Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans), [1998] 4 FCR 340, 1998 CanLII 7113 (FC)

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T-1893-96

The Friends of the West Country Association (*Applicant*)

v.

Minister of Fisheries and Oceans, Director, Marine Programs, Canadian Coast Guard (*Respondents*)

Indexed as: Friends of the West Country Assn.v. Canada (Minister of Fisheries and Oceans) (T.D.)

Trial Division, Gibson J."Calgary, April 22 and 23; Vancouver, July 7, 1998.

Environment " Judicial review of Screening Environmental Assessment Reports, addenda, approvals issued under Navigable Waters Protection Act (NWPA), s. 5(1) " Proponent (not party herein) applying for approval to construct two bridges over navigable waters " Triggering requirement for environmental assessment under Canadian Environmental Assessment Act " Reports, addenda concluding bridges not likely to cause significant adverse environmental effects " Approvals issued by Canadian Coast Guard on behalf of Minister of Fisheries and Oceans (MFO) based on Order in Council P.C. 1998-527 transferring to Department of Fisheries and Oceans control and supervision of Canadian Coast Guard " Public Service Rearrangement and Transfer of Duties Act, s. 2 authorizing Governor in Council to transfer powers, duties, functions from one minister to another, and to transfer supervision of any portion of public service from one department to another " Order in Council not transferring powers, duties, functions of "Minister" defined in NWPA, s. 5(1) as Minister of Transport, to MFO " Although issuance of approvals by MFO irregular, not in interests of justice to declare approvals void " In American case law, principle of independent utility of proposed work critical factor in determining scope of project " Canadian Environmental Assessment Act: Responsible Authority's Guide extending principle on mandatory basis to defining scope of assessment " While s. 15(2) indicating responsible authority having discretion as to whether multiple projects forming single project, ss. 15(3), 16(1) indicating mandatory application of independent utility principle to definition of scope of assessment " Reasonably open to responsible authority to treat bridges as separate projects for purposes of environmental assessments " But environmental assessments deficient as (1) not conducted in respect of construction or other undertaking "in

relation to" projects, namely Mainline Road; (2) failed to include consideration of cumulative environmental effects likely to result from each project in combination with Mainline Road project " Deficiencies constituting errors in law justifying judicial intervention " Preamble to CEAA committing Government to facilitating public participation in environmental assessment of projects " CEAA, s. 55 requiring establishment of public registry in respect of every project for which environmental assessment conducted " Public registry herein maintained at Sarnia, Ontario " Applicant comprised mainly of residents of rural Alberta in region where bridges to be built " Not complying with requirement of convenient access for most concerned public " Inviting applicant to request copies of materials in registry through Access to Information Act not meeting s. 55, preamble obligations, constituting reviewable error.

Administrative law " Judicial review " Certiorari " Screening Environmental Assessment Reports, addenda, approvals issued under Navigable Waters Protection Act, s. 5(1) " Reports, addenda concluding two proposed bridges not likely to cause significant adverse environmental effects " Not separate reviewable decisions " Bridges designed to be integral elements of single roadway " Resulting in virtually identical recommendations " Judicial review process not impeded by seeking review of more than one decision " In interests of justice to treat matter as single application notwithstanding comprised multiple decisions integrally interrelated " Court ordering production of substantially more material than filed in tribunal record " All material provided pursuant to Court order relevant, properly before Court " Unlike human rights scenario where document relied upon by investigator, but not called for by Commission, not subject to production " No distinct investigation, decision-making stage herein because Canadian Environmental Assessment Act, s. 17(2) mandating Minister, other responsible authority to take supervisory role over investigation, not merely be passive recipient.

This was an application for judicial review of Screening Environmental Assessment Reports, their addenda, and approvals issued under *Navigable Waters Protection Act* (NWPA), subsection 5(1). The proponent (not a party herein) holds extensive logging rights in the region in question, and has engaged in a long-term timber harvest planning process which identified the need for a major "haul road" to transport logs from the area where it has logging rights to its plant site. The construction of the new Mainline Road, involving the two bridges, was identified as the preferred option. The proponent applied for approval to construct two bridges, one over Prairie Creek and the other over Ram River, both "navigable waters". The application for approvals triggered a requirement for environmental assessment under the *Canadian Environmental Assessment Act* (CEAA). Two separate environmental assessments were conducted. Screening Environmental Assessment Reports were approved and issued. Following the public consultations required by the CEAA, addenda to the Screening Environmental Assessment Reports were completed. Both reports and their addenda determined that the bridges were not likely to cause significant adverse environmental effects. The Canadian Coast Guard issued the approvals on behalf of the Minister of Fisheries and Oceans, who had assumed responsibility in respect of relevant portions of the Canadian Coast Guard effective April 1, 1995, apparently based on Order in Council P.C. 1995-527, which had been made pursuant to *Public Service Rearrangement and Transfer of Duties Act*. Section 2 thereof authorizes the Governor in Council to transfer any powers, duties or functions from one minister to another as well as to transfer the control or supervision of any portion of the public service from one department or portion of the public service to another. "Minister" is defined in the NWPA as the Minister of Transport.

The applicant, which was comprised mainly of rural Alberta residents living in the region in which Prairie Creek and Ram River are situated, was concerned that the proponent's proposal for extensive new forestry operations might adversely affect the environment. The applicant alleged that the

bridges and a related road, known as the "Mainline Road", were integrally related to the new forestry operations.

Pursuant to a Court order, the respondents provided substantially more material than originally filed in the tribunal record. The Federal Court of Appeal subsequently dismissed the appeal from that order on the ground that it was moot. The respondents then raised the relevance of the additional documentation produced pursuant to that order.

The issues were: (1) whether the matter was properly before the Court; (2) whether the additional documentation produced pursuant to the Court order was relevant; (3) whether the approvals were void because they were issued by the wrong Minister; and (4) whether the environmental screening was conducted in accordance with law.

Held, the application should be allowed.

(1) The respondents urged that the application was improperly before the Court because it sought review of at least four separate decisions (the two reports, their addenda and the two approvals). The Screening Environmental Assessment Reports are very similar. The two bridges are designed to be integral elements of a single roadway. They result in virtually identical recommendations. The two approvals appear to have flowed from the Screening Environmental Assessment Reports. There was no evidence that any separate study or decision-making process was engaged in. This judicial review process was not impeded or rendered more complex by the fact that judicial review was sought of more than one decision. It was in the interests of justice that this matter be dealt with as a single application notwithstanding that it comprised multiple decisions that were so integrally interrelated.

(2) All of the material produced pursuant to the Court order was relevant and properly before the Court. The situation herein was not analogous to a human rights scenario where a document relied upon by the investigator in his report, but not called for by the Commission, was not subject to production as a document relied upon by the Commission in its decision. There is no distinct investigation and decision-making stage because CEAA, subsection 17(2), which states that no action under subsection 20(1) can be taken unless the responsible authority is satisfied that the delegated duty has been carried out in accordance with the CEAA, mandates that the Minister, or other responsible authority, take a supervisory role over the investigation, and not merely that of a passive recipient.

(3) P.C. 1995-527 did not transfer the powers, duties or functions of the "Minister", as defined, from the Minister of Transport to the Minister of Fisheries and Oceans. Rather, it transferred to the Department of Fisheries and Oceans the control and supervision of Canadian Coast Guard, with certain irrelevant exceptions. The Minister of Fisheries and Oceans has the management and direction of the Department of Fisheries and Oceans. The Minister of Fisheries and Oceans could have been empowered by the Governor in Council to make the authorizations under NWPA, subsection 5(1) by a transfer of powers, duties and functions from the Minister of Transport, but, for whatever reason, he or she was not. The issuance of the approvals on behalf of the Minister of Fisheries and Oceans was irregular. But to declare the issuance of the approvals void would not be in the interests of justice.

(4) A broad interpretation of the application of the CEAA was mandated, particularly when the preamble thereto and the purposes of the Act enunciated in section 4 are read together with other provisions of the Act.

In American case law, the independent utility of a proposed work or project appears to constitute a critical factor in determining its scope. While the concept of "independent utility" has not been

directly reflected in Canadian case law, it is implicit in at least one case, and more directly in *The Canadian Environmental Assessment Act: Responsible Authority's Guide* . Since "responsible authorities" may be found in any department or agency of the government of Canada and beyond, the guide was published to achieve some degree of uniformity in the application of the CEAA, and its pronouncements should be accorded a reasonable degree of deference. The Guide indicates that other physical works or activities accessory to the principal project may be included as part of the scoped project. It also indicates that all relevant aspects of a physical work that are likely to be carried out must be included in the assessment. It appears to interpret the CEAA as extending the independent utility principle, on a mandatory basis, to defining the scope of the assessment, not merely the scope of the project. Thus a "generous interpretation" of the CEAA could lead a responsible authority into an examination of the environmental effects of related works and undertakings that, in themselves, might fall entirely outside the legislative competence of Parliament, a result clearly contemplated by subsection 12(4) and the definition of "jurisdiction" contained in CEAA, subsection 12(5).

CEAA, subsection 15(1) provides that the scope of the project in relation to which an environmental assessment is to be conducted shall be determined by the responsible authority. Subsection 15(2) makes it clear that a responsible authority has discretion as to whether or not to consider multiple projects as forming a single project. The responsible authority, the Canadian Coast Guard, Navigable Waters Protection Division, determined that the two bridges were not so closely related as to form a single project for purposes of the conduct of environmental assessments. Such a finding was reasonably open to it. There was no error in defining the projects subject to environmental review, specifically in not including within the scope of the bridge projects the road and the proposed forestry operations to which the bridges might be considered accessory. That was not, however, an end of the matter.

Subsection 15(3) requires the responsible authority, where a project is in relation to a physical work, to conduct the relevant environmental assessment in respect not merely of the project as defined but also in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to the physical work that constitutes the project that is proposed by the proponent or that is, in the opinion of the responsible authority, "likely to be carried out [by any other than the proponent] in relation to [the physical work that constitutes the project]". The construction of the road and the forestry operations were "proposed by the proponent", not by some other person. Thus the responsible authority was obliged by subsection 15(3) to include within the scope of the environmental assessment the road, and perhaps the forestry operations, if they were "in relation to" the projects, i.e. the bridges and their related abutments. The responsible authority was without discretion. The discretion provided by the closing words of subsection 15(3) only comes into play where a proposed project is likely to be carried out in relation to the defined project by some other person. Subsection 15(3) clearly shows, on the facts of this case, that the responsible authority must apply the independent utility principle in the definition of the scope of the assessment.

Subsection 16(1) requires a responsible authority to include within an environmental screening the environmental effects that may occur in connection with the project as defined and also those that are likely to result from the project in combination with other projects or activities that have been or will be carried out. The construction of the road and the proponent's proposed forestry operations will be carried out. Subsection 16(1) clearly reflects, on the facts of this case, an obligation on the part of the responsible authority to apply the independent utility principle in the definition of the scope of the assessment. The scope of the environmental assessments did not extend to the environmental effects of the road construction project, or to the environmental effects of that project and the forestry operations. The environmental assessments were deficient in two fundamental

respects: (1) they were not conducted in respect of a construction or other undertaking, namely the Mainline Road, that was a construction or other undertaking "in relation to" the projects, as defined, and that was proposed by the proponent; (2) they failed to include consideration of the cumulative environmental effects likely to result from each project in combination with another project that had been or would be carried out, once again, the Mainline Road. These deficiencies were errors of law in the essential statutory preliminary steps to the issuance of the approvals under the NWPA. Against a standard of correctness, such errors justified the Court's intervention.

Pursuant to the Government's commitment, as set out in the preamble to the CEAA, to facilitate public participation in the environmental assessment of projects and to provide access to the information on which those environmental assessments are based, section 55 of the CEAA requires the establishment of a public registry in respect of every project for which an environmental assessment is conducted. Such registry is to be maintained from the commencement of the environmental assessment until any follow-up program in respect of the project is completed. The public registry herein was maintained at Sarnia, Ontario although the applicant's members resided in a remote area of the Alberta foothills. The requirement that the registry be established and operated in a manner to ensure convenient public access for the most concerned public had not been met. When the applicant requested copies, only some materials were provided. The applicant's representative was invited to make an application for the remaining materials under the *Access to Information Act*. Given that the materials were requested for the purpose of the public consultation provided for in CEAA, subsection 18(3) and that the period provided for such consultation was quite short, the recommendation to make use of the *Access to Information Act* procedures was completely inappropriate and not in keeping with the obligation under section 55 of the CEAA and the related commitment recited in the preamble to the CEAA. This failure on the part of the Minister of Fisheries and Oceans and his or her delegate constituted a further reviewable error in the procedure leading to the decisions here under review.

statutes and regulations judicially considered

Access to Information Act, R.S.C., 1985, c. A-1.

Canadian Environmental Assessment Act, S.C. 1992, c. 37, preamble, ss. 2(1) "environmental assessment", "environmental effect", "federal authority", "interested party", "project", "responsible authority", 4(*a*),(*b*),(*b*.1) (as enacted by S.C. 1994, c. 46, s. 1), (*c*),(*d*), 5(1), 11, 12(3),(4),(5) "jurisdiction", 14(*a*), 15(1),(2),(3), 16(1),(2),(3),(4), 17, 18(1),(2),(3), 20(1), 55(1),(2),(3),(4),(5),(6) (7), 59(*f*).

Department of Fisheries and Oceans Act, R.S.C., 1985, c. F-15.

Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 18.1(1) (as enacted by S.C. 1990, c. 8, s. 5).

Federal Court Rules, C.R.C., c. 663, RR. 2(2), 1602(2) (as enacted by SOR/92-43 , s. 19).

Federal Court Rules, 1998, SOR/98-106, R. 302.

Law List Regulations, SOR/94-636.

Navigable Waters Protection Act, R.S.C., 1985, c. N-22 , ss. 2 "Minister", "navigable water", 3, 5.

Order Transferring from the Department of Transport to the Department of Fisheries and Oceans the Control and Supervision of the Canadian Coast Guard other Than the Harbours and Ports Directorate and the Regional Harbours and Ports Branches, the Marine Regulatory Directorate, and the Ship Inspection Directorate and the Regional Ship Inspection Branches, SI/95-46.

Public Service Rearrangement and Transfer of Duties Act, R.S.C., 1985, c. P-34 , ss. 2, 3.

cases judicially considered

applied:

Canada (Attorney General) v. Mossop, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554; (1993), 100 D.L.R. (4th) 658; 13 Admin. L.R. (2d) 1; 46 C.C.E.L. 1; 17 C.H.R.R. D/349; 93 CLLC 17,006; 149 N.R.1; *Union of Nova Scotia Indians v. Canada (Attorney General)*, 1996 CanLII 3847 (FC), [1997] 1 F.C. 325; (1996), 22 C.E.L.R. (N.S.) 293; [1997] 4 C.N.L.R. 280; 1996 CanLII 11847 (FC), 122 F.T.R. 81 (T.D.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321; *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Quebec (Attorney General) v. Canada (National Energy Board)*, 1994 CanLII 113 (SCC), [1994] 1 S.C.R. 159; (1994), 112 D.L.R. (4th) 129; 20 Admin. L.R. (2d) 79; 14 C.E.L.R. (N.S.) 1; [1994] 3 C.N.L.R. 49; 163 N.R. 241; *R. v. Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213; (1997), 151 D.L.R. (4th) 32; 118 C.C.C. (3d) 97; 24 C.E.L.R. (N.S.) 167; 9 C.R. (5th) 157; 217 N.R. 241.

distinguished:

Canada (Human Rights Commission) v. Pathak, 1995 CanLII 3591 (FCA), [1995] 2 F.C. 455; (1995), 180 N.R. 152 (C.A.).

considered:

Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans), [1997] F.C.J. No. 1666 (T.D.) (QL); *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans* (1997), 23 C.E.L.R. (N.S.) 145; 130 F.T.R. 206 (F.C.T.D.); affd (1997), 25 C.E.L.R. (N.S.) 230 (F.C.A.).

referred to:

Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans), [1998] F.C.J. No. 821 (T.D.) (QL).

authors cited

Canadian Environmental Assessment Agency. *The Canadian Environmental Assessment Act: Responsible Authority's Guide*. Ottawa: Minister of Supply and Services Canada, 1994.

APPLICATION for judicial review of Screening Environmental Assessment Reports, their addenda and approvals determining that the proposed construction of two bridges would not likely cause significant adverse environmental effects. Application allowed.

appearances:

Stewart A. G. Elgie and *Jerry V. DeMarco* for applicant.

Ursula M. Tauscher for respondents.

solicitors of record:

Sierra Legal Defence Fund, Toronto, for applicant.

Deputy Attorney General of Canada for respondents.

The following are the reasons for order rendered in English by

Gibson J.:

(1) BACKGROUND AND DECISIONS UNDER REVIEW

Under cover of a letter dated December 13, 1995, Agra Earth & Environmental Limited, on behalf of Sunpine Forest Products Ltd., (the proponent), submitted to the Canadian Coast Guard, Navigable Waters Protection Division, an application for approval to construct two bridges, one over Prairie Creek and the other over Ram River, each of which is acknowledged to be a "navigable water" within the meaning assigned to that term in section 2 of the *Navigable Waters Protection Act*[1] (the NWPA). In the result, neither bridge could be built unless the bridge "and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction".[2] The "Minister" is defined in section 2 of the NWPA to be the Minister of Transport. Subsection 5(1) of the NWPA is prescribed in the *Law List Regulations*[3] enacted pursuant to section 59 of the *Canadian Environmental Assessment Act*[4] (the CEAA). In the result, the application for approvals pursuant to subsection 5(1) of the NWPA to construct the two bridges triggered a requirement for environmental assessment under the CEAA.

Two separate environmental assessments were conducted. Screening Environmental Assessment Reports were approved July 17, 1996 and issued the next day. Public consultations were then conducted as required by the CEAA. Following the public consultations, addenda to the Screening Environmental Assessment Reports were completed August 16, 1996. Both reports and their addenda determined that the bridges were not likely to cause significant adverse environmental effects. Thus, it was determined that the Canadian Coast Guard, on behalf of the "Minister", was entitled to proceed with the issuance of approvals under subsection 5(1) of the NWPA. The approvals were issued August 17, 1996 on behalf of the Minister of Fisheries and Oceans.

The applicant filed this application for judicial review on August 19, 1996 seeking review of the Screening Environmental Assessment Reports and their addenda and of the approvals issued under subsection 5(1) of the NWPA.

(2) THE PARTIES

The applicant, The Friends of the West Country Association, is a non-profit organization, made up mainly of rural residents living in the vicinity of Strachan, Alberta, a small community in the Rocky Mountain foothills, west of Rocky Mountain House. The applicant alleges that many of its members actively hunt, hike, trap, fish and engage in other recreational activities in the region where they live, which is also the region in which Prairie Creek and the Ram River are situated. The applicant expresses the concerns of its members, regarding a proposal for extensive new forestry operations by the proponent, that they fear might affect the environment and the quality of life in the region in which they live. The applicant alleges that the bridges and a related road, known as the "Mainline Road", are integrally related to the new forestry operations.

The respondent, the Director, Marine Programs, Canadian Coast Guard, is the individual who "signed off" the Screening Environmental Assessment Reports and the related addenda. The approvals under subsection 5(1) of the NWPA were signed by or on behalf of the Regional Director, Central & Arctic Region, Canadian Coast Guard for the respondent Minister of Fisheries and Oceans.

The proponent, though not a party to this application for judicial review, is vitally interested in its outcome. It apparently holds extensive logging rights in the region in question, known as the "West Country". It has engaged in a long-term timber harvest planning process which identified the need for a major "haul road" to transport logs from the area where it has logging rights to its Strachan plant site. In examining various road alternatives to meet its needs, the construction of the new Mainline Road, involving the two bridges in question, was identified as the preferred option. Thus, the application for permission under the NWPA to construct the two bridges followed.

(3) THE RELIEF SOUGHT

In its memorandum of fact and law, the applicant refines the reliefs sought in its originating notice of motion to the following terms:

. . . an order:

(a) That the decisions of the Director [Director, Marine Programs, Canadian Coast Guard] and MFO [Minister of Fisheries and Oceans] on July 18, 1996, August 16, 1996 and December 3, 1996 pursuant to section 20(1) of *CEAA*, that the proposed construction of the Prairie Creek and Ram River Bridges, and related undertakings is not likely to cause significant adverse environmental effects, be quashed or set aside;[5]

(b) That the Screening Environmental Assessment Reports for the Prairie Creek and Ram River bridges, approved by the MFO and the Director on July 18, 1996, August 16, 1996 and December 3, 1996, be declared invalid or unlawful;

(c) That the MFO be prohibited from issuing any approvals under the *NWPA* or any other enactment, that would authorize Sunpine to proceed with construction of the Prairie Creek or Ram River bridges or related undertakings until the requirements of the *CEAA* have been fully complied with;

(d) That the decision by the MFO to issue approvals under *NWPA* to authorize Sunpine to proceed with construction of the Prairie Creek and Ram River bridges, and related undertakings, be quashed or set aside;

(e) That the Director and the MFO (if it is the responsible Minister) be required to subject Sunpine's application for permission to construct the Prairie Creek and Ram River bridges, and related undertakings, to a full environmental assessment that complies with the requirements of *CEAA,* including the requirements in sections 15 and 16, before making any decisions under section 20(1) of *CEAA*, and before deciding whether to issue any permits under the *NWPA* or to otherwise approve the project in any way;

(f) That the Director and the MFO (if it is the responsible Minister) be required to refer Sunpine's Prairie Creek and Ram River bridge proposals to a review panel under section 20(1)(c) of the *CEAA*; and

(g) Such other order or orders as to the Court seems just.

Before the Court, counsel for the applicant abandoned the request for the relief set out in paragraph (c) quoted above. Further, counsel acknowledged that the reliefs set out in paragraphs (e) and (f) are in the alternative.

(4) THE ISSUES AND RELATED ANALYSIS

(1) Preliminary, procedural and jurisdictional matters

(a) Single decision, order or other matter

Counsel for the respondents urged that this application for judicial review is improperly before the Court in that it purports to seek review of at least four separate decisions:[6] the decisions reflected in the two Screening Environmental Assessment Reports[7] and their addenda and the two approvals under subsection 5(1) of the NWPA.

The Screening Environmental Assessment Reports are, not surprisingly, very similar. They relate to two, two-lane, single span bridges over two relatively narrow and shallow waterways that are in relatively close proximity to one another. The two bridges are designed to be integral elements of a single roadway, the Mainline Road connecting the proponent's timber rights areas with the Strachan plant site. They result in virtually identical recommendations. As I read subsection 15(2) of the CEAA, the "responsible authority", here allegedly the Minister of Fisheries and Oceans, could have determined that the two "projects", the bridges, "are so closely related that they can be considered to form a single project." If such a determination had been made, and it was not on the facts of this matter, only one Screening Environmental Assessment Report, one recommendation and, arguably, one approval would have resulted.

The two approvals under subsection 5(1) of the NWPA appear to have flowed from the Screening Environmental Assessment Reports. There is no evidence before me that any separate study or decision-making process was engaged in. The dates of the approvals follow very shortly after the completion of the addenda to the Screening Environmental Assessment Reports.

Given the foregoing, I could find no ground, at the time of the hearing before me, for concluding that this judicial review process was in any way impeded or rendered more complex or intractable by reason of the fact that judicial review was sought of more than one decision. Indeed, if a number of separate judicial review applications had been filed, the only practical course would have been to order that the separate applications be heard together on the basis of a single tribunal record. Equally, I would anticipate that, in such circumstances, the parties would also have each only filed one record, or if they had filed more, each would have been essentially identical. Accordingly, I concluded at the hearing before me that it would not have been in the interests of justice to break up this application. Indeed, to the contrary, I concluded that it was in the interests of justice that this matter be dealt with as a single application notwithstanding that it comprised multiple decisions that were so integrally interrelated. I emphasized to counsel that my decision in this regard turned purely on the facts of this matter.

(b) The tribunal record

The tribunal record originally filed in this matter in accordance with the *Federal Court Rules* [8] was a relatively thin document. The applicant understood the Canadian Coast Guard to have before it in its consideration of the proponent's proposals substantially more material. It applied to this Court for an order requiring that additional material be filed. By order dated May 7, 1997 [(1997), 23 C.E.L.R. (N.S.) 145], my colleague Mr. Justice Muldoon required the respondents to provide the applicant and

the Registry of this Court with substantial additional material, duly certified, as more particularly described in his order. Mr. Justice Muldoon's order was appealed. It was not stayed pending the determination of the appeal. Thus, the material was provided and filed in accordance with the order.

The Federal Court of Appeal [(1997), 25 C.E.L.R. (N.S.) 230] dismissed the appeal from Mr. Justice Muldoon's order on the basis that, since the material had been provided and filed in accordance with the order of Mr. Justice Muldoon, the appeal was moot. In related reasons, Strayer J.A. wrote [at page 231]:

In dismissing the appeal we take no position on the correctness of the decision under appeal. Further, our decision should not be taken to affect the right or obligation of the motions judge who hears the judicial review to determine which decisions are subject to review and which documents are relevant for the review of those decisions. [Emphasis added.]

Thus, counsel for the respondents raised before me the relevance of the additional documentation produced pursuant to Mr. Justice Muldoon's order. That material was much more extensive than the original tribunal record provided. It included, perhaps most importantly, the application submitted on behalf of the proponent for approval to construct the bridges here at issue.

Counsel acknowledged that officers of the Canadian Coast Guard who conducted the environmental screening had before them much more material than was in the tribunal record filed, including all of the material provided to the Court in response to the order of Mr. Justice Muldoon. She referred me to *Canada (Human Rights Commission) v. Pathak*[9] where Mr. Justice MacGuigan wrote:

Only the report of the investigator and the representations of the parties are necessary matter for the Commission's decision. Anything else is in the discretion of the Commission. If the Commission, therefore, elects not to call for some document, that document cannot be said to be before it in its decision-making phase, as opposed to its investigative phase. It is therefore not subject to production as a document relied upon by the Commission in its decision, although it may well have been relied upon by the investigator in his report. These are two different moments of the Commission's life, distinct moments not to be obliterated by a legal fiction.

The same authority was cited before Mr. Justice Muldoon and in his reasons for decision. Following the citation, he wrote [at page 156]:

The respondents' submission is that the case at bar is analogous to a Human Rights Commission scenario because subsection 20(1) of the CEAA states: "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)". That submission must be rejected by virtue of subsection 17(2) of the CEAA . . . which states that no action under subsection 20(1) can be taken unless the responsible authority is satisfied that the delegated duty has been carried out in accordance with the CEAA. There is no distinct investigation and decision-making stage, because subsection 17(2) of the CEAA mandates that the Minister (or other responsible authority) take a supervisory role over the investigation, and not merely that of a passive recipient.

I concur with the analysis of my colleague. I conclude that all of the material produced in accordance with the order of Mr. Justice Muldoon was relevant and properly before me on this application for judicial review.

(c) The authority of the decision maker under the *Navigable Waters Protection Act*

As indicated earlier in these reasons, the "Minister" as defined in the NWPA is the Minister of Transport; it is he or she who is authorized to issue approvals under subsection 5(1) of that Act. However, on the evidence before me, the approvals under subsection 5(1) of the NWPA were issued on behalf of the Minister of Fisheries and Oceans. That action was apparently taken on the strength of Order in Council P.C. 1995-527, dated March 28, 1995 [SI/95-46], enacted by the Governor General in Council pursuant to the *Public Service Rearrangement and Transfer of Duties Act* .[10] Section 2 of the *Public Service Rearrangement and Transfer of Duties Act* authorizes the Governor in Council to transfer "any powers, duties or functions . . . from one minister to another" as well as to transfer "the control or supervision of any portion of the public service . . . from one department or portion of the public service to another".

P.C. 1995-527 did not purport to transfer the powers, duties or functions of the "Minister", as defined, from the Minister of Transport to the Minister of Fisheries and Oceans as it would appear it could have. Rather, the Order in Council transferred to the Department of Fisheries and Oceans "the control and supervision of that portion of the public service in the Department of Transport known as the Canadian Coast Guard," other than certain portions of the Coast Guard that are not relevant here. By virtue of the *Department of Fisheries and Oceans Act* ,[11] the Minister of Fisheries and Oceans "has the management and direction" of the Department of Fisheries and Oceans.

Thus, it is alleged on behalf of the respondents, pursuant to the Order in Council, the Minister of Fisheries and Oceans assumed responsibility for the portions of the Canadian Coast Guard relevant to the purposes of this matter and, implicitly at least, was substituted for the Minister of Transport as the Minister designated for the purposes of subsection 5(1) of the NWPA.

Mr. Justice Muldoon, in his reasons referred to earlier, casts serious doubt on the efficacy for the purposes of this matter of the action of the Governor in Council. While acknowledging that [at page 155]:

When the validity of an administrative decision is challenged on the grounds that it is *ultra vires*, it is the Court at the judicial review hearing which will decide whether this is in fact so. The effect of such a fundamental procedural defect is beyond the issue now before the Court, . . .

Mr. Justice Muldoon nonetheless opined [at page 153]:

At the time of the assessment the Minister of Fisheries and Oceans did not have and presently still does not have the power to issue approvals under the NWPA or delegate his authority to issue such approvals to the Canadian Coast Guard.

He went on [at page 154]:

The fact that the Minister of Fisheries and Oceans has the power under section 3 of the *Public Service Rearrangement and Transfer of Duties Act* to "carry out the respective powers that formerly belonged to or were to be carried out by the Minister . . . from whom or which the power, duty, function, control or supervision is so transferred" does not mean that the Minister of Fisheries and Oceans has the power under the NWPA to grant an authorization. The order-in-council did not amend the NWPA. The effect of the order-in-council made pursuant to the *Public Service Rearrangement and Transfer of Duties Act* is that the Minister of Fisheries and Oceans has all powers formerly within the purview of the Minister of Transport to administer the Coast Guard. The NWPA stipulates that the Minister of Transport, not the Minister of Fisheries and Oceans, makes the authorizations. The Minister of Transport can delegate this to anybody, and not necessarily to the Coast Guard. (So, too, can the Minister of Fisheries and Oceans but only after the Act is amended, if

ever.) How the Minister of Fisheries and Oceans was ever involved in the first place remains a mystery.

Counsel for the applicant urged that I should adopt the position of my colleague and find the approvals under the NWPA to be simply void because they were issued on behalf of the wrong Minister.

The Minister of Fisheries and Oceans assumed responsibility in respect of the relevant portions of the Coast Guard effective April 1, 1995. The responsibility for conducting the environmental screening in respect of the two bridges was delegated to the Coast Guard after that day. That responsibility was carried out, reports with respect to the screening and public consultation results formulated and, in the result, recommendations were made by the Coast Guard for the issuance of approvals under subsection 5(1) of the NWPA. These recommendations were made to the delegate of the Minister responsible for the relevant portions of the Coast Guard. That Minister, I conclude, could have been empowered by the Governor in Council to, in the words of Mr. Justice Muldoon, "make[s] the authorizations" under subsection 5(1) of the *Navigable Waters Protection Act* by a transfer of powers, duties and functions from the Minister of Transport. But, for whatever reason, he or she was not. Thus, I am in agreement with Mr. Justice Muldoon to this extent: that the issuance of the approvals on behalf of the Minister of Fisheries and Oceans was irregular.

Nevertheless, I decline the suggestion that I should go further and decide this application on this highly technical ground which would be the result if I were to find the issuance of the approvals to be, in the result, void. I make no such finding. To do so, in my opinion, would not be in the interests of justice. The applicant and the proponent are, I conclude, entitled to a decision from this Court as to whether the environmental screening that is at the base of this application was conducted in accordance with law.

(2) Standard of Review

Counsel for the applicant framed the substantive issues regarding the environmental screening reports in terms of failure on the part of the responsible authority to comply with statutory duties placed upon it by the CEAA. Thus, he urged, the issues were issues of statutory interpretation regarding the nature or scope of the statutory duties in question. On this basis, he referred me to *Canada (Attorney General) v. Mossop*[12] where Chief Justice Lamer wrote:

The question before the Court in this case is one of statutory interpretation: it is therefore a question of law. The appellant argued that, nevertheless, the Federal Court of Appeal should have exercised judicial restraint and upheld the Tribunal's decision. Absent a privative clause, the courts have shown curial deference *vis-à-vis* certain specialized tribunals when interpreting their own Act. The question is therefore whether a tribunal set up under the *CHRA* [the Canadian Human Rights Act] is such a body. On this point, this court, my colleague L'Heureux-Dubé J. dissenting, just a few months ago, in *Zurich Insurance Co. v. Ontario (Human Rights Commission)* . . . found that such a board does not have the kind of expertise that should enjoy curial deference on matters other than findings of fact:

In spite of the ability to overturn decisions of the Board on findings of fact, this Court has indicated that some curial deference will apply even to cases without privative clauses to reflect the principle of the specialization of duties . . . . While curial deference will apply to findings of fact, which the Board of Inquiry may have been in a better position to determine, such deference will not apply to findings of law in which the Board has no particular expertise.

It seems to me that this should have put the matter to rest. But if any additional reasons need be given for our having come to that conclusion, I would adopt in that regard the reasons of my colleague Justice La Forest in this case. [Citations omitted.]

Mr. Justice La Forest, in concurring reasons, wrote at page 585:

The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one at issue in this case. These are ultimately matters within the province of the judiciary and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform. The courts cannot abdicate this duty to the tribunal. They must, therefore, review the tribunal's decisions on questions of this kind on the basis of correctness, not on a standard of reasonability.

Counsel for the respondents urged that the substantive issues before me were not questions of statutory interpretation and therefore questions of law, but rather were questions of review of reports made in the exercise of judgment, on the basis of wide discretion, and therefore the standard of review should be one of patent unreasonableness. She referred to the reasons of my colleague Mr. Justice MacKay in *Union of Nova Scotia Indians v. Canada (Attorney General)*[13] where he wrote at pages 348-349:

Yet it must be remembered that the decision of the Ministers under the CEAA is not a scientific decision; it is a decision made in the exercise of judgment that takes into account appropriate scientific, economic, political and social considerations. In *Alberta Wilderness Assn. v. Express Pipelines Ltd.* . . . the Court of Appeal described the process under CEAA as follows . . . :

No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes . . . the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

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

The decisions cited before me are not in the least incompatible. To the extent that the substantive issues before me are questions of law, whether as to jurisdiction or as to interpretation of statutory authority, the standard of review that I will apply is correctness. To the extent that they relate to the exercise of discretion by the responsible authority, the standard of review that I will apply is that of reasonableness.

(3) Substantive Matters

(a) General principles

In *Friends of the Oldman River Society v. Canada (Minister of Transport)*,[14] Mr. Justice La Forest wrote:

The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures. In Canada, both the federal and provincial governments have established Departments of the Environment, which have been in place for about 20 years. More recently, however, it was realized that a department of environment was one among many other departments, many of which pursued policies that came into conflict with its goals. Accordingly, at the federal level steps were taken to give a central role to that department, and to expand the role of other government departments and agencies so as to ensure that they took account of environmental concerns in taking decisions that could have an environmental impact.

He continued at pages 40-41:

A broad interpretation of the application of the *Guidelines Order*[15] is consistent with the objectives stated in both the Order itself and its parent legislation"to make environmental impact assessment an essential component of federal decision making. A similar approach has been followed in the United States with respect to the *National Environmental Policy Act* . As Pratt J. put it in *Environmental Defense Fund, Inc. v. Mathews*, 410 F.Supp. 336 (D.D.C. 1976), at p. 337:

NEPA does not supersede other statutory duties, but, to the extent that it is reconcilable with those duties, it supplements them. Full compliance with its requirements cannot be avoided unless such compliance directly conflicts with other existing statutory duties.

To hold otherwise would, in my view, set at naught the legislative scheme for the protection of the environment envisaged by Parliament in enacting the *Department of the Environment Act*, and in particular s. 6.

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

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen ed., *Environmental Rights in Canada* , 1981, 245, at p. 247:

The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development: see M. I. Jeffrey, *Environmental Approvals in Canada* (1989), at p. 1.2, " 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision making.

(b) Interpretation: The independent utility test and the Responsible Authority's Guide

Bridges are singularly useless structures when taken in abstract. They serve no useful purpose but to facilitate getting from someplace to someplace else over an impediment, usually water, that separates the places. In American jurisprudence, the independent utility of a proposed work or

project appears to constitute a critical factor in determining its scope. It appears to have crystallized in what has come to be known as the "independent utility test".

In *Thomas v. Peterson*,[16] the Court had before it an application to enjoin construction of a timber road in a former national forest, a roadless area, a situation not dissimilar to that before me when it is considered that the bridges constituting the projects here under review were to form integral parts of a forestry road. Judge Sneed wrote at page 758:

While it is true that administrative agencies must be given considerable discretion in defining the scope of environmental impact statements . . . there are situations in which an agency is required to consider several related actions in a single EIS . . . . Not to require this would permit dividing a project into multiple "actions," each of which individually has an insignificant environmental impact, but which collectively have a substantial impact . . . .

. . .

It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales

The same might be said of the forestry operations contemplated by the proponent and the road of which the bridges in question form an integral part.

Judge Sneed continued at page 759:

We conclude, therefore, that the road construction and the contemplated timber sales are inextricably intertwined, and that they are "connected actions" within the meaning of the CEQ regulations.

. . .

We stated that an EIS must cover subsequent stages when "[t]he dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." . . . The dependency of the road on the timber sales meets this standard; it would be irrational to build the road and then not sell the timber to which the road was built to provide access.

The same principle is embodied in standards that we have established for determining when a highway may be segmented for purposes of NEPA. In *Daly v. Volpe* . . . we held that the environmental impacts of a single highway segment may be evaluated separately from those of the rest of the highway only if the segment has "<u>independent utility</u>." [Emphasis added.]

While this concept of "independent utility" has apparently not been directly reflected in judicial authority from Canadian courts dealing with environmental assessment issues, it is at least implicitly reflected in the following passage from the reasons of Mr. Justice Iacobucci on behalf of the Court in *Quebec (Attorney General) v. Canada (National Energy Board)* :[17]

I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export

contract to be fulfilled. Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the licence sought. [Emphasis added.]

The independent utility concept or principle is much more directly reflected in a publication entitled *The Canadian Environmental Assessment Act: Responsible Authority's Guide*[18] prepared by the Canadian Environmental Assessment Agency (the Guide). At the first page of the Guide, its purpose is set out in the following terms:

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

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

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

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

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

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

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

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

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

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

The foregoing guidance reflects the "independent utility" principle enunciated in *Thomas v. Peterson* , *supra*, particularly in determining the scope of the project that will form the subject of an

environmental assessment.

The Guide goes further. At page 19, under the heading "Undertakings in relation to a physical work", the Guide advises:

Finally, under the Act, the RA must include in the EA all relevant aspects of a physical work (that is, all undertakings in relation to that physical work) that are proposed or, in its opinion, are likely to be carried out. These undertakings could include, for example, the construction, operation, modification, decommissioning, or abandonment of a physical work. Such proposed undertakings or undertakings that are likely to be carried out must be included in the scope of the project even if there is no specific trigger for them. The assessment of all proposed undertakings or undertakings that are likely to be carried out in relation to a physical work should be conducted as early in the planning stages of the physical work as is practicable. [Emphasis added.]

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

At page 20, under the heading "Scope of the assessment" and subheading "Effects to be assessed", the Guide states:

The RA exercising any power, duty or function under section 5 of the Act must include in the assessment all factors that are relevant to the decision that the RA must make:

" all the factors that the Act requires an RA to consider, including all effects that fall within the Act's definition of "environmental effect", regardless of whether the effect falls within an area of federal jurisdiction . [Emphasis added.]

These elements of the Guide would appear to interpret the CEAA to extend the independent utility principle, on a mandatory basis, to defining the scope of the assessment, not merely the scope of the project. Further, they clearly identify the reality that a "generous interpretation" of the CEAA leads a responsible authority into examination of the environmental effects of related works and undertakings that, in themselves, might fall entirely outside the legislative competence of Parliament. This result is clearly contemplated by subsection 12(4) and the definition "jurisdiction" contained in subsection 12(5) of the CEAA.

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

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

(c) The scope of the projects

Section 15 of the CEAA is set out in full in the Appendix to these reasons. For ease of reference, the relevant portions of section 15 are quoted here:

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

. . .

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

(*a*) the responsible authority, or

. . .

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

Subsection 15(2) makes it clear that a responsible authority has discretion as to whether or not to consider multiple projects to form a single project.

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

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

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

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

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

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

But that is not the end of the matter.

(d) The scope of the assessments"Undertakings in relation to the projects and effects to be assessed

Subsection 15(3) of the CEAA reads as follows:[19]

15. . . .

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decom-missioning, 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 responsible authority,

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

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

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

Subsection 16(1) of the CEAA provides in part as follows:

16. (1) Every screening . . . 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.]

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

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

In *R. v. Hydro-Québec*[20], Mr. Justice La Forest, writing for the majority and by reference to the first quotation cited above from his reasons in *Friends of the Oldman River Society, supra*, wrote:

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

Taking into account the totality of the evidence before me and the provisions of the CEAA to which I have referred, in the absence of a direct constitutional challenge to those provisions, and there is none here, I conclude that the environmental assessments conducted were deficient in two fundamental respects: first, they were not conducted in respect of a construction or other undertaking, namely, the Mainline Road, that was a construction or other undertaking "in relation to" the projects, as defined, and that was proposed by the proponent; and, secondly, they failed to include consideration of the cumulative environmental effects likely to result from each project[21] in combination with another project that had been or would be carried out, once again, the Mainline Road.

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

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

(e) Access to information and public consultation

The preamble to the CEAA provides in part:

AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;

Obviously pursuant to that commitment, section 55 of the CEAA requires the establishment of a public registry in respect of every project for which an environmental assessment is conducted. The registry is to be established for the purpose of facilitating public access to records relating to the environmental assessment and is required to be established and operated in a manner to ensure convenient public access. It is to be maintained from the commencement of the environmental assessment until any follow-up program in respect of the project is completed. The nature of the records to be contained in the registry is specified.

On the facts of this matter, for reasons not entirely clear on the record, the public registry was maintained at Sarnia, Ontario, a place that could hardly be said to meet the requirement that the registry be established and operated in a manner to ensure convenient public access for the most concerned public. The applicant and its members resident in a relatively remote area in the foothills of Alberta could hardly be said to have had convenient public access to a registry in Sarnia.

A representative or representatives of the applicant requested that, in light of the remoteness of the registry from the site of the bridge projects, copies of all materials on the registry be provided to the applicant. Copies of some materials were provided but copies of other materials were not provided for the stated reasons of cost and the amount of work in duplication of the materials. The applicant's representative or representatives were invited to make an application for the materials under the *Access to Information Act*.[22] Given that the materials were requested for the purpose of the public consultation provided for in subsection 18(3) of the CEAA and that the period provided for such consultation was quite short, the recommendation to make use of the *Access to Information Act* procedures was completely inappropriate and, more importantly, not in keeping with the obligation under section 55 of the CEAA and the related commitment recited in the preamble to the CEAA.

I conclude that this failure on the part of the Minister of Fisheries and Oceans and his or her delegate constitutes a further reviewable error in the procedure leading to the decisions here under review.

(5) CONCLUSION

Based upon the foregoing analysis, I conclude that the Screening Environmental Assessment Reports and their addenda, and the resultant approvals under subsection 5(1) of the NWPA that are here under review cannot stand. I am satisfied that the Screening Environmental Assessment Reports and their addenda are not separate reviewable decisions in and of themselves but rather are, in the words of Mr. Justice Hugessen,[23] "essential statutory preliminary step[s] required by the *Canadian Environmental Assessment Act* prior to" the resultant approvals. The approvals will be set aside and, together with the related essential statutory preliminary steps will be referred back to the Minister of Fisheries and Oceans, or other appropriate Minister, for reconsideration and, if appropriate, for redetermination in a manner consistent with the *Canadian Environmental Assessment Act,* the *Navigable Waters Protection Act* and these reasons.

(6) COSTS

This matter was heard at Calgary, Alberta on April 22 and 23, 1998. At that time the *Federal Court Rules*[24] provided that no costs were to be awarded on a judicial review proceeding such as this in the absence of special reasons. At the close of the hearing, the Court consulted counsel as to whether special reasons existed in this matter. Neither counsel identified special reasons. There will be no order as to costs.

[1] R.S.C., 1985, c. N-22. An extensive number of statutory and regulatory provisions, as well as the provisions of an order in council, will be referred to throughout these reasons. To minimize quotations in the body of the reasons, the provisions that will be referred to are set out at length in an appendix.

[2] See s. 5(1)(*a*) of the *Navigable Waters Protection Act*.

[3] SOR/94-636.

[4] S.C. 1992, c. 37 (as amended).

[5] The December 3, 1996, "decision" relates to minor design modifications for the Ram River bridge.

[6] At the time this matter was heard, s. 1602(2) [as enacted by SOR/92-43 , s. 19] of the *Federal Court Rules,* C.R.C., c. 663 read in part as follows:

Rule 1602. . . .

(2) The applicant's notice of motion [initiating an application for judicial review] shall be dated and signed by the applicant, or the applicant's solicitor, and shall

. . .

(*f*) set out the date and details of the decision, order or other matter in respect of which judicial review is sought; and [Emphasis added.]

Only days after the hearing of this matter, the new *Federal Court Rules, 1998* [SOR/98-106] came into force. Rule 302 of the new Rules provides:

302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order [which includes a decision] in respect of which relief is sought.

I note the authority provided to the Court, by order, to relieve from the "one application, one decision" general rule. I am satisfied that equivalent flexibility, without the necessity for an order, was provided under the old Rules by the general rule of interpretation that was s. 2(2) of the Rules. It read as follows:

Rule 2. . . .

(2) These Rules are intended to render effective the substantive law and to ensure that it is carried out; and they are to be so interpreted and applied as to facilitate rather than to delay or to end prematurely the normal advancement of cases.

[7] Two decisions of this Court have recently held that panel review reports under the *Canadian Environmental Assessment Act* are not judicially reviewable under s. 18.1(1) of the *Federal Court*

Act [R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5)] *(Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1997] F.C.J. No. 1666 (T.D.) (QL), *per* Hugessen J., quoted with approval in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans*), [1998] F.C.J. No. 821 (T.D.) (QL), *per* McKeown J.). Mr. Justice Hugessen stated [at para. 4]:

Rather I think that 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*.

The same might be said of the screening assessment reports issued under s. 18 of the CEAA, prior to the decisions on behalf of a Minister represented by the approvals under s. 5(1) of the NWPA. This issue was not argued before me. It will therefore not be further pursued at this point in these reasons.

[8] C.R.C., c. 663 (as amended); since the hearing of this matter, repealed and replaced by the *Federal Court Rules, 1998*, SOR/98-106, 5 February, 1998.

[9] 1995 CanLII 3591 (FCA), [1995] 2 F.C. 455 (C.A.), at p. 464.

[10] R.S.C., 1985, c. P-34.

[11] R.S.C., 1985, c. F-15.

[12] 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at pp. 577-578.

[13] 1996 CanLII 3847 (FC), [1997] 1 F.C. 325 (T.D.).

[14] 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at pp. 16-17.

[15] The Guidelines Order [*Environmental Assessment and Review Process Guidelines Order*, SOR/84-467] was a predecessor to the *Canadian Environmental Assessment Act*.

[16] 753 F.2d 754 (9th Cir. 1985).

[17] 1994 CanLII 113 (SCC), [1994] 1 S.C.R. 159, at p. 191.

[18] Minister of Supply and Services Canada, Cat. No. EN106-25/1-1994E, ISBN 0-662-22773-5, November 1994.

[19] I note that the English and French language versions of s. 15(3) might be interpreted differently. Both versions are, of course, equally authoritative. No difference was argued before me and, for the purposes of this matter only, I find none. Nevertheless, I note that this question of interpretation might arise in the context of another proceeding.

[20] 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213, at pp. 266-267.

[21] "Project" is a defined term in s. 2(1) of the *Canadian Environmental Assessment Act* . Please see the Appendix to these reasons.

[22] R.S.C., 1985, c. A-1.

[23] *Supra*, note 7.

[24] *Supra*, note 8.

APPENDIX

1. *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;

WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

WHEREAS the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality;

AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

. . .

2. (1) In this Act,

. . .

"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;

"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;

. . .

"federal authority" means

(*a*) a Minister of the Crown in right of Canada,

(*b*) an agency of the Government of Canada or other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs,

(*c*) any department or departmental corporation set out in Schedule I or II to the *Financial Administration Act*, and

(*d*) any other body that is prescribed pursuant to regulations made under paragraph 59(*e*),

but does not include the Commissioner in Council or an agency or body of the Yukon Territory or the Northwest Territories, a council of the band within the meaning of the *Indian Act*, The Hamilton Harbour Commissioners constituted pursuant to *The Hamilton Harbour Commissioners' Act*, The Toronto Harbour Commissioners constituted pursuant to *The Toronto Harbour Commissioners' Act, 1911*, a harbour Commission established pursuant to the *Harbour Commissions Act* or a Crown corporation within the meaning of the *Financial Administration Act*;

. . .

"interested party" means, in respect of an environmental assessment, any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious;

. . .

"project" means

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

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

. . .

"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;

. . .

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.

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(*a*) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(*b*) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(*c*) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(*d*) under a provision prescribed pursuant to paragraph 59(*f*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

. . .

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

(2) A responsible authority shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(*a*) or 37(1)(*a*).

. . .

12. . . .

(3) Every federal authority that is in possession of specialist or expert information or knowledge with respect to a project shall, on request, make available that information or knowledge to the responsible authority or to a mediator or a review panel.

(4) Where a screening or comprehensive study of a project is to be conducted and a jurisdiction has a responsibility or an authority to conduct an assessment of the environmental effects of the project or

any part thereof, the responsible authority may cooperate with that jurisdiction respecting the environmental assessment of the project.

(5) In this section, "jurisdiction" means

(*a*) the government of a province;

(*b*) an agency or a body that is established pursuant to the legislation of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a project;

(*c*) a body that is established pursuant to a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to an assessment of the environmental effects of a project; or

(*d*) a governing body that is established pursuant to legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a project.

. . .

14. The environmental assessment process includes, where applicable,

(*a*) a screening or comprehensive study and the preparation of a screening report or a comprehensive study report;

. . .

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.

(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.

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decom-missioning, 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 responsible authority,

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

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.

(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.

(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*.

17. (1) A responsible authority may delegate to any person, body or jurisdiction within the meaning of subsection 12(5) any part of the screening or comprehensive study of a project or the preparation

of the screening report or comprehensive study report, and may delegate any part of the design and implementation of a follow-up program, but shall not delegate the duty to take a course of action pursuant to subsection 20(1) or 37(1).

(2) For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 20(1) or 37(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.

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.

(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.

(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.

. . .

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 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.

. . .

55. (1) For the purpose of facilitating public access to records relating to environmental assessments, a public registry shall be established and operated in a manner to ensure convenient public access to the registry and in accordance with this Act and the regulations in respect of every project for which an environmental assessment is conducted.

(2) The public registry in respect of a project shall be maintained

(*a*) by the responsible authority from the commencement of the environmental assessment until any follow-up program in respect of the project is completed; and

(*b*) where the project is referred to a mediator or a review panel, by the Agency from the appointment of the mediator or the members of the review panel until the report of the mediator or review panel is submitted to the Minister.

(3) Subject to subsection (4), a public registry shall contain all records produced, collected, or submitted with respect to the environmental assessment of the project, including

(*a*) any report relating to the assessment;

(*b*) any comments filed by the public in relation to the assessment;

(*c*) any records prepared by the responsible authority for the purposes of section 38;

(*d*) any records produced as the result of the implementation of any follow-up program;

(*e*) any terms of reference for a mediation or a panel review; and

(*f*) any documents requiring mitigation measures to be implemented.

(4) A public registry shall contain a record referred to in subsection (3) if the record falls within one of the following categories:

(*a*) records that have otherwise been made available to the public in carrying out the assessment pursuant to this Act and any additional records that have otherwise been made publicly available;

(*b*) any record or part of a record that the responsible authority, in the case of a record under its control, or the Minister, in the case of a record under the Agency's control, determines would have been disclosed to the public in accordance with the *Access to Information Act* if a request had been made in respect of that record under that Act at the time the record comes under its control, including any record that would be disclosed in the public interest pursuant to subsection 20(6) of that Act; and

(*c*) any record or part of a record, except a record or part containing third party information, if the responsible authority, in the case of a record under the responsible authority's control, or the

Minister, in the case of a record under the Agency's control, believes on reasonable grounds that its disclosure would be in the public interest because it is required in order for the public to participate effectively in the assessment.

(5) Sections 27, 28 and 44 of the *Access to Information Act* apply, with such modifications as the circumstances require, to any determination made under paragraph (4)(*b*) in respect of third party information, and, for the purpose of section 27 of that Act, any record referred to in paragraph (4)(*b*) shall be deemed to be a record that the responsible authority or the Minister intends to disclose and, for the purpose of applying that Act, any reference in that Act to the person who requested access shall be disregarded if no person has requested access to the information.

(6) Notwithstanding any other Act of Parliament, no civil or criminal proceedings lie against a responsible authority or the Minister, or against any person acting on behalf of or under the direction of a responsible authority or the Minister, and no proceedings lie against the Crown or any responsible authority for the disclosure in good faith of any record or any part of a record pursuant to this Act, for any consequences that flow from that disclosure, or for the failure to give any notice required under section 27 or any other provision of the *Access to Information Act* if reasonable care is taken to give the required notice.

(7) For the purposes of this section, "third party information" means

(*a*) trade secrets of a third party;

(*b*) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(*c*) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; and

(*d*) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

. . .

59. The Governor in Council may make regulations

. . .

(*f*) prescribing the provisions of any Act of Parliament or any regulation made pursuant thereto that confer powers, duties or functions on federal authorities the exercise or performance of which requires an environmental assessment under paragraph 5(1)(*d*);

2. *CANADIAN ENVIRONMENTAL ASSESSMENT ACT" LAW LIST REGULATIONS*

REGULATIONS PRESCRIBING PROVISIONS OF

ACTS PARLIAMENT AND REGULATIONS

MADE PURSUANT TO ANY SUCH ACT THAT

CONFER POWERS, DUTIES OR FUNCTIONS

ON FEDERAL AUTHORITIES OR ON THE

GOVERNOR IN COUNCIL, THE

EXERCISE OF WHICH REQUIRES AN

ENVIRONMENTAL ASSESSMENT

. . .

1. These Regulations may be cited as the *Law List Regulations*.

. . .

2. The provisions of an Act set out in Part I of Schedule I and a regulation set out in Part II of that Schedule are prescribed for the purposes of paragraph 5(1)(*d*) of the *Canadian Environmental Assessment Act*.

. . .

SCHEDULE I

(Section 2)

PROVISIONS OF ACTS AND REGULATIONS

THAT CONFER POWERS, DUTIES OR

FUNCTIONS ON FEDERAL AUTHORITIES

PART I

PROVISIONS OF ACTS

Item* Provisions

. . .

11. *Navigable Waters Protection Act* (*14*)

(*a*) paragraph 5(1)(*a*)

(*b*) subsection 6(4)

(*c*) section 16

(*d*) section 20

3. *NAVIGABLE WATERS PROTECTION ACT*

2. In this Act,

"Minister" means the Minister of Transport;

"navigable water" includes a canal and any other body of water created or altered as a result of the construction of any work.

3. In this Part,

. . .

"work" includes

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

(*b*) any dumping of fill or excavation of materials from the bed of a navigable water,

(*c*) any telegraph or power cable or wire, or

(*d*) any structure, device or thing, whether similar in character to anything referred to in this definition or not, that may interfere with navigation.

. . .

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless

(*a*) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;

(*b*) the construction of the work is commenced within six months and completed within three years after the approval referred to in paragraph (*a*) or within such further period as the Minister may fix; and

(*c*) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (*a*).

(2) Except in the case of a bridge, boom, dam or causeway, this section does not apply to any work that, in the opinion of the Minister, does not interfere substantially with navigation.

4. *PUBLIC SERVICE REARRANGEMENT AND TRANSFER OF DUTIES ACT*

2. The Governor in Council may

(*a*) transfer any powers, duties or functions or the control or supervision of any portion of the public service from one minister to another, or from one department or portion of the public service to another; or

(*b*) amalgamate and combine any two or more departments under one minister and under one deputy minister.

3. Where under this Act, or under any other lawful authority, any power, duty or function, or the control or supervision of any portion of the public service, is transferred from one minister to another, or from one department or portion of the public service to another, the minister, department or portion of the public service to whom or which the power, duty, function, control or supervision is transferred, and the appropriate officers of that department or portion of the public service, shall, in

relation thereto, be substituted for and have and carry out the respective powers and duties that formerly belonged to or were to be carried out by the minister, department or portion of the public service and the respective officers of the department or portion of the public service from whom or which the power, duty, function, control or supervision is so transferred.

5. *ORDER IN COUNCIL P.C. 1995-527, MARCH 28, 1995, SI/95-46*

His Excellency the Governor General in Council, on the recommendation of the Prime Minister, pursuant to paragraph 2(*a*) of the Public Service Rearrangement and Transfer of Duties Act, is pleased hereby to transfer, effective April 1, 1995, to the Department of Fisheries and Oceans the control and supervision of that portion of the public service in the Department of Transport known as the Canadian Coast Guard, other than

(*a*) the Harbours and Ports Directorate and the regional Harbours and Ports Branches;

(*b*) the Marine Regulatory Directorate; and

(*c*) the Ship Inspection Directorate and the regional Ship Inspection Branches.