

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18



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Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)

Bow Valley Naturalists Society and Banff Environmental Action and Research Society, Appellants and Minister of Canadian Heritage, John Allard acting superintendent for Kootenay, Yoho, and Lake Louise Field Unit of Parks Canada, and Canadian Pacific Hotels Corporation, Respondents

Federal Court of Appeal

Linden, Isaac, Sharlow JJ.A.

Heard: December 4, 2000

Judgment: January 10, 2001 [\[FN*\]](#)

Docket: A-642-99

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Proceedings: affirming (1999), 32 C.E.L.R. (N.S.) 84, 18 Admin. L.R. (3d) 269, [175 F.T.R. 122](#) (Fed. T.D.)

Counsel: *Karen G. Wristen* and *Margot A. Venton*, for appellants

Kirk N. Lambrecht, for respondent Minister

Judson E. Virtue, for respondent CP Hotels

Subject: Environmental; Public

Environmental law --- Statutory protection of environment — Environmental assessment — General

Hotel proposed to build meeting facility in national park — Minister of Canadian Heritage approved proposal, concluding that adverse environmental effects would not be significant — Public interest group applied for judicial review — Application was dismissed on basis that assessment met requirements of Canadian Environmental Assessment Act and management plan for park — Public interest group appealed — Appeal dismissed — Minister's scoping of project represented reasonable exercise of discretion — Although decision and reasons betrayed drafting deficiencies, including lack of specificity, decision regarding potential cumulative effects of project was not unreasonable — Cumulative effects assessment is not required to consider purely hypothetical projects — Intent of Act is not to eliminate development in parks but to ensure sustainable development and assessment process that is flexible so that objectives may be balanced — Court should ensure steps in Act are followed, but defer to responsible authorities in substantive determinations — Canadian Environmental Assessment Act, S.C. 1992, c. 37.

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Cases considered by *Linden J.A.*:

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

Citizens' Mining Council of Newfoundland & Labrador Inc. v. Canada (Minister of the Environment) (1999), 29 C.E.L.R. (N.S.) 117, 163 F.T.R. 36, 17 Admin. L.R. (3d) 287 (Fed. T.D.) — considered

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 2 W.W.R. 193, [1992] 1 S.C.R. 3, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, 48 F.T.R. 160 (S.C.C.) — considered

Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans) (1999), 31 C.E.L.R. (N.S.) 239, 248 N.R. 25, 169 F.T.R. 298 (note), [2000] 2 F.C. 263 (Fed. C.A.) — considered

Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans) (September 21, 2000), Doc. 27644 (S.C.C.) — referred to

Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment) (2000), 34 C.E.L.R. (N.S.) 1 (Fed. T.D.) — referred to

Lavoie v. Canada (Minister of the Environment) (2000), 35 C.E.L.R. (N.S.) 183 (Fed. T.D.) — considered

Manitoba's Future Forest Alliance v. Canada (Minister of the Environment) (1999), 30 C.E.L.R. (N.S.) 1, 170 F.T.R. 161 (Fed. T.D.) — considered

Pushpanathan v. Canada (Minister of Employment & Immigration), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) [1998] 1 S.C.R. 982, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1 (S.C.C.) — applied

Quebec (Attorney General) v. Canada (National Energy Board), 112 D.L.R. (4th) 129, [1994] 1 S.C.R. 159, 14 C.E.L.R. (N.S.) 1, 20 Admin. L.R. (2d) 79, (sub nom. *Québec (Procureur général) v. Office national de l'énergie*) 163 N.R. 241, [1994] 3 C.N.L.R. 49 (S.C.C.) — considered

Union of Nova Scotia Indians v. Canada (Attorney General) (1996), 122 F.T.R. 81, [1997] 1 F.C. 325, 22 C.E.L.R. (N.S.) 293, (sub nom. *Union of Nova Scotia Indians v. Canada (Minister of Fisheries & Oceans)*) [1997] 4 C.N.L.R. 280 (Fed. T.D.) — considered

Statutes considered:

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

Generally — considered

Preamble — referred to

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

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18

s. 2(1) "project" — considered

s. 2(1) "responsible authority" — considered

s. 2(1) "screening" — referred to

s. 4 [am. 1993, c. 34, s. 19; am. 1994, c. 46, s. 1] — considered

s. 5(1)(a) — considered

s. 5(1)(b) — considered

s. 5(1)(c) — considered

s. 5(1)(d) — considered

s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

s. 15(3) — considered

s. 16 — considered

s. 16(1) — considered

s. 16(1)(a) — considered

s. 16(1)(a)-16(1)(e) — considered

s. 16(1)(b) — considered

s. 16(2) — considered

s. 16(3) — considered

s. 17 — considered

s. 18 — considered

s. 20 — considered

s. 20(1) — considered

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National Energy Board Act, R.S.C. 1985, c. N-7

Generally — referred to

Words and phrases considered

cumulative effects

"Cumulative effects" are not defined in the Act [*Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 16(1)(a)]. The Agency has defined cumulative environmental effects as "the effects on the environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing, and imminent projects and activities."

Only likely cumulative environmental effects must be considered. Projects or activities which have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered. The Agency's *Reference Guide on Cumulative Effects* suggests, however, that "it would be prudent to consider projects or activities that are in a government approvals process as well."

APPEAL by public interest group from judgment reported at (1999), 32 C.E.L.R. (N.S.) 84, 18 Admin. L.R. (3d) 269, [175 F.T.R. 122](#) (Fed. T.D.), dismissing application for judicial review of Minister of Canadian Heritage's decision respecting environmental assessment.

The judgment of the court was delivered by *Linden J.A.*:

Introduction

1 This is an appeal of a decision of the Trial Division, dated September 21, 1999, which dismissed the appellants' application for judicial review of a decision by Parks Canada with respect to an environmental assessment ("assessment") of a proposal submitted to it by Canadian Pacific Hotels ("CP") to develop a meeting facility at the Chateau Lake Louise ("Chateau") in Banff National Park.

Facts

2 In September 1996, CP put forward a proposal for the development of a new meeting facility at the Chateau Lake Louise in Banff National Park. Parks Canada reviewed the proposal and, in January 1997, issued revised Terms of Reference for an environmental screening of a meeting facility. In response, in June 1997, CP submitted its revised proposal, entitled the *Chateau Lake Louise Long Range Development Plan, 1997* ("Long Range Plan"), setting out its long term vision for the Chateau.

3 The Long Range Plan, published in attractive booklet form containing colour photographs, envisioned several future developments, but CP stated that the meeting facility was to be the first project. The Long Range Plan consisted of five[FN1] components: the meeting facility, swimming pool and spa restoration, Tom Wilson Room conversion, staff housing and an additional level to the existing parkade. The proposed 148,547 square foot meeting facility is to be a seven-storey building with six meeting rooms, a seven-hundred person meeting hall, a two-hundred and fifty-two seat dining-room and eighty-one new guest rooms. It was proposed as an additional wing to the hotel. It would be constructed partly on the site of an existing surface parking lot and abandoned boiler building. CP acknowledged that additional assessments would be required should it decide to proceed with the staff housing and parkade expansions.

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4 The Long Range Plan incorporated many mitigation measures, such as implementing a Green Partnership Program for environmental stewardship; water system upgrades and pumping station modifications in conjunction with a program to monitor conditions in Lake Louise and to provide intake metre readings to Parks Canada Environment Assessment Office. CP agreed to cap development to 1,126 guests per night by the year 2000, which is below the allowable limit of 1,166. Furthermore, CP agreed to return 20.5 acres of undisturbed land on the Chateau leasehold to Parks Canada, thereby reducing the leasehold to only what is needed for operations and limiting, if not eliminating, the prospect of further development at the site.

5 As part of their proposal, CP conducted an environmental screening which addressed the following issues: staff housing, habitat loss, water supply, community impact, waste water treatment, parking needs, electrical supply, traffic, waste stream management, public involvement, demand analysis, mitigation measures, alternatives, cumulative effects, construction impacts, knowledge deficiencies and increased use. As a result of the screening, CP produced the following five substantial and detailed screening documents: The Chateau Lake Louise Meeting Facility - Banff National Park Screening, June 1997 (Certified Document #1); The Chateau Lake Louise Meeting Facility - Banff National Park Screening Update, January 1998 (Certified Document #2); Chateau Lake Louise Development Plan with Meeting Facility Matrix of Environmental Effects, Mitigation Actions and Time Lines (Certified Document #3); Water Quality Monitoring: Louise Creek, 1997 (Certified Document #4); and Project Registration Form (Certified Document #5).

6 The MacLeod Institute, a third party consultant retained by Parks Canada conducted an independent review of CP's screening, and provided a list of areas which required more scrutiny, additional information or more critical analysis. Public consultation was carried out. In response to concerns identified through the public consultation process and internal review within Parks Canada, CP submitted additional screening documents.

The Superintendent's Decision

7 On April 2, 1998, the Acting Superintendent John Allard ("Superintendent") rendered his decision on CP's proposal to develop a meeting facility. In his decision, which appears under a heading "Lake Louise, Yoho and Kootenay National Park CEAA Project Registration Form," the Superintendent found that CP's proposal to expand the Chateau included

... a meeting facility and requisite ancillary support facilities. This would include a six story meeting facility with accommodation, food services, a large meeting room, and smaller "break-out" meeting rooms. This will be adjacent to the current parking wing. Sewer, water, waste and electrical infrastructures will be up-graded to service the expansion along with the addition of two proposed staff housing units.

8 The decision itself, which is the subject of this litigation, reads as follows:

Nature and Extent of Environmental Effects:

Impact of increased footprint, consumption of water and electrical resources, solid and liquid waste treatment requirements, parking requirements, trails, wildlife habitat and movements, air quality, and community infrastructure is an likely [sic]. The nature and extent of impacts is defined within assessment documents and subsequent update which have included recent research. While impacts are likely in some areas, the nature and extent of the effects are localized and, based upon current information and assessment, can be mitigated and/or compensated for.

Cumulative Effects:

Overall cumulative effects are considered within the context of the BNP management plan and also in the stra-

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tegic EA completed for the current draft of the Lake Louise Development Use Framework. Regardless of this latter documents' status (is not yet fully endorsed and/or approved by Parks Canada), cumulative effects measured for the meeting facility proposal are addressed by the assessment at a geographic (upper Lake Louise, Fairview Wildlife Corridor, Townsite) and temporal (mid-eighties to a 10 [2008] year time frame with references back to early 'modern' development of year-round operation) scale that is most relevant to the nature and significance of perceived environmental impacts. Socio-economic factors considered relate to the spher[e] of operation of CP Hotels in the Canadian Rockies. The cumulative effects analysis is contained within updates to the original assessment, the last dated 98/02/17.

The specific areas of concern related to Water Supply/Demand; Waste Water Disposal; Electrical Power; Solid Waste Disposal; Traffic and Transportation; Ecological Integrity; Community Life, and; Habitat Loss.

Mitigation:

See Table 2 contained in the preface to the Environmental Screening by Stanley Consulting Group Limited prepared for CP Hotels and dated June 1997 and subsequent updates to 98/02/17. All potential environmental effects proposed mitigations are listed there. Mitigations are all technically feasible. Updates [sic] to mitigations have been necessary to expand the scope, establish levels of legal commitment, and establish timelines and/or performance measures. Where there was a perceived lack of sufficient empirical data to establish benchmarks, or the outcome of a particular mitigation is uncertain, a 'reversability' option has been identified. Final mitigation presentation and management of the Environmental Management System required to manage this complex project will be delegated to and Environmental Manager. This person will make all relevant information public and report periodically to all identified stakeholders. Further to this, separate MOU's and contract have been and will continue to be signed between Parks Canada and CP Hotels at crucial junctures of development (prior to building permit being issued, prior to occupancy, prior to further proposed projects that have been itemized in the assessment, etc.). The purpose is to ensure that all commitments have been completed prior to advancement into the next phase of the proposal.

Public Comments:

Only three letters received from the general public. Deadlines were extended so that a total of 4 letters were received before September 5th, with one more on September 7th. Only one response provided meaningful comments as to factors and statements within the EA. The remainder were of a second order unsubstantiated by data. More specifically that the project should simply be rejected 'out of hand' based upon concept alone and perceived management plan inconsistencies.

The majority of the commentary resulting from the scheduled public forums is summarized elsewhere. No new factors were revealed through this process and the amount of response 'for' or 'against' is approximately divided at 50%/50%. There was no information to suggest that comprehensive study or panel review would be required.

9 The Superintendent concluded that the project was not likely to have a significant environmental impact provided that the mitigation measures associated with the project were implemented.

10 In a letter dated July 3, 1998, Executive Director, Mountain Parks, Department of Canadian Heritage, confirmed the approval of the meeting facility and set out the specific requirements for mitigation. The two appellants launched a judicial review application.

The Trial Judge's Decision

11 The Trial Judge dismissed the application for judicial review. Relying on the Act and the decision of the Su-

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preme Court of Canada in *Pushpanathan v. Canada (Minister of Employment & Immigration)*,^[FN2] the Trial Judge, without particularizing the standard of review to be used, concluded that there was no basis which would warrant his interference with the decision of the Superintendent.

12 The Trial Judge found that Parks Canada had been vested with the responsibility of maintaining national parks. He reasoned as follows:

First, Parks Canada is the authority charged with the responsibility of maintaining national parks unimpaired for the enjoyment of future generations and the maintenance of ecological integrity through the protection of natural resources. This is particularly true in the context of Banff National Park, which holds a unique position among Canada's national parks. For this reason, Parks Canada has engaged in a detailed and thorough review of the park's ecological habitat and the inter-relation between human activity and that habitat, culminating in the 1997 Banff National Park Management Plan. Decisions with respect to the appropriate level of human activity in the context of Banff National Park, the management and policy goals established for the park and the protection of its ecological integrity are a highly specialized field in which Parks Canada has significant knowledge and expertise.^[FN3]

13 The Trial Judge further found that:

An important and crucial aspect of the CEEA [Act] is Parliament's recognition of Park's Canada's expertise and its participation in extensive studies and planning exercises related to environmental concerns. It is for this reason that the authority is expressly provided with a broad discretion to determine the scope of the project to be assessed and the scope of the assessment to be conducted. This discretion ensures that the assessment will adequately address the specific characteristics of each project in light of the planning and management policies in place to ensure environmental integrity. It allows Parks Canada to establish the scope of projects and environmental assessments and to determine the appropriate level of sustainable development.^[FN4]

Environmental Assessment under the Canadian Environmental Assessment Act - General Framework

14 The current *Canadian Environmental Assessment Act*^[FN5] came into force in January 1995. The Act is one element of a major reform of the federal environmental assessment practice. It provides a framework for assessing environmental effects of certain projects which trigger the Act's application.

15 The Act requires the environmental assessment of projects when "a federal authority" is the proponent of the project (s. 5(1)(a)), or is providing funding (s. 5(1)(b)), land (s. 5(1)(c)), or a permit for a project (s. 5(1)(d)). All projects which trigger the Act's application are to receive an appropriate degree of environmental assessment, depending on the scale and complexity of the likely effects of the project.

16 The Act defines "project" as:

2(1)(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or

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

17 Environmental assessment is a tool used to help achieve the goal of sustainable development by providing "an effective means of integrating environmental factors into planning and decision-making processes."^[FN6] According to Parks Canada, environmental assessment is "a comprehensive and systematic process designed to identify, analyse and evaluate the environmental effects of proposed projects."^[FN7] The Supreme Court of Canada commented that an

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environmental assessment had become "a planning tool that is now generally regarded as an integral component of sound decision-making."[\[FN8\]](#)

18 There are three types of environmental assessments: screening,[\[FN9\]](#) comprehensive study, and panel review. Screening and comprehensive study account for the vast majority of projects assessed under the Act.

19 The basic framework for an environmental assessment is as follows. First, the responsible authority[\[FN10\]](#) must decide whether the Act applies to the project and if it does, which type of environmental assessment applies. The next step is the conduct of the assessment itself. Following the assessment, the responsible authority makes a decision as to whether or not to allow the project to proceed. The final step is the post-decision activity which includes ensuring that mitigation measures are being implemented and giving public notice concerning the responsible authority's course of action.

20 The Canadian Environmental Assessment Agency ("Agency"), which oversees the implementation of the Act, published, for the assistance of various responsible authorities, *A Guide to the Canadian Environmental Assessment Act* which provides for a four-step process in conducting an assessment:[\[FN11\]](#)

Step 1: Scoping

Step 2: Describing or Assessing Environmental Effects

Step 3: Mitigating Environmental Effects

Step 4: Evaluating or Determining the Significance of Adverse Environmental Effects.

While not binding, this Guide explains how the Agency envisions the operation of the process, which is a complex one.[\[FN12\]](#)

21 Pursuant to s. 15 of the Act (see Appendix attached), the responsible authority determines the scope of the environmental assessment. Under s. 16, it then determines the scope of the factors to be considered by that assessment. It may conduct the assessment itself or, if it prefers, may choose to manage the assessment process done by others, ensuring that a screening report is prepared. The latter type of environmental assessment is often referred to as self-directed environmental assessment. In practice, the project proponent may conduct the assessment, prepare the screening report, and design and implement mitigation measures and a follow-up program. Nevertheless, the responsible authority is directly responsible for ensuring that the screening is carried out in compliance with the Act. This was the *modus operandi* in this case.

22 The responsible authority has the discretion as to whether or not to allow public review and comment on the screening report before making any decision on the project. If, after the screening, the responsible authority concludes that further investigation is required, or if public concerns about the project warrant it, the responsible authority may refer the project to the Minister of the Environment for a referral to mediation or for a panel review.

23 It has been suggested that the process of scoping involves several issues, namely the scope of the project itself, the scope of the environmental assessment; the scope of the factors considered; and scoping interested parties.[\[FN13\]](#)

Scope of the Project

24 Pursuant to s. 15 of the Act, the first step in conducting an environmental assessment is to scope the project with respect to which an assessment is to be conducted. In other words, the responsible authority must determine

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which components of the proposed development should be considered part of the project for the purposes of the environmental assessment. [\[FN14\]](#) *The Reference Guide on Addressing Cumulative Environmental Effects* prepared by the Agency [\[FN15\]](#) notes that the "assessment of cumulative environmental effects largely depends on effective scoping, i.e., setting the boundaries of the assessment and focus the analysis."

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

26 *The Responsible Authority's Guide* suggests two criteria be used in determining what constitutes an accessory to the principal project: interdependence and linkage. If the principal project cannot proceed without the undertaking of another physical work or activity, then that other physical work or activity may be considered as a component of the scoped project. Furthermore, if the decision to undertake the principal project makes the decision to undertake another physical work or activity inevitable, then that other physical work or activity may also be considered as a component of the scoped project.

27 *The Operational Policy Statement* issued by the Agency entitled "Establishing the Scope of the Environmental Assessment" provides that "scoping establishes the boundaries of an environmental assessment (what elements of the project to consider and include and what environmental components are likely to be affected and how far removed those components are from the project)." The Statement recommends the following, among other things, be considered when determining the scope of the project: the description of the project (what is the project and is it the principal project?) and justification for the project (what is the purpose of project and why is it proposed?), and other physical works which are inevitable or physically linked to or are inseparable from the proposed projects; whether the proposed project is or has been the subject of an assessment of environmental effects by others, such as other environmental assessments, forest management plans, or resource management plans, regional land use plans; whether other review processes have occurred or are occurring and their results.

28 Pursuant to subs. 15(2) of the Act, the responsible authority may combine two or more projects to which the Act applies into the same environmental assessment if it determines that the projects are so closely related that they can be considered to form a single project. This power is discretionary.

29 Subsection 15(3) of the Act requires the responsible authority to include in the environmental assessment a consideration of all undertakings or activities with respect to a physical work, and all activities with respect to a physical work which are proposed or in its opinion, are likely to be carried out.

30 The scope of the project to be assessed has been the subject of significant judicial consideration in the past few years. [\[FN16\]](#) In *Quebec (Attorney General) v. Canada (National Energy Board)*, [\[FN17\]](#) the Supreme Court of Canada considered the question of the scope of the project for the purposes of assessment under the *National Energy Board Act*. [\[FN18\]](#) Hydro-Québec had applied for licences to export electricity to Vermont and New York. The National Energy Board ("Board") approved the licences subject to two environmental conditions related to the proposed electricity generating facilities. At issue was the Board's ability to attach the conditions. One condition required that, prior to their construction, the electricity generating facilities undergo an environmental assessment. This Court found that the Board exceeded its jurisdiction by attaching the conditions as the facilities were under provincial jurisdiction. The case was then taken to the Supreme Court of Canada. The Supreme Court rejected the arguments of Hydro-Québec and ruled that, in assessing the scope of the assessment, the proper question to ask was whether the construction of the new facilities "is required to serve, among other needs, the demands of the export contract." [\[FN19\]](#) The Court further held that the Board was not limited in its scope of inquiry to the "environmental ramifications of the

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transmission of power by a line of wire." [FN20] Thus, the environmental effects of the electricity generating facilities were related to the Board's power to grant an export licence and came within the scope of the assessment.

31 The case of *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)* [FN21] involved the construction of a bridge and an environmental assessment was undertaken by the Canada Coast Guard. The proponent of the project was also undertaking the conversion and expansion of an existing pulp mill, the construction of a new pulp mill, the construction of hundreds of kilometres of logging roads and other related forestry activities. The approval was challenged on the basis of the narrow scoping of the project. Nadon J. found that, when determining the scope of the project under subs. 15(1) of the Act, the responsible authority was required under subs. 15(3) to assess not just those undertakings proposed by the proponent but also those which were likely to be carried out in relation to the bridge. Nadon J. quoted, with approval, directly from the Minister's memorandum:

The effect of s. 15(3) . . . is that the scope of the assessment of a physical work project may be increased beyond what is proposed in the project itself, in order to take into account the environmental effects of the undertakings the responsible authority believes are likely to be carried out to carry the project through its life cycle. [FN22]

The Court concluded that the Coast Guard was not required to include in the scope of the project the forestry operations, the pulp mills or the construction of the new roads. The forestry operations were not undertakings related to the bridge or likely to be carried out in relation to that project. The Court noted, however, that " . . . [u]nless environmental assessment is connected with the regulatory authority which triggers the CEAA [Act], there is simply no reasonable limit placed on what the responsible authority in any given case would have to consider." [FN23]

32 In *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [FN24] the project was the construction of two bridges which were part of a proposed mainline road to bring logs to a mill. This Court had to determine whether the road and the related forestry operations should have been included in the project which was subject to assessment. The Court found that the responsible authority could include in the scope of the project undertakings, as defined in subs. 2(1) of the Act, in the life cycle of the main project under the assessment which are ancillary or subsidiary to that physical work. The Court expressly rejected the "independent utility principle" on which the Trial Division relied to determine the scope of the project and concluded that the responsible authority declined to exercise its discretion, because in declining to consider matters outside the scope of the projects, it "construed the boundaries of the exercise of its discretion more narrowly than those provisions permit." [FN25]

33 In *Citizens' Mining Council of Newfoundland & Labrador Inc. v. Canada (Minister of the Environment)*, [FN26] the court had to determine whether an environmental assessment to be undertaken with respect to a smelter/refinery was conducted in compliance with the Act, in particular whether a mine/mill project had to be assessed under the same assessment. The opponent of the project contended that under subs. 15(3) of the Act, the scope of the a physical work or project had to include every related construction, operation or other undertaking or activity proposed by the same proponent. MacKay J. found that since the scope of the assessment was left to the discretion of the Minister as the responsible authority, and its determination was not based on irrelevant considerations and there was no suggestion that the Minister acted in bad faith, there was no basis on which to set aside the discretion of the Minister. As such, the Minister did not err in law by failing to include the mine/mill project within the scope of the smelter/refinery projects. MacKay J. concluded that, in a project involving a physical work, subs. 15(3) of the Act requires inclusion of every phase in the life span of the work. MacKay J. notes that such an interpretation is supported by the French version of the Act. [FN27]

34 It would thus appear that the "scope" of a project under s. 15 is normally limited to undertakings directly related to the proposed physical work, such as its construction and operation, and ancillary or subsidiary undertakings.

Scope of the Assessment

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18

35 Once the responsible authority has determined the scope of the project, it must determine the scope of the assessment itself. Subsection 16(1) sets out the factors to be considered in an environmental assessment. Additional factors may be considered under subs. 16(2). Unlike the factors listed in subs. 16(1), the consideration of subs. 16(2) factors is discretionary.

36 In *Friends of the West Country Assn.*, this Court concluded that subs. 16(1) is mandatory and requires the consideration of the factors listed in paras. 16(1)(a) to (e). Under subs. 16(3), the responsible authority determines the scope of the factors to be taken into consideration under para. 16(1)(a). The Court found that the use of the word "shall" in para. 16(1)(a) indicates that some consideration must be given to each factor.

37 But there is some flexibility permitted in the exercise. In *Alberta Wilderness Assn. v. Express Pipelines Ltd.*,^[FN28] Hugessen J.A. rejected the proposition that subs. 16(1) requires a sequential examination of the factors enumerated therein:

. . . Nothing in the statute supports such a view. Section 16 certainly does not say or imply that the listed factors must be considered sequentially while section 37 (as well as sections 20 and 23 which do not apply to this case) strongly suggests that mitigation measures and environmental effects must be considered together. In our view, logic and common sense point the same way: there can be no purpose whatever in considering purely hypothetical environmental effects when it is known and proposed that such effects can and will be mitigated by appropriate measures.^[FN29]

Assessing Cumulative Environmental Effects

38 Pursuant to para. 16(1)(a) of the Act, every screening or comprehensive study must consider any cumulative environmental effects which are likely to result from the proposed development in combination with other projects or activities which have been or will be carried out.

39 The Act defines "environmental effect" as follows:

2(1)(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 one 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.

40 "Cumulative effects" are not defined in the Act. The Agency has defined cumulative environmental effects as "the effects on the environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing, and imminent projects and activities."

41 Only likely cumulative environmental effects must be considered. Projects or activities which have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered. The Agency's *Reference Guide on Cumulative Effects* suggests, however, that "it would be prudent to consider projects or activities that are in a government approvals process as well."

42 In order to assess cumulative environmental effects, advice from and consultation with relevant individuals, organizations and government departments and agencies should be consulted.

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18

43 *The Reference Guide on Cumulative Effects* recommends that the consideration and analysis of cumulative environmental effects should be adequately documented in the assessment report.

44 Under subs. 16(3), the responsible authority determines the scope of the factors listed in paras. (a) to (e), including the scope of the cumulative environmental effects to be considered. As Justice Rothstein explained in [*Friends of the West Country Assn.*](#):

. . . Paragraph 16(1)(a) cannot be read in isolation. The "other projects or activities" have not been defined in that paragraph. In other words, paragraph 16(1)(a) does not specify which other projects or activities are to be considered . . . The scoping of other projects or activities to be taken into account is left to the discretion of the responsible authority under subsection 16(3) and paragraph 16(1)(a) places no mandatory duty in that regard on the responsible authority.[\[FN30\]](#)

45 Rothstein J.A. further reasoned as follows:

. . . under paragraph 16(1)(a), the responsible authority is not limited to considering environmental effects solely within the scope of a project as defined in subsection 15(1) . . . Indeed, the nature of a cumulative effects assessment under paragraph 16(1)(a) would appear to expressly broaden the considerations beyond the project as scoped. It is implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered . . . [\[FN31\]](#)

46 Finally, he explained:

. . . Implicit in a cumulative effects assessment under paragraph 16(1)(a) are effects from both the project as scoped and other projects or activities. Sunpine argued that if there were no adverse environmental effects from the project as scoped, there could be no cumulative effects as envisaged by that paragraph. While on its face this argument is compelling, I am not sure it is possible to rule out that a federal project, while creating no adverse effects itself, could exacerbate adverse effects of other projects. In any event, a finding of insignificant effects as was made here still implies some effects from the bridge projects themselves. It is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects. I do not say that is the case here. I only observe that a finding of insignificant effects of the scoped projects is sufficient to open the possibility of cumulative significant environmental effects when other projects are taken into account. For this reason, I do not think the insignificant effects finding precludes the application of the cumulative effects portion of paragraph 16(1)(a) or subsection 16(3) in this case.[\[FN32\]](#)

47 Upon a review of jurisprudence in this area, it becomes clear that, although courts have narrowly interpreted the meaning of the "scope of the project," they have gone further in their interpretation of the cumulative effects provisions under the Act. It is mainly under para. 16(1)(b) of the Act that the courts have required the responsible authority to broaden the scope of its analysis.

Determining the Significance of the Effects

48 In accordance with s. 20 of the Act, following a screening, the responsible authority must decide whether or not the project is likely to cause significant adverse environmental effects. This determination must take into account the implementation of mitigation measures. If the responsible authority decides that the project is not likely to cause significant adverse environmental effects, it may allow the project to proceed, while ensuring that any appropriate mitigation measures are implemented.

49 The Guide suggests that the evaluation consists of three determinations. First, the responsible authority must

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determine whether or not the environmental effects are adverse. Second, it must decide whether or not they are significant. In deciding whether or not the effects are significant, the Agency's *Reference Guide* entitled "Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects" suggests that the following factors be taken into consideration: magnitude of the adverse environmental effects; geographic extent of the adverse environmental effects; duration and frequency of the effects; degree to which the adverse environmental effects are reversible or irreversible; and ecological context. The Reference Guide also suggests that the adverse environmental effects may be significant if they occur in areas or regions which have already been adversely affected by human activities; and/or are ecologically fragile and have little resilience to imposed stresses. Third, it must be decided whether these significant effects are likely to occur.

50 The Trial Judge, without specifying the exact standard of review he employed, noted that, given the objective of the Act which requires balancing of rights among different constituencies, the Court must be sensitive to the limited scope of its judicial review.

Arguments

51 The appellants argued that the Superintendent's decision is reviewable on a correctness standard because the interpretation of ss. 15 and 16 of the Act is a question of law. The appellants contended that the scope of the project was changed in midstream and, in any event, was too narrowly scoped. Parks Canada failed to conduct a cumulative environmental effects assessment, because the assessment failed to consider how the Long Range Plan combined with other existing and planned projects or activities in Lake Louise and environs would affect the environment of either the leasehold or Lake Louise and environs.

52 Counsel for the Minister of Heritage and Parks Canada argued that the standard of reasonableness was the appropriate one for review of the responsible authority's discretionary decisions under the Act. He contended that the decision was consistent with the new adaptive management principle employed in environmental assessments.

53 Counsel for CP argued that, while the interpretation of a provision of the Act might be reviewable on a standard of correctness, the Act gives a broad discretion to the decision-maker to make substantive decisions which require deference from the court. As such, the appropriate standard of review is either patent unreasonableness or reasonableness. He asserted that the Act was sufficiently complied with by the responsible authority.

Analysis

54 The main issue on this appeal is whether the approval given to CP for the meeting facility complies with the requirements of the Act. The analysis, which follows, is in three parts: the standard of review; the scoping of the project; and the cumulative effects analysis.

Standard of Review

55 The leading case dealing with ss. 15 and 16 of the Act is a decision of this Court in [Friends of the West Country Assn. v. Canada \(Minister of Fisheries & Oceans\)](#).^[FN33] Writing for the unanimous Court, Rothstein J.A. concluded that the interpretation of the Act, a statute of general application, is a question of law reviewable on a correctness standard.^[FN34] Consequently, this standard of review of statutory interpretation issues will be employed in this case. However, in that case, this Court did not rule on the appropriate standard of review for discretionary decisions of substance pursuant to the authority granted in the Act. The Trial Judge in that case has held that the standard of review for such cases should be reasonableness. Applying the [Pushpanathan](#) factors, this would be appropriate in this case particularly because there is no privative clause, and because the level of expertise in administering the Act is minimal in this and most, if not all, other responsible authorities.^[FN35]

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18

Scoping of the Project

56 The Respondent Minister of Canadian Heritage, acting through Parks Canada, is the responsible authority for the purposes of s. 15 of the Act. The Superintendent of Parks Canada, as the responsible delegated authority in this case, bore the responsibility of scoping the project.

57 It is clear that the responsible authority scoped the project as the meeting facility only, despite some sloppy, otiose words in the decision document, which also mentioned the future staff housing unit. The appellants contest this, saying that this was too narrow a scoping and that the entire Long Range Plan of CP for the Chateau should have been the subject of the screening, because it was all tied together into one. It was also contended on appeal that the responsible authority changed the scope of the project in midstream, at first including the entire Long Range Plan and then altering it to include only the meeting facility. The respondent CP rightly objects to this argument being raised on appeal, as it was not pleaded nor argued in the Trial Division, denying it the opportunity to offer evidence contradicting this allegation. In any event, there is no evidence to support the claim. The project, from the start, was thought to be by CP and Parks Canada only the meeting facility. Apparently, however, CP was invited, at an early stage, by Parks Canada to prepare a Long Range Plan outlining the possible future development of the Chateau. It was accepted that each additional component of the Long Range Plan would require its own assessment when the time came to proceed with it. The first and only project, for which approval was sought, was the meeting facility alone.

58 Consequently, in my view, there is no basis upon which to interfere with the scoping of the project as only the meeting facility. It was a reasonable exercise of the discretion of the responsible authority to which this Court must defer.

59 The responsible authority, as well as determining the scope of the project, must also outline the parameters of the screening of the project. In response to CP's proposal, Parks Canada initially provided CP with a copy of Terms of Reference for Environmental Assessment Process: Environmental Screening.^[FN36] These generic Terms of Reference describe the general mandate of Parks Canada and the Act. They list the components which the screening ought to consider, including the scope of the project; project development procedures; project operational requirements; site description; environmental impacts, including environmental effects, pollution and cultural features, such as aesthetics, public safety, cultural heritage and socio-economic impacts; mitigation measures; and cumulative environmental effects.

60 In response to a Draft Environmental Screening Report prepared by CP, Parks Canada issued a more specific Terms of Reference for a Draft Environmental Screening Report - Chateau Lake Louise Meeting Facility.^[FN37] In those specific terms of reference, Parks Canada mandated, that in conducting an environmental assessment, CP ought to "direct particular attention and effort" to a number of subjects, including staff housing, water supply, waste water treatment, electrical supply, waste stream management, demand analysis, alternatives, construction impacts, increased use, habitat loss, community impact, parking needs and traffic, public involvement, conceptual proposal, mitigation measures, cumulative effects.

61 It becomes clear from a review of both the general and specific terms of reference that Parks Canada directed CP's attention to the specific issues which it needed to address in its environmental assessment.

62 In response to Parks Canada specific terms of reference, CP conducted an environmental assessment. In June 1997, Stanley Consulting Group Ltd., on behalf of CP, prepared a screening report entitled "Chateau Lake Louise Meeting Facility Banff National Park: Environmental Screening." In January 1998, a subsequent report was submitted entitled "Chateau Lake Louise Leasehold Development Proposal: Environmental Screening Update." This second report addressed the issues of pool restoration and upgrades, staff housing and amenities, and transportation and parking. In all there were five substantial screening documents, containing hundreds of pages, prepared to meet the requirements of the Act as directed by Parks Canada.

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Cumulative Effects

63 The main complaint about the substance of the Superintendent's decision is the cumulative effects assessment. It is contended that it failed to take into account possible other future projects by third persons that may impact on Lake Louise and environs. Under s. 17 of the Act, provided there is sufficient guidance from the responsible authority, the conduct of the screening and the preparation of the screening report may be delegated. As such, the proponent may conduct the screening and prepare the report. The responsible authority alone remains responsible for ensuring that the environmental assessment is conducted in compliance with the Act.

64 In the specific terms of reference, Parks Canada directed CP to conduct its environmental assessment on 21 items listed, including a heading requiring particular attention to the cumulative effects of the proposed project. The assessment of cumulative effects to be done by CP was to focus "not only on the immediate Chateau leasehold,"

. . . but also include the effects of development with regard to a broader ecosystem (Fairview Wildlife Corridor), the community of Lake Louise, and the Bow Valley within Banff National Park. This includes consideration on how the rest of the area (Lake Louise and environs) will develop over time and what the overall impact of resource and land use will be as a sum total by all parties. This should particularly include those areas noted above where a cumulative effects analysis has been suggested.[\[FN38\]](#)

65 Parks Canada suggested to CP to "review the contents of both the commentary and Terms of Reference in order to determine the appropriate level of effort, analysis, and relevant information required to complete the assessment."

66 In April 1998, Stanley Environmental, on behalf of CP, prepared a final of three versions of its cumulative effects document. The assessment addressed infrastructure, including water supply and use, waste water disposal, electrical power, solid waste disposal, traffic, transportation and parking; human use and ecological integrity; visitor experience; and community life.

67 Under the heading "Cumulative Effects" of the decision of the responsible authority (the Project Registration), the following is written:

Overall cumulative effects are considered within the context of the BNP [Banff National Park] management plan and also the strategic EA completed for the current draft of the Lake Louise Development Use Framework. Regardless of this latter documents' status (is not yet fully endorsed and/or approved by Parks Canada), cumulative effects measured for the meeting facility proposal are addressed by the assessment at a geographic (upper Lake Louise, Fairview Wildlife Corridor, Townsite) and temporal (mid-eighties to a 10 [2008] year time frame with references back to early 'modern' development of year-round operation) scale that is most relevant to the nature and significance of perceived environmental impacts. Socio-economic factors considered relate to the spher[e] of operation of CP Hotels in the Canadian Rockies. The cumulative effects analysis is contained within updates to the original assessment, the last dated 98/02/17.

The specific areas of concern related to Water Supply/Demand; Waste Water Disposal; Electrical Power; Solid Waste Disposal; Traffic and Transportation; Ecological Integrity; Visitor Experience; Community Life, and; Habitat Loss.

68 Therefore, although it did not conduct its own cumulative effects analysis, but relying on the documents prepared by CP, which it was entitled to do, Parks Canada concluded that the environmental effects of CP's proposal were "not likely significant."

69 A close review of the evidence demonstrates that, in conducting its screening, CP closely followed the direc-

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tions from Parks Canada. The environmental assessment in this case was an ongoing process. There was an extensive exchange and production of documents. Periodic meetings took place between representatives of CP and Parks Canada. There was much give and take, in part responding to public comments. As a first step, CP submitted its initial proposal to Parks Canada. It then prepared a screening report dated June 1997. In January 1998, in response to Parks Canada demands, it produced an update to the screening report. At a November 28, 1997, meeting between representatives of CP and Parks Canada, it was agreed that Parks Canada would provide CP with a document on cumulative effects which would consist of the following headings: power, water, sewage, staff housing, community, and habitat. As a result of this ongoing consultation between CP and Parks Canada, CP produced three different versions of a report chapter headed "Cumulative Effects": the first in January 1998, comprising 11 pages (as part of the 1998 Screening Update), the second in February 1998, comprising 14 pages, and a third one in April 1998, containing 16 pages. Each was done in response to the responsible authority's requests for more information and more analysis of possible environmental impact of the cumulative effects the meeting facility could have on the Lake Louise area. This demonstrates that the Responsible Authority was cognizant of the need to consider the cumulative effects and kept pressing CP to deal responsibly and fully with them in the screening process.

70 It must be remembered that the entire screening process was done in the context of the *Lake Louise Community Plan* ("Community Plan") and the *Banff National Park Management Plan* ("Banff Management Plan"). The Banff Management Plan (1997) is the product of the extensive policy review and environmental study (the Banff-Bow Valley Study) undertaken by the Minister of Canadian Heritage. Under the Banff Management Plan, Parks Canada policy is to concentrate development of visitor services in either the Banff Townsite or the Lake Louise Area under a strict growth strategy. It must be noted that the Banff Management Plan specifically provided for consideration of CP's meeting facility. The Community Plan sets out limits to growth in the Lake Louise area. A cumulative effects assessment is a component of the Community Plan. Parameters for development of the Chateau are included in that cumulative effects assessment.

71 The February 1998 cumulative effects material, for example, takes into account the June 1997 environmental assessment and revisions to that assessment reflected in the January 1998 Screening Update and the accompanying February 1998 matrix. The February 1998 document, for instance, contains the following comments:

Consideration of the potential for cumulative effects arising from construction and operation of the Meeting Facility must be addressed in the context of the overall proposal for development at the Chateau and environmental mitigation measures (some already in place) with potential for beneficial cumulative effects upon hotel operation *as a whole* as well as in specific regard to the Meeting Facility. Thus while there is potential for cumulative effects arising from construction and operation of the Meeting Facility per se, these must be examined in the context of the facility as an integrated component of hotel operations and the cumulative effects of these operations upon environment and community.

72 The February document also makes extensive references to the scoping of the project as done by the responsible authority. It looks at every element of the cumulative effects analysis, such as water supply and use, solid waste disposal, visitor experience and community life, and analyzes the impact of each on the environment of the entire Lake Louise area. Possible mitigation measures are discussed throughout and were later found to be adequate and feasible, subject to monitoring for compliance. The April document echoes and adds to the data.

73 It should also be noted that the contents of the final decision could be viewed as incorporating, as part of the Reasons, the various notes and documents prepared throughout the decision-making process by the staff of the responsible authority, à la [Pushpanathan](#),^[FN39] such as the letter from D.M. Herman, Environmental Assessment Specialist, to the Superintendent, which stated:

Based upon consultative review of the initial screening report, subsequent update, further mitigation/cumulative effects revision, and taking into account the implementation of all mitigations measures itemized and committed to by the proponent, the project defined in those documents is not likely to cause significant environmental im-

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pacts . . . [\[FN40\]](#)

74 All of this evidence clearly shows that CP was fully aware of its obligation to consider cumulative effects of its project in the larger context of the entire community and, in writing, made Parks Canada aware of all these matters.

75 Consequently, even though the decision and its reasons leave much to be desired, and even though they are often untidy, confusing and lacking in specificity, I cannot conclude that the cumulative effects aspect of the decision of Parks Canada being judicially reviewed was unreasonable or that the Trial Judge erred in his decision in that regard. It is not necessary for the decision to be a model of legal analysis. Nor is it required, in order to comply with the Act, to consider fanciful projects by imagined parties producing purely hypothetical effects.

Conclusion

76 In its memorandum of fact and law, CP rightly notes:

The national parks are not wilderness reserves. They are intended to be visited, used and enjoyed by the people of Canada. The national parks provide a natural experience and are to be administered such that the natural experience is preserved for the use, enjoyment and benefit of future Canadians. Managing the parks calls for the balancing of these conflicting ideas.

77 The *Canadian Environmental Assessment Act* was not intended to eliminate any and all development in the national parks. One of its stated purposes is to ensure sustainable development. Neither was the Act intended to provide a rigid structure for conducting environmental assessments, as each set of circumstances requires a different type of assessment, different scoping and different factors to be taken into consideration. While the dictates of the law must be followed, the process is a flexible and sometimes confusing one.

78 The environmental assessment of CP's proposed meeting facility resulted in the production of numerous volumes of documents. Voluminous studies were undertaken by experts who considered a large number of different factors including cumulative effects. Public consultation was done. While the wording of the decision of the responsible authority is not as tidy, precise and lucid as one might wish it to be, I am not persuaded that, in the light of all the evidence, it was so unreasonable that it must be quashed. The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the Judges to decide what projects are to be authorized, but, as long as they follow the statutory process, it is for the responsible authorities.

Disposition

79 I am, consequently, of the view that the Trial Judge's decision that the environmental assessment in this case was conducted sufficiently in accordance with the requirements of the Act, and that the decision of Parks Canada was not unreasonable, should not be interfered with. The appeal will be dismissed with costs. While the fact that litigants purport to act in the public interest is a factor to be considered in exercising our discretion as to costs, it is only one factor. The appellants' case was largely based on arguments with no factual foundation and this factor weighs against granting the appellants relief from costs.

Appeal dismissed.

Appendix

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18

4. The purposes of this Act are

- (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;
- (b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;
- (b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;
- (c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and
- (d) to ensure that there be an opportunity for public participation in the environmental assessment process.

.....

Scope of project

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

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

Same assessment for related projects

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

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

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

All proposed undertakings to be considered

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

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

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18

sponsible authority, likely to be carried out in relation to that physical work.

Factors to be considered

16.(1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public that are received in accordance with this Act and the regulations;
- (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
- (e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need 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.

Additional factors

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the purpose of the project;
- (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
- (c) the need for, and the requirements of, any follow-up program in respect of the project; and
- (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Determination of factors

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

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

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Factors not included

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

.....

Screening

18.(1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

- (a) a screening of the project is conducted; and
- (b) a screening report is prepared.

Source of information

(2) Any available information may be used in conducting the screening of a project, but where a responsible authority is of the opinion that the information available is not adequate to enable it to take a course of action pursuant to subsection 20(1), it shall ensure that any studies and information that it considers necessary for that purpose are undertaken or collected.

Consideration of public comments

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.

.....

Decision of responsible authority following a screening

20.(1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

- (a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out and shall ensure that any mitigation measures that the responsible authority considers appropriate are implemented;
- (b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in

2001 CarswellNat 39, 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, 27 Admin. L.R. (3d) 229, [2001] 2 F.C. 461, 2001 CarswellNat 1721, 2 F.C. 461, [2001] F.C.J. No. 18

whole or in part; or

(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel, the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

.....

4. La présente loi a pour objet :

a) de permettre aux autorités responsables de prendre des mesures à l'égard de tout projet susceptible d'avoir des effets environnementaux en se fondant sur un jugement éclairé quant à ces effets;

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

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

c) de faire en sorte que les éventuels effets environnementaux négatifs importants des projets devant être réalisés dans les limites du Canada ou du territoire domanial ne débordent pas ces limites;

d) de veiller à ce que le public ait la possibilité de participer au processus d'évaluation environnementale.

.....

Détermination de la portée du projet

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

Pluralité de projets

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

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Projet lié à un ouvrage

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

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

Éléments à examiner

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

- a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;
- b) l'importance des effets visés à l'alinéa a);
- c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;
- d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;
- e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, - don't l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

Éléments supplémentaires

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

- a) les raisons d'être du projet;
- b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;
- c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;
- d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

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Obligations

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

a) à l'autorité responsable;

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

Situations de crise nationale

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

.....

Examen préalable

18.(1) Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion, l'autorité responsable veille :

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

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

Information

(2) Dans le cadre de l'examen préalable qu'elle effectue, l'autorité responsable peut utiliser tous les renseignements disponibles; toutefois, si elle est d'avis qu'il n'existe pas suffisamment de renseignements pour lui permettre de prendre une décision en vertu du paragraphe 20(1), elle fait procéder aux études et à la collecte de renseignements nécessaires à cette fin.

Participation du public

(3) Avant de prendre sa décision aux termes de l'article 20, l'autorité responsable, dans les cas où elle estime que la participation du public à l'examen préalable est indiquée ou dans le cas où les règlements l'exigent, avise celui-ci et lui donne la possibilité d'examiner le rapport d'examen préalable et les documents consignés au registre public établi aux termes de l'article 55 et de faire ses observations à leur égard. 1992, ch. 37, art. 18; 1993, ch. 34, art. 23(F).

.....

Décision de l'autorité responsable

20.(1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) :

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a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en oeuvre du projet et veiller à l'application de ces mesures d'atténuation;

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

c) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29 :

(i) s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,

(iii) si les préoccupations du public le justifient.

. . . an environmental assessment that is conducted pursuant to section 18 and that includes a consideration of the factors set out in subsection 16(1); . . .

"responsible authority," in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted; . . .

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

[FN*](#) A corrigendum was issued by the court on February 8, 2001, and has been incorporated herein.

[FN1](#) In his reasons, the Trial Judge listed these five components. In its memorandum of fact and law, CP mentioned a sixth component, i.e., a new water permit.

[FN2](#) [\[1998\] 1 S.C.R. 982](#) (S.C.C.).

[FN3](#) Trial Judge's reasons, at para. 23.

[FN4](#) Trial Judge's reasons, at para. 24.

[FN5](#) S.C. 1992, c. 37 [hereinafter the "Act"].

[FN6](#) Preamble to the Act.

[FN7](#) [Http://www.parcscanada.gc.ca/ceaa/english/wea_e.htm](http://www.parcscanada.gc.ca/ceaa/english/wea_e.htm).

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[FN8](#) *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [\[1992\] 1 S.C.R. 3](#) (S.C.C.), at 71 [hereinafter *Oldman River*].

[FN9](#) In the case at bar, screening, the least detailed type of exercise, was a type of the assessment to be conducted. Under the Act "screening" is:

[FN10](#) The "responsible authority" is defined in the Act as follows:

[FN11](#) Canadian Environmental Assessment Agency, *The Canadian Environmental Assessment Act: Responsible Authority's Guide* (Ottawa: Minister of Supply and Services Canada, 1994).

[FN12](#) Courts have relied on the Agency's publications in the past in order to explain the environmental assessment process under the Act, see *Friends of the West Country Assn.*, *Citizens' Mining Council* and *Manitoba's Future Forest Alliance*, *infra*, note 12.

[FN13](#) R. Northey, *The 1995 Annotated Canadian Environmental Assessment Act and EARP Guidelines Order* (Toronto: Carswell, 1994), at 600-601.

[FN14](#) See *The Responsible Authority's Guide*, at pp. 68-69, or Appeal Book, at pp. 388-389.

[FN15](#) *The Reference Guide* is one of three sections of *The Responsible Authority's Guide*, which is part of the *Canadian Environmental Assessment Act Procedural Manual*.

[FN16](#) J. Hanenbury, "Environmental Impact Assessment and the Constitution: The Never-Ending Story" (2000), 9 J.E.L.P. 169, at 180. See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [\[1992\] 1 S.C.R. 3](#) (S.C.C.); *Citizens' Mining Council of Newfoundland & Labrador Inc. v. Canada (Minister of the Environment)* (1999), [163 F.T.R. 36](#) (Fed. T.D.); *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)* (1999), [170 F.T.R. 161](#) (Fed. T.D.), appeal discontinued in October 2000; *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* (1999), [\[2000\] 2 F.C. 263](#) (Fed. C.A.), application for leave to appeal to the Supreme Court of Canada dismissed ([September 21, 2000](#), [Doc. 27644](#)) (S.C.C.); *Lavoie v. Canada (Minister of the Environment)* (2000), [35 C.E.L.R. \(N.S.\) 183](#) (Fed. T.D.), currently under appeal; *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)* (2000), [34 C.E.L.R. \(N.S.\) 1](#) (Fed. T.D.), currently under appeal.

[FN17](#) [\[1994\] 1 S.C.R. 159](#) (S.C.C.).

[FN18](#) R.S.C. 1985, c. N-7.

[FN19](#) *Supra*, note 13, at 161.

[FN20](#) *Ibid.*, at 175.

[FN21](#) *Supra*, note 12.

[FN22](#) *Ibid.*, at para. 53.

[FN23](#) *Ibid.*, at para. 86.

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[FN24](#) *Supra*, note 12.

[FN25](#) *Ibid.*, at para. 33.

[FN26](#) *Supra*, note 12.

[FN27](#) *Ibid.*, at paras. 60-63.

[FN28](#) (1996), 201 N.R. 336 (Fed. C.A.)

[FN29](#) *Ibid.*, at para. 13.

[FN30](#) *Supra*, note 12, at para. 28.

[FN31](#) *Ibid.*, at para. 34.

[FN32](#) *Ibid.*, at para. 39.

[FN33](#) *Supra*, note 12.

[FN34](#) *Ibid.*, at para. 10.

[FN35](#) In *Lavoie*, Lemieux J. dealt with an alleged breach of s. 16(1)(a). He concluded that the actions of the responsible authority were neither unreasonable nor patently unreasonable. Lemieux J. followed the reasons of MacKay J. in *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), [1997] 1 F.C. 325 (Fed. T.D.), which is a pre-*Pushpanathan* case. MacKay J. employed the term "patently unreasonable," but described the test in terms which suggest that, in reality, he was using something closer to the reasonableness standard:

[FN36](#) Appeal Book, Volume IV, Tab 10, Exhibit "3" to the affidavit of Steve Whittingham.

[FN37](#) Appeal Book, Volume IV, Tab 10, Exhibit "4" to the affidavit of Steve Whittingham.

[FN38](#) Specific terms of reference, Appeal Book, Volume IV, Tab 10, at page 5.

[FN39](#) See *Pushpanathan v. Canada (Minister of Employment & Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.).

[FN40](#) Certified Document #5, Tab 6.

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