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Ottawa, Ontario, this 16th day of September, 2004

Present: The Honourable Justice James Russell

BETWEEN:

PRAIRIE ACID RAIN COALITION, THE PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT, and TOXICS WATCH SOCIETY OF ALBERTA

Applicants

and

THE MINISTER OF FISHERIES AND OCEANS OF CANADA, and TRUENORTH ENERGY CORPORATION

Respondents

REASONS FOR ORDER AND ORDER

The Application

[1] The Department of Fisheries and Oceans Canada ("DFO") is the Responsible Authority under the *Canadian Environmental Assessment Act*, S.C. 1992, chap. C-37 ("CEAA") for a project derived for the purposes of *CEAA* from a proposal of the respondent TrueNorth Energy Corporation ("TrueNorth").

[2] TrueNorth proposes to develop an oil sands extraction mine near Fort McMurray, Alberta. The mine involves the removal of oil-laden soil. A fish-bearing stream, Fort Creek, runs through the area of the proposed mine. The development requires the destruction of Fort Creek. This means that an authorization to destroy fish and fish habitat is required by s. 35 of the *Fisheries Act*, R.S., c. F-14 ("*Fisheries Act*").

[3] Section 15 of *CEAA* gives the Responsible Authority responsibility to determine the scope of the project to be assessed.

[4] For the purposes of the required environmental assessment, DFO identified the scope of the project in relation to which an environmental assessment should be conducted as the destruction of Fort Creek and associated activities. That decision ("Decision") was distributed to the relevant parties by DFO in a letter dated December 13, 2002 and is the subject of the present judicial review application by the

Applicants.

BACKGROUND

[5] On August 30, 2000, TrueNorth announced its plans for an oil sands mine. It proposed to construct a surface mining and bitumen extraction operation 90 kilometres north of Fort McMurray, Alberta.

[6] Based on the information available to DFO from various TrueNorth disclosures, it became apparent to DFO that TrueNorth's proposal entailed the de-watering of Fort Creek (a tributary of the Athabasca River), an undertaking that seemed likely to cause a harmful alteration, disruption, or destruction of fish habitat ("HADD"). Under s. 35 of the *Fisheries Act*, such a HADD is prohibited unless expressly authorized by the Minister of Fisheries and Oceans ("Minister"). Pursuant to ss. 5(1)(*d*) of *CEAA*, no authorization may be issued under s. 35 of the *Fisheries Act* before an environmental assessment is concluded under *CEAA*.

[7] In anticipation of receipt of an application for a s. 35(2) authorization, on October 2, 2000 DFO declared itself the Responsible Authority for the purpose of the assessment. By virtue of her position as the Area Chief, Habitat with the DFO, Ms. Dorothy Majewski was responsible for ensuring that DFO conducted the regulatory processes under the *Fisheries Act* and *CEAA* in accordance with the law.

[8] On April 23, 2001, DFO received a formal application for a s. 35(2) *Fisheries Act* authorization from TrueNorth. As anticipated earlier, TrueNorth's application confirmed that Fort Creek would be de-watered and diverted. From DFO's review of the TrueNorth application it became apparent that only the destruction of the bed and channel of Fort Creek and the diversion of Fort Creek were works or undertakings that could cause a HADD.

[9] In July 2001, DFO obtained TrueNorth's environmental impact assessment ("EIA"), a document required by the Province of Alberta for the purposes of its review of TrueNorth's proposal. The EIA identified fish tainting as a potential issue of high significance. Fish tainting is a long term declining quality of fish caused either by natural seepage or by the deposit of a deleterious substance into waters frequented by fish. The deposit of a deleterious substance into waters frequented by fish is prohibited by s. 36(3) of the *Fisheries Act*. This was not subject to an authorization under s. 35(a) of the *Fisheries Act*. The report contemplated the possibility of the deposit coming from the operations of True North's mine.

[10] The issue of fish tainting turned out to be speculative. On May 10, 2002, TrueNorth provided DFO with a consultant's report that revised its July, 2001 findings contained in the EIA by reducing the potential fish tainting effects to the level of negligible. On July 31, 2002, in response to DFO's earlier request following the consultant's report, Environment Canada provided its expert advice which, while not necessarily disputing TrueNorth's assessment that fish tainting effects would be negligible, urged that further studies be conducted.

[11] In July, 2002, DFO participated as an intervener in the hearings conducted by the Province of Alberta through the Alberta Energy and Utilities Board ("AEUB") in relation to the TrueNorth mining proposal. Unlike under the *Fisheries Act*, where permitting in relation to the TrueNorth proposal is contemplated only in relation to those works or undertakings that could cause a HADD, the Province of Alberta regulates the totality of the activities contemplated by TrueNorth. Because of DFO's expertise in fisheries matters, DFO's participation in provincial hearings was aimed at assisting the Province of Alberta in addressing potential issues that could arise in relation to fisheries. Environment Canada was

another expert federal department that participated in the provincial hearings. DFO's participation necessitated a consideration of those findings that are relevant to the conduct of the federal regulatory and environmental assessment processes.

[12] DFO circulated its preliminary scoping decision in a letter dated August 15, 2002 as follows:

For the purposes of the required environmental assessment, DFO has identified the scope of the project in relation to which an environmental assessment is to be conducted as follows:

1. The destruction of the bed and channel of Fort Creek

2. The construction of temporary or permanent diversions of Fort Creek

3. The construction of site de-watering and drainage works

4. The construction and operation of associated sediment and erosion control works

5. The construction of any Fort Creek crossings and associated approaches

6. The construction and operation of any fish habitat compensation works as required by DFO

7. The construction of camps and storage areas associated with (1) through (7)

8. Site clearing and removal of riparian vegetation associated with (1) through (8).

[13] On September 6, 2002, the Government of Canada served its submissions on the AEUB and the participants in the provincial hearings.

[14] Section 8 of the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181 requires the Responsible Authority to consult with other federal authorities before determining the scope of the project pursuant to s. 15(1) of *CEAA*.

[15] Parks Canada Agency in a letter to DFO dated August 29, 2002 indicated that it was in agreement with the scope of the project as proposed by DFO in its letter of August 15, 2002.

[16] Natural Resources Canada in a letter to DFO dated November 25, 2002 indicated that, as the Responsible Authority for the project, DFO had full discretion under *CEAA* to determine the scope of the project and Natural Resources had no opinion on its scoping decision.

[17] On October 8, 2002, Environment Canada recommended as follows:

[T]he scope of the project be expanded beyond that proposed in [DFO's] letter of August 15, 2002, to include the entire project as defined by TrueNorth Energy Ltd. in its combined application to the Alberta Energy Utilities Board and Alberta Environment. This would also ensure an effective harmonized approach to environmental assessment, and would be consistent with the scope of project for which the preparation of the environmental impact assessment report was required under the *Alberta Environmental Protection* and *Enhancement Act*.

[18] On October 9, 2002, Applicants' counsel submitted a letter arguing that the proposed scoping

was too narrow and that a comprehensive study was required.

[19] On December 13, 2002, DFO issued its final scoping Decision with scoping unchanged from its August 15, 2002 preliminary decision.

[20] In arriving at the final scoping Decision, Ms. Majewski was guided by the principles that the determination must be reasonable and made on a case-by case basis. Ms. Majewski determined the scope of the project to be that which includes the undertakings and activities that require authorization under s. 35(2) of the *Fisheries Act* and give rise to the application of *CEAA* and the ancillary works and activities. Accordingly, she scoped in the destruction of the bed channel of Fort Creek because it entails physical activities prescribed to be a "project" for the purpose of *CEAA* pursuant to Part VII of the Schedule of the *Inclusion List Regulations*. The remaining elements of her scoping Decision entail the ancillary works and activities, including a Fort Creek diversion channel.

[21] Had the water flows of Fort Creek into a diversion channel exceeded limits shown in s. 9 of the *Comprehensive Study List Regulations*, a comprehensive study would have been required. Since this was not the case, Ms. Majewski concluded that the environmental assessment under *CEAA* should be conducted at a screening level.

[22] In reaching her final Decision on scoping Ms. Majewski took into consideration all comments, including those made by the Applicants' counsel, as well as the findings of the provincial hearing.

DECISION UNDER REVIEW

[23] Because its mining project will impact Fort Creek, a fish-bearing water course, TrueNorth was required to obtain authorization from DFO pursuant to s. 35(2) of the *Fisheries Act* to undertake work that may affect fish habitat. As a result of TrueNorth's s. 35(2) *Fisheries Act* application ("35(2) Application"), s. 5(d) of *CEAA* was triggered. This means that the Responsible Authority, in this case DFO, must determine, pursuant to s. 15 of *CEAA*, the scope of the project to be subject to an environmental assessment under *CEAA*.

[24] Although DFO, as the Responsible Authority, was engaged in determining the scope of the project to be subject to environmental assessment under *CEAA*, it continued to be engaged in the process established by the AEUB and Alberta Environment. Environment Canada also continued to be involved in the process established by the AEUB and Alberta Environment.

[25] In respect of TrueNorth's 35(2) Application, by way of letter dated August 15, 2002, DFO advised that it had identified the scope of the project in relation to which an environmental assessment under *CEAA* ought to be conducted.

[26] Prior to finalizing its determination as to the scope of the project, DFO allowed other federal authorities to comment on its proposed scope of the project. Responses to DFO's letter dated August 15, 2002 were received from Health Canada, Parks Canada, Natural Resources Canada and Environment Canada. All of these federal authorities, except for Environment Canada, agreed with DFO's determination of the scope of the project.

[27] The scoping Decision under challenge is contained in a letter dated December 13, 2002, wherein DFO determined that, having reviewed the responses received from Health Canada, Parks

Canada, Natural Resources and Environment Canada, the scope of the project for the purposes of an environmental assessment under *CEAA* would be the same as set out in its letter of August 15, 2002 ("Scoping Decision").

THE APPLICANTS' INTEREST IN THE PROJECT

[28] Prairie Acid Rain Coalition ("PARC") is a non-profit coalition of environmental organizations in the three prairie-provinces who are concerned about acid rain and acid deposition. The purpose and mandate of PARC are to review the regulatory processes for air emissions, to promote alternative energy sources and the use of the best available technology, and to increase public awareness. PARC was formed in 1982.

[29] Pembina Institute for Appropriate Development ("Pembina Institute") is a non-profit environmental policy research and education organization founded in 1986 in Drayton Valley, Alberta. For the past ten years, the Pembina Institute has researched, reviewed, consulted and presented at formal hearings on a lengthy list of oil sands developments.

[30] Toxics Watch Society of Alberta ("Toxics Watch") is a non-profit society incorporated in 1988. The purposes of Toxics Watch are to promote environmental health in Alberta through public awareness for the safe control of toxic chemicals, to conduct and review research on toxic chemicals, and to promote strategies to avoid or reduce chemical waste. Toxics Watch also has an extensive history of involvement in formal hearings on oil sands developments.

[31] The Oil Sands Environmental Coalition ("OSEC") is a coalition of environmental groups that has represented the interests of the environmental community in reviewing and intervening in oil sands development plan approval processes since 1995. Both Toxics Watch and the Pembina Institute are member groups, each being responsible for particular issues arising from EIAs. OSEC and PARC coordinate their work on oil sands development through OSEC's consultative process.

[32] Each Applicant has demonstrated both a long-term commitment to, and substantial involvement in, the processes by which the monitoring, regulating and abating of the oil sands industry's various environmental impacts are undertaken.

[33] Each Applicant has demonstrated substantial involvement in the review and approval processes undertaken with respect to TrueNorth's Fort Hills oil sands project. Both the Pembina Institute and Toxics Watch, through OSEC, performed a pre-application review of TrueNorth's application and provided written and oral evidence during the AEUB hearing. PARC provided input and assistance to OSEC during the hearing.

[34] Toxics Watch, on behalf of OSEC, also met with federal authorities to discuss the federal assessment process and telephoned DFO twice to follow-up on the scoping Decision. PARC advised OSEC on the federal assessment process.

[35] Each Applicant opposes DFO's Decision to scope TrueNorth's Fort Hills oil sands project as limited to the destruction of Fort Creek. Their shared concerns relate to: the potential for the oil sands project's emissions to contribute to acid rain and greenhouse gas emissions; the cumulative impacts of the project in combination with other oil sands projects; a lack of specificity in proposed mitigation measures; a lack of federal involvement in the mitigation of the project's effects; and the integrity of *CEAA* assessment process.

PERTINENT LEGISLATION

[36] The decision under review is the scoping Decision made by DFO pursuant to s. 15(1) of the *Canadian Environmental Assessment Act*, S.C. 1992, c-37, s. 15(1) ("*CEAA*")which reads as follows:

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

[37] The *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181 ("*Regulations*") require the Responsible Authority to consult with federal authorities before determining the scope of the project pursuant to s. 15 (1) of *CEAA*. Subsection 8(a) of the *Regulations* reads as follows:

8. Where a project is subject to a screening or a comprehensive study, the responsible authorities other than a federal authority referred to in section 7 shall, after consulting with all federal authorities that respond pursuant to paragraph 6(1)(c), together determine (a) the scope of the project pursuant to subsection 15(1) of the Act;	8. Si un projet fait l'objet d'un examen préalable ou d'une étude approfondie, les autorités responsables, autres que l'autorité fédérale visée à l'article 7, doivent, après avoir consulté les autorités fédérales qui ont fait parvenir une réponse en vertu de l'alinéa 6(1)c), déterminer ensemble : a) la portée du projet en application du paragraphe 15 (1) de la Loi;

[38] Project is defined under s. 2 of *CEAA* as follows:

2. (1) In this Act, "project" means (a) in relation to a physical work, any proposed construction, operation, modification, decommissioning,	2. (1) Les définitions qui suivent s'appliquent à la présente loi. « _projet_ » Réalisation - y compris l'exploitation, la modification, la désaffectation ou la fermeture

abandonment or other undertaking in relation to that physical work, or

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

- 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).

[39] DFO declared itself a Responsible Authority in anticipation of receipt of a s. 35(2) authorization. Section 35 of the *Fisheries Act*, R.S., c. F-14, reads as follows:

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

35. (1) Il est interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.

(2) Le paragraphe (1) ne s'applique pas aux personnes qui détériorent, détruisent ou perturbent l'habitat du poisson avec des moyens ou dans des circonstances autorisés par le ministre ou conformes aux règlements pris par le gouverneur en conseil en application de la présente loi.

[40] Pursuant to s. 5(1)(*d*) of *CEAA*, no authorization prescribed by regulations made under para. 59(f) of *CEAA* may be issued before an environmental assessment is concluded under *CEAA*. Subsection 5(1)(*d*) of *CEAA* reads:

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_:

...

d) une autorité fédérale, aux

...

(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.

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.

[41] Subsection 35(2) of the *Fisheries Act*, under which the authorization sought by TrueNorth would be issued, is a "provision prescribed pursuant to para. 59(f)" (*Law List Regulations*, SOR/94-636, Schedule I, Part I, Item 6(e)).

ISSUES

[42] The issue on this application is whether DFO committed a reviewable error in the Decision issued December 13, 2002 concerning the scope of the project. The Applicants submit that the Decision, and the reasons supporting it, disclose three errors which they describe as follows:

a. An error in interpretation of the scope of the federal assessment power under the *CEAA*, reviewable on the standard of correctness;

b. An error in interpretation of the definition of "project" and the *Inclusion List Regulation* under the *CEAA*, reviewable on the standard of correctness; and

c. An unreasonable exercise of discretion in determining the scope of the project to be assessed, reviewable on the standard of reasonableness *simpliciter*.

ARGUMENTS

Applicants

Generally

[43] The Applicants submit that the application of *CEAA* to the project is straightforward. TrueNorth is planning to build an oil sands project that requires the issuance of a federal permit and this triggers an assessment under *CEAA*. The destruction of the Fort Creek is an impact of that project, not a separate project in and of itself. Because the oil sands project exceeds two separate thresholds set out in the *Comprehensive Study List Regulations*, SOR/94-638, a comprehensive study of the project is required.

[44] DFO's Decision defines the project as something other than what it obviously is, thereby avoiding responsibility for the proper assessment and mitigation of the project's full impacts. This attempt should fail because it rests on an erroneous interpretation of *CEAA* and renders significant portions of *CEAA* unworkable or absurd.

[45] The Applicants' argument addresses the following issues: the framework of *CEAA*; the error in interpretation of the scope of the federal assessment power; the error in interpretation of the definition of "project" and the *Inclusion List Regulation*, SOR/94-637; the unreasonable exercise of discretion; and the implications of DFO's error.

The Framework of CEAA

[46] *CEAA* governs the environmental assessment responsibilities of all federal departments and agencies. For present purposes, it determines three relevant issues: when does the duty to prepare an assessment arise; what type of assessment must be done; and what are the steps to take after an assessment has been completed.

[47] Section 5, known as the "triggering section," establishes the circumstances under which the duty to prepare an environmental assessment arises. There must be some form of federal involvement in the project to be assessed. The federal authority might be the proponent of the project, or it might provide financial assistance to the project proponent, or it might provide access to, or use of, federal lands to enable the project to be carried out.

[48] In the case at bar, federal involvement is by way of the issuance or a grant a prescribed permit, licence or approval "for the purpose of enabling the project to be carried out in whole or in part" (s. 5(1)(*d*)). The *Law List Regulation* lists the prescribed permits, licences and approvals, and includes s. 35(2) authorizations under the *Fisheries Act* at Part 1, s. 6(e).

[49] Section 5 also refers to a "project" as defined by *CEAA*. The definition of "project" in s. 2 has two parts:

"project" means (a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or (b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b);	« _projet_ » Réalisation - y compris l'exploitation, la modification, la désaffectation ou la fermeture - d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59b).

[50] The *Inclusion List Regulation* prescribes the proposed physical activities pursuant to ss. (b) of the definition and s. 59(b).

[51] Once the duty to prepare an assessment is triggered, the form of assessment must be determined. *CEAA* provides for three types of assessment: screenings; comprehensive studies; and mediation or assessment by a review panel. Each ascending level of assessment, moving from screening up to mediation or review panel, entails a more detailed and in-depth examination of a project.

[52] Under s. 18(1) of *CEAA*, a Responsible Authority must prepare a screening of the project, unless the project is described in the Comprehensive Study List. Screening is, therefore, the default level of assessment. Where a project is described in the Comprehensive Study List, s. 21 of *CEAA* requires the Responsible Authority to "ensure that a comprehensive study is conducted," or "refer the project to the Minister [of Environment] for a referral to a mediator or a review panel."

[53] The Comprehensive Study List is found in the *Comprehensive Study List Regulations*, as amended, which at s. 3 lists projects "for which a comprehensive study is required" and specifically mentions the following:

PART IV OIL AND GAS PROJECTS

The proposed construction, decommissioning or abandonment of

(a) a platform, artificial island or any other physical work for the production of oil and gas, where the platform, island or work is located offshore in salt water or fresh water;

(b) a heavy oil or oil sands processing facility with an oil production capacity of more than 10 000 m^3/d; or

(c) an oil sands mine with a bitumen capacity of more than 10 000 m^3/d.

[54] TrueNorth's project includes a processing facility with a capacity of 30 000 m^3/d and a mine with a capacity of 15 000 m^3/d and so, in the Applicants' view, requires assessment by comprehensive study.

[55] DFO, in contrast, has chosen to describe the project as the destruction of Fort Creek. It has done so pursuant to its authority under s. 15(l) of *CEAA* which provides that "the scope of the project in relation to which an environmental assessment is to be conducted shall be determined by the responsible authority." This approach to scoping has two effects. First of all, it narrows the undertakings that DFO will consider to exclude the infrastructure making up TrueNorth's oil sands project and its associated environmental impacts. Secondly, because the destruction of creeks is not listed in the *Comprehensive Study List Regulations*, DFO will only prepare a screening report which is the lowest level of assessment.

[56] *CEAA* creates a substantive difference in the content of a screening as opposed to a comprehensive study. Section 16(l) requires that both screenings and comprehensive studies include a consideration of the environmental effects of the project, cumulative environmental effects that may result from the project in combination with other projects, and measures that are technically and economically feasible that would mitigate any significant adverse environmental effects of the project. However, s. 16(2) also provides that comprehensive studies (but not screenings) must consider the purpose of the project, alternative means of carrying out the project and the environmental effects of such alternatives, and the need for, and requirements of, any follow up programs.

[57] The final relevant portions of *CEAA* govern what happens once an assessment is complete. When a screening report is completed, s. 20(1) provides that the responsible authority may:

a) Exercise any power or perform any function in relation to the project (ie. issue a permit, lease the land, provide the financing etc.), if it concludes that, taking into account the implementation of any mitigation measures identified in the screening assessment, the project will not cause significant adverse environmental effects. The responsible authority must, however, ensure that these mitigation measures are implemented;

b) Not exercise any power or perform any function in relation to the project, if it concludes that, even taking into account the implementation of any mitigation measures, the project would have significant adverse environmental effects that cannot be justified in the circumstances; or

c) Where there is uncertainty whether the project is likely to cause significant adverse environmental effects, or the project is likely to cause significant adverse effects after taking into account appropriate mitigation measures but if the responsible authority cannot determine that those effects are not justified in the circumstances, the responsible authority may refer the project to the Minister for a referral to panel review or mediation.

[58] In contrast, s. 21(a) of *CEAA* provides that, where a Responsible Authority prepares a comprehensive study report, it shall provide that report to the Minister of Environment and the Canadian Environmental Assessment Agency. Section 22 then provides that the Agency shall make the report available to the public and facilitate the receipt of public input. That input is then provided to the Minister for consideration along with the comprehensive study report. This mandatory receipt and consideration of public input is missing from the screening process.

[59] Section 23 of *CEAA* further provides that, after taking into account the report, public input and appropriate mitigation measures, the Minister may send the project back to the Responsible Authority for action under s. 37. The Responsible Authority may then take the same courses of action as it may take after completion of a screening report. Alternatively, the Minister can refer the project on for further study via mediation or panel review under s. 29 of *CEAA* to address, *inter alia*, outstanding uncertainties or public concern. A project reviewed by comprehensive study, therefore, also receives additional Ministerial consideration that is absent from the screening process.

[60] After the assessment is finished and a project goes ahead, *CEAA* requires the Responsible Authority to ensure the implementation of identified mitigation measures. This applies to both screenings (ss. 20(1)(*a*), 20(2)) and comprehensive studies (ss. 37(1) and (2)).

DFO Erred in Adopting a Restrictive Interpretation of the Scope of the Federal Assessment Power

[61] The Applicants say that the DFO's erroneous approach to scoping the project in the case at bar rests on a mistaken interpretation of the intent of *CEAA* and the scope of the federal assessment power that is subject to review by this Court on a standard of correctness (*Friends of the West Country v. Canada (Minister of Fisheries and Oceans)* (1999), 31 C.E.L.R. (N.S.) 239 (F.C.A.) at p. 243).

[62] At para. 26 of her affidavit, Ms. Majewski states:

In cases where a regulatory decision such as the decision to issue a *Fisheries Act* section 35(2) authorization triggers an EA, there are limitations on the scope of the project. In these cases, the scope of

the project should be limited to those elements over which the federal government can validly assert authority, either directly or indirectly. The EA scope of project should correspond to the federally regulated undertaking involved in the application.

[63] The Applicants say that at the core of this interpretation of *CEAA* is the mistaken notion that a federal authority may only look at what it may validly regulate. In the Supreme Court of Canada's landmark decision in *Friends of the Oldman River v. Canada*, [1992] 1 S.C.R. 3, the Court addressed the assertion that the federal government is restricted to examining only those parts of a project that trigger the federal legislative responsibility. In explicitly rejecting this view, at pp. 62-76, La Forest J. concluded that:

a) The scope of assessment is not confined to the particular head of power under which the federal authority has a decision-making responsibility; and

b) Once the initiating department has been given authority to embark on the assessment, its review must consider the environmental effect on all areas of federal jurisdiction.

[64] DFO's conclusion in the case at bar that the project scope must be restricted to those elements over which it can assert regulatory authority (ie. the fisheries in Fort Creek) is therefore mistaken. DFO's authority to issue a s. 35(2) authorization is a required trigger for the federal assessment, but once the assessment authority under *CEAA* is engaged, DFO must examine the impacts of the project on all areas of federal jurisdiction, not just fisheries alone.

[65] The Applicants point out that these impacts are not merely academic. Environment Canada and DFO identified issues of federal concern in their submissions to the AEUB, including fish tainting from processing facility effluent, impacts on migratory birds, regional acid deposition and greenhouse gas emissions. These concerns are shared by the Athabasca Chipewyan First Nation which is affected by the project. But if DFO's scoping Decision stands, all such issues will (ironically) be excluded from the scope of the federal assessment itself. This is exactly the impoverished view of the federal assessment authority La Forest J. warns against in *Oldman*.

[66] The Applicants say that, since *Oldman*, the law has advanced to affirm that the federal assessment power goes further than looking at aspects of a project with environmental effects on federal areas of jurisdiction. It now requires an examination of all the effects of the entire project. The key is that, while the examination can be broad, the ultimate exercise of authority must be restricted to powers under federal jurisdiction.

[67] The Applicants argue that this more expansive approach is foreshadowed in *Oldman*, where La Forest J. adopts an Australian High Court decision, *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1 (H.C.), affirming the constitutional authority of the Australian federal government to look at the environmental impacts of a mining project under state regulation while exercising its state and commerce power in granting an export permit for the mined ore.

[68] This approach is then explicitly confirmed as the law in Canada in the second landmark environmental assessment case of *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (the "*Hydro-Quebec*" case). In a decision upholding the NEB's authority to review the environmental effects of power plants designed to produce, in part, the power that was the subject of the power export certificate application before the NEB, the Supreme Court established three key principles:

a) It is proper for federal authorities to consider in their decision-making processes the overall environmental costs of granting the permits or licences over which they have authority (at pp. 187-200);

b) That undertakings related to the matter under federal jurisdiction may validly be considered in the course of the federal environmental assessment, even if those undertakings are located in a province and primarily under provincial jurisdiction (at pp. 192 and 193); and

c) Any overlap between federal and provincial assessment processes is not an unusual nor unworkable product of federalism, and the federal government must have regard to its unique sphere of responsibilities that complement those of the provinces (at pp. 193 - 194).

[69] The Applicants say that these principles were applied in the Federal Court of Appeal's decision in *Friends of the West Country*, where the Court concluded that the Coast Guard erred in restricting its cumulative effects analysis under s. 16(1) of *CEAA* to only environmental effects emanating from sources within federal jurisdiction. Once *CEAA* is triggered, "the federal responsible authority is to exercise its cumulative effects discretion unrestrained by its perception of constitutional jurisdiction" (at para. 34 and 38).

[70] At p. 254, para. 36 of *Friends of the West Country*, the Court restricts its comments to the cumulative effects analysis that occurs after a project has been scoped. However, based on the preceding Supreme Court authorities, the same reasoning applies to the scoping of a project under s. 15(1): project components outside federal jurisdiction should be considered, and that consideration will inform the final federal decision over the regulatory instruments within federal power. Only in this way, say the Applicants, will the "overall environmental costs" of a federal decision be accounted for.

[71] The Applicants argue that Parliament adopted this expansive view of the federal assessment power when drafting *CEAA*. "Environmental effect" is defined in s. 2 as "any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions." This broad language lacks any explicit or implied intention to limit the federal assessment to only those environmental effects directly tied to federally regulated undertakings or federal areas of jurisdiction.

[72] Sections 5(1)(*a*) - (*d*) of *CEAA* speak of federal authorities exercising powers that enable the project to be carried out "in whole or in part." This indicates an awareness, say the Applicants, that a federal authority may have a connection to, or regulatory control over, only a piece of a project. Nevertheless, s. 5(1) requires an environmental assessment of "the project" in its entirety, not just the federal portion.

[73] Section 15(3) of *CEAA* states that "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." The Applicants say that this indicates that a connection between related undertakings can bring them both within the purview of the federal assessment, as the power plants connection to the power export brought the plants within the scope of the NEB's review in *Hydro-Quebec*.

[74] In addition, the Applicants point out that the preamble to *CEAA* refers to the following objectives: to "achieve sustainable development by .... encouraging and promoting economic development that conserves and enhances environmental quality"; and to use environmental assessment as a means of "integrating environmental factors into planning and decision-making processes in a

manner that promotes sustainable development." Neither objective can be achieved, say the Applicants, if federal authorities voluntarily blinker themselves to the true impacts of major industrial developments by down-scoping them to comparatively innocuous activities.

[75] Turning to the *Regulations*, the Applicants point out that Governor in Council must be aware that oil sands projects are carried out on provincial land and are subject to provincial regulation. Hence, they are not in their entirety subject to federal regulation. Nonetheless, oil sands projects were included in the *Comprehensive Study List Regulations*, indicating an intention to require federal assessments of projects in their entirety in the course of exercising direct regulatory power over only a portion of the project.

[76] The Applicants' position is that *CEAA* consistently uses language that indicates a broad view of the federal assessment power that encompasses all related works and their environmental impacts.

[77] As the Court of Appeal said in *Friends of the West Country*, DFO's duty is to perform the required assessment "unrestrained by its perception of constitutional jurisdiction." It should not be cut off at the knees with an erroneously narrow interpretation that finds no support in the language of the scheme.

DFO Erred in Interpreting the Definition of "project" and the Inclusion List Regulation

[78] The Applicants take the position that DFO's decision further relies on an erroneous interpretation of the definition of "project" and the *Inclusion List Regulation*, which is also reviewable on a standard of correctness.

[79] DFO relies on the listing of activities that harm or destroy fish habitat in Part VII of the *Inclusion List Regulation* to support its Decision that the destruction of Fort Creek is, by itself, a project capable of discrete assessment under *CEAA*.

[80] The central flaw in this argument, say the Applicants, is that the *Inclusion List Regulation*, as amended by SOR 99-436, only applies to physical activities not related to physical works. As the destruction of Fort Creek is integrally related to the physical work of constructing the oil sands mine and processing facility, it must be considered as part of the assessment of the larger oil sands project itself and not as a discrete physical activity.

[81] The second part of the definition of "project" in s. 2 of *CEAA* applies to "any proposed physical activity not relating to a physical work" that is listed by regulation. Section 3 of the *Inclusion List Regulation* as amended by SOR/99-436 repeats this distinction in stronger terms:

3. The physical activities and classes of physical activities set out in the schedule are prescribed for the purpose of paragraph (b) of the definition "project" in subsection 2(1) of the Canadian Environmental Assessment Act except in so	3. Pour l'application de la définition de « projet » , au paragraphe 2(1) de la Loi canadienne sur l'évaluation environnementale, sont des activités concrètes et des catégories d'activités concrètes les activités et les catégories d'activités

far as they relate to a physical work.	énumérées à l'annexe, dans la mesure où elles ne sont pas liées à un ouvrage.

[82] Thus, say the Applicants, any physical activity that is related to a physical work is specifically excluded from the Inclusion List. This does not mean that those physical activities go un-assessed. It means, rather, that the physical activities connected to physical works should be assessed in conjunction with the physical work itself as part of the overall undertaking.

[83] The destruction of Fort Creek patently "relates to" the construction and operation of the oil sands mine. The activity of destroying the creek is a consequence of building the mine and has no independent purpose. This point arises directly from TrueNorth's application for a s. 35(2) authorization, which states:

... activities associated with the mine would result in alterations of fish habitat in the Fort Creek Watershed. (cover letter)

TrueNorth Energy Corp. plans to development [sic] the Fort Hills Oil Sands Project as an open pit mine. During the development of this mine, fish habitat in Fort Creek would be altered. (p. 2 of the application)

[84] The mine and processing facilities are "physical works" within the intended meaning of *CEAA*. As stated by Hobby, Ricard et al in the *Canadian Environmental Assessment Act: An Annotated Guide*, pp. II-20 - II-21, while "the Act does not define 'physical work' ...the implication for the definition of 'project" is clear: physical activity by humans and concrete results are fundamental." In the opinion of the Applicants, the mine and processing facilities exhibit both qualities.

[85] The listing of oil sands mines and processing facilities in the *Comprehensive Study List Regulation* is a definitive legislative decision to classify them as physical works. The definition in s. 2 of "project" creates only two types of project: physical works or physical activities listed in the *Inclusion List Regulation*. If a project is described in the scheme of *CEAA*, it must be one of these two things.

[86] Because of their inclusion in the *Comprehensive Study List Regulation*, oil sands mines and processing facilities are deemed to be projects within the meaning of *CEAA*. Their absence from the *Inclusion List Regulation* means they must be physical works. The Applicants say this is a decision already made by the drafters of *CEAA* and the regulations.

[87] For these reasons, the Applicants say that DFO erred in interpreting the definition of "project" and the *Inclusion List Regulation* as supporting its scoping Decision. The destruction of Fort Creek is an activity related to the physical work of constructing the mine and processing facilities, which disqualifies it from assessment as a listed activity under the *Inclusion List Regulation*. It must, instead, be assessed as part of the larger comprehensive study of the oil sands project itself.

The Scoping Decision is Unreasonable

[88] In addition to the foregoing errors in interpretation, the Applicants say that the Decision is an unreasonable exercise of discretion under s. 15(1) of *CEAA* that cannot stand up to a "somewhat probing examination." (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20, paras. 48-56).

[89] The Applicants concede that DFO's exercise of discretion under s. 15(1) is entitled to some deference from this Court and should be reviewed on the standard of reasonableness *simpliciter*. However, DFO must exercise its discretion in accordance with the purpose and scheme of *CEAA*, and this Court is entitled to interfere where the Applicants can demonstrate that the Decision departs from the objects of the legislative scheme and the perspective within which it was intended to operate (*Bow Valley Naturalists v. Canada (Minister of Canadian Heritage)* (2001), 37 C.E.L.R. (N.S.) 1, at para. 55; *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 at para. 53).

The Scoping Decision is Absurd and Undermines the Functioning of CEAA

[90] The Applicants point out that *CEAA* describes and classifies projects on the basis of their functional purpose. Looking at the *Comprehensive Study List Regulation*, it lists a series of undertakings - power stations, oil sands projects, dams, pulp mills etc. - that all have obvious purposes and underlying rationales.

[91] The same is true of the activities listed as projects in the *Inclusion List Regulation*. The Applicants point out that the purpose of many listed activities is apparent from their description - weapons testing, for example, is obviously a function of Canada's army (Part IV, s. 25). While the purposes of the activities affecting fish habitat listed in Part VII do not appear in the description, they are equally obvious. Fish can be destroyed, for example, if there is an invasive species that preys on our indigenous species (s. 42), or fish habitat can be harmed by dredging to clear a shipping channel (s. 43). Also, fish habitat can be lost by draining a water body to reduce flooding risks (s. 44).

[92] The destruction of Fort Creek, in contrast, has no purpose independent of the construction of the oil sands project. By itself, it is a project without rationale, purpose or function. This is an absurd concept of a project that is out of keeping with the commonsense approach to project description established by *CEAA*.

[93] To define a project in a manner that divorces it from any functional purpose also undermines the weighing function that a Responsible Authority may have to perform once an assessment is completed. Under ss. 20(1)(*b*) and 37(1)(*a*)(ii) of *CEAA*, the Responsible Authority is called on to decide whether a project causing significant adverse environmental effects should still be approved because its effects are justified "in the circumstances," meaning in light of the social, economic and other non-environmental benefits of the project under consideration.

[94] This balancing of interests cannot occur in the present case unless the project is considered as an oil sands mine and processing facility. Factors such as employment levels and royalty payments to government may be part of the justification for the Fort Hills oil sands project, but they have no bearing on a creek destruction project without purpose.

DFO's Approach to Scoping Undermines the Comprehensive Study Regulation

[95] The Applicants also say that DFO's approach to scoping the Fort Hills oil sands project threatens to make the listing of major projects in the *Comprehensive Study List Regulation* substantially irrelevant.

[96] Federal involvement in most major projects - be they oil sands mines, pulp and paper mills or oil refineries - will most often come through the engagement of federal lands, federal financing or federal permits relating to a portion of the project. If DFO's scoping approach is adopted, federal involvement in

a piece of a project would never produce an assessment of the project as a whole, robbing most, if not all, of the listings in the *Regulation* of any effect.

DFO's Approach Creates Inconsistency in the Application of CEAA

[97] The Applicants point out that, under *CEAA*, different federal authorities may act as responsible authorities for different types of projects. Maintaining a common approach to project scoping and assessment, therefore, achieves consistency and predictability in the application of *CEAA*, and should be preferred to an approach that creates conflict and inconsistency.

[98] To assist in achieving consistency in scoping decisions, the Canadian Environmental Assessment Agency has issued a policy statement, *Establishing the Scope of the Environmental Assessment*, that lists issues a Responsible Authority should consider when setting a project's scope. The Applicants say that DFO's Decision varies from the policy in two key ways. First of all, while the policy's first recommendation is to consider the proponent's project description and justification, DFO's scoping decision ignores TrueNorth's description of its project as an "oil sands project" and its justification for the destruction of Fort Creek as necessary to build a mine. Secondly, while the policy also emphasizes focussing on "other physical works that are inevitable or that are physically linked to the proposed project," DFO's decision leaves all the related works and undertakings out of the project scope.

[99] The Applicants also emphasize that DFO's Decision directly contradicts its own past treatment of major mining projects that are listed in the *Comprehensive Study List Regulation*. For example, Suncor's Project Millennium oil sands project triggered a comprehensive study due to a s. 35(2) authorization application; the Huckleberry Copper Mine Project, Kemess South Gold/Copper and Musselwhite mining projects all triggered comprehensive studies due to s. 35(2) triggers; and the Cheviot Coal Mine project triggered a joint review panel due to a s. 35(2) authorization application *(Tsawwassen Indian Band v. Canada (Minister of Environment)*, [1998] F.C.J. No. 371 (T.D.) para. 52).

[100] DFO's reliance on the provincial environmental assessment in setting the scope of the federal assessment further contributes to uncertainty in the administration of *CEAA*. Ms. Majewski states that "the fact that the province addressed [environmental concerns within federal jurisdiction] to the satisfaction of DFO is a consideration that I took into account" in scoping the project.

[101] The implication of Ms. Majewski's statement is that, had there been no provincial assessment, she would perhaps have scoped the project as an oil sands project, not a creek destruction project. However, the presence or absence of other assessment processes does not change the nature and purpose of the undertaking proposed and should not be a relevant factor at the project scoping stage of a *CEAA* assessment.

[102] The Applicants point out that parallel assessment processes can validly be taken into account once a project has been scoped and the assessment is underway. But what is critical is that *CEAA* takes parallel processes into account through provisions for cooperation on environmental studies, reports and review panels (ss. 12(4), 40), and in the use of previously prepared environmental assessments (s. 24). In specifically providing for these types of intergovernmental cooperation, *CEAA* indicates how the existence of a provincial assessment may properly be integrated in the federal process. Down-scoping a federal project is not one of the options provided.

The Decision Leaves Important Issues of Federal Concern Outside the Scope of the Assessment

[103] The TrueNorth oil sands project impacts on multiple areas of federal concern. For this reason, the Applicants say that it is unreasonable that DFO, with full knowledge of these impacts, would nonetheless deliberately leave them outside the reach of the federal assessment. This undermines the central purpose of *CEAA*, which is to ensure that federal authorities carefully examine the environmental effects of projects before they make decisions permitting those projects to go ahead.

[104] The Decision even puts the issue of fish tainting caused by effluent from the mine facilities (something that DFO acknowledges as important and within its jurisdiction) outside the scope of the project assessment. In the opinion of the Applicants, Ms. Majewski's claim at para. 17 that DFO can require fish tainting studies as a condition of its authorization makes no sense. DFO cannot impose conditions on the mine effluent when it has specifically excluded the mine itself from the federal assessment.

The Scoping Results in an Assessment Out of Proportion to the Undertaking

[105] The Applicants further point out that another indicator of the unreasonableness of the scoping Decision is that it reverses the pyramid of environmental scrutiny established by *CEAA*. *CEAA* is designed to ensure that the rigour of an assessment increases as the potential environmental effects of a project increase. This is achieved through mechanisms such as the *Comprehensive Study List Regulation* and referrals to mediations and panel reviews under ss. 20, 23 and 25 of *CEAA*.

[106] In this case, an oil sands project covering 41 sq. miles (arguably the most intensive type of terrestrial industrial development occurring in Canada) is being subjected to the least rigorous form of assessment. Again, this has only been achieved through defining the project as something other that what it obviously is.

Previous Authorities are Distinguishable

[107] The Applicants address and distinguish three cases: *Friends of the West Country*; *Bow Valley Naturalists*, and *Tsawwassen Indian Band*.

[108] The ratio of the Court's finding on s. 15 in *Friends of the West Country*, is that s. 15(3) does not compel the Responsible Authority to "re-scope" a project to include related works and undertakings after it has made its scoping decision under s. 15(1).

[109] The Applicants' case, however, does not depend on s. 15(3). It relies instead on the fact that the True North project consists of physical works listed in the *Comprehensive Study List Regulations*. It also relies on the errors in DFO's interpretation of the scope of the federal assessment power and the *Inclusion List Regulation*.

[110] *Bow Valley* largely affirms *Friends of the West Country* on the s. 15 point. The project at issue in that case was not listed in the *Comprehensive Study List Regulation* and the Court had no cause to consider the implications of that listing for the scoping decision.

[111] The Court's discussion in *Bow Valley* of how scoping should be done supports the Applicants' point that DFO should assess the principal project proposed by the proponent. Referencing the *Responsible Authorities Guide*, Linden J.A. notes at para. 25 that "according to the principle project/accessory test, the principal project, i.e. either the undertaking with respect to a physical work or the physical activity, must always be included in the scope of the project." TrueNorth's oil sands mine is an undertaking with respect to a physical work and therefore forms the principal project.

[112] The *Tsawwassen* case addresses a more analogous situation. The Applicant First Nation challenged Environment Canada's decision under s. 15(1) to scope the dumping of material dredged during the building of an ocean terminal as an ocean dumping activity and not an ocean terminal construction project. Ocean terminals of the kind at issue in that case are listed in the*Comprehensive Study List Regulation*.

[113] The facts of the case and the basis upon which it was decided, however, distinguish it from the present application. The ocean terminal had already been fully assessed under an Environmental Assessment and Review Process Guidelines Order and was built and in operation by the time the applicant brought its case. Similarly, the ocean dumping had already taken place by the time the applicant challenged the scoping decision. These were clearly key factors influencing the trial judge in rejecting the notion that the ocean dumping should trigger a second full assessment of the ocean terminal.

[114] As regards the specific conclusions reached by the trial judge in *Tsawwassen* at para. 52 in upholding the scoping decision, the Applicants offer the following comparisons to the case at bar:

a) All previous applications for ocean disposal permits ... dating back to 1993 ... have been subjected to environmental assessments .... as ocean dumping projects.

The exact converse applies in the case at bar, with all major mining projects with s. 35(2) triggers being assessed by comprehensive study or panel review.

b) The physical activity of ocean disposal is, itself, defined as a project for the purposes of *CEAA* by virtue of paragraph (b) of the definition of project in subsection 2(1) of *CEAA* and by the regulations adopted under section 59, the Inclusion List Regulations under Part VI, paragraph 40.

As explained above, DFO cannot rely on the *Inclusion List Regulation* in this case.

c) The use of dredged material for fill at Deltaport was only one alternative and was not necessary for completion of the Deltaport project. Accordingly, issuance of an amendment to Permit No. 4543-2-02137 was not required to enable Deltaport to proceed but only to enable the ocean disposal to proceed within the meaning of paragraph 5(1)(d) of *CEAA*.

There is no evidence in the case at bar that the mine can proceed without the destruction of Fort Creek.

d) The Deltaport project had been approved and had commenced construction by September 1993, which was 15 months before *CEAA* was proclaimed in force and two years before the amendment of Permit No. 4543-2-03137, which was applied for on September 28, 1995.

The mine is not yet built and *CEAA* has been in force at all material times.

[115] The jurisdictional and interpretive errors raised by the Applicants in the case at bar were also not addressed by the trial judge in *Tsawwassen*. Finally, the Court of Appeal's decision further reinforces the unique and distinguishing features of *Tsawwassen* because that decision turns on the fact that all relevant activities had occurred before the challenge was brought and does not even consider the scoping issue. Taken all together, the Applicants submit that the *Tsawwassen* decision is factually unique and not applicable to the case at bar.

The Implications of DFO's Error

[116] The Applicants are of the view that the implications of DFO's restrictive scoping of the TrueNorth project will be felt in both the assessment process and the ultimate mitigation of the effects of the project. On the process side, the TrueNorth project will not receive a focussed and in-depth federal comprehensive study that permits a clear evaluation of its environmental impacts, particularly as they relate to areas of federal responsibility and members of the public will be deprived of an opportunity to provide input on the results of such a comprehensive study.

[117] Perhaps more importantly, the Applicants argue, DFO's scoping decision effectively relinquishes any federal control over the mitigation of potentially significant project impacts affecting areas of federal responsibility. Sections 20(2) and 37(2) of *CEAA* require that, when either a screening or comprehensive study is completed and the Responsible Authority has decided to provide the loan, land or permit so that the project may go ahead, it shall ensure that the identified mitigation measures are implemented:

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

[118] Sections 20(2) and 37(2) of *CEAA* arm a federal authority with expanded regulatory powers to insert conditions relating to mitigation measures in any regulatory authorizations that it issues. This is achieved through the use of the phrase "notwithstanding any other Act of Parliament." In this case, the "other Act" is the *Fisheries Act*, being the statute under which DFO exercises its powers and performs its duties and functions. Notwithstanding the specific content of the *Fisheries Act*, ss. 20(2) and 37(2) of *CEAA* supplement DFO's powers under that statute and empower it to impose conditions in the fisheries authorization related to the protection of fish habitat and the implementation of mitigation measures bearing on areas of federal jurisdiction.

[119] The s. 35(2) authorizations issued for the Cheviot Coal Mine at the conclusion of a federal-provincial joint panel review provide an example of the expansive effect of ss. 20(2) and 37(2). Each authorization contains conditions protecting migratory birds and their habitat, an issue of federal concern that was identified during the joint assessment process. But for *CEAA* assessment process and s. 37(2), those terms would not be in a fisheries authorization.

[120] The Applicants are concerned that mitigation measures identified in a brief screening assessment of the destruction of a creek will obviously be more limited and less numerous than those identified in a more detailed comprehensive study of a major oil sands mine and processing facility. DFO is thus limiting its ultimate responsibility for ensuring the mitigation of the environmental impacts of True North project by unduly restricting its gaze to the loss of one creek at the outset of the assessment process.

[121] While Alberta may also be looking at some of the same environmental effects, a parallel provincial process does not free DFO from the duty to comply with *CEAA*. As the Court pointed out in *Hydro-Quebec* at p. 194, the federal government has unique and important responsibilities engaged by this project that will benefit from a focussed federal review.

[122] In specific response to TrueNorth's evidence regarding harmonization agreements, the

Applicants say there is no evidence that the provincial and federal governments entered into an agreement to conduct a harmonized environmental assessment for the TrueNorth project. Even under a harmonized assessment, DFO would still have to meet the legal requirements of *CEAA*, as harmonization agreements do not permit a responsible authority to abdicate the requirements of *CEAA* (*Canadian Environmental Law Association* at p. 77).

Respondent - TrueNorth

Generally

[123] TrueNorth says that the Applicants have misconstrued the application of *CEAA* and the regulations made under that statute. The decision as to what constitutes a project for the purposes of environmental assessment under *CEAA* must consider what has triggered the application of *CEAA* in the first place.

[124] The Decision, contrary to the assertions of the Applicants, does not render *CEAA* unworkable or absurd. The Decision takes into account the project and related undertakings that give rise to the involvement of DFO and the application of *CEAA*. DFO's Decision is consistent with the objectives of the Harmonization Accord and the Sub-Agreement entered into by the *CCME* and, more importantly, with the legal framework established under *CEAA*.

The Framework of CEAA

[125] Section 5(1) of *CEAA* is commonly referred to as the "triggering section." It establishes the circumstances under which the duty to prepare an environmental assessment arises. It states that the duty arises if a federal authority does one of the following things:

(a) proposes a project;

(b) makes payments or provides a guarantee for loan or other form of financial assistance to a proponent of a project;

(c) transfers federal lands for the purpose of enabling a project to be carried out; or

(d) issues a permit, licence or approval described in the Law List Regulations that enables a project to be carried out.

[126] To determine whether *CEAA* is triggered pursuant to s. 5(1)(*d*) it is necessary to review the *Law List Regulations*.

[127] In this case, *CEAA* trigger was s. 35(2) of the *Fisheries Act*:

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.	35. (1) Il est interdit d'exploiter des ouvrages ou entreprises entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.	(2) Le paragraphe (1) ne s'applique pas aux personnes qui détériorent, détruisent ou perturbent l'habitat du poisson avec des moyens ou dans des circonstances autorisés par le ministre ou conformes aux règlements pris par le gouverneur en conseil en application de la présente loi.

[128] TrueNorth applied for authorization from DFO to carry on a work or undertaking "that results in the harmful alteration, disruption or destruction of fish habitat." The work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat is the destruction of Fort Creek and it is not the oil sands mine or processing facilities. Put another way, it is the destruction of Fort Creek and not the construction and operation of a mine that has triggered the application of *CEAA*.

[129] The destruction of Fort Creek is a "physical work" because it involves the construction of temporary or permanent diversions. The destruction of Fort Creek can also be considered a "physical activity" because the harmful alteration, disruption or destruction of fish habitat that requires an authorization pursuant to s. 35(2) of the *Fisheries Act* is a prescribed activity pursuant to the *Inclusion List Regulations*. Regardless of whether the destruction of Fort Creek is a physical work or a physical activity, it constitutes a "project" as defined in s. 2 of *CEAA*.

[130] The application of *CEAA* relies on the designation of a Responsible Authority in respect of a given project. The Responsible Authority is the federal authority required to exercise a power or function referred to in s. 5 of *CEAA*. The Responsible Authority is prohibited from exercising the power or function until it has ensured that an environmental assessment under *CEAA* has been conducted.

[131] Accordingly, in this case, because DFO must exercise its authority in respect of TrueNorth's s. 35(2) Application to destroy Fort Creek, DFO is the Responsible Authority.

[132] The first decision to be made by a Responsible Authority is to determine, pursuant to s. 15(1) of *CEAA*, the scope of the project in relation to which an environmental assessment should be conducted.

[133] The Responsible Authority, having determined the scope of the project, must then determine the form of assessment that will be undertaken. *CEAA* stipulates that if a project is not described in the *Comprehensive Study List Regulations* or the *Exclusion List Regulations* then the Responsible Authority must ensure that a screening of the project is conducted and a screening report prepared. *CEAA* also stipulates that if a project is described in the *Comprehensive Study List Regulations*, the Responsible Authority must ensure that a comprehensive study is conducted or it must refer the project to the Minister of Environment for referral to a mediator or review panel.

[134] In this case, because the destruction of Fort Creek is not described in the *Comprehensive Study List Regulations* or the *Exclusion List Regulations*, DFO must ensure that a screening of the project is conducted and a screening report is prepared. In order to determine the factors that must be considered in the screening report, the Responsible Authority must refer to s. 16(1) of *CEAA*. The Responsible Authority must also, pursuant to s. 16(3) of *CEAA*, determine the scope of the assessment that will be undertaken. In this case, no decision has been made by DFO pursuant to s. 16(3) that is the subject of

these proceedings.

[135] If the form of assessment undertaken is a screening report (as it is in the case at bar), the Responsible Authority may, taking into account the implementation of mitigation measures, exercise the power or function that will allow the project to be carried out if the project is not likely to cause significant environmental effects. Alternatively, the Responsible Authority may refuse to exercise the power or function that will allow the project to be carried out or it may refer the project to the Minister of Environment for referral to a mediator or review panel.

[136] Accordingly, the Applicants are incorrect when they say that, because the destruction of creeks is not listed in the *Comprehensive Study List Regulations*, DFO will only prepare a screening report which is the lowest level of assessment. In reality, depending on the screening report conclusions, DFO may refer the project to the Minister of Environment for further assessment.

DFO Did Not Err When It Interpreted the Scope of the Federal Assessment Power Under CEAA

[137] TrueNorth says that it is improper for the Applicants to rely on those portions of Ms. Majewski's affidavit that make legal arguments or draw conclusions of law because they do not constitute reasons underlying the Decision and ought not to be relied upon by this Court.

[138] Nevertheless, TrueNorth says that the Applicants have misinterpreted the Supreme Court of Canada's decision in *Oldman*. In that case, at p. 67, the Supreme Court of Canada stated as follows:

It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the Constitution Act, 1867 differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities.

[139] This means that, in this case, when Parliament's involvement is as a result of its jurisdiction over fisheries, it must focus on the environmental effects relevant to a consideration of whether to authorize the destruction of fish habitat.

[140] It is Parliament's jurisdiction over fisheries, and not oil sands mines or oil sands processing, that is at issue. Again, in *Oldman* the Supreme Court of Canada stated as follows at p. 69:

In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of bona fides, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.

[141] In the case at bar, TrueNorth says it is the destruction of fish habitat that is the cause of an environmental assessment under *CEAA*. This means that the federal government ought to examine matters directly related to the exercise of its jurisdiction over fisheries, namely the destruction of Fort Creek. In *Oldman*, the Supreme Court at pp. 71-72 cautioned against an interpretation of federal power

that would encroach on matters within provincial jurisdiction:

I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the Guidelines Order as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction. However, on my reading of the Guidelines Order the "initiating department" assigned responsibility for conducting an initial assessment, and if required, the environmental review panel, are only given a mandate to examine matters directly related to the areas of federal responsibility affected.

[142] The Supreme Court went on to state at p. 72 that "environmental impact assessment can only affect matters that are truly in relation to an institution or activity that is within federal legislative jurisdiction." In the case at bar, the activity that is within federal legislative jurisdiction is the destruction of Fort Creek and not the construction and operation of a mine *per se*.

[143] TrueNorth argues that the Applicants have confused "scope of the project" and "scope of assessment." TrueNorth agrees that DFO, when preparing a screening report in respect of the destruction of Fort Creek, may consider the environmental effects of that project on all areas of federal jurisdiction. But the Decision under consideration is the scope of the project and not the scope of the assessment that has yet to be carried out.

[144] TrueNorth says the Applicants have also misinterpreted the Supreme Court of Canada's decision in *Hydro-Quebec*. In that case, at p. 191, the Supreme Court made the following observation prior to upholding the NEB's authority to review the environmental affects of power plants designed to produce the power that was subject of the power export certificate application:

As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export contract to be fulfilled.

[145] In the case at bar, the activity within federal jurisdiction, namely the destruction of Fort Creek, can occur without the construction of the mine or the oil sands processing facilities, whereas in *Hydro-Quebec* the activity within federal jurisdiction, namely the export of electricity, could not occur without the generation of the electricity to be exported. The Supreme Court of Canada, at p. 191, recognized this crucial distinguishing factor when it established the following test upon which to base its decision:

A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract, if this question is answered in the affirmative, then the environmental affects of the construction of such facilities are related to the export.

[146] In the case at bar, TrueNorth says the test is "whether the construction of [the oil sands mine and processing facility] is required to serve, among other needs, the demands of [the destruction of Fort Creek]." TrueNorth says this question must be answered in the negative. The construction of the oil sands mine and processing facility is not necessary to support the destruction of Fort Creek. Put another way, the destruction of Fort Creek can occur without subsequent development of the oil sands mine and related processing facilities.

[147] The Supreme Court of Canada's test on this issue was stated somewhat differently, but equally effectively, by Nadon, J. of this Court in *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 903 (T.D.) ("*Tolko*"). Nadon J. stated the following at para. 81 in the context of the test to be used in the determination of the scope of the project in that case:

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".

[148] The Applicants argue that the reasoning in *Friends of the West Country*, in respect of the scope of assessment ought to also apply to the scoping of a project. But TrueNorth says there is no legal or logical basis for such an argument. The danger of accepting the Applicants' argument is obvious when the following words from *Tolko*, endorsed by Nadon J. at para. 86 in that case, are considered:

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 [.Navigable Waters Protection Act], does everything that City or province does become one big "project" which must be environmentally assessed under *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 *CEAA*, there is simply no reasonable limit placed on what the responsible authority in any given case would have to consider.

[149] The Applicants also rely on the Federal Court of Appeal's decision in *Friends of the West Country*. Again, TrueNorth says that the Applicants have misinterpreted that case. The Applicants refer to *Friends of the West Country* in the context of the Responsible Authority's duty to determine, pursuant to s. 16 of *CEAA*, the scope of an environmental assessment. In this case, the issue is the "scope of project" as determined by DFO pursuant to s. 15(1) of *CEAA* and not the scope of environmental assessment. Once scope is determined, the Responsible Authority can then examine all areas of federal jurisdiction as part of any assessment that is carried out.

[150] In *Friends of the West Country*, the Federal Court of Appeal concluded that the Responsible Authority was correct when it determined that, pursuant to s. 15(l) of *CEAA*, the scope of project should be restricted to two bridges as opposed to including the proponent's access road and mill. The bridges were connected to the road which was required by the proponent to transport timber to the mill.

[151] The Federal Court of Appeal, in the context of s. 15(3) of *CEAA* and the definition of "project" in s. 2 of *CEAA*, stated as follows at para. 20 of *Friends of the West Country*:

The words "in relation to" in context here do not contemplate any other construction, operation, modification, decommissioning, abandonment or other undertakings that has any conceivable connection to the project as scoped. Rather 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.

[152] TrueNorth says that the Applicants, instead of referring this Court to relevant portions of *Friends of the West Country* that are in respect of "scope of project" and s. 15 of *CEAA*, have relied on portions of the decision that are in respect of the "scope of assessment" and s. 16 of *CEAA*. However, s. 16 of *CEAA* is not at issue in the case at bar and only after DFO prepares a screening report will the Applicants, or anyone else for that matter, be able to determine whether s. 16 of *CEAA* has been complied with.

[153] The Applicants argue that the repeated use of the phrase "in whole or in part" in s. 5(1) of *CEAA* requires "an environmental assessment of the 'project' in its entirety, not just the federal piece." TrueNorth says there is no merit to this argument. The phrase simply recognizes that, in respect of a project such as the destruction of Fort Creek, the proponent does not require any federal permits or authorizations to commence the construction of camps and storage areas that will be required to carry out the project, even though construction of the camps and storage areas are scoped as part of the project.

[154] The Applicants also argue that, because the *Comprehensive Study List Regulations* prescribe oil sands projects, Parliament intended to require federal assessments of such projects in all cases. TrueNorth acknowledges that an entire oil sands project could be subject to environmental assessment under *CEAA* under certain circumstances. This could occur, for instance, if a federal authority proposed the construction and operation of an oil sands project, or provided a loan guarantee to assist the proponent of an oil sands project, thereby triggering the application of *CEAA* pursuant to s. 5(a) or 5(b) respectively. However, in the case at bar, it is only because of Parliament's jurisdiction over fisheries that *CEAA* has been triggered and, in accordance with the relevant jurisprudence, this must be taken into account when determining the scope of the project.

DFO Did Not Err in Interpreting the Definition of "Project"

[155] TrueNorth submits that the Decision and the reasons supporting it are all contained in DFO's letter of December 13, 2002. The affidavit of Ms. Majewski should not be considered reasons underlying the Decision.

[156] Accordingly, the Applicants' argument relying upon Ms. Majewski's affidavit cannot form a basis for this Court to set aside the Decision unless it is shown that the destruction of Fort Creek cannot be considered a "project" as defined in s. 2 of *CEAA*.

[157] TrueNorth says that, for the Applicants to succeed in their argument that the Decision ought to be set aside because of DFO's interpretation of "project" in s. 2 of *CEAA*, they must show that only an oil sands mine and its processing facilities meet the definition and that the destruction of Fort Creek cannot meet that definition. The Supreme Court of Canada decision in *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895 affirms that the relevant inquiry in this case is whether the destruction of Fort Creek can be a "project" and not how Ms. Majewski arrived at that conclusion.

[158] TrueNorth is of the view that the destruction of Fort Creek can be considered a "physical work" because it involves the construction of temporary or permanent diversions. In addition, the destruction of Fort Creek involves the construction of site de-watering and drainage works as well as the construction and operation of fish habitat compensation works. Even if the destruction of Fort Creek did not require construction of temporary or permanent diversions, the construction of site de-watering and drainage works and the construction and operation of fish habitat compensation works, it would nevertheless constitute a "physical work" pursuant to the first branch of the definition of "project" in s. 2 of *CEAA*:

[*CEAA*] does not define "physical work". However, the implication for the definition of "project" is clear: physical activity by humans and concrete results are fundamental. The Concise Oxford Dictionary of Current English, 9th ed. (Oxford: Clarendon Press, 1995), at pp. 1029 and 1613 defines the adjective "physical" as "of matter; material", and the noun "work" as "a thing done or made by work; the result of an action; an achievement; a thing made". So the expression "physical works" would not include objects of natural growth, such as trees, which have come into existence by a natural process as opposed to having been manufactured or created by the exertion of human labor. [emphasis added]

Hobby, Ricard et al. at pp. ii-20 and ii-21

[159] TrueNorth asserts that the destruction of Fort Creek can also be considered a "physical activity" because the harmful alteration, disruption or destruction of fish habitat which requires an authorization pursuant to s. 35(2) of the *Fisheries Act* is a prescribed activity pursuant to the *Inclusion List Regulations*.

[160] The Applicants argue that the destruction of Fort Creek cannot be considered a "physical activity" because it is related to a "physical work," namely the oil sands mine and processing facilities. TrueNorth says this is incorrect. The phrase "not relating to a physical work" in the definition of "project" in s. 2 of *CEAA* and "except insofar as they relate to a physical work" in s. 3 of the *Inclusion List Regulations* are intended to ensure that a multitude of environmental assessments are not conducted unnecessarily. If it were not for these two phrases, a Responsible Authority could be required, under certain circumstances, to conduct several environmental assessments in respect of the same project.

[161] For instance, s. 32 of the *Inclusion List Regulations* states that "construction [...] of a military weapons platform" is a physical activity and s. 34 states that "construction of drainage [...] within the right-of-way of a railway line" is a physical activity. Both the construction of a military weapons platform and the construction of drainage are likely to result in a physical work. If it were not for the two phrases the Applicants rely upon, then the physical activity of the construction and the resulting physical work would be subject to separate environmental assessments under *CEAA*.

[162] Accordingly, TrueNorth submits that the phrase "not relating to a physical work" as used in the definition of "project" in s. 2 of *CEAA* and the phrase "except insofar as they relate to a physical work" as used in s. 3 of the *Inclusion List Regulations* are intended to ensure that separate environmental assessments are not undertaken for physical activities that are related to a physical work since those activities will be, by necessity, already included within the scope of the "physical work" as a result of s. 15(3) of *CEAA*.

[163] The Applicants argue that because oil sands mines and processing facilities are described in the *Comprehensive Study List Regulations* they must be deemed to be projects within the meaning of *CEAA* and therefore subject to federal regulation. But TrueNorth points out that there are no provisions in *CEAA*, or principles in law, that suggest consideration should be given to the *Comprehensive Study List Regulations* when interpreting the definition of "project" in s. 2 of *CEAA* or determining the scope of project pursuant to s. 15(1) of *CEAA*.

[164] The Applicants' argument that the construction and operation of oil sands mines and processing facilities should be deemed to be a "project" as defined in s. 2 of *CEAA* would only have merit if the construction and operation of oil sands mines were prescribed activities in the *Inclusion List Regulations*. However, Parliament has not prescribed the construction and operation of oil sands mines in the *Inclusion List Regulations*. If this Court were to accept the Applicants' argument that because oil sands mines and processing facilities are described in the *Comprehensive Study List Regulations* they must be deemed to be projects within the meaning of *CEAA*, and therefore subject to federal regulation, *CEAA* would become the "constitutional Trojan horse" that the Attorney General for Saskatchewan warned against in *Friends of the Oldman River*.

The Decision Is Not Only Reasonable But Correct

[165] TrueNorth submits that DFO's Decision is entitled to deference from this Court and that the applicable standard of review is reasonableness *simpliciter*. The Supreme Court of Canada has stated that this standard of review has the following implications:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against a standard of reasonableness for example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if a decision was unreasonable.

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.

Law Society of New Brunswick v. Ryan, 2003, SCC 20, at paras. 48, 51 and 55.

[166] TrueNorth says that the Decision is not only reasonable; it is correct. In addition to the jurisprudence already referred to which stands for the proposition that an environmental assessment conducted pursuant to *CEAA* must be connected with the regulatory authority which triggers *CEAA*, Dawson, J. of this Court, in a decision that was upheld by the Federal Court of Appeal, has said that "[e]vironmental assessment must be connected to the regulatory authority which is capable of triggering *CEAA*." (*Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of Environment)*, [2001] F.C.J. No. 627 (T.D.) at para. 176).

[167] Contrary to the assertions of the Applicants, TrueNorth says the Decision is neither unreasonable nor absurd. Instead, it takes into account the plethora of Federal Court and Supreme Court of Canada jurisprudence that requires an environmental assessment conducted under *CEAA* to be connected to the regulatory authority that triggered the application of *CEAA*.

[168] The Applicants also argue that there ought to be "consistency and predictability" in the application of *CEAA*. But TrueNorth says that only if the Responsible Authority takes into account the regulatory authority that has triggered the application of *CEAA* pursuant to s. 5(1)(*d*) will there be consistency and predictability. This was recognized in *Tolko*.

[169] The Applicants also raise the issue of fish tainting which is not a concern in respect of the destruction of Fort Creek. If fish tainting were a concern in respect of the destruction of Fort Creek, DFO could address the issue in its screening report and, if necessary, refuse TrueNorth's s. 35(2) Application.

[170] The evidence is that fish tainting is not a concern. However, TrueNorth says that even if fish tainting were a concern, this does not mean that the Decision made in connection with the destruction of Fort Creek was unreasonable. If TrueNorth, while constructing or operating the mine and processing facility, were to deposit a substance that contributed to fish tainting, it would be an offence pursuant to the *Fisheries Act* and would be prosecuted.

[171] More importantly, if DFO is concerned that fish tainting might occur as a result of the construction or operation of the mine, it can, relying on s. 37(2) of the *Fisheries Act*, require that the mining operation be modified or shut down. The exercise of this power, pursuant to s. 6(f) of the *Law List Regulations* and s. 5(1)(*d*) of *CEAA*, would trigger the application of *CEAA*. Under these circumstances, taking into account the regulatory power being exercised, the scope of the project would have to include

the physical works and activities that are suspected of causing the fish tainting.

[172] In any event, TrueNorth says the Applicants are incorrect when they suggest that a necessary consequence of the Decision is that the issue of fish tainting will not, or cannot, be addressed.

[173] There is no basis upon which to conclude that the Decision is unreasonable. DFO took into account the federal regulatory authority that triggered the application of *CEAA* and correctly determined the scope of the project.

Respondent - The Minister of Fisheries and Oceans

The Standard of Review

[174] The Minister says that the appropriate standard of review for a discretionary decision made in the context of *CEAA* is reasonableness *simpliciter* (see *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 37 C.E.L.R. (N.S.) 1 (F.C.A.); *Inverhuron & District Ratepayers' Association v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1008 (F.C.A.) leave to appeal to the SCC refused [2001] S.C.C.A. No. 463).

[175] The Minister is also of the view that the appropriate standard of review applied to the interpretation of a statute will, in the context of *CEAA*, generally be correctness.

Scoping Projects under CEAA

[176] The Minister says that the Applicants' submission that s. 15 of *CEAA* requires, as a matter of law, that the project include all of the components of the oil sands mine is not supported by judicial consideration of s. 15. Rather, this Court has now settled that a Responsible Authority such as DFO has discretion to establish the scope of a project that is the subject of environmental assessment. Nothing in the circumstances of this case suggests that this discretion was exercised unreasonably (*Manitoba's Future Forest Alliance et al. v. Canada (Minister of the Environment)* (1999), 170 F.T.R. 161 (T.D.) ("*Tolko*"); *Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment) et al.* (1999), 163 F.T.R. 36 (T.D.); *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans) et al.* (1999), 248 N. R. 25 (F.C.A.)).

[177] Once a Responsible Authority has determined that it is required to conduct an environmental assessment it must determine what the scope of the project should be (that is, what proposed undertakings or activities should be included in the assessment). After that, it will go on to determine the scope of the environmental assessment (that is, what are the factors to be taken into account and what should be the scope of their consideration). These determinations are discretionary under s. 15 (scope of project) and s. 16 (scope of the assessment) of *CEAA*.

[178] Only the project scoping decision, made under s. 15 of *CEAA*, is the subject of this application for judicial review.

[179] As the Federal Court of Appeal noted in *Bow Valley Naturalists Society*, *CEAA* does not define the process of scoping, nor does it provide any direction to the Responsible Authority to determine which physical works or physical activities should be included within the scope of a project.

[180] In its operational policy statement, *Establishing the Scope of the Environmental Assessment*, which is referred to by the Applicants, the Canadian Environmental Assessment Agency has identified a list of issues that may be taken into account in determining the scope of a project and the scope of the environmental assessment in any given case. As this Court and the Federal Court of Appeal have noted in other cases, the Canadian Environmental Assessment Agency guidance material, while not binding, is helpful in understanding how *CEAA* should be applied (*Operational Policy Statement - Establishing the Scope of the Environmental Assessment*, September 25, 1998 (OPS-EPO/1-1998); *Tolko*, paras. 76-77; *Bow Valley Naturalists*, para. 20).

[181] In *Canadian Environmental Assessment Act - An Annotated Guide*, the authors describe at page II-54 the challenge that the scoping of a project presents to a Responsible Authority:

The challenge in determining the scope of a project is to find the balance between artificially separating related undertakings or activities for the purposes of an environmental assessment (which has been described as "project splitting") and casting the net too widely to include undertakings or activities that are remotely related to the triggered project and that are typically matters within the jurisdiction of the province where the project is located.

[182] The authors then continue at page II-57 to address the relationship between scoping and constitutional units:

Scoping a project is an area where constitutional limits have practical consequences. The individual circumstances of each case must be carefully considered in determining whether to scope a project and include related physical works or activities. Where, for example, a mill is the project triggering the environmental assessment, scoping the project for the purposes of the assessment to include the mill as the "principal" project and an access bridge as an associated or "accessory" physical work or activity undertaken solely for the purpose of supporting the mill is unlikely to pose a significant risk that the Minister or responsible authority has exceeded federal jurisdiction. On the other hand if the project triggering the assessment is, for example, an access bridge functionally "accessory" to a mill that is the "principal" undertaking by virtue of its complexity and value, scoping the project for the purposes of the assessment to include the access bridge and the mill may be problematic from a constitutional perspective. In either case, if the project were scoped to include the removal of trees, a matter clearly within provincial jurisdiction but necessary for the construction of the access bridge and the mill, the Minister or responsible authority would likely be invading an area of provincial jurisdiction.

Hobby, Ricard, et al. *Canadian Environmental Assessment Act - An Annotated Guide*, Canada Law Book Inc., pages II-54, II-57

[183] The constitutional challenges inherent in scoping were described by the Supreme Court of Canada in the *Oldman River* case at 71-72 where the Supreme Court of Canada referred to a need to avoid using the federal environmental assessment process "as a constitutional Trojan horse [that would enable] the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction."

[184] The Minister says that, in order to find the right "balance between artificially separating related undertakings or activities" and "casting the net too widely," factors that can be taken into account in determining the scope of a project may validly include the following:

1- The nature of *CEAA* trigger.

The triggers found in paragraphs 5(1)(*a*), (*b*), and (*c*) of *CEAA* relate to the exercise of the government's powers to act as a natural person (proponent) - (a), to spend government funds - (b), or to deal with its own property - (c). In those circumstances the government makes purely discretionary decisions about its own involvement in a project. Hence, it has broad discretion to scope the project as it wishes before making such decisions about government property.

By comparison, in the context where only the 5(1)(*d*) trigger comes into play (as in the present case), a more prudent approach may be appropriate, as the environmental assessment is associated with, and justified by, the exercise of a legislative or regulatory power over non-governmental proponents. A distinction can also be made within the 5(1)(*d*) trigger between situations where the federal government's legislative or regulatory power that is engaged involves the management of a resource, and situations where it involves the management of an activity. The government having generally more flexibility in the latter situations than in the former. The Supreme Court of Canada made this clear in *Friends of the Oldman River*, at 67-68, wherein the majority of the Court held that:

...[A] somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities. The foregoing observations may be demonstrated by reference to two cases involving fisheries. In Fowler v. The Queen, [1980] 2 S.C.R. 213, the Court found that s. 33(3) of the Fisheries Act was ultra vires Parliament because its broad prohibition enjoining the deposit of "slash, stumps or other debris" into water frequented by fish was not sufficiently linked to any actual or potential harm to fisheries. However, s. 33(2), prohibiting the deposit of deleterious substances in any place where they might enter waters frequented by fish, was found intra vires Parliament under s. 91(12) in Northwest Falling Contractors Ltd. v. The Queen, [1980] 2 S.C.R. 292.

2- The nature of the responsible authority's regulatory responsibility.

The responsible authority must be mindful of its regulatory responsibilities and not be misled by the relative functional importance and interdependence of various aspects of a proposal in respect of which the RA is making a scoping of the project decision.

Canadian Environmental Assessment Act - An Annotated Guide, supra, at pages II-54 to II-57

Operational Policy Statement - Establishing the Scope of the Environmental Assessment, supra

Manitoba's Future Forest Alliance et al. v. The Minister of the Environment and Tolko Manitoba Inc. et al., supra

3- Provincial Assessment.

A proposal that is or has been the subject of an assessment of environmental effects by another authority, and the results of any such assessment may inform the RA of issues that may be relevant for the purposes of its decision-making.

Operational Policy Statement - Establishing the Scope of the Environmental Assessment, supra

The DFO Decision

[185] In para. 26 of her affidavit, Ms. Majewski states that in cases where a s. 35(2) *Fisheries Act*

authorization triggers an environmental assessment "the scope of the project should be limited to those elements over which the federal government can validly assert authority, either directly or indirectly." The Applicants use this passage to argue that DFO took the position that the scope of the project "must be restricted to those elements over which it can assert regulatory authority." The Minister says this is incorrect. The word "should" (rather than "must") indicates that Ms. Majewski was aware that the scoping decision is discretionary in nature and not mandatory. She simply noted that, in the particular context of a *Fisheries Act* s. 35(2) authorization trigger, a more prudent approach than in other contexts should generally (but not necessarily always) be taken.

[186] The Minister emphasises that the Applicants confuse "scope of project" (what is the project to be assessed?) and "scope of assessment" (what is to be considered during the assessment of the project?).

[187] The Applicants' references to the *Oldman River* case are really about what the federal government can consider during an assessment. In that case, the Supreme Court of Canada does not address the issue of how a project should be scoped. What DFO will eventually consider in its environmental assessment in the case at bar is hypothetical. The Applicants have challenged the scoping Decision without waiting to see what issues DFO will address in its assessment. There are no indications on the record that DFO intends to limit the scope of the assessment to only those effects of the project (as scoped) that would impact on fisheries.

[188] The Minister is also of the view that the Applicants, in their reference to *Friends of the West Country*, also confuse "scope of project" with "scope of assessment." The statement of the Federal Court of Appeal in that case that "the federal responsible authority is to exercise its cumulative effects discretion unrestrained by its perception of constitutional jurisdiction," was made in the very limited context of a discussion about what projects or activities, other than the one that is subject to *CEAA* assessment, should be considered in assessing the potential cumulative environmental effects. The impacts of other projects and activities that interact with those of the regulated project can only be considered to a limited extent. The Federal Court of Appeal, in *Friends of the West Country*, does not suggest that the federal government could assert jurisdiction over other projects and activities.

[189] The Minister considers the *Hydro-Quebec* case as a good example of what the Supreme Court of Canada meant in *Oldman River* when it stated, at pages 67-68, that "a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities." In the *Hydro-Quebec* case, the NEB was dealing with an application for a licence to construct and use an international power transmission line. The NEB was, therefore, exercising a federal regulatory power over an activity (exportation of electricity). In the case at bar, the DFO is exercising a federal regulatory power to authorize a HADD. Thus the Decision of DFO, as expressed in Ms. Majewski's affidavit, is to take a prudent approach, so that "[t]he EA scope of project should correspond to the federally regulated undertaking involved in the application."

[190] The Applicants argue that the phrase "in whole or in part" contained in ss. 5(1) of *CEAA* "requires an environmental assessment of 'the project' in its entirety, not just the federal piece." The Applicants try to argue that, as a matter of law, the "project" within the meaning of s. 5 that DFO's authorization will allow in whole or in part must be the oil sands project as a whole. But the wording of s. 5 in general, and the words "in whole or in part" in particular, do not support the Applicants' position. DFO determines what the project is in accordance with s. 15 of *CEAA*. In the case at bar, DFO determined that the project would consider authorizing, in whole or in part, was simply the destruction of a creek (and accessory activities). Nothing in the DFO determination conflicts with the wording of ss. 5 (1) of *CEAA*.

[191] The Minister says that the mere fact that oil sands projects are listed in the *Comprehensive Study List* does not make it mandatory for a Responsible Authority to scope the project as such. Scoping decisions are made on a case-by-case basis. In certain instances, DFO may, and in fact has, determined that the project to be reviewed should be the entire mine project. In other circumstances, where DFO only has to approve the construction of a bridge leading to a mine site, DFO could legitimately take a narrower approach, as it did in the context of forestry operations (see the *Friends of the West Country* and the *Tolko* cases, for example). In the case before this Court, DFO determined that its involvement in the project was limited and similar to that in the forestry operations cases; this explains the decision to take the "narrow" approach. While people may disagree with this approach, as the Applicants obviously do, and while a "broader" approach might also have been reasonable, it can not be said to be contrary to the terms of *CEAA*, or to be an unreasonable exercise of discretion.

The Definition of "Project"

[192] The Applicants take the position that, in the circumstances of this case, the project has to be defined, as a matter of statutory interpretation, as the proposed construction and operation of the oil sands mine as whole. But the Minister feels that this position is based on a misinterpretation of both *CEAA* and the relevant case law. In *Bow Valley Naturalists*, the Federal Court of Appeal referred to the Canadian Environmental Assessment Agency's *Responsible Authority's Guide* as a tool that provided some direction in determining which physical works or activities should be included within the scope of a project. The Court had the following to say about scoping at para. 25:

The Act does not define the process of scoping of the project. Neither does it define the term "scope." Nor does it provide any direction to the responsible authority in determining which physical works should be included within the scope of the project. The Responsible Authority's Guide, however, suggests the use of the principal project/accessory test to ensure consistency in scope of the project determinations. According to the principal project/accessory test, the principal project, i.e., either the undertaking with respect to a physical work or the physical activity, must always be included in the scope of the project. The scope should also include other physical works or physical activities which are accessory to the principal project.

[193] In the case before this Court, it was appropriate for DFO, in determining the scope of the project, to take into account the fact that *CEAA* was triggered in the particular context of the proposed authorization of a HADD, a subject-matter that, in the opinion of the Minister, involves the management of the fisheries resource.

[194] As for the "principal project," the *Responsible Authority's Guide* provides that "[it] 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)."

[195] In such a case, and in accordance with the Supreme Court of Canada's decision in *Oldman River*, the Minister says it is appropriate that a project be scoped to ensure that, ultimately, the environmental assessment that is conducted remains sufficiently linked to the regulatory authority that triggers *CEAA*.

[196] A similar approach has been adopted by this Court in the particular context of *CEAA* and of the "ss. 35(2) of the *Fisheries Act* trigger." In *Tolko*, Nadon J. noted as follows at para. 86:

Unless the environmental assessment is connected with the regulatory authority which triggers *CEAA*,

there [would] simply [be] no reasonable limit placed on what the responsible authority in any given case would have to consider.

[197] Even if the Applicants were correct that the oil sands mine as a whole is a physical work (or includes physical works) and that the de-watering of Fort Creek is, as a matter of law, a physical activity relating to a physical work, within the meaning of *CEAA* definition of "project", that "physical work" is not necessarily, as a matter of law, the oil sands mine as a whole (including the processing facilities).

[198] Indeed, even though Ms. Majewski in her affidavit referred to the project as an activity listed in the *Inclusion List Regulations*, her scoping decision included such things as "[t]he construction of temporary or permanent diversion of Fort Creek [and] [t]he construction of site de-watering and drainage works," which are "physical works."

[199] In the circumstances of this case, and bearing in mind that the environmental assessment should remain "connected with the regulatory authority which triggers *CEAA*" (*Tolko*), it was open to DFO to identify the Fort Creek diversion channel and the site of de-watering and drainage works, as opposed to the oil sands mine as a whole, as the "physical work" to which the de-watering of Fort Creek relates. The Minister admits that, by referring to the *Inclusion List Regulations*, Ms. Majewski characterized incorrectly *CEAA* "trigger." This, however, is of no consequence for the Decision as a whole. As was pointed out by the Supreme Court of Canada in *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895 at paras. 19-20, it is not necessary for an administrative body to consciously identify the source of power it is relying upon for the exercise of that power to be valid:

It is my view that the Court of Appeal's position on the need for administrative specification must be rejected. There is no precedent for holding that an administrative body must consciously identify the source of power it is relying on, in order for the exercise of that power to be valid. Traditionally, the primary question in reviewing the validity of subordinate legislation has been whether the delegate has authority under the empowering statute to make the impugned enactment. Any regulation, rule or order must be consistent with the purposes of the empowering statute, and cannot be designed to achieve some collateral purpose, extraneous to the statute's objectives. Provided that the subordinate legislation is within the bounds or "sphere" of statutory authority, it will be valid, and will not be reviewable on its merits.

There is little room in this traditional analysis for considering the mind set of the delegate itself, and I see no basis for interfering with the established approach. Courts are primarily concerned with whether a statutory power exists, not with whether the delegate knew how to locate it.

[200] With the Supreme Court of Canada guidance in mind, it is difficult to see how Ms. Majewski's mischaracterization of *CEAA* trigger could be anything but a technicality. It has no impact on the final scoping Decision. Furthermore, s. 57 of *CEAA* provides that an application for judicial review under *CEAA* shall be refused "where the sole ground for relief established on the application is a defect in form or a technical irregularity."

[201] The Minister takes the position that, in light of *Oldman River* and *Tolko*, it was open to DFO to determine that the project in the case at bar should be scoped, for the purpose of *CEAA*, around the undertakings and activities in respect of which an authorization under the s. 35(2) of the *Fisheries Act* was sought, i.e the de-watering of Fort Creek, and the construction of a diversion channel.

[202] The Applicants argue that the de-watering of the creek is related to the oil sands mine and processing facilities as a whole and so constitutes, as a matter of law, an "undertaking in relation to a

physical work," within the meaning of the first branch of the definition of "project" in s. 2 of *CEAA* and not a "physical activity not relating to a physical work," within the meaning of the second branch of the definition. For this reason, the Applicants are of the view that, as a matter of law, the "physical work" to which it is related (i.e. the mine and the processing facilities) must necessarily be included in the scope of the project.

[203] The Minister says that this Court should be careful not to interpret the words "in relation to" in a vacuum in the way that the Applicants suggest. These words should be interpreted so as to be consistent with the principles set out in the *Oldman River* and *Tolko* decisions to ensure that, in any given case, the environmental assessment of a project remains connected with the regulatory authority that triggers *CEAA*. To achieve this, this Court should recognize that an Responsible Authority must be given some discretion to determine, in any given case, if the undertaking or activity it is regulating is "in relation to" a physical work and, if so, to determine what physical work it is related to. To accept the arguments of the Applicants on this point would negate virtually all the case law dealing with the issue of scoping and would leave a Responsible Authority with virtually no discretion to determine what the scope of a project should be.

[204] As for the "accessory" branch of the Canadian Environment Assessment Agency's "principal/accessory test," the Agency's *Responsible Authority's Guide* provides that in order to determine what is accessory to a principal project the following two criteria can be applied:

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.

[205] In *Tolko*, Nadon J. noted that, for another physical work or activity to be interdependent with, or linked to, the principal project, the carrying out of the principal project must render inevitable in a physical sense, as opposed to an operational sense, the realization of the other physical work or activity. At para. 81, he stated:

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"."

[206] In terms of the case at bar, in order for the oil sands mine to be considered an accessory of the "creek destruction" project, it would have to be established that the creek destruction project cannot, in a physical sense, proceed without the mine being constructed and operated. To paraphrase Nadon J. in *Tolko*, perhaps it makes no sense to de-water the creek without a mine being operated, but the plain fact is that the de-watering of the creek does not require, nor make inevitable, the construction and operation of the mine.

Reasonableness Simpliciter

[207] The Federal Court of Appeal has confirmed in *Friends of West Country* that scoping decisions are discretionary in nature. The Court stated at para. 12:

Subsection 15(1) is straightforward. It confers on the responsible authority [the Canadian Coast Guard in this case] the power to determine the scope of the project in relation to which an environmental assessment is to be conducted.

[208] The Minister points out that the criteria applied by the Federal Court to discretionary decisions are set out in *Environmental Resource Centre v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1937 (T.D.) where the Court stated at para. 136:

The within applications challenge ministerial decisions. The framework for judicial review of a ministerial decision was described by Justice Strayer in Vancouver Island Peace Society et al v. Canada (Minister of National Defence) et al, [1992] 3 F.C. 42 at page 48:

In determining whether an official or agency has acted in accordance with the law in reaching the decision in question, the Court can consider whether the official or agency has correctly interpreted the law and whether the decision has been taken on the basis of facts and reasons relevant to the purpose for which the authority was granted to make such a decision. But within that permissible range, the original decision-maker has a right to make a decision which the Court cannot reverse even if it per chance does not agree with such decision.

[209] In *Bow Valley*, the Federal Court of Appeal (cited with approval in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1008 (C.A.) leave to appeal dismissed [2001] S.C.C.A. No. 463 at para. 36) determined that some deference is due to a Responsible Authority's decision under s. 15(1) of *CEAA*. Linden, J.A., for a unanimous court, stated as follows at para. 78:

The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to scope of the project, the extent of the screening and the assessment of the cumulative effects in light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized, but, as long as they follow the statutory process, it is for the responsible authorities.

[210] The Court in *Inverhuron*, at para. 38, emphasized that deference still requires some examination:

This does not mean, however, that the Court's approach to reviewing the Minister's decision ought to be so deferential as to exclude all inquiry into the substantive adequacy of the environmental assessment. To adopt this approach would risk turning the right to judicial review of her decision into a hollow one.

[211] The Minister appreciates that the Court is obligated to undertake a fairly probing examination of the facts to determine whether there is a rational basis for the Decision, or whether the Decision has been made on the basis of facts and reasons relevant to the purpose for which the authority was granted to make such a decision.

[212] Paragraph 81 of Nadon J.'s decision in *Tolko*, by invoking a physical linkage test rather than an

operational connection, clearly counters the position of the Applicants that the project must necessarily be scoped so as to have a stand-alone functional purpose. This line of reasoning was dismissed by Nadon J., who concluded that DFO's scoping decision in *Tolko* was reasonable even though constructing a bridge in the middle of nowhere might, from an operational and functional standpoint, make no sense.

[213] The case law indicates that narrow scoping, in the context of regulatory triggers such as s. 35(2) of the *FA* is *prima facie* reasonable. To hold otherwise in the instant case would, the Minister argues, result in the marginal impact on fish habitat from the de-watering of a creek mandating, as a matter of law, an environmental assessment of a major industrial development for which the federal government has no other decision-making responsibility. And even if a broader scoping decision might have been reasonable, it does not mean that a decision to scope more narrowly is necessarily unreasonable.

[214] The words of Nadon J. in *Tolko* are again helpful on this point:

[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 *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 *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 *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 *CEAA*, no environmental assessment was triggered. If these "projects" were projects which had triggered an environmental assessment under subsection 5(1) of *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".

[215] Paragraph 20 of *Friends of the West Country*, also support the Minister's position on this issue:

[20] The words "in relation to" are used in the definition of "project" in subsection 2(1) and in subsection 15(3) instead of the word "of". However, if the word "of' was used, the environmental assessment would be limited to the construction, operation, modification, decommissioning or abandonment of the physical work itself. Where a physical work is being constructed, there may be ancillary construction for example, something as major as a coffer dam required to hold back water where the construction of a bridge required work on a river bed, or of a lesser order, such as the construction of temporary living quarters for construction workers. The words "in relation to" in context here do not contemplate any other construction, operation, modification, decommissioning, abandonment or other undertakings that has any conceivable connection to the project as scoped. Rather 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.

[216] The Minister points out that, in the case at bar, the DFO did not make its scoping Decision until the available information had shown that no more than mere speculation could be entertained in relation to the alleged fish tainting potential of the oil sands mining operation. More generally, the DFO satisfied itself, before making its scoping Decision, that the environmental concerns related to matters within federal jurisdiction that had been identified during the provincial review had been addressed to its satisfaction. DFO also assured itself that no other federal based *CEAA* triggers needed to be considered. In particular, the information to the effect that no more than mere speculation could be entertained in relation to the alleged fish tainting potential of the oil sands operations assuaged DFO's concerns in this regard (*Hamilton-Wenworth (Regional Municipality) v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 627 (T.D.) (aff'd [2001] F.C.J. No. 1700 (F.C.A.), para. 174).

[217] The Minister also points out that, as the deposit of a deleterious substance, the source of fish tainting, is prohibited under ss. 36(3) of the *Fisheries Act*, it is not subject to an authorization under ss. 35 (2). Only regulations made under ss. 36(5) of the *Fisheries Act* could result in permitting such deposit. These regulations could be a *CEAA* trigger.

ANALYSIS

[218] The Applicants say that the Decision is reviewable on grounds of both legal error and unreasonableness.

Legal Error

[219] The Applicants raise three distinct legal errors, each of which, they say, is sufficient to vitiate the Decision.

Limiting Scope of Project to Federal Authority

[220] In this regard the Applicants point to preliminary correspondence dealing with the scoping issue and to the affidavit of Ms. Majewski to show that DFO took the position that a project subject to a federal environment assessment under *CEAA* has to correspond to the federally regulated undertaking involved in the application. This caused DFO to scope the destruction of Fort Creek for assessment when it should have scoped the mining project identified in TrueNorth's application.

[221] The Applicants place particular reliance upon paras. 25 and 26 of Ms. Majewski's affidavit which read as follows:

For projects subject to section 5(1) regulatory triggers, the scope of project must be limited to those elements over which the federal government can validly assert authority either directly or indirectly. The project addressed in a federal EA should correspond to the federally-regulated undertaking involved in the application.

In cases where a regulatory decision such as the decision to issue a *Fisheries Act* section 35(2) authorization triggers an EA, there are limitations on the scope of the project. In these cases, the scope of project should be limited to those elements over which the federal government can validly assert authority, either directly or indirectly. The EA scope of project should correspond to the federally regulated undertaking involved in the application.

[222] DFO takes the position that these words were not meant to denote legal constraint but were partial justification for a discretionary decision that, in the entire context in which it was made, was reasonable. Ms. Majewski could have decided to scope the entire mining project but, for the various reasons expressed, there was nothing unreasonable in her limiting the scope of assessment to the destruction of Fort Creek.

[223] TrueNorth takes the position that in so far as Ms. Majewski's affidavit expressed a legal opinion it is not appropriately before the Court but that, in any event, it is legally correct that a project addressed in a federal environment assessment should correspond to the federally regulated undertaking in the application. In this case, federal involvement was triggered by s. 35(2) of the *Fisheries Act* and it was entirely reasonable to link the scope of the assessment under *CEAA* to the appropriate head of federal power that brought *CEAA* into play i.e. DFO's jurisdiction over the fish habitat of Fort Creek.

[224] First of all, to address TrueNorth's point concerning the admissibility of those portions of Ms. Majewski's affidavit that refer to legal matters, I am of the view that they are appropriately before this Court and constitute part of the Decision under review. The affidavit of Ms. Majewski has not been entered in order to argue points of law; it merely explains the reasons for her Decision on scoping. If Ms. Majewski felt herself legally constrained to address the scoping issue in a particular way, that would be a reviewable aspect of her Decision. Ms. Majewski's affidavit is good evidence not of what the law is in relation to scoping under *CEAA*, but of why she made the Decision she did. See in this regard *Lun v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1694 (T.D.); and *Ogunfowara v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 456 (T.D.).

[225] Read as a whole, I am of the view that Ms. Majewski's affidavit makes it clear that, in the context of TrueNorth's application, it was both reasonable to limit the scope of any assessment to the destruction of Fort Creek and legally appropriate to do so.

[226] In paras. 23 and 24 of her affidavit, she tells us that a responsible authority has a discretion with regard to the scoping of a project and that this discretion "must be exercised reasonable for any given case." She also tells us that the "scope of a project must be determined on a case-by-case basis."

[227] However, she then goes on to say (in para. 25) that "for projects subject to s. 5(1) regulatory triggers, the scope of project must be limited to those elements over which the federal government can validly assert authority either directly or indirectly."

[228] In my view, in scoping the project in the case at bar, Ms. Majewski felt herself legally constrained to limit the scope of any assessment to those elements of the project over which the federal government could validly assert authority. The first principal issue for this Court, then, is to decide whether she was wrong to assume such legal constraint and, if she was, whether that should vitiate the Decision.

[229] The Applicants say that, on this point, Ms. Majewski committed a reviewable error that justifies quashing the whole Decision. They say the restrictive approach to scoping that is apparent in the Decision rests upon a mistaken interpretation of *CEAA* and the scope of the federal assessment power. In this regard, the Applicants rely heavily upon the landmark decisions of the Supreme Court of Canada in *Oldman River* and *Quebec-Hydro* and the Federal Court of Appeal decision in *Friends of the West Country*.

[230] As regards the *Oldman River* case, the Applicants understandably emphasize those aspects in the judgment of LaForest J. that support a more expansive approach to assessment:

I should make it clear, however, that the scope of assessment is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Such a responsibility, as I stated earlier, is a necessary condition to engage the process, but once the initiating department has thus been given authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction. (pp. 72-73)

[231] Notwithstanding the able and spirited argument of counsel for the Applicants on this point, I do not feel that the judgment of LaForest J. in *Oldman River*, is of any real assistance to the Applicants in the context of the scoping Decision that is before the Court in this application. The Supreme Court of Canada, in *Oldman River*, was considering a constitutional question that involved deciding whether a federal *Guidelines Order* was so broad as to offend s. 92 of the *Constitution Act, 1867*. The Supreme Court of Canada made it clear in that case that "the scope of assessment is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term proposal." It would be a very different thing, in my view, to conclude that, when scoping a project for assessment, a decision maker should not consider the relevant head of power that has brought the decision maker into play.

[232] There are other aspects of the judgment of LaForest J. in *Oldman River*, that suggest there must be some link between the exercise of legislative power and an appropriate head of power:

It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. (p. 67)

[233] In addition, in reviewing the particular federal *Guidelines Order* that came before the court in *Oldman River*, LaForest J. was of the view that it only gave a "mandate to examine matters directly related to the areas of federal responsibility affected," and that it could not be used by an initiating department "as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power." (p. 72)

[234] In my view, then, the *Oldman River* case, although directing that assessment, once

appropriately initiated, can consider the impact of a project on all areas of federal jurisdiction, does not suggest that the scope of an assessment does not have to be connected to the relevant head of federal power that is engaged by an application. In fact, I am of the view that there was behind the judgment of LaForest J. in *Oldman River* an assumption that the exercise of legislative power can only give a mandate to examine matters that are related to the heads of federal responsibility affected.

[235] In any event, I am of the view that the scoping mandate of DFO is to be found in *CEAA* itself and not by reference to a decision such as that in *Oldman River*, that dealt specifically with the constitutionality of a particular Guidelines Order.

[236] But the Applicants also feel that their case is assisted on the scoping issue by the decision of the Supreme Court of Canada in *Hydro-Quebec*. In that case, the Supreme Court of Canada examined whether the NEB was entitled to consider, as relevant to its decision to grant licences, the environmental impact of the construction by *Hydro-Quebec* of future production facilities to transmit electricity.

[237] In *Hydro-Quebec*, the Supreme Court of Canada found that "the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border":

To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an expert contract to be fulfilled. Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the license sought. (p. 191)

[238] In *Hydro-Quebec*, even though no constitutional question had been raised on the appeal, the respondents expressed a concern that allowing the Board to examine the impact of new facilities might involve bringing within the inquiry areas that are subject to provincial regulation and control.

[239] Even though no constitutional question was raised, the Supreme Court made a point of saying that "it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects those concerns":

In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. (p. 192)

[240] The Supreme Court of Canada resolved this conflict in the following way:

As noted earlier, the vires of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction , it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. The co-existence of responsibility is neither unusual nor un-workable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid and that the Board attempted to reduce the

imposition of conditions 10 and 11 to the licences. (p. 193)

[241] In *Hydro-Quebec*, the environmental effects within the province had to be "relevant" to the Board's decision to grant an export licence before the Board could consider those effects. The case does not say that a federal authority can consider all environmental effects once its powers have become engaged. The effects in question have to be relevant to the decision it has to make.

[242] In the case at bar, the federal authority of the DFO has been engaged because TrueNorth applied for an authorization under s. 35(2) of the *Fisheries Act*. In my view, the granting of such an authorization does not require DFO to consider all environmental effects emanating from the mining project and I can find nothing in the *Hydro-Quebec* case that requires, sanctions or even encourages such a view.

[243] I agree with the Applicants that, once *CEAA* has been triggered, there is nothing in s. 15 or any provision related to the scope of an assessment which specifically limits a scoping decision to the relevant head of federal jurisdiction occupied by the responsible authority. But, in my view, no such words of limitation are necessary because it could not have been Parliament's intent to authorize a Responsible Authority to environmentally assess aspects of a project unrelated to those heads of federal jurisdiction called into play by the project in question.

[244] Nor do I think the Applicants are assisted on the scoping issue by the decision of the Federal Court of Appeal in *Friends of the West Country*. That case dealt specifically with the interpretation to be placed upon paras. 16(1)(*a*) and 16(3) of *CEAA*. Rothstein J., at p. 253, made it clear that under para. 16 (1)(*a*), a Responsible Authority is not limited to considering environmental effects solely within the scope of a project as defined in ss. 15(1) of *CEAA* or "to considering only environmental effects emanating from sources within federal jurisdiction." But para. 16(1)(*a*) deals with "cumulative effects" so that, as Rothstein J. pointed out, it is "implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered."

[245] A cumulative affects assessment is not the issue before the Court in this application which is concerned solely with the scoping Decision of a Responsible Authority made under s. 15(1) of *CEAA*. The judgment of Rothstein J. in *Friends of the West Country* comes with the following strongly worded caveat at p. 254:

Of course, in saying that a responsible authority may consider factors outside federal jurisdiction, I am restricting my comments to paragraph 16(1)(*a*) and ss. 16(3) and to where, once a project under federal jurisdiction has been scoped, the requirement to consider cumulative environmental effects is engaged.

[246] When read as a whole, the reasons offered by Ms. Majewski in her affidavit for the scoping Decision, amount to her saying that she was mindful that scoping must be in accordance with federal responsibilities and in relation to areas where conditions can be placed on the proponent. On the basis of present authorities, I cannot say she was incorrect in this assumption and the Decision should not be set aside on this basis.

Improper Delegation

[247] The Applicants also argue that Ms. Majewski improperly delegated her scoping authority and duties to the province of Alberta. To support this argument they rely upon the following words from para. 28 of her affidavit:

Environmental concerns related to matters within federal jurisdiction in respect of TrueNorth's oil sands project as a whole were identified. The fact that the province addressed these concerns to the satisfaction of DFO is a consideration that I took into account in determining the appropriate scope.

[248] The Applicants say that these words implicitly acknowledge that the oil sands project as a whole could have been scoped and are evidence that Ms. Majewski abdicated her responsibilities under the *CEEA* in favour of the province.

[249] The words themselves can be read in a variety of ways and the Court cannot engage in speculative exegesis. In the context of the Decision as a whole (including Ms. Majewski's affidavit) they do not provide sufficient evidence for either interpretation advanced by the Applicants and I decline to find a reviewable error on this ground.

Mistaken Interpretation of "Project" and the Inclusion List Regulations

[250] The third legal error advanced by the Applicants to attack the Decision is that Ms. Majewski relied upon an erroneous interpretation of the definition of "project" in *CEAA* and the *Inclusion List Regulations*. The Applicants say this error can be found in para. 29 of Ms. Majewski's affidavit:

In my opinion it is reasonable to scope the project as the activities or works that cause the harmful alteration, disruption or destruction (HADD) of fish habitat in Fort creek. The issuance of a section 35(2) authorization is *CEAA* trigger. Because such an activity is on the Inclusion List Regulations, the dewatering and partial destruction is caught, and a *CEAA* environmental assessment would have to be done.

[251] The Applicants say that the destruction of Fort Creek is an activity related to the physical work of constructing the mine and processing facilities of the oil sands project, which means that it cannot be assessed as a listed activity under the *Inclusion List Regulations* and must, instead, be assessed as part of the larger, comprehensive study of the oil sands project itself.

[252] TrueNorth takes the position that these arguments have no merit because the destruction of Fort Creek can qualify as either a "physical work" or a "physical activity" and obviously qualifies as a "project" under *CEAA* in its own right.

[253] The DFO concedes that Ms. Majewski was incorrect when she referred to the *Inclusion List Regulations* to support her characterization of *CEAA* "trigger" but this was a mere technicality and had no real impact on the final scoping Decision.

[254] I see nothing in the definition of "project" in *CEAA* that would prevent the destruction of Fort Creek from being a project in its own right and for the reasons advanced by DFO I decline to hold that a reviewable error occurred over this issue.

Unreasonableness and Other Grounds

[255] The Applicants cite various reasons why the Decision should be considered unreasonable, absurd, inconsistent with *CEAA*, detrimental to the Comprehensive Study Regulations, conducive to inconsistency, neglectful of important issues of federal concern and disproportionate to the project as a whole, and so should be set aside. I have considered each in turn and my conclusion is that I am not persuaded that the Court should interfere on any of these grounds. Many of the assertions made by the Applicants concerning the consequences of the Decision are speculative and arguable. However, once the

Court accepts that a decision concerning the scope of a project should be connected in some way with the head of federal regulatory authority that has triggered *CEAA*, it is difficult to find fault with the Decision in this case that carefully took this factor into account and defined scope accordingly.

ORDER

THIS COURT ORDERS THAT:

1. The Application is dismissed.

2. The Respondents shall have the cost of this Application.

"James Russell"

JFC

FEDERAL COURT

Names of Counsel and Solicitors of Record

DOCKET: T-213-03

STYLE OF CAUSE: PRAIRIE ACID RAIN COALITION,

THE PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT,

and TOXICS WATCH SOCIETY OF ALBERTA

Applicants

- and -

THE MINISTER OF FISHERIES AND OCEANS OF CANADA, and TRUENORTH ENERGY CORPORATION AND NORTHERN DEVELOPMENT

Respondents

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: Tuesday, May 25, 2004

REASONS FOR ORDER

AND ORDER BY: The Honourable Mr. Justice Russell

DATED: September 16, 2004

APPEARANCES BY: Mr. Timothy Howard

For the Applicants

Mr. Bruce Hughson (Minister)

Mr. Martin Ignasiak (TrueNorth Energy Corp.)

For the Respondents

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For the Respondent (TrueNorth Energy Corp.)

FEDERAL COURT

Date: 20040916

Docket: T-213-03

BETWEEN:

PRAIRIE ACID RAIN COALITION,

THE PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT,

and TOXICS WATCH SOCIETY OF ALBERTA

Applicants

- and -

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REASONS FOR ORDER

AND ORDER
