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Alberta Wilderness Assn. v. Cardinal River Coals Ltd.

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

Federal Court of Canada — Trial Division

Campbell J.

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

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

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

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

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

Subject: Public; Environmental

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

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

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

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

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

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

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

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

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

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

Cases considered by *Campbell J.*:

> *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)* (1998), 152 F.T.R. 49 (Fed. T.D.) — considered
>
> *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)* (1998), [1999] 1 F.C. 483, 29 C.E.L.R. (N.S.) 21 (Fed. C.A.) — considered
>
> *Alberta Wilderness Assn. v. Express Pipelines Ltd.* (1996), 201 N.R. 336, 137 D.L.R. (4th) 177, 42 Admin. L.R. (2d) 296 (Fed. C.A.) — considered

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

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

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

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

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

Statutes considered:

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

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

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

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

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

s. 2(1) "mitigation" — considered

s. 4(a) — considered

s. 5(1)(d) — considered

s. 11(1) — referred to

s. 15 — referred to

s. 16 — considered

s. 16(1) — considered

s. 16(1)(a) — considered

s. 16(1)(b) — considered

s. 16(1)(c) — considered

s. 16(1)(d) — considered

s. 16(1)(e) — considered

s. 16(2) — considered

s. 16(2)(b) — considered

s. 16(2)(d) — considered

s. 24 — considered

s. 24(1)(a) — considered

s. 24(2) — considered

s. 34 — referred to

s. 34(a) — considered

s. 34(b) — considered

s. 34(c) — considered

s. 35 — considered

s. 37(1) — considered

s. 37(1)(a) — referred to

s. 41 — considered

s. 41(c) — considered

s. 42 — considered

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

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

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

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

s. 35(2) — considered

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

Generally — referred to

s. 4 — considered

s. 12 — considered

s. 12(1)(h) — considered

s. 12(1)(i) — considered

s. 35(1) — considered

s. 35(2) — considered

Treaties considered:

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

Preamble — considered

Treaty No. 8, 1899, T8 1899

Generally — referred to

Regulations considered:

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

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

Generally

s. 35(1)

s. 35(2)

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

***Campbell J.*:**

1 In March 1996, Cardinal River Coals Ltd. ("CRC") submitted applications to obtain Alberta regulatory ap-

provals and a Federal Department of Fisheries and Oceans ("DFO") authorization to construct a 23 km. long and 3.5 km. wide open pit coal mine in its mine permit area located 2.8 km. east of the Jasper National Park boundary.

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

I. Factual Background and Issues

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

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

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

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

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

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

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

10 On October 2, 1997, the Minister, with the approval of the Governor in Council, published the "*Federal Government Response to the Environmental Assessment Report of the AEUB-CEAA Joint Review Panel on the Cheviot Coal Project*" (the "Federal Response"). The Federal Response outlined the Government of Canada's reply to the

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Joint Review Panel Report and indicated that authorizations for the Project would be issued under the *Fisheries Act*.[FN3]

11 On October 31, 1997, the applicants filed an application for judicial review of the Joint Review Panel Report (T-2354-97). At that time, the Minister had not yet taken a course of action pursuant to the recommendations contained in that report.[FN4]

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

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

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

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

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

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

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

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

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

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

> (iii) Is the Minister prohibited from issuing *Fisheries Act* authorizations for aspects of the Project that will

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contravene the *Migratory Birds Regulations*?[FN8]

This final issue concerns whether an apparently lawful authorization is in fundamental conflict with certain regulatory provisions.

II. Legal Context

A. The provisions of CEAA

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

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

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

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

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

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

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

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

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

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

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

. . . . .

4. The purposes of this Act are

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> (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;...
>
> . . . . .
>
> 16.(1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
>
> (b) the significance of the effects referred to in paragraph (a);
>
> (c) comments from the public that are received in accordance with this Act and the regulations;
>
> (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
>
> (e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.
>
> (2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> (a) the purpose of the project;
>
> (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
>
> (c) the need for, and the requirements of, any follow-up program in respect of the project; and;
>
> (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

B. Precedent interpreting the provisions of CEAA

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

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

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

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

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

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

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

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

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

III. The Joint Review Panel: Duties

A. The Alberta and Federal approval processes

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

> **1.2 Approval Process**
>
> In Alberta, the development of a coal mine is based upon a two-stage approval process. The first provincial approval (or permitting) stage deals primarily with the conceptual plans for the mine project as a whole. This stage is carried out under the disclosure requirements of the Coal Development Policy for Alberta, the EIA [Environmental Impact Assessment] requirements of Alberta Environmental Protection (AEP), and the permit requirements of the EUP [Alberta Energy and Utilities Board]. In the case of the Cheviot Coal Project, a federal approval from the DFO is also required. These various processes are described in greater detail below.
>
> The second stage of the approval process, generally referred to as the licensing stage, is designed to examine, on an individual basis and in much greater detail, the specific components of the project. These include licenses from the EUB for individual pits and rock dumps, as well as more detailed approvals from AEP for air and water emissions and reclamation plans.

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

1.2.1 Coal Development Policy for Alberta (1976)

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

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

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

(1) preliminary disclosure to government,

(2) disclosure by the applicant to the public,

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

(4) a final decision by the government.

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

1.2.2 Alberta Environmental Protection

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

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

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1.2.3 Alberta Energy and Utilities Board

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

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

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

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

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

Sections 40 and 41 of the CEA Act provide for the establishment and appointment of a Joint Review Panel and for the factors to be considered by a Joint Review Panel.[FN14]

B. Decision making and recommendation duty

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

There are significant differences worth noting in the role of the Panel in a combined provincial and federal decision-making process. Under the Alberta provincial statutes, the Panel is charged with determining whether a proposed energy development is in the public interest. In making its determination as to whether a project is in the public interest, the Panel is required to consider a range of factors, including resource conservation, safety,

> economic and social impacts of the project, and effects on the environment. Its decision, including reasons, is documented in a Decision Report.
>
> Under the CEA Act, the Panel is required to submit to the Minister of the Environment and to the Responsible Authority (in this case DFO) a report which provides its rationale, conclusions, and recommendations relating to the environmental assessment of the project, including any mitigation measures and follow-up programs. No decision on federal issues is made by the Panel. Section 37 of the CEA Act authorizes the Responsible Authority to exercise its power to allow a project to proceed if, taking into account the report submitted by a review panel and any mitigation measures, its adverse environmental effects are deemed to be insignificant or, if they are significant, felt to be justified in the circumstances.
>
> As per the agreement between the EUB and CEAA, the Panel intends to issue a single Decision Report designed to meet the requirements of both levels of government.[FN15]

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

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

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

1. Consideration duty

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

> 16.(1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel *shall include a consideration* of the following factors:...
>
> s.16.(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel *shall include a consideration* of the following factors:... [Emphasis added]

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

> 41. An agreement or arrangement entered into pursuant to subsection 40(2) or (3), and any document establishing a review panel under subsection 40(2.1), shall provide that the assessment of the environmental effects of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement and shall provide that
>
> > (a) the Minister shall appoint or approve the appointment of the chairperson or appoint a co-chairperson, and shall appoint at least one other member of the panel;

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

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

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

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

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

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

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

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

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

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

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

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

2. Information gathering duty

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

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

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> (a) ensure that *the information required for an assessment by a review panel is obtained* and made available to the public;... [Emphasis added]

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

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

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

40 Respecting the use of the phrase "all information required" in paragraph 4, with respect to the *CEAA* aspect of the Joint Review Panel's duty, I find that what is "required" is that which will meet the just found high standard of care respecting consideration of the s.16 factors, and the onerous evidence gathering duty on the Joint Review Panel.[FN23]

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

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

> 35.(1) A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to
>
> (a) give evidence, orally or in writing; and
>
> (b) produce such documents and things as the panel considers necessary for conducting its assessment of the project.
>
> (2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and other things as is vested in a court of record.
>
> (3) A hearing by a review panel shall be public unless the panel is satisfied after representations made by a witness

> that specific, direct and substantial harm would be caused to the witness by the disclosure of the evidence, documents or other things that the witness is ordered to give or produce pursuant to subsection (1).
>
> (4) Where a review panel is satisfied that the disclosure of evidence, documents or other things would cause specific, direct and substantial harm to a witness, the evidence, documents or things are privileged and shall not, without the authorization of the witness, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, documents or other things pursuant to this Act.
>
> (5) Any summons issued or order made by a review panel pursuant to subsection (1) shall, for the purposes of enforcement, be made a summons or order of the Federal Court by following the usual practice and procedure.
>
> (6) No action or other proceeding lies or shall be commenced against a member of a review panel for or in respect of anything done or omitted to be done, during the course of and for the purposes of the assessment by the review panel.

3. Reporting duty

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

44 In addition, the terms of reference set for the Joint Review Panel to follow, by paragraphs 2 and 4 of Schedule 1 to the Joint Panel Agreement quoted above, require that the process of information gathering be transparent. Similarly, as the Joint Review Panel Report must reflect the Joint Review Panel's consideration of the s.16 factors, I find the reporting must be transparent as well.

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

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

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

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

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

50 During the course of the hearing, CRC argued that the "Joint Review Panel Report" is a combination of the

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

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

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

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

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

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

1. Valued Environmental Components (VEC's)

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

2. Significance of environmental effects

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

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

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

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

A. Extent of the duty to consider cumulative effects

1. CEAA and Joint Panel Agreement requirements

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

> 16.(1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> > (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or *will be carried out*;... [Emphasis added]

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

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

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

2. Federal concerns

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

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

63 Therefore, the Joint Review Panel was certainly on notice that consideration of cumulative effects should include forestry and other mining development. On the basis of the above analysis of the requirements of *CEAA* in combination with the Joint Panel Agreement, I find that the Joint Review Panel had a duty to obtain all available

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information about likely forestry and mining in the vicinity of the Project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel Report.

B. Meeting the duty

1. Forestry

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

> The Panel also notes that CRC, in attempting to carry out an assessment of potential cumulative effects (CEA), stated that it was unable to obtain the necessary information from other industry sources, particularly forestry. The Panel can appreciate the difficulty that this creates for an applicant. Given that a CEA is a requirement of both the provincial and federal EIA process, the Panel believes that the government has a responsibility for ensuring either that needed data can be collected or alternatively, that the current legislation is amended to recognize the limitations that lack of cooperation between industry sectors or companies within a sector can create for a CEA. In this particular case, the Panel notes that CRC was able to use data from the Tri-Creeks watershed as a surrogate measure of the likely effects of modern forestry practices on both discharge rates and water quality, and found little evidence of impact. Therefore, the Panel does not expect the cumulative effects of coal mining and forestry at present/predicted levels to have a significant impact on regional fisheries resources, or reduce their capacity as renewable resources, to meet either present or future needs.[FN33]

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

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

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

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

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

68 From these statements it is evident that the Joint Review Panel, while displaying concern about ungulate habitat in the mine area, operated on the apparently erroneous assumption that forest cover would be maintained in that area.

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

2. Mining

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

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

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

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

> 7. Integrated resource planning, the process that produced the *Coal Branch Sub-Regional Integrated Resource Plan* ("IRP"), is the mechanism through which the *Eastern Slopes Policy* is implemented by providing more detailed and comprehensive land use allocations and guidance. The IRP indicates that six (6) "approvals in principle" have been given by the Government of Alberta for new coal projects in the planning region where the proposed Cheviot Coal Mine Project is located. The IRP also notes that there are three coal mines operating in the

region and two others which have been issued permits already but have not yet begun operations (p. 9). A copy of the relevant portion of the IRP is attached hereto and marked as Exhibit "3".

8. The two projects for which permits have already been granted are initiatives of Manalta Coal Ltd., and are known as the Mcleod River and Mercoal projects. At the time of the Review Panel's environmental assessment, these two approved mines had not yet got underway. However, information on the nature of these planned projects and their location was available at the time of the Review Panel's hearing for the Cheviot Coal Project because applicants are required under the Preliminary Disclosure process to submit information relating to the "scope, timing, and overview of environmental impact" of a project prior to receiving an 'approval in principle" (which precedes the permitting stage) (see Exhibit "1", *Coal Development Policy*, p. 32). Because these projects had been approved, their cumulative effects in combination with the environmental effects of the Cheviot Coal Project on the aquatic and terrestrial ecosystem and valued environmental components of the area should have been considered in the Review Panel's report but were not.[FN39]

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

12. The AWA Coalition asked the Review Panel to compel the Government of Alberta to produce the "approvals in principle" for the other five (5) planned mine projects so it could consider them in its review. At a minimum, the AWA Coalition wanted the Review Panel to compel the disclosure of at least the names of the companies, the location of the coal leases involved and what volumes of coal they were looking to produce. The AWA Coalition believed that this information was relevant and necessary to the Review Panel's environmental assessment under the *Canadian Environmental Assessment Act*.[FN40]

74 About the application to compel the "approvals in principle", the Joint Review Panel said this:

The AWA Coalition requested that the Panel require the Government of Alberta to produce copies of the preliminary disclosure documents, prepared under the requirements of the Coal Development Policy of Alberta, for a number of other surface coal mines which had been proposed in the region. The Government of Alberta advised the Panel that those documents had, in its view, been submitted in confidence and so could not be released, except perhaps under a request under the Freedom of Information and Protection of Privacy Act. The Government also noted that the documents were dated, with some being submitted in the mi-1970's, and that without someone to speak to them, it would not be possible to determine if the various proposals remained relevant.

The Panel determined that, given the expectation of the parties that the documents were submitted in confidence and, more importantly, the inability of anyone, including the applicant, to test the relevance of the documents, it was not prepared to attempt to compel that the documents be submitted to the hearing.[FN41]

75 I find that this statement proves that the Joint Review Panel failed to compel the production of the mining information because it misconstrued its power to do so, and it misconceived that it has the obligation to decide on its relevance once produced.

76 Therefore, with respect to the two projects for which permits have been granted and the five projects which have received approvals in principle, I find that the Joint Review Panel breached its duty to obtain all available information about likely mining in the vicinity of the Project, to consider this information with respect to cumulative environmental effects, to reach conclusions and make recommendations about this factor, and to substantiate these conclusions and recommendations in the Joint Review Panel Report.

V. The Joint Review Panel: Breach of Duty?: *Alternate Means*

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

A. Extent of the duty to consider alternate means

77 Section 16(2)(b) provides as follows:

> s.16.(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> . . . . .
>
> (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;...

78 In the present case, with respect to the method of mining, I find that the requirements of this section are properly restricted to the alternate means to open pit mining being underground mining. About this factor, the Joint Review Panel said the following:

> With regard to its existing mining operations, the Panel is prepared to accept CRC's contention that the Luscar mine is approaching the end of its economic life and that, for CRC to continue operations in the Hinton region, an alternative source of metallurgical coal will be needed. The Panel also believes that CRC has made a reasonable effort to evaluate and assess feasible alternatives to the proposed project. The Panel notes that no other lease holder came forward during the hearings to advise that it was willing to provide CRC with access to another source of coal or to propose an alternative to the Chevoit Coal Project. The Panel also accepts CRC's reticence and that of its employees to move to underground mining techniques or, given the concerns expressed by the Hamlet of Cadomin, to develop Cadomin East at this time, particularly given the relatively small amount of reserves associated with either option. The Panel also notes that development of the other coal leases currently held by CRC, even if economic, would also have associated environmental and social issues. The Panel does believe, despite the contention of the AWA Coalition, that it was provided with sufficient evidence to test whether the proposed alternatives were technically and environmentally feasible.[FN42]
>
> . . . . .
>
> With regard to the need for and alternatives to the Cheviot Coal Project, the Panel concludes that CRC has established that, subject to receiving the necessary federal and provincial approvals, it has the right to carry out extraction of the coal resources within the applied for mine permit boundary. The Panel believes that CRC has adequately considered other potential sources of metallurgical coal, and that the Cheviot Coal Project provides CRC, from an economic perspective, with an optimal combination of coal reserves, coal quality, and access to infrastructure. The Panel also concludes that, under reasonable economic assumptions, the Chevoit Coal Project is economically viable, and will provide significant economic benefits to both the region and to the province.[FN43]

79 With respect to alternative means, the quoted passages of the Joint Review Panel Report prove that the Joint Review Panel limited its consideration because of CRC's practical and economic concerns and, consequently, the terms of its proposal. As noted above, CRC applied for Alberta regulatory approval for an open pit coal mine, and the scope of its Environmental Impact Assessment (EIA) was limited accordingly. It appears that, as a result of this limitation, the Joint Review Panel's consideration was similarly limited.[FN44]

80 While the alternative means of underground mining is generally considered in the Joint Review Panel Report, the effects of this alternative means, as compared to the effects of open pit mining, are not considered in any meaningful way. I agree with the applicant's argument that simply identifying potential "alternative means" without discussing their comparative environmental effects fails to provide any useful information to decision makers, and fails to meet the requirements of s. 16(2)(b) of *CEAA*.

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

81 While it is true that, as the Joint Review Panel asserts[FN45], CRC has the right to carry out the extraction of the coal resources within the applied for mine permit boundary, I find that it does not have the right to do it by open pit mine.[FN46]

82 Thus, I find that a comparative analysis between open pit mining and underground mining at the Project site is required to comply with the provisions of s.16(2)(b).

83 During the course of the hearing, counsel for CRC tactfully pointed out that, prior to the Joint Review Panel's consideration of the Project under *CEAA*, all detailed Alberta regulatory approvals leading to a final decision had been given. The point made was that, in the face of these approvals, the Minister's concern and, therefore, the requirements of *CEAA* are incidental to this almost completed process. My response to this assertion is that *CEAA*, as well as Alberta resource and environmental protection legislation, serves the interests of Albertans, and consequently, its terms must be met as framed.

VII. The Joint Review Panel: Breach of Duty?: *Procedural Fairness*

84 The sole procedural fairness argument in this case arises from what appears to be an oversight on the part of the Joint Review Panel Secretariat.

85 The evidence submitted on behalf of the Canadian Nature Federation proves to my satisfaction that a legitimate expectation was created that its submissions entitled "The Canadian Nature Federation's Response to the Environmental Impact Assessment of the Proposed Cheviot Mine Project" and "The Canadian Nature Federation's Response to Norwest's Overview of Rock Waste Disposal Cheviot Mine Plan" would be placed, by the Joint Review Panel's Secretariat, before the Joint Review Panel for consideration. Since neither document is referred to in the Joint Review Panel Report nor noted on the Joint Review Panel's exhibit list, I find it to be circumstantially correct on a balance of probabilities, that neither document was submitted to the Joint Review Panel for consideration.[FN47]

86 Therefore, I find that, as a result of a breach of due process based on legitimate expectations, the Joint Review Panel has committed a reviewable error in that it did not consider information it accepted for consideration.

VIII. Conclusion to Sections II to VII

A. With respect to the present application T-1790-98:

87 For the reasons provided, I find that, as a result of the Joint Review Panel's breaches of duty and error in due process, the environmental assessment in the present case was not conducted in compliance with the requirements of *CEAA*, and therefore, the Minister's Authorization was issued without jurisdiction. Accordingly, it is quashed.

B. With respect to: T-2354-97:

88 Concerning non-compliance with the requirements of *CEAA* found in the Joint Review Panel Report, during the course of argument, many opinions were expressed as to whether the Joint Review Panel Report, or at least the conclusions and recommendations expressed in it, can be set aside and referred back to the Joint Review Panel for further consideration under s.18.1(3)(b) of the *Federal Court Act*.[FN48] The precedents referred to above give no clear direction on this issue.

89 Also during the course of argument, I expressed the opinion that, if the environmental assessment conducted by the Joint Review Panel is found not to be in compliance with the requirements of *CEAA*, the least intrusive ap-

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

proach to reaching compliance would be adopted.

90 In my opinion, the most appropriate approach to reaching compliance is that suggested by counsel for the Minister which involves reliance on the provisions of s.24 of *CEAA* which read as follows:

> 24.(1) Where a proponent proposes to carry out, in whole or in part, a project for which an environmental assessment was previously conducted and
>
> (*a*) the project did not proceed after the assessment was completed,
>
> (*b*) in the case of a project that is in relation to a physical work, the proponent proposes an undertaking in relation to that work different from that proposed when the assessment was conducted,
>
> (*c*) the manner in which the project is to be carried out has subsequently changed, or
>
> (*d*) the renewal of a licence, permit, approval or other action under a prescribed provision is sought,
>
> the responsible authority may use or permit the use of that assessment and the report thereon to whatever extent it is appropriate for the purpose of complying with section 18 or 21.
>
> (2) Where a responsible authority uses or permits the use of an environmental assessment and the report thereon pursuant to subsection (1), the responsible authority shall ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project.

91 In view of my findings, within the terms of s.24(1)(a), it is clear that the Project cannot proceed until the Joint Review Panel's environmental assessment is conducted in compliance with *CEAA*. Therefore, as argued by counsel for the Minister, in my opinion, under s.24(2) the Minister has authority and responsibility to direct the Joint Review Panel to reconvene and, having regard to my findings, direct that it do what is necessary to make adjustments to the Joint Review Panel Report so that the environmental assessment conducted can be found in compliance with *CEAA*. For this result to occur, in my opinion, the following directions must be met:

> (1) Obtain all available information about likely forestry in the vicinity of the Project, consider this information with respect to cumulative environmental effects, and, accordingly, reach conclusions and make recommendations about this factor, and substantiate these conclusions and recommendations in the Joint Review Panel Report;
>
> (2) Obtain all available information about likely mining in the vicinity of the Project, consider this information with respect to cumulative environmental effects, and, accordingly, reach conclusions and make recommendations about this factor, and substantiate these conclusions and recommendations in the Joint Review Panel Report;
>
> (3) With respect to alternative means, do a comparative analysis between open pit mining and underground mining at the Project site to determine the comparative technical and economic feasibility and comparative environmental effects of each, consider this information, reach conclusions and make recommendations about this factor, and substantiate these conclusions and recommendations in the Joint Review Panel Report.
>
> (4) Consider the documents "The Canadian Nature Federation's Response to the Environmental Impact Assessment of the Proposed Cheviot Mine Project" and "The Canadian Nature Federation's Response to Norwest's Overview of Rock Waste Disposal Cheviot Mine Plan".

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92 In view of my findings and order with respect to the present application (T-1790-98), I decline to exercise my discretion to grant relief in T-2354-97.

IX. With Respect to T-1790-98: Is the Authorization "Contrary to Law" under S.18.1(4)(f) of the Federal Court Act?[FN49]

93 Since the Authorization in the present case is quashed, the answer to the question posed might be considered moot. However, I have been asked by both the Applicants and the Respondent to answer the question because it will certainly require an answer respecting authorizations which, unlike the one in the present application, will allow rock to be deposited in stream beds.

94 The test for whether the "contrary to law" issue is moot, and, if it is, whether I should nevertheless answer the question, is found in the following words of Sopinka J. in *Borowski v. Canada (Attorney General)*[FN50] where at 353 he says:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Secondly, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. *In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may none the less elect to address a moot issue if the circumstances warrant.* [Emphasis added]

95 I find that a "live controversy" respecting the question exists and, therefore, I should answer the question.

96 The issue in this challenge to the Minister's Authorization concerns the correct interpretation to be placed on the words of s.35(1) of the *Migratory Birds Convention Act Regulations* (the "*MBCA Regulations*")[FN51] as established by the *Migratory Birds Convention Act, 1994* (the "*MBC Act*")[FN52]. With respect to this issue, the applicant's written argument is very clear and concise, and to state the issues to be resolved, I can do no better than to cite it, without references, as follows:

> **Issue 1: Is the MFO prohibited from issuing Fisheries Act authorizations for aspects of the Project that will contravene the MBCA Regulations?**
>
> 32. The *Federal Court Act*, R.S.C. 1985, c. F-7 ("*FCA*") provides:
>
> > 18.1(4)(f) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal... acted in any other way that was *contrary to law*.

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

33. The MFO, through the issuance of *Fisheries Act* authorizations for the Cheviot Coal Project, would permit the deposition of millions of tonnes of waste rock and materials in areas frequented by migratory birds, particularly harlequin ducks. This would be "contrary to law". The *MBCA Regulations* provide:

> 35.(1) Subject to subsection (2), *no person shall deposit* or permit to be deposited oil, oil wastes, or *any other substance harmful to migratory birds in* any waters or *any area frequented by migratory birds*.
>
> (2) Subsection (1) does not apply to the deposit of a substance of a type, in a quantity and under conditions authorized by
>
> > (a) regulations made by the Governor in Council under any Act for any waters in respect of which those regulations apply; or
> >
> > (b) the Minister for scientific purposes.

34. The Panel Report sets out the following findings of fact concerning the Project and its impacts on harlequin ducks and other migratory birds:

> (i) The Project as proposed, and as approved by the MFO and Governor in Council, specifically calls for the deposition of large quantities of waste materials in areas frequented by migratory birds. The mining process will involve the removal of millions of tonnes of waste rock, debris and other materials, much of which will be deposited into creek valleys on the project site. The deposition of this waste will permanently bury at least three creeks and valley bottom areas that are important habitat used by harlequin ducks and other migratory birds for nesting, rearing and other purposes.
>
> (ii) CRC's proposed mining operations, by its own admission, "would result in the *permanent loss of two probable nesting areas* [for harlequin ducks] (Cheviot and Thornton Creeks) and portions of MacKenzie Creek [also an identified nesting area] and one of its tributaries. As well, Harris Creek, a possible nesting site, would be modified." As a result of the loss of these nesting areas, the Panel concluded, "some reductions in the current size of the breeding population [of harlequin ducks] ... *will occur*, and furthermore, there is a significant risk that the population may not recover to its current size due to the permanent loss of some habitat." These population reductions "may be of local, regional or even provincial significance".
>
> (iii) Harlequin ducks are endangered or significantly declining throughout their North American range, and habitat destruction is a major cause of their decline.
>
> (iv) Harlequin ducks are a 'nest loyal' species: i.e. they return to the same stream each year to nest. They are "particularly sensitive to disturbance".
>
> (v) The harlequin duck population in the vicinity of the Cheviot mine (the Macleod River population) is regionally important and is the second largest breeding population of harlequins found to date in Alberta.
>
> (vi) The diversity of other migratory bird species in the area of the proposed Cheviot mine site is also "notably high". Many of the migratory bird species that use the Cheviot site are declining in Alberta, particularly due to the loss of riparian (i.e. stream side) habitat.
>
> (vii) The Panel concluded that "the development of the Cheviot Coal Project will have a significant adverse effect" on many of the migratory bird species that use the area.

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> 35. Based on the clear findings of the Panel Report, and the evidence of Environment Canada (the expert agency responsible for migratory birds), the issuance of *Fisheries Act* authorizations for the proposed mine operations will result in the deposit of harmful substances in areas frequented by migratory birds. Thus, the actions of the MFO will be "contrary to law" (s.35 of the *MBCA Regulations*) and subject to judicial review under section 18.1(4)(f) of the *FCA*.[FN53]

A. Interpretation of the phrase: "any other substance harmful to migratory birds"

96 The principle objective is to establish the intention of Parliament. The respondent argues that this intention can be established by use of the *ejusdem generis* rule of statutory interpretation, and that application of the rule will result in a narrow interpretation of the words "any other substance" as meaning "any other substance *similar to oil*".[FN54]

97 The rule is set out in *National Bank of Greece (Canada) c. Katsikonouris*,[FN55] where at 203 LaForest J. says:

> Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will *normally* be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. [Emphasis added]

98 La Forest J.'s use of the term "normally" is instructive. I find it to mean that a general rule of construction is useful unless the intention of Parliament is otherwise clear. I find such to be the case here and, therefore, put no weight on the respondent's argument.

99 The purpose of the *MBC Act* is stated in s.4 as follows:

> 4. The purpose of this Act is to implement the Convention by protecting migratory birds and nests.

100 The Convention referred to in s.4, which was concluded in 1916, is a Schedule to the *MBC Act* and in the preamble reads:

> His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas, Emperor of India, and the United States of America, being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects, and to the end of concluding a convention for this purpose have appointed as their respective plenipotentiaries:...

101 Regarding the *MBCA Regulations*, s. 12 of the *MBC Act* specifies that the Governor in Council may make regulations necessary to carry out the purposes and provisions of the *MBC Act* and the Convention, including the following:

> s.12.(1)...
>
> (h) for prohibiting the killing, capturing, injuring, taking or disturbing of migratory birds or the damaging, destroying, removing or disturbing of nests;
>
> (i) prescribing protection areas for migratory birds and nests, and for the control and management of those areas;...

102 I find on the basis of these provisions that there is a clear intention expressed to provide wide protection to

migratory birds, and, therefore, the phrase under consideration should be given a similarly wide interpretation. Therefore, I find that *any* substance, including oil and oil wastes, is capable of being prohibited if it is "harmful".

103 Respecting what substances are "harmful" to migratory birds, I find that the interpretation of this word depends on the facts of each case. While rock might indeed be inert, as the respondent contends, I agree with the applicant's argument that millions of tonnes of it deposited into creek beds constitutes a threat to the preservation of migratory birds that nest there, and, therefore, in such circumstances is "harmful" and, thus, within the meaning of that term as used in s.35(1) of the *MBCA Regulations*.

B. Application of s. 35(1) to the Minister

104 The target of s.35(1) of the *MBCA Regulations* is any person who deposits or permits the deposit of harmful substances. It might very well be that while the Minister is acting under lawful authority to issue an authorization under s.35(2) of the *Fisheries Act* to "allow the harmful alteration, disruption or destruction of fish habitat" as, for example, the Authorization in the present case provides[FN56], he or she is nevertheless liable under s.35(1) of the *MBCA Regulations* for so doing.

105 I agree with the applicant's argument that such liability makes the issuance of the Authorization "contrary to law" within the meaning of s.18.1(4)(f) of the *Federal Court Act*.

106 But there is a way that this result of apparently conflicting legislative provisions can be avoided. Under s.35(2) of the *MBCA Regulations* as above quoted, the Minister can avoid all liability for contravention of s.35(1) of the *MBCA Regulations* by the passage of appropriate regulations. Were the Authorization in the present case made within jurisdiction, and were regulations passed under s.35(2) before the Authorization was acted upon, the applicant's present argument could not be successfully made.

107 Although I have answered the question posed, I decline to exercise my discretion to make a declaration or prohibit the issuance of further *Fisheries Act* authorizations since the Minister has the ready option of obtaining regulatory protection to avoid liability. Obviously, if such protection is not obtained, any further authorizations issued without it are subject to judicial review and order at the discretion of the Court.

Application granted.

Appendix 1

The following are the relevant portions of Sexton J.A.'s decision in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] F.C.J. No. 1746:

> The crux of this appeal is whether the existence of an unchallenged federal response should bar the appellant from seeking prohibition against the Minister for future authorizations. In my view, the Applications Judge was in error in accepting the respondents' argument that the response supersedes the report.
>
> In a preliminary motion prior to this appeal, the respondents sought to strike out the appellants' original application on the basis that it was time-barred. Hugessen J., starting at paragraph 3, made the following comments:
>
> > Rather I think the Report should be seen as an essential statutory preliminary step required by the *Canadian Environmental Assessment Act* prior to a decision by the Minister to issue an authorization under section 35 of the *Fisheries Act*.

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> That decision has not been made and I think it is a fair reading of the Applicants' Originating Notice of Motion that it seeks primarily to prohibit the Minister from making it on the grounds that the Panel Report is fatally defective.
>
> Prohibition (like mandamus and quo warranto) is a remedy specifically envisaged in section 18 of the *Federal Court Act* and like them it does not require that there be a decision or order actually in existence as a prerequisite to its exercise.

I agree with the view presented in this passage, which was adopted by Gibson J. in *Friends of the West Country Association v. Canada (Ministry of Fisheries and Oceans)*, [1998] F.C.J. No. 976 (T.D.)[Q.L.] at page 7.

The view that the panel report is an essential statutory pre-requisite to the issuance of approvals is supported by previous case law. I agree with the decisions of *Bowen v. Canada*, [1997] F.C.J. No. 1526 (T.D.)[Q.L.], *Friends of West Country*, *supra*, and *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), 22 C.E.L.R. (N.S.) 293 (F.C.T.D.) which hold that an environmental assessment carried out in accordance with the Act is required before a decision such as the Minister's authorization in the present case can be issued. This view is reinforced by the decision in Friends of the *Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.) which confirmed that the guidelines that were a pre-cursor to *CEAA* (the *Environmental Assessment and Review Process Guidelines Order* SOR/84-467) were mandatory rather than directory in nature and, thus, failure to comply with them would deny the responsible authority the jurisdiction to proceed.

The requirements of *CEAA* are legislated directions that are explicit in mandating the necessity of an environmental assessment as a pre-requisite to Ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. It is equally clear that any assessment must be conducted in accordance with the Act, including for example, the requirement imposed under s. 16 of *CEAA*. The fact that a federal response has been issued and remains unchallenged does not change these requirements. Thus, the appellants are entitled to argue the merits of their case.

The appellants are entitled to seek prohibition against the Minister on the basis that the panel report is materially deficient. The fact that the federal response was not challenged is irrelevant to the appellants' claim. In my view, the federal response does not supersede the panel report, nor can it, as the respondents suggest, potentially cure any deficiencies in the panel report. The two are separate statutory steps with distinct purposes and functions.

Section 37 of *CEAA* dictates that the Minister must consider the panel report before embarking on a course of action. Paragraph 34(c)(l) establishes that this report must set out the "rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project". Subsection 34(d) makes it clear that it is this report that contains the results of the environmental assessment that must be submitted to the Minister. Finally, s. 2 defines "environmental assessment" as "as assessment of the environmental effects of the project that is conducted in accordance with this Act". Thus the report that must be submitted to the Minister pursuant to s. 34(d) must contain, pursuant to s. 34(c)(l) and s. 2, the results of an environmental assessment conducted in compliance with the requirements of *CEAA*.

In sum, the combined effect of sections 34(c), 34(d), 2 and 37 is that before taking a course of action, the Minister must consider an environmental assessment, that was conducted in accordance with the Act. Therefore, the appellants are entitled to bring into question report and are not barred from doing so because they did not challenge the federal response.

I believe that the proper approach of the Applications Judge should have been, on the assumption that an environmental assessment in accordance with *CEAA* was an essential pre-requisite to the issuance of any authorizations of the Minister, to proceed to analyze the arguments advanced by the appellants, in order to decide whether

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a proper environmental assessment had been conducted by the Joint Panel.

Appendix 2

The following describes the approach used by the Joint Review Panel in considering the factors in s.16(1) and s.16(2) of *CEAA* as found in the Joint Panel Report [Applicant's Application Record, Vol. II, T-2354-97, pp.588-592]:

1.5.2 Environmental Assessment Process

The Agreement between the EUB and CEAA (Appendix B) provides a brief outline of the issues which are expected to be considered by the Panel. However, a number of terms (e.g. the spatial and temporal boundaries of environmental effects; cumulative environmental effects; and the significance of environmental effects) are not defined. In its application, CRC set out in some detail the approach it had adopted in assessing the significance of any adverse environmental effects potentially resulting from the Cheviot Coal Project, as well as their temporal and spatial boundaries and the cumulative environmental effects of their proposed project in conjunction with other activities in the region. Many of CRC's views and assumptions were questioned at the hearing by various interveners. As well, CRC, in its EIA, has made use of the concept of Valued Environmental Components (VECs) in its analysis of environmental effects. In order to ensure that there is a common understanding of the Panel's interpretation of these concepts, a brief discussion of each was felt appropriate.

It is worth noting that the Panel does not believe that the discussion below either can or should be binding on future tribunals tasked with addressing public interest issues. While the Panel believes that the approach taken here is valid to the Cheviot Coal Project, clearly other approaches to assessing the environmental effects of a project may be equally if not more appropriate.

Valued Environmental Components

VECs have been defined by CRC as "those environmental attributes associated with the proposed project development, which have been identified to be of concern by either the public, government, or the professional community". Physical (e.g. groundwater, air quality), biological (e.g. fish, vegetation, ungulates), and social/economic (e.g. forestry, public health, recreation) components of the environment were included by CRC in its selection of VECs, in part in response, CRC noted, to the broad-based definition of environmental effects found in both provincial and federal legislation. The use of VECs was intended to help ensure that the EIA process is focused on relevant issues.

The Panel believes that the use of VECs is appropriate for the Cheviot Coal Project. In particular, the Panel accepts that their use can minimize unnecessary effort to assess issues of likely little relevance, and ensure that the efforts of the applicant, the interested publics, and the government review agencies alike are focused on key questions. Furthermore, the results of analyses of VECs, if properly done, can reasonably be expected to be applicable to a broader range of environmental parameters.

Spatial and Temporal Boundaries

CRC noted that the Cheviot Coal Project has the potential to affect various VECs over a range of distances from the actual sources of disturbance as well as over a number of time periods of various lengths. In preparing the EIA, CRC indicated that it has generally attempted to describe the aerial extent of a predicted impact (i.e. its spatial boundary), as well as the time period over which CRC predicted that such impacts will occur (i.e. its temporal boundary). The Panel notes that while CRC initially attempted to provide some broader definitions of these two terms, it is evident from the EIA that both the spatial and temporal boundaries of environmental effects ultimately tended to be highly specific to: first, the actual components of the Cheviot Coal Project (e.g. the transportation and

utilities corridor, the coal processing plant, or the surface mine); second, the project phase (e.g. construction, operation, or decommissioning); and third, the particular VEC under consideration (e.g. water quality, vegetation, or carnivores). The Panel, therefore, has also not attempted to set broad definitions for either the spatial or temporal boundaries of environmental effects, but rather has considered the evidence as presented for each VEC.

Significance of Environmental Effects

While recognizing that this is somewhat of an over simplification, the Panel believes that the environmental effects arising from the Cheviot Coal Project can be placed, for all practical purposes, into one of three general categories. These are:

(1) changes to the numbers of organisms, including both flora and fauna, found in the environment and their relative proportions to each other;

(2) changes to the physical properties, including water, air, and soil, of the environment and their interactions; and

(3) changes to the human use of the environment, for aesthetic, spiritual, recreational, economic, or any other purpose.

For each of these three categories, the parameters which define when an environmental effect is significant are clearly different. In assessing whether an environmental effect of the Cheviot Coal Project is significant, the Panel has, when appropriate, used the following general criteria:

(1) For organisms, an environmental effect was generally considered to be significant when the changes induced by the Cheviot Coal Project are beyond the normal range of natural variation in the population size of that organism or group of organisms **and** the effects on population size will continue beyond the life of the Cheviot Coal Project into the foreseeable future. The term population is based on the biological definition of population; that is, a geographically distinct assemblage of members of a species, usually capable of successful reproduction.

(2) For the physical properties of the environment, an environmental effect of the Cheviot Coal Project would normally be considered to be significant when either the mean value of the physical property or its normal range of variation is altered to the point that this results in either a reduced carrying capacity of the environment for biological VECs, or a risk to human health or safety.

(3) For human use, an environmental effect resulting from the Cheviot Coal Project would usually be considered to be significant if it results in a permanent loss of an area or region where an activity was historically carried out and where other comparable areas cannot be readily substituted.

Where particular issues did not clearly fall into any of the above categories, the Panel has used its professional judgement in its assessment of the significance of environmental effects. For example, an environmental effect may be deemed significant if it precludes organisms from returning to an area where they previously occurred or alternatively precludes some reasonably likely future human use. Clearly a greater degree of judgement regarding whether these alternative events have a reasonable probability of occurring and their importance, if they did, must be applied. It is worth noting that while all of the environmental effects described above result in negative impacts, the same model can be applied when the environmental effects result in a net positive change.

In its application, CRC stated that it had considered the effects of its mitigation measures prior to determining environmental significance, an approach which was questioned by some parties at the hearing. The Panel, in its

assessment of the Cheviot Coal Project, believes that the significance of environmental effects can only be realistically determined after mitigation has been incorporated into the project design. In this case, this would include the mitigation measures required by the Panel and other regulatory agencies in addition to those proposed by CRC.

Cumulative Environmental Effects

Both provincial and federal EIA legislation require a proponent to assess the cumulative environmental effects of its proposed project. In recent years, a considerable amount of debate has occurred regarding how cumulative environmental effects should be defined and assessed, but a number of questions remain. In this case, CRC's approach to addressing cumulative effects was also challenged by some interveners.

For the purposes of this review the Panel believes that, ideally, in order to carry out a cumulative effects assessment (CEC) of the Cheviot Coal Project, it is necessary to first have some knowledge of the historic status of each VEC that may be affected by the project (e.g. what was its past distribution and occurrence? Were these attributes stable or variable?). The second step is to understand its current status (e.g. has its distribution and occurrence changed? Are these attributes more or less variable?). The third step is to ascertain why those changes, if any, have occurred (e.g. are they caused by normal biological, physical, or social processes? Or, are they due to anthropogenic or some other unique forces?).

Based upon this description of existing conditions, the fourth step in the process is to estimate the likely incremental effects of the proposed project on the VEC, both in absolute terms as well as on its degree of variability. The final step is to identify any other reasonable factors, particularly other projects or developments which, if they also occur, will also have an effect on the VEC, and what their incremental effects either alone or combined might be.

In carrying out its review, the Panel has, either explicitly or implicitly, applied the above criteria to the information provided by CRC in its application. In those cases where the data base is incomplete or of questionable quality, the Panel has used its professional judgment as appropriate. The Panel has then attempted to assess, within the context of the full range of project benefits and costs:

(1) whether the incremental changes in a VEC created by the Cheviot Coal Project are significant;

(2) if they are significant, whether they are justified from a public interest perspective; and

(3) if they are justified, whether the incremental changes in a VEC create a significant risk that other development opportunities may need to be foregone.

...I feel that for the practical reasons given by the appellants, the matter should be remitted to the Trial Division and heard together with the application for judicial review in T-1790-98. These cases raise the same issues and are based on the same facts. We note that at the hearing of the appeal the appellants agreed to expedite the hearing of T-1790-98 if this court was inclined to follow their suggestion that these applications be heard together. This is the proper course to follow, as it would reduce any prejudice to the respondent on account of delay. The appeal is allowed, the decision of the Applications Judge set aside and the matter referred back to the Trial Division *for determination on the merits*. [Emphasis added]

42. Where the Minister establishes a review panel jointly with a jurisdiction referred to in subsection 40(1), the assessment conducted by that panel shall be deemed to satisfy any requirements of this Act and the regulations respecting assessments by a review panel.

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> When there is insufficient information on future projects or activities to assess their cumulative environmental effects with the project being proposed, best professional judgement should be used. [Applicants Book of Authorities, Vol II: T-1790-98, Tab 81, p. 138.]
>
> "mitigation" means, in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> It seems clear from these cases that older authorities are no longer to be absolutely relied upon. The only principle of interpretation now recognized is a words-in-total-context approach with a view to determining the object and spirit of the taxing provisions.
>
> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking this into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

FN* A corrigendum issued by the court on October 19, 1999 has been incorporated herein.

FN1 *Fisheries Act*, R.S.C. 1985, c. F-14.

FN2 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

FN3 During the course of the hearing of this application, I ruled that the Federal Response is irrelevant to the issues to be determined.

FN4 The Minister and CRC, by separate notices of motion filed November 18 and November 26, 1997, applied to strike out the applicants' originating notice of motion on the ground, *inter alia*, that it had been filed out of time with respect of the Joint Review Panel Report. By way of a cross-motion filed November 27, 1997, the applicants applied for an extension of the 30-day limit. The motions by the Minister and CRC were dismissed by Mr. Justice Hugessen on December 2, 1997. On March 24, 1998, I granted Wayne Roan (acting on his own behalf) and all other members of the Smallboy Camp, intervener status and on April 15, 1998, Prothonotary Hargrave granted Treaty 8 First Nations intervener status. Although both the Smallboy Camp and Treaty 8 First Nations participated in the initial judicial review hearing, neither participated in the subsequent re-hearing before me.

FN5 The application in T-1790-98 requests relief respecting this authorization "and any other authorization or approvals that may be issued by the Minister of Fisheries and Oceans for the Cheviot Coal Project or portion thereof prior to the hearing of this matter". On September 29, 1998, a further authorization was issued and in their written argument the Applicants argue for relief respecting it as well. In oral argument, however, counsel for the Applicants advised that this issue would not be pressed, and, accordingly, I decline to accept jurisdiction over the September 29, 1998 authorization.

FN6 During the hearing CRC argued that I should consider its argument that the applicants were out of time for the

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filing of their application on T-2354-97, and, therefore, they cannot raise the argument respecting the sufficiency of the Joint Review Panel Report required as a pre-condition to the Authorization in either judicial review application. I dismissed this argument from the bench since it was presented to the Appeal Division on the appeal of T-2354-97, and I conclude that by Sexton J.A.'s words as follows that it was not accepted:

I find, therefore, that jurisdiction is complete in both T-2354-97 and T-1790-98.

FN7 During the hearing of the application before me, counsel agreed that T-1790-98 should be heard first as a decision respecting *CEAA* under it will determine the challenge under T-2354-97.

FN8 *Migratory Birds Regulations*, C.R.C. 1978, c. 1035.

FN9 As set out in detail below, the duties on a review panel conducting an environmental assessment exclusively under *CEAA* are the same for the Joint Review Panel in the present case conducting an environmental assessment under *CEAA* and Alberta legislation.

FN10 Applicant's Application Record (Memorandum of Fact and Law): T-1790-98, p. 22.

FN11 Attached as Appendix 1 are the relevant passages of the decision.

FN12 *Alberta Wilderness Assn. v. Express Pipelines Ltd.* (1996), 137 D.L.R. (4th) 177 (Fed. C.A.).

FN13 In *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [1998] 4 F.C. 340 (Fed. T.D.), at 360, Gibson J. made a finding to the same effect. With respect to the exercise of discretion he found that the standard of review is reasonableness. In the present case the respondent argues that the standard of review for discretionary decisions should be patent unreasonableness, based, in part, on an argument that s.42 of *CEAA*, which reads as follows, constitutes a privative clause:

I reject this argument because s.42 is incapable of this construction; it is a provision which simply establishes that an assessment by a joint review panel satisfies statutory requirements respecting assessments by non-joint review panels. No standard of review is set by the provision. In any event, as will become evident in the analysis to follow, the review in the present case concerns only errors of law.

FN14 Applicant's Application Record, Vol II: T-2354-97, pp.582-584.

FN15 Applicant's Application Record, Vol II: T-2354-97, p.586.

FN16 This fact is in sharp contrast with the Alberta regulatory process which, as above described, first obtains a high level of government approval. Evidence on this point comes from the testimony before the Joint Review Panel of Mr. Robert L. Stone, Director of Environmental Assessment, Alberta Environmental Protection, who in a letter dated September 18, 1996, stated: "In my opinion, [CRC's] Environmental Impact Assessment (EIA) report is complete pursuant to Section 51 of the *Environmental Protection and Enhancement Act*". [Application Record of the Respondent, Vol. I: T-2354-97, p.373] With respect to the meaning of this approval, during public hearings, the Chair of the Joint Review Panel asked the following question of Mr. Stone: "...can I take it from that AEP believes that Cardinal River Coals has adequately dealt with cumulative effects of their project in their environmental assessment?", to which Mr. Stone responded: "Yes, you can". [*Ibid*, p.136]

FN17 Applicant's Application Record, Vol II: T-2354-97, p. 767.

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

FN18 *Ibid.* at 768.

FN19 *Ibid.*

FN20 *Ibid.* at 584.

FN21 During the course of the hearing of the application in the present case, CRC argued that the terms of reference for the *CEAA* environmental assessment were set by the process which set the terms of reference for the EIA; that is, they are one and the same, and therefore, the environmental assessment is limited to considering the effects of only an open pit coal mine. It is clear that this argument must be rejected because paragraph 4(c) of the "Terms of Reference for the Panel of the Cheviot Coal Project" defines the terms of reference of the EIA as only an item of information to be taken into consideration.

FN22 Applicant's Application Record, Vol II: T-2354-97, p.767.

FN23 During the course of the hearing in the present case, with particular respect to "alternate means", counsel for CRC argued that the scope of the factors to be considered in the assessment were those set for the EIA, therefore, with reference to "alternate means", the scope of the assessment should be considered limited to an open pit mine. I reject this argument since the words of the Joint Panel Agreement place no such limitation, and, indeed, ensure the scope is as expanded as possible.

FN24 *Canadian Environmental Assessment Act Responsible Authority Guide*, Canadian Environmental Assessment Agency, Nov. 1994. The relevant portion of this reference reads:

FN25 supra

FN26 Attached as Appendix 2 is the Joint Review Panel's description of this approach.

FN27 Applicant's Application Record, Vol II: T-2354-97, p. 589.

FN28 This interpretation was essentially agreed to by counsel for the applicants in the course of hearing, but the concern remained about including "mitigation" in the determination of weight.

FN29 Mitigation is defined in s.2(1) of *CEAA* as follows:

With respect to mitigation, the applicants argue that, within the Joint Panel's consideration of the environmental effects on carnivores, the enforcement of a monitoring program called the "Carnivore Compensation Program" does not meet the statutory definition of "mitigation". I give no weight to this argument as I find that, on the facts of this application, monitoring is a control measure.

FN30 Submission of Department of Fisheries and Oceans, Applicant's Application Record, Vol. I: T-2354-97, p. 500.

FN31 *Ibid.* at 501.

FN32 Applicant's Application Record, Vol II: T-2354-97, p. 663

FN33 Applicant's Applications Record, Vol II: T-2354-97, p. 636.

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

FN34 Affidavit of Dianne Pachal, February 19, 1998: Applicant's Supplementary Application Record, Vol. III: T-2354-97, p.1

FN35 Affidavit of Dianne Pachal, October 13, 1998: Applicant's Application Record, (Documents and Evidence): T-1790-98, p. 20

FN36 Applicant's Application Record, Vol II: T-2354-97, pp. 679, 681.

FN37 During the presentation of the Respondent's case in the present application, reference was made to evidence, both in the EIA and otherwise produced, regarding forestry activities in the Project area. However, as found above, the fact that some information exists does not relieve the Joint Review Panel of the duty to consider this, and other available information, in meeting its reporting obligations. That some information was presented does not alter the fact that all available information was not gathered, nor does the Joint Review Panel's use of a "surrogate measure of likely effects" rectify this deficiency.

FN38 Applicant's Application Record (Documents and Evidence), T-1790-98, p. 48.

FN39 *Ibid.* at 22.

FN40 *Ibid.* at 23.

FN41 Applicant's Application Record, Vol. II: T-2354-97, p. 595.

FN42 Applicant's Application Record, Vol. II: T-2354-97, p. 600.

FN43 *Ibid.* at 736.

FN44 While the Applicants also argue that the Joint Review Panel Report does not adequately deal with the environmental effects of the transportation and utilities system, and coal processing plant, given the Joint Review Panel's findings at pages 26 and 29 of the Joint Review Panel Report [Applicant's Application Record, Vol. II: T-2354-97, pp.607 and 609], I find that this concern is an attack on the quality of evidence considered and, therefore, does not concern a reviewable error.

FN45 Applicant's Application Record, Vol. II: T-2354-97, p.600

FN46 Although the applicants used the mentioned assertion as the basis for an argument that the Joint Review Panel failed to meet the requirements of s.16(1)(e), I give it no weight. The public and private need for the project was established by the Alberta regulatory approvals given prior to the Joint Review Panel's consideration, and, within this reality, the Joint Review Panel made substantiated findings that CRC established a need of the Cheviot Coal Project. [see Applicant's Application Record, Vol. II: T-2354-97, p.600-601] Therefore, I find the Joint Review Panel has met its duty under s.16(1)(e).

FN47 The source of evidence for his finding is the affidavit of Anne Kendrick, sworn February 4, 1998: Application Record of the Respondent, Vol 1: T-2354-97, p.15, at p.16.

FN48 Section 18.1(3)(b) of the *Federal Court Act* reads: "On an application for judicial review, the Trial Division may ... (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal".

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

FN49 Section 18.1(4)(f) of the *Federal Court Act* reads: "The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal...(f) acted in any other way that was contrary to law".

FN50 *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.).

FN51 *Migratory Birds Regulations*, C.R.C. 1978, c. 1035, Applicant's Book of Authorities Vol. 1: T-1790-98, Tab 12.

FN52 *Migratory Birds Convention Act*, 1994, S.C. 1994, c. 22, Applicant's Book of Authorities Vol. 1: T-1790-98, Tab 11.

FN53 Applicant's Application Record (Memorandum of Fact and Law): T-1790-98, p. 10-12.

FN54 With respect to the objective, the "modern rule" of statutory interpretation was enunciated by E.A. Driedger as follows, in *Construction of Statutes*, (2nd ed., 1983) at 87:

This principle was adopted by the Supreme Court of Canada in *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 at 578, [1984] C.T.C. 294 (S.C.C.), at 316, per Estey J., and by the Federal Court of Appeal as a "words-in-total-context" approach in *Lor-Wes Contracting Ltd. v. R.* (1985), 60 N.R. 321 at 325, [1985] 2 C.T.C. 79 at 83, [1986] 1 F.C. 346 (Fed. C.A.) at 352 wherein MacGuigan J., delivering the court's judgment, concluded:

In *Driedger on the Construction of Statutes*, (R. Sullivan, 3rd ed., 1994) at 131, the author further elaborated on the "modern rule" as follows:

FN55 *National Bank of Greece (Canada) c. Katsikonouris* (1990), 74 D.L.R. (4th) 197 (S.C.C.).

FN56 Applicant's Application Record (Documents and Evidence): T-1790-98, p. 10.

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