be the result if the Applicants' arguments are accepted. Unless the environmental assessment is connected with the regulatory authority which triggers the *CEAA*, there is simply no reasonable limit placed on what the responsible authority in any given case would have to consider.

[87] In concluding on this point, I wish to say that, since the 13-year F.M.P. and the 1997 annual plan, save for the Sewap Creek crossing, did not require the exercise of a power or the performance of a duty or function by a federal authority in regard to a project as set out in [subsection 5\(1\)](#) of the *CEAA*, no environmental assessment was triggered. If these "projects" were projects which had triggered an environmental assessment under [subsection 5\(1\)](#) of the *CEAA*, then the responsible authority could have exercised its discretion under [subsection 15\(2\)](#) and determined that the projects were "so closely related that they can be considered to form a single project".

[88] For the foregoing reasons, I have not been persuaded that the CCG's decision to approve the construction of the Sewap Creek Bridge is one that I should interfere with. Consequently, this application for judicial review shall be dismissed with costs in favour of the Respondents.

Ottawa, Ontario "MARC NADON"

June 18, 1999 JUDGE

---

<sup>1</sup> In paragraph 10 of its memorandum of fact and of law, the respondent Tolko gives the following description of its bridge: 10. The Sewap Creek Bridge is a single lane, wooden plank bridge measuring approximately 5 metres in width (about 16 feet) and 22 metres in span (about 70 feet). It is designed for low volume traffic. It is located on a road that is continuously gated with no public access. It was built in or about late August of 1997, together with 12 kms. of all-season road associated with it. It is located north of Cranberry-Portage on a road known as the Naosap Road between Cranberry-Portage and Sherridon, Manitoba. Logging operations have been conducted in the area since 1974, and as far back as 1980 Manfor harvested within one km. of the bridge site.

<sup>2</sup> *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, as amended.

<sup>3</sup> *Fisheries Act*, R.S.C., c. F-14.

<sup>4</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, as amended.

<sup>5</sup> In *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)*, [1998 CanLII 7113 \(FC\)](#), [1998] 4 F.C. 340, at pages 355-358 (paragraphs 19 to 25), Gibson J. explains why, notwithstanding the fact that the *NWPA* defines the "Minister" as the Minister of Transport, the Minister of Fisheries and Oceans gave the approval under the *NWPA*. I accept Gibson J.'s explanation and agree with him that the Judicial Review Application should be decided, not on a technicality, but on the substance of the matter before

the Court.

<sup>6</sup> The application for the licence of the BCTMP mill was later abandoned.

<sup>7</sup> Northey, Rodney, 1995 *Annotated Canadian Environmental Assessment Act*, (Carswell, 1994) p. 666.

<sup>8</sup> At page 362 of his reasons in *Friends of the West*, Gibson J. gives a brief explanation of "the independent utility test": Bridges are singularly useless structures when taken in abstract. They serve no purpose but to facilitate getting from someplace to someplace else over an impediment, usually water, that separates the places. In American jurisprudence, the independent utility of a proposed work or project appears to constitute a critical factor in determining its scope. It appears to have crystallized in what has come to be known as the "independent utility test".

<sup>9</sup> Canadian Environmental Assessment Agency, *The Canadian Environmental Assessment Act: Responsible Authority's Guide* (Ottawa: Minister of Supply and Services Canada, 1994).

<sup>10</sup> In his reasons, Gibson J. states that "the bridges are designed to be integral elements of a single roadway, the Mainline Road connecting the proponent's timber rights areas with the Strachan plant site". It may well be that the CCG ought to have considered the Mainline Road and the bridges as a single project under [subsection 15\(2\)](#). However, the CCG did not so exercise its discretion. Gibson J. found no reviewable error in respect of the CCG's decision under [subsection 15\(1\)](#).

11

[40 C.F.R. 158.19\(a\)](#).

<sup>12</sup> The passage in the *Guide* to which Gibson J. refers to in paragraph 38 of his reasons is found at page 19 of the *Guide* under the heading "Undertakings in relations to a physical work" and it provides: Finally, under the [Act](#), the RA must include in the EA all relevant aspects of a physical work (that is, all undertakings in relation to that physical work) that are proposed or, in its opinion, are likely to be carried out. These undertakings could include, for example, the construction, operation, modification, decommissioning, or abandonment of a physical work. Such proposed undertakings or undertakings that are likely to be carried out must be included in the scope of the project even if there is no specific trigger for them. The assessment of all proposed undertakings or undertakings that are likely to be carried out in relation to a physical work should be conducted as early in the planning stages of the physical work as is practicable.