Environmental Resource Centre v. Canada (Minister of Environment), 2001 FCT 1423 (CanLII)

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Docket: T-274-99
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T-1799-99

T-100-00

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BETWEEN:

ENVIRONMENTAL RESOURCE CENTRE, PRAIRIE ACID RAIN COALITION and TOXICS WATCH SOCIETY OF ALBERTA

Applicants

- and -

THE MINISTER OF ENVIRONMENT (CANADA) and THE MINISTER OF FISHERIES AND OCEANS and SUNCOR ENERGY INC.

Respondents

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED BY THE MINISTER OF ENVIRONMENT

Intervener

REASONS FOR ORDER

HENEGHAN J.

INTRODUCTION

[1] Environmental Resources Centre, Prairie Acid Rain Coalition and Toxics Watch Society of Alberta (the "Applicants") bring three applications for judicial review relative to a major oil sands project (the "Project") undertaken by Suncor Energy Inc. ("Suncor") in northern Alberta. In T-274-99, the Applicants challenge the legality of a decision made by the Minister of Environment ("MOE") pursuant to the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, as amended (the "CEAA"). In T-1799-99 and T-100-00, the Applicants challenge the decisions of the Minister of Fisheries and Oceans ("MFO") to issue authorization to the *Fisheries Act*, R.S.C. 1985, c. F-14, as amended. The purpose of the authorization is to allow Suncor to alter or destroy fish habitat for the construction and operation of the Project.

FACTS

The Parties

[2] The Applicants are public interest groups who are engaged in promoting protection of the environment and beneficial management of natural resources. Environmental Resource Centre, ("ERC"), formerly known as Save Tomorrow, Stop Pollution ("STOP"), is a federally registered non-profit organization with approximately 200 associate members. Its mandate is to provide public education and research concerning avoidance and reduction of toxic wastes. It has been involved in the review and approval processes for various oil sands developments since 1970.

[3] Toxic Watch Society, ("TW"), is a non-profit provincially registered society based in Edmonton, Alberta and has been involved in review and approval process of every major oil sands development since 1990.

[4] Prairie Acid Rain Coalition ("PARC"), is an unincorporated association in the form of an informal coalition of environmental organizations from the prairie provinces of Manitoba, Alberta and Saskatchewan. The goals of this group include promotion of the review of regulatory processes for air emissions, and public awareness of the environmental effects of acid rain.

[5] ERC and TW are members of the Oil Sands Environmental Coalition ("OSEC"). That group was formed in 1995 as an umbrella group to monitor oil sands developments in Alberta. The group was formed to share resources and because the Alberta Energy and Utility Board ("AEUB") has a policy requiring public interest interveners in proceedings before that Board to form coalitions and make joint submissions. OSEC actively participated in the federal and provincial review processes concerning the Suncor development which is relevant to this application.

[6] The Applicants seek standing to bring these applications since they are not "directly affected" by the decisions in issue.

[7] The MOE and the MFO are the decision-makers whose decisions are under review. Suncor is the owner of the Project and was joined as a Respondent by Order of the Court made on April 19, 1999.

[8] The MOE ("Alberta") was granted leave to participate as an intervener by an Order dated August 18, 1999. The basis for the participation of Alberta is the extensive role played by that department in the overall regulatory process employed by the Province of Alberta in relation to exploitation and development of natural resources in that province, including oil sands development.

The Oil Sands Development Project

[9] The Project, entitled "Project Millennium", involves the expansion and upgrade of an existing oil sand mine operated by Suncor. The existing plant had been in operation since the late 1960's. Its operation was confined to the west side of the Athabasca River until late 1998 when the Steepback Mine was commissioned on the east side of the river. The two operations were connected by a bridge. The Steepback Mine project included a new ore preparation plant and service complex.

[10] The objectives of the Project were to increase production of upgraded crude oil products to a minimum of 210,000 barrels per day by the year 2002.

[11] Over the 30 year life of the plan, the Project is expected to produce and upgrade 2.8 million barrels of bitumen, creating benefits that include 800 new direct jobs, approximately 1,200 indirect positions, as well as sizeable taxes and royalties to the governments of both Canada and Alberta. This $2 billion investment includes the expansion of the Steepbank Mine, the construction of an oil sands extraction plant on the east side of the river, a pipeline linking the existing oil sands extraction plant and the west side of the river, modifications to the existing oil sands extraction plant, utilities and infrastructure to accommodate the increased production level, and an integrated reclamation plan for all of Suncor's mining areas.

The Provincial Environmental Assessment and Regulatory Process

[12] Suncor was required to prepare a formal application for review and approval by Alberta Environment pursuant to the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 ("EPEA") and by the AEUB pursuant to the *Oil Sands Conservation Act*, S.A. 1983, c. O-55. In accordance with these requirements and existing practice between the AEUB and Alberta Environment, Suncor prepared a single EIA as part of the project application. This required Suncor to prepare terms of reference to be considered by Alberta Environment with the assistance of consultations with the public, other governments, governmental departments and agencies. The EIA was submitted on April 21, 1998 to the two agencies, according to the Affidavit of Mark Shaw.

Suncor's Application Record, page 4.

[13] The AEUB and Alberta Environment identified deficiencies in the EIA and requested further information from Suncor. These were addressed by Supplemental Information Responses, which were provided on several occasions up to November 23, 1988. Once the Director of Alberta Environment is satisfied that the EIA is complete, it is referred to the decision-maker, who determines whether the project is in the public interest.

[14] The EIA is sent to the Minister and to the AEUB, who is authorized as the public interest decision-maker, per section 2.1 of the *Energy Resources Conservation Act*, R.S.A. 1980, c. E-11. Once a project has been determined to be in the public interest, it may continue through the Alberta regulatory process.

[15] The AEUB, after reviewing all the material submitted, decided that a public hearing into the Project was required. The AEUB conducted a public hearing from January 12 to 15, 1999 in Fort McMurray and in Calgary on February 2, 1999. The Applicants TW and ERC were participants in

the hearings as members of OSEC. Representatives from the Department of Fisheries and Oceans (the "DFO") and Environment Canada also participated.

[16] In the present case, an approval was required from Alberta environment before the contemplated activity could be undertaken. That approval is granted pursuant to the EPEA and it cannot be granted prior to a determination by the AEUB that the Project is in the public interest; see section 65 of EPEA. The approval may be granted for no more than 10 years, and may be appealed to the Environmental Appeal Board. Applications to renew the approval engage the same process.

[17] Unforeseen consequences of approved activities may be addressed by flexible responses permitted in the EPEA. Furthermore, the EPEA provides for a range of remedial or enforcement actions should the terms of the approval be breached.

[18] Suncor held two approvals pursuant to the above process. They were issued to it by the AEUB and Alberta Environmental Protection ("AEP") and needed amendment before Suncor could proceed with the Project. Approval number 8101 from the AEUB was in respect of its existing oil sands mine and processing facilities in Fort McMurray. Approval number 94-01-19 for AEP was for initial construction activities for the Project.

[19] The AEUB issued a preliminary decision to amend its prior approval and approved Project Millennium on March 29, 1999. Detailed reasons for its decision and conditions to the approval were released on July 23, 1999. Those reasons referred to certain provincial environmental control initiatives including the Cumulative Environmental Effects Management Initiative ("CEEMI") and the Regional Sustainable Development Strategy ("RSDS"). The AEUB was satisfied that if Suncor and all other companies in the oil sands region continued to participate in RSDS and CEEMI, these initiatives could adequately and effectively address regional cumulative environmental effects.

[20] On February 12, 1999 the AEUB issued a decision in connection with the Shell Muskeg River Mine, also in the Fort McMurray area, wherein it considered CEEMI and RSDS. According to Suncor, the Shell project involved consideration of issues similar to those involved with its project including cumulative environmental effects and appropriate responses by industry and the regulators. The AEUB took these initiatives into account when issuing its approval to Shell.

Suncor's Application Record, page 111

The Federal Environmental Assessment and Regulatory Process

[21] The federal environmental process was invoked because the Project required authorization from DFO for the harmful alteration, destruction or disruption of fish habitat under section 35(2) of the *Fisheries Act, supra*. Specifically, the Project would affect fish habitat in three creeks, McLean Creek, Wood Creek, Leggett Creek and a small wetlands (Shipyard Lake).

Respondent Minister's Application Record, T-274-99, pages 241-242

[22] Suncor was therefore required to apply to DFO for an authorization to harmfully alter or destroy fish habitat. This application was comprised of the same EIA that was provided to the

AEUB, including all Supplemental Information Responses, and additional Supplemental Information Responses that were required by the DFO.

[23] The terms of reference for the EIA were established by AEP following circulation of draft terms of reference after the announcement of the Project in August 1997. The draft terms of reference for the EIA had been provided to DFO in September 1997. In late March 1998, DFO confirmed that the final terms of reference issued by Alberta would satisfy the requirements of the environmental assessment process under the CEAA. On April 3, 1998, Suncor formerly applied for the authorizations pursuant to section 35(2) of the *Fisheries Act, supra*. The EIA was provided to DFO on April 21, 1998.

[24] On May 1, 1998, DFO wrote to Suncor and set out the scope of the Project and of the environmental assessment. In its letter, DFO described the scope as follows:

...the project shall be defined as the construction, operation, decommissioning and abandonment of the physical works associated with the following project components:

1. Access Corridors (utility and transportation elements)

2. Mine Site (pits and bitumen extraction facilities)

3. Tailings and overburden disposal areas

4. All ancillary facilities related to the mining operations

Respondent Ministers' Application Record, T-274-99, page 346

[25] By letter dated May 4, 1998, DFO acknowledged receipt of Suncor's application and confirmed that since authorizations pursuant to section 35(2) of the *Fisheries Act, supra* are included in the *Law List Regulations*, SOR/94-636 under the CEAA, DFO, Habitat Management Division, would act as the federal responsible authority ("RA") for the Project. As such, the RA was required to conduct an environmental assessment in accordance with the Act. Since the mining activity for the proposed Project exceeds the limits provided in Part IV of the *Comprehensive Study List Regulations*, SOR/94-638, pursuant to the CEAA, the environmental assessment would be in the form of a Comprehensive Study Review ("CSR") which would be conducted in accordance with the requirements of sections 16(1) and (2) of the CEAA.

[26] The CSR required a consideration of the environmental effects of the Project and any cumulative environmental effects that are likely to result in conjunction with other projects that have been or will be carried out. The CSR relied on the EIA which had been prepared by Suncor for the provincial environmental assessment. The EIA considered two development scenarios. The first was a consideration of the cumulative environmental effects of the Project together with oil sands extraction projects that have been carried out and those projects which were in the approval process. The second scenario involved the additional consideration of oil sands extraction projects which were planned but not yet in the approval mode.

Respondent Ministers' Application Record, T-274-99, page 231

[27] DFO communicated with other federal departments having an interest in the Project requesting comments and comments were provided by Indian and Northern Affairs Canada,

Canadian Heritage Parks Canada, Health and Welfare Canada, Environment Canada Environmental Protection Prairie and Northern Regions, Department of Fisheries and Oceans Habitat Management Division. As a result of this solicitation of comments from various federal departments, Suncor provided supplemental information and that was circulated in the same manner, again with the request for comments.

[28] DFO was also provided with further supplemental information requested by Alberta Environmental Protection, relative to the provincial assessment process.

[29] In September 1998 and prior to the submission of the CSR to the Minister, Mr. Paul Bernier, Vice President, Program Delivery, of the Canadian Environmental Assessment Agency ("Agency") engaged in discussions with the province of Alberta concerning the need for an adaptive management strategy to govern and mitigate the environmental effects of various oil sands projects in the Fort McMurray region. The correspondence which was exchanged as a result of those discussions was included as an appendix to the CSR.

[30] The terms of reference for the RSDS were not finalized at the time of completion of the CSR. The CSR was completed and submitted in early November 1998. It was a 153 page report comprised of some eleven chapters that addressed, among other things, the different aspects of the environment that would be considered, as well as human health, socio-economic and physical and cultural heritage components. The table of contents for the CSR is attached as Appendix "A". The description of the environmental effects assessment identified the same subjects while also referring to Aboriginal Persons, sustainable use of renewable resources and trans-boundary effects. The CSR also contained several mass charts and tables.

[31] The CSR also contains conclusions and recommendations to the Minister. The recommendations specifically address cumulative environmental effects and mitigation measures. The CSR concluded as follows:

DFO has concluded that, with implementation of the mitigation measures and follow-up requirements, including the industry-led AOSCEI and the AEP RSDS initiative, Project Millennium will not have significant adverse environmental effects. Notwithstanding the above analysis, comments received during the public review of this CSR will be used to verify that stakeholder concerns are being addressed and that the environmental effects of Project Millennium are acceptable.

In support of the above, the following recommendations should be considered in the approval of Project Millennium.

1. Suncor's continued participation in and support of the initiatives it has advanced to address outstanding environmental issues. These initiatives include: RAMP, WBEA, RAQCC, AOSCEI, TEEM and RIWG.

2. Suncor's continued support of stakeholder involvement, as appropriate, in the various initiatives described above.

3. Participation by appropriate federal agencies in the various initiatives described above.

4. Suncor's submission of an annual report to DFO documenting activities and achievements related to proposed research, follow-up programs and initiatives described above. The report is to be made available to all regional stakeholders.

Respondent Ministers' Application Record, T-274-99, page 113

[32] It is clear from the CSR that the RA, as the authors of that report, were acutely aware of initiatives undertaken in Alberta both by the government and industry to address environmental effects of oil sands development. The CSR contains many references to the Alberta initiatives in its consideration of the various effects of the Project.

[33] The CSR was submitted to the Agency on November 4, 1998. On November 6, 1998, the MFO so advised the MOE and requested her advice on an appropriate course of action.

[34] In accordance with the Act, public review and comment on the CSR was solicited for a period of thirty days expiring December 10, 1998.

[35] The responses received from the public were referred to DFO by the Agency and include responses from public interest groups and for the Department of Environment Canada. The Agency also requested DFO and Environment Canada to comment on the public responses and the manner in which Alberta's RSDS and the industry-led CEEMI could mitigate possible adverse cumulative effects to a level of insignificance. A list of the responses received in relation to the CSR is found at Appendix B to these reasons.

[36] On January 8, 1999, legal counsel for the Agency wrote the AEUB, requesting a copy of the terms of reference for the RSDS so that they could be provided to the MOE prior to making her decision on the CSR. The Agency said that the MOE would not be able to make a determination before receipt of the terms of reference. The terms of reference were provided on January 15, 1999 and the MOE made her decision on January 21. By letter of the same day, legal counsel for the Agency advised the AEUB of the decision and that the federal authorities would appear before the AEUB to make their submissions on the Project on February 2, 1999.

[37] The effect of the decision made on January 21, 1999 was to refer the matter back to the RA for action to be taken under section 37 of the *Fisheries Act, supra*. The ultimate action taken was the issuance of two authorizations, the first on August 17, 1999 to allow exploratory drilling and the second on December 21, 1999, to authorize completion of the Project by Suncor.

[38] According to the Affidavit of Bev Ross filed in T-1799-99, the RA reviewed many documents and studies relating to the Project, together with the CSR. The RA decided to issue a separate authorization for exploratory drilling which Suncor wished to carry out in the Wood Creek Valley and to deal with the balance of the Project pursuant to a further authorization. The August authorization related to the exploratory drilling. In addition to reviewing the CSR and various reports submitted by Suncor, officials from Suncor and the RA met on July 12, 1999 to discuss the creeks affected by the Project and to discuss the issues of mitigation and compensation for the loss of fish habitat resulting.

Respondent Ministers' Application Record, T-1799-99, page 407

[39] The documents taken into account in deciding to issue the August authorization included the final approval given to the Project by the AEUB on June 29, 1999, the draft approval for the Project to be issued by Alberta pursuant to the EPEA, *supra* and the draft of terms of reference for the RSDS dated July 5, 1999. These documents appear in the certified Tribunal Record at Tabs 5, 12 and 8, respectively.

[40] Among other considerations in deciding to issue the August authorization, the RA took into account a habitat compensation agreement for the Project, as described in the habitat conservation and protection guidelines issued by the RA. Suncor provided a letter of intent to compensate for loss of fish habitat, on August 17, 1999. This was found acceptable to the Department and according to Ms. Ross, after reviewing this letter of intent, the details of the proposed drilling program and its proposed mitigation, she drafted the August authorization. The August authorization refers to mitigation in relation to Wood Creek and says, among other things, that the work should be limited to certain times of year and should minimize disruption to the creek bed and banks.

[41] The final authorization was issued on December 21, 1999 and authorizes the harmful alteration, disruption or destruction of fish habitat in Shipyard Lake, Legett Creek, Wood Creek and McLean Creek.

[42] According to the Affidavit of Mr. Fred Hyntka filed in T-100-00, he worked with Suncor prior to the issuance of this final authorization to develop a final compensation plan for fish habitat and to ensure that mitigation measures, including operative elements, were in effect to monitor and control cumulative effects. As well, he relied on the final authorization issued by the AEUB, Alberta's RSDS strategy and the approvals issued pursuant to the EPEA, *supra*, and the *Water Resources Act, supra*, both statutes of Alberta. As well, he sought the opinion of the Agency, Environment Canada and the Department of Indian and Northern Affairs concerning the design and implementation of further mitigation measures and a follow-up plan. He relied on the commitment expressed by Environment Canada in its letter of December 21, 1999, where the department stated that it was relying on various Alberta initiatives including the RSDS and CEEMI, for the management and monitoring of cumulative environmental effects in the oil sands region.

[43] Furthermore, Mr. Hyntka, on behalf of the RA, expressed satisfaction with the RSDS proposed by Alberta as being an effective regulatory framework for controlling and managing cumulative environmental effects on a regional basis.

[44] Although the December authorization refers to an environmental protection plan for the Project, that plan was not completed at the time the authorization was issued. Mr. Hyntka concludes his affidavit by saying that following the issuance of the authorization, he continued to work on the preparation of that plan.

Respondent Ministers' Application Record, T-100-00, page 1333

[45] The MOE made her decision on January 21, 1999. The decision, as it appears in the record, reads as follows:

I am writing to advise you of my decision regarding the Suncor Millennium Oil Sands Project.

On November 6, the Canadian Environmental Assessment Agency (the Agency) and I received the comprehensive study report on the above-mentioned project submitted by you. I am referring the project back to your department for action under subsection 37(1) of the *Canadian Environmental Assessment Act* (the Act). Having taken into consideration the comprehensive study report and

public comments filed pursuant to subsection 22(2) of the Act, I have concluded that the project as described, is not likely to cause significant adverse environmental effects.

...

With respect to informing the public about the federal government's decision in this matter, I ask that your officials issue a public notice outlining the course of action being taken by your department.

Respondent Ministers' Application Record, T-274-99, pages 1-2

[46] The short paragraphs quoted above are the only part of the letter written by the MOE to her colleague, the MFO, that appear on the record. The MOE invoked Cabinet confidence pursuant to section 39 of the *Canada Evidence Act*, R.S.C. 1985 c.C-5, as amended, in respect of the balance of her letter. No challenge was taken in respect of the assertion of Cabinet confidence by the MOE.

THE APPLICATIONS

[47] In T-274-99, the Applicants seek an order quashing the decision which was made by the Minister of the Environment. Specifically, the Applicants request the following relief:

1) an order or orders:

(i) quashing the decision of the Minister of Environment of January 21, 1999, to refer the project back to the responsible authority for action to be taken under section 37 of CEAA;

(ii) declaring that the essential statutory preliminary steps required by CEAA prior to the issuance of any authorization, namely an environmental assessment review by mediation or review panel, were not followed by the Minister of the Environment constituting failure to comply with CEAA;

(iii) that any authorizations or approvals that may be issued by the Minister of Fisheries and Oceans ("MFO") prior to the hearing of this matter, be quashed or set aside;

(iv) that the MFO and any delegate be prohibited from issuing any authorizations under section 35 of the *Fisheries Act*, or taking any other action for the purpose of enabling the Project or portion thereof to proceed, until CEAA has complied with;

(v) declaring that the requirements of CEAA must be complied with before the MFO or any delegate issues any authorizations under the *Fisheries Act* or takes any other action for the purpose of enabling the Project or portion thereof to proceed.

[48] The Applicants seek similar relief in the remaining applications for judicial review. In cause T-1799-99, concerning the authorization issued on August 17, 1999, the prayer for relief is as follows:

1) an order or orders:

a) quashing the decision of the Minister of Fisheries to issue the Authorization to Suncor;

b) declaring that the mandatory statutory steps required by the *Canadian Environmental Assessment Act* ("CEAA") prior to the issuance of the Authorization, namely the completion of an environmental assessment in compliance with CEAA, were not complied with;

c) declaring that the Minister of Fisheries failed to comply with the mandatory duties imposed by s. 37(1)(a), 37(2) and 38 of the CEAA when issuing the Authorization;

d) quashing or setting aside any further authorizations or approvals that may be issued by the Minister of Fisheries prior to the hearing of this matter;

e) prohibiting the Minister of Fisheries and any delegate from issuing any further authorizations under section 35 of the *Fisheries Act*, or taking any other action for the purpose of enabling the Project or portion thereof to proceed, until CEAA has been complied with;

f) declaring that the requirements of CEAA must be complied with before the Minister of Fisheries or any delegate issues any authorizations under the *Fisheries Act* or takes any other action for the purpose of enabling the Project or portion thereof to proceed.

[49] Finally, in cause T-100-00, the Applicants frame the prayer for relief as follows:

1) an order or orders:

a) quashing the decision of the Minister of Fisheries to issue the Authorization to Suncor;

b) declaring that the mandatory statutory steps required by the *Canadian Environmental Assessment Act* ("CEAA") prior to the issuance of the Authorization, namely the completion of an environmental assessment in compliance with CEAA, were not complied with;

c) declaring that the Minister of Fisheries failed to comply with the mandatory duties imposed by s. 37(1)(a), 37(2) and 38 of CEAA when issuing the Authorization;

d) quashing or setting aside any further authorizations or approvals that may be issued by the Minister of Fisheries prior to the hearing of this matter;

e) prohibiting the Minister of Fisheries and any delegate from issuing any further authorizations under section 35 of the *Fisheries Act*, or taking any other action for the purpose of enabling the Project or portion thereof to proceed, until CEAA has been complied with;

f) declaring that the requirements of CEAA must be complied with before the Minister of Fisheries or any delegate issues any authorizations under the *Fisheries Act* or takes any other action for the purpose of enabling the Project or portion thereof to proceed.

ARGUMENTS

Applicants

i) Overview of the Applicants' Argument

[50] The Applicants submit that the decision of the federal MOE to refer the Project back to the MFO for approval, rather than on to a further stage in the assessment process, was an error in law. Specifically, the Applicants allege that the MOE erred in accepting the CSR that was prepared by the Department of Fisheries and Oceans as complying with the CEAA. As well, the Applicants

argue that the Minister erred in not referring the Project on for further assessment in light of the uncertainties about the likelihood of the Project causing significant environmental effects.

[51] They argue that the subsequent issuance of authorizations by the MFO was also erroneous, on two grounds. First, the Minister erred in issuing the authorizations when the mandatory provisions of the CEAA had not been met. Second, the Applicants argue that the Minister of Fisheries erred in issuing the authorizations without complying with the mandatory and non-delegable duty imposed by CEAA to ensure that the mitigation measures identified necessary to mitigate environmental effects are implemented.

ii) The Standard of Review

[52] It is submitted that the MOE erred in accepting the CSR as complying with section 4 and 16 of the CEAA. These provisions require that careful consideration be given to the potential significance of the cumulative environmental effects of the Project. The Applicants submit that assessment of the cumulative environmental effects is a mandatory requirement of the CEAA. Failure to comply with a mandatory requirement is an error of law reviewable on the standard of correctness. In this regard, the Applicants rely on *Alberta Wilderness Association v. Cardinal River Coals Ltd.*, 1999 CanLII 7908 (FC), [1999] 3 F.C. 425, (1998), 165 F.T.R. 1(F.C.T.D.), pages 440 and 442; *Friends of the West County Association v. Canada (Minister of Fisheries and Oceans)*, 1999 CanLII 9379 (FCA), [2000] 2 F.C. 263 (F.C.A.), aff'd, 1998 CanLII 7113 (FC), [1998] 4 F.C. 340 (F.C.T.D.).

[53] The Applicants submit that the MOE erred in referring the Project back to the DFO for approval pursuant to section 23(a) of the CEAA rather than referring it for further review pursuant to section 23(b). They say this is an error because the duties prescribed by section 23 require that the MOE refer the Project to a mediator or review panel when the environmental effects associated with it are uncertain.

iii) The CSR

[54] The Applicants say that the first step in the cumulative effects assessment is the definition of the scope of that assessment by the RA pursuant to section 16(3) of the CEAA. The determination of the scope is a discretionary decision; see *Friends of the West Country, supra*.

[55] The second step is an assessment of the cumulative effects of the scoped projects in accordance with the requirements of sections 4 and 16 of the CEAA. Among other things, the study is to assess the significance of environmental effects. The Applicants rely on the decision of this Court in *Alberta Wilderness Association* v. *Cardinal River Coals, supra* at page 453 for a description of the process of considering the significance of environmental effects as follows:

...define and describe the environmental effects, and then make a finding respecting the weight to be placed on each effect, or in the words of the provision, to consider the "significance" of each effect.

[56] The Applicants say that the CSR does not comply with sections 4 and 16 of the CEAA because the portion of the CSR dealing with cumulative effects under the heading "Environmental Assessment of Cumulative Effects" provides neither a definition of those effects nor a description of their creation, scope or intensity. The CSR, at page 83, says as follows:

There is a high degree of uncertainty associated with predicted environmental effects of projects that are planned but not approved ...[i]t is therefore not possible to predict with confidence the cumulative effects of existing and approved projects in combination with planned but not approved projects.

[57] The Applicants submit that the failure to address these points in the CSR is not cured by the reference, provided in Appendix 2 of the CSR, to the EIA prepared by Suncor. They argue that the CEAA requires the federal authorities to prepare their own environmental assessment, not simply to rely on work prepared by a proponent of a project. Furthermore, the Applicants say that the EIA was not before the MOE when she made her decision.

[58] The Applicants argue, as well, that the failure to provide an assessment of cumulative environmental effects is compounded by an erroneous interpretation of the requirements of that assessment. They say that the CSR refers to potential cumulative environmental effects that were not fully examined because they fall outside the scope of the regional study area of the Project. These effects include increased acid deposits in Saskatchewan and Northwest Territories, effects on water quality in Great Slave Lake and effects on Canada's ability to meet its international obligations to reduce greenhouse emissions under the *Kyoto Protocol to the U.N. Framework Convention on Climate Change*, FCCC/CP/1997/7/Add.1.

[59] The Applicants next present the alternative argument that if this Court concludes that the CSR does contain an assessment of cumulative environmental effects, then the conclusion expressed in the CSR that the cumulative environmental effects will be insignificant, is unreasonable.

[60] The Applicants say that the conclusion of insignificance is not supported by any information in the CSR and contradicts the statement in the CSR, at p. 83, that it is "impossible" to confidently predict what the cumulative effects of the Project will be.

[61] The Applicants say that the proposed existence of the RSDS does not change this analysis. They describe the RSDS as a multi-stakeholder process involving all of the companies operating in the region, federal and provincial government agencies, affected municipalities and towns, First Nations and non-governmental groups. Participation in RSDS is voluntary and decisions are made by consensus. This strategy offers an opportunity to study environmental effects. It does not, by itself, render those effects insignificant and does not replace scientific inquiry into the question of significance.

iv) The Section 23, CEAA, Decision

[62] The Applicants submit that the standard of review applicable to the MOE's authority under section 23 is reasonableness *simpliciter*, as determined by the Federal Court of Appeal decision of *Inverhuron & District Ratepayers Assn. v. Canada*, 2001 CAF 203 (CanLII), 2001 F.C.A. 203, (2001) 273 N.R. 62 (F.C.A.) at paragraphs 39-40. In this decision, it was held that while a degree of deference was owed to the Minister, it was necessary that she reach her decision on a reasonable basis.

[63] The Applicants submit that the MOE erred in sending the Project back for approval instead of referring it on to mediation or panel review. The reasons for her decision are not apparent on the record since she invoked the privilege of cabinet confidence, pursuant to section 39 of the *Canada Evidence Act, supra*, over a portion of her letter communicating the decision. Nonetheless,

the Applicants say that it is clear from the record that the basis for her decision was the existence of the RSDS which was accepted as a mitigation measure within the meaning of the CEAA.

[64] The Applicants submit that the MOE erred in accepting the RSDS process as one that operates to reduce the many uncertainties related to the likelihood of the Project causing significant environmental effects, to a standard of certainty with insignificant environmental effects.

[65] They argue that since nearly every significant environmental effect associated with the Project is uncertain, referring the Project back to the RA for approval was a reviewable error and a misinterpretation of the duties under section 23.

[66] The Applicants submit that the purpose of section 23 is to allow the MOE to review the CSR to determine if it meets the requirements of sections 4 and 16 of the CEAA, and to determine if it contains sufficient information to permit a final decision to be made concerning the Project. The Applicants are concerned only with the latter.

[67] The Applicants say that sections 23(a) and (b) must be read together. These provisions contemplate two alternative situations: certainty and uncertainty. If the CSR identifies uncertainties concerning significant environmental effects, then the MOE has no choice except to refer a project to mediation or a review panel.

[68] The Applicants further submit that the decision made pursuant to section 23 affects the ability of the RA to comply with sections 37(2) and 38 of the CEAA. Section 37(2) requires the RA to ensure that any necessary mitigation measures are implemented. If the CSR is deficient by reason of failing to identify mitigation measures with sufficient certainty, the RA's ability to comply with sections 37(2) and 38 will be compromised.

[69] The Applicants refer to a manual published by the Canadian Environment Assessment Agency entitled "Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects" (November 1994) (the "Significant Effects Guide"). This Guide is used by RAs and the Canadian Environment Assessment Agency in determining significance. The Applicants say that the CSR identifies adverse environmental effects which may be significant when assessed according to the criteria in this Guide. Those affected areas include ambient air quality, hydrology and transboundary emissions.

[70] The Applicants say that the CSR identifies the RSDS as a mitigation measure. However, the Applicants submit that the MOE had before her only the finalized Terms of Reference of the RSDS, the advice given to her by representatives of her department and from the DFO, and public comments concerning the CSR and RSDS at the time she made her determination.

[71] On the basis of the information before her, the MOE would have been aware that the RSDS is a voluntary, multi-stakeholder, consensus-based planning process involving oil sands production companies, Alberta and federal regulatory agencies, affected towns and municipalities, First Nations, and non-governmental organizations.

[72] The Applicants argue that the RSDS does not constitute a "mitigation measure" within the meaning of the CEAA, as that term is defined in section 2. They submit that the RSDS is not a known means of ensuring the reduction of cumulative environmental effects since its primary function is to identify known effects in the first phase. The Applicants here rely on *Union of Nova Scotia Indians,* 1996 CanLII 3847 (FC), [1997] 1 F.C. 325 (F.C.T.D.); *Alberta Wilderness*

Association v. *Express Pipeline Ltd.* (1996), 1996 CanLII 12470 (FCA), 137 D.L.R. (4th) 177 (F.C.A.) and *Cantwell* v. *Canada (Minister of Environment)* (1991), 41 F.T.R. 18 (F.C.T.D.).

[73] The Applicants further argue that the RSDS is not amenable to implementation by the RA because all federal regulatory authorities participate in the RSDS merely as stakeholders, not as agents with control over that process.

[74] The Applicants say the adoption of the RSDS as a mitigation measure is an error since it does not meet the definition of a mitigation measure set out in section 2 of the CEAA. The MOE erred in her interpretation of section 23(b)(i) of the CEAA, which creates a mandatory imperative, and which is specifically designed to address identified uncertainties through further assessment.

[75] The Applicants further submit that the decision of the MOE not to refer the Project for mediation is unreasonable because that decision effectively contradicts one of the purposes of the CEAA, that is to ensure a full consideration of environmental effects before an RA exercises its power regarding a project. They rely on *Canadian Association of Industrial, Mechanical & Allied Workers, Local 14* v. *Paccar of Canada Ltd.*, 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983, (1989), 62 D.L.R. (4th) 437 in support of this argument.

v) The Issuance of the Authorizations by the DFO

[76] The Applicants rely on their challenges to the decision of the MOE to support their arguments against the issuance of the authorizations by the DFO. They argue that the jurisdiction of the MFO to issue those authorizations depends upon prior compliance with the CEAA in the preparation and review of the CSR; see *Alberta Wilderness Association* v. *Canada (Minister of Fisheries and Oceans*, 1998 CanLII 9122 (FCA), [1999] 1 F.C. 483, at page 493 and *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.* (1999), *supra* at page 464.

[77] The Applicants submit that pursuant to sections 17, 37(1) and 37(2) of the CEAA, the MFO has a non-delegable mandatory duty to ensure the implementation of mitigation measures when issuing the authorizations permitting the Project to proceed. The CSR identifies the RSDS as the mitigation measure.

[78] The Applicants submit that the MFO could have acted in a way to ensure implementation of the mitigation measures identified in the CSR by attaching conditions to the authorizations and his failure to do so effectively removes any means of ensuring that the mitigation measures are implemented. The only conditions attached to the authorizations relate to matters concerning fish habitat, not to the RSDS.

[79] The Applicants argue that as a result, the MFO abandoned his statutory duty. The implementation of the RSDS will depend upon the Alberta provincial regulators, not on the federal government. The federal authorities have assigned the regulation of matters falling within their jurisdiction to the provincial regulators and this is improper; see *Friends of the Oldman River Society*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3 (S.C.C.).

[80] Finally, the Applicants argue that both the MOE and the MFO have abandoned their obligations to follow the intention of the CEAA, as expressed in its preamble:

WHEREAS the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating 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.

This abandonment amounts to an abrogation of the duties imposed by law and the decision of the MOE and the authorizations issued by the MFO should be set aside.

Respondent Ministers' Submissions

i) The Standard of Review

[81] The Respondent Ministers agree that the standard of review applicable to the interpretation of the CEAA is the standard of correctness; see: *Friends of the West Country* v. *Canada, supra*.

[82] However, they argue that the correct interpretation of the CEAA is not the issue in these proceedings. Rather the true issue is the reasonableness of the decisions which were made and the applicable standard of review in those circumstances is either reasonableness or patent unreasonableness; see: *Friends of the West Country, supra*. The Respondent Ministers argue that the decisions in issue are correct in law and based upon a reasonable exercise of judgment.

[83] The Respondent Ministers refer to the decision of the Supreme Court of Canada in *Pushpanathan* v. *Canada*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, (1998), 160 D.L.R. (4th) 193, arguing that the following factors determine that a deferential standard of review is appropriate:

a) The legislative intent of the statute indicates that Parliament intended the decision be left to the Minister;

b) The responsible Ministers and their officers have a high level of expertise in their respective fields;

c) The Ministers' role should be conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies.

[84] The Respondent Ministers also rely on the recent Federal Court of Appeal decision of *Inverhuron, supra* to support their position that the appropriate standard of review of the section 23 decision by the MOE is reasonableness *simpliciter*.

ii) The Environmental Assessment Process

[85] The Respondent Ministers submit that the environmental assessment process, here in issue, is essentially a planning tool. It is not intended to act as a strict regulatory instrument; see: *Friends of the Oldman River* v. *Canada, supra*, at 71.

[86] They characterize the environmental assessment process under the CEAA as a flexible one, where environmental effects and mitigation measures could be considered together; see *Alberta Wilderness Association* v. *Express Pipeline, supra*, at 342 and *Grand Council of Crees* v. *Canada* 1994 CanLII 113 (SCC), [1994] 1 S.C.R. 159 at 198-199.

[87] The Respondent Ministers go further and submit that the implementation of the environmental process in an adaptive way is sound in law and science, and that adaptive management is an appropriate tool to address the inherent uncertainties in the environmental assessment process. In both their written and oral arguments, the Respondent Ministers promote the idea that adaptive management, as illustrated by the RSDS, was properly relied on in this case.

iii) The CSR

[88] The Respondent Ministers dismiss the arguments raised by the Applicants concerning the conduct of the CSR and its treatment of cumulative environmental effects on the basis that the Applicants have failed to establish a breach of section 16 of the CEAA relative to these matters. They submit that these arguments are directed at the significance of environmental effects, the adequacy and completeness of the evidence that was presented, and the judgments reached by the Department of Environment and the Department of Fisheries and Oceans. They argue that these are matters to be assessed on the standard of reasonableness and do not involve the question of statutory interpretation.

[89] As for the alleged failure of the MOE to comply with section 4 of the Act, the Respondent Ministers say that this section merely establishes the purpose of the CEAA and serves as an interpretative provision. It is not an operational provision that can be breached; alternatively, the evidence shows that the CSR complied with the spirit and letter of section 4.

iv) The Section 23, CEAA, Decision

[90] The Respondent Ministers submit that the CSR was prepared in accordance with the CEAA and the MOE did not commit a reviewable error in concluding that the Project was not likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures including the RSDS. Indeed, the Respondent Ministers argue that if the RSDS is found to be a mitigation measure, then the Applicants must fail in their challenge to the decision of the MOE.

v) The Issuance of the Authorizations by the DFO

[91] The Respondent Ministers argue that the CEAA only requires the responsible authorities to ensure the implementation of mitigation measures. The CEAA does not detail a particular means of doing so. Section 37(2) gives the RA considerable latitude in ensuring such implementation.

[92] The Respondent Ministers rely on the Affidavit of Bev Ross to show that the DFO took steps to ensure the implementation measures in relation to the first authorization which concerned a drilling program.

[93] Likewise, the Respondent Ministers refer to the Affidavit of Fred Hnytka to show that reasonable efforts were made to ensure the implementation of mitigation measures in relation to the second or final authorization.

[94] The Respondent Ministers submit that the reasonable efforts undertaken by DFO for the implementation of mitigation measures raise a question of reasonableness, not a question of law.

Respondent Suncor's Submissions

i) Standing

[95] The Respondent Suncor challenges the Applicants standing to bring these applications. In this case, the Applicants seek public interest standing because they do not have a direct or personal interest pursuant to the words "directly affected" in section 18(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7.

[96] Suncor questions whether the Applicants have a genuine interest in the matters in dispute and whether they have shown that there is not a more appropriate party to bring the application. Suncor here relies on the test established by the Supreme Court of Canada in *Canadian Council of Churches v. Canada,* 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, (1992), 1992 CanLII 760 (BC CA), 88 D.L.R. (4^{th}) 183 (S.C.C.).

[97] Suncor points out that ERC and TW were members of OSEC, the coalition which made submissions during the proceedings before the AEUB. The AEUB granted approval for Project Millennium and no challenge was filed in the Alberta Court of Appeal respecting those approvals.

[98] As well, Suncor says that during the hearings before the AEUB, OSEC withdrew its objections to the approval of Project Millennium. ERC and TW, as members of OSEC, have represented that they were satisfied with the submissions made by OSEC. Their current objections are inconsistent with their participation before the AEUB as members of OSEC. According to Suncor, this inconsistency militates against any finding that the Applicants have a "genuine interest" in the matters under review.

[99] Suncor finds support for this argument in the written submissions made by OSEC to the Canadian Environment Assessment Agency and DFO dated January 14, 1999 attaching a copy of the agreement between OSEC and Suncor for the management of SO_2 and NO_x emissions in the Athabasca oil sands region. That letter provided in part as follows:

Based on the level of agreement reached between OSEC and Suncor, OSEC changed its position regarding the application before the EUB for the Project Millennium [sic]. ***OSEC considers itself no longer adversely affected by the Project, provided that Suncor follows through on its commitments and that adequate conditions are placed on the provincial approval of the Project to ensure compliance with these commitments.*** As you will note in the attached agreement (e.g. sub-section (viii)(d) & (e) on page 2 of the agreement), that there are conditions that obligate Suncor to take specific actions within a clear time frame in the event of a breakdown of the broader multi-stakeholder process.

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[100] Suncor also submits that the concerns now raised by the Applicants in these proceedings are the same ones raised by OSEC before the AEUB. The members of OSEC were consulted and required to argue before the AEUB. OSEC made representations to the Canadian Environment Assessment Agency and the AEUB that it was withdrawing its opposition to the Project. Suncor says that the Applicants are now seeking a second opportunity to express their concerns in another forum. This change in position raises concerns about the use of court process and the allocation of judicial resources.

[101] Suncor raises a different argument in relation to PARC.

[102] PARC neither participated in nor filed any written submissions before the AEUB in January or February 1999. It elected not to participate in the public review of Project Millennium, despite the fact that the issue of cumulative environmental effects, including trans-boundary effects, received considerable focus. It has no formal membership and its first communication to the MOE was a letter dated December 20, 1998.

[103] Furthermore, the members of PARC live at a geographical distance from the Project. That is a factor to be considered by a court in deciding whether to exercise its discretion in the granting of public interest standing; see *Shiell v. Canada (Atomic Energy Control Board)* (1995), 98 F.T.R. 75, 17 C.E.L.R. (N.S.) 286 (F.C.T.D.) and *Citizens Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of Environment)* (1999), 163 F.C.R. 36, 29 C.E.L.R. (N.S.) 117 (F.C.T.D.).

[104] For these reasons, Suncor submits that PARC should not be granted public interest standing in these proceedings.

[105] Finally, on the issue of standing, Suncor argues that the Applicants have failed to show that there is no more appropriate forum to bring the application. Suncor relies on the decision in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 1998 CanLII 9124 (FC), [1999] 2 F.C. 211 as authority for the proposition that an applicant for public interest standing has the burden of proving on a balance of probabilities that there are no more appropriate persons who are likely to litigate the issues.

ii) Standard of Review

[106] Suncor characterizes the decisions made in the preparation of the CSR pursuant to section 16(3) of the Act as discretionary ones, relying on the decision in *Friends of the West Country, supra*. It submits that the appropriate standard of review of such discretionary decisions is that of patent unreasonableness; see *Union of Nova Scotia Indians* v. *Canada (Minister of Fisheries and Oceans), supra*, at 345.

[107] Suncor relies on the decision of the Supreme Court of Canada in *Pushpanathan, supra*, and says that the standard of review applicable to the RA's discretionary decisions is patent unreasonableness.

[108] Alternatively, Suncor submits that in light of *Inverhuron, supra*, the standard of review applicable to the decision of the MOE under section 23 is reasonableness *simpliciter*.

iii) The CSR

[109] Suncor submits that the CSR complies with the Act and is not patently unreasonable. The evidence about cumulative environmental effects considered by the RA included the EIA prepared by Suncor for AEUB, the Supplemental Information Report provided by Suncor to both federal and provincial agencies, and information and comments from Environment Canada. As well, the RA had the benefit of the results of public discussions. Suncor submits the RA was entitled to review and

assess the EIA and the information from other sources as it considered necessary in the exercise of its discretion.

[110] Moving to the issue of "significance", Suncor argues that mitigation can be used to eliminate uncertainty and this is related to the significance of environmental effects. If the MOE had applied mitigation and uncertainty still remained, the decision would have to be reviewed. However, the question remains whether the RSDS can amount to a mitigation measure that can reduce an otherwise significant effect to an insignificant one.

[111] Suncor argues that the RSDS can amount to mitigation measures within the meaning of section 2(1) of the CEAA.

[112] Suncor proceeds to question the extent of control the federal government exercises over the Alberta regulatory process and says that the appropriate regulator in the oil sands development area is the Alberta government through the AEUB and the Environmental Protection Board. The CEAA is not a regulatory statute but provides a process for conducting assessments.

[113] Suncor concludes by submitting that the decision of the MOE was reasonable; it was made in recognition of the constitutional balance between the requirements of the CEAA to conduct an assessment and the recognition of primary regulatory power in the hands of the province.

iv) The Issuance of Authorizations by the DFO

[114] Suncor supports the position of the MFO in relation to the issuance of authorizations pursuant to section 37 of the *Fisheries Act, supra* and submits that the MFO committed no reviewable error in issuing the authorizations because the environmental assessment, upon which they depend, was conducted in accordance with the CEAA.

[115] Furthermore, it argues that there was no reviewable error in issuing the authorizations because DFO did ensure that mitigation measures were being implemented. The Department was justified in relying on the RSDS as contributing to mitigation measures.

Intervener's Submissions

[116] The Intervener submits that the regulation of the environment is an area of concurrent jurisdiction between the Federal and Provincial Governments; see *Friends of the Oldman River Society* v. *Canada, supra*.

[117] The Intervener further submits that cooperation is recognized and encouraged between the federal and provincial governments in matters falling within the CEAA. Furthermore, the CEAA is procedural legislation and does not operate as substantive environmental legislation. It will apply only when the responsible authority has a positive regulatory duty to perform; see *Friends of the Oldman River Society, supra* at page 47 and *R.* v.*Hydro Quebec*, 1997 CanLII 318 (SCC), [1997] 3 S.C.R. 213 at page 287.

[118] The Intervener submits that the Applicants' arguments alleging non-compliance by the Minister with sections 4 and 16 of the Act, are misplaced. The Intervener argues that the proper construction of section 16 outlines a process which requires decisions to be made on the basis of available information. The decision-maker must consider relevant factors. The Intervener argues that here, the MOE in fact considered relevant factors in her consideration of the CSR and that document adequately addressed matters which should have been raised.

[119] The Intervener says that the Act does not contemplate a duty on the RA to duplicate efforts already undertaken in relation to cumulative environmental effects and that to require such duplication would unreasonably strain the requirements of section 16 of the Act.

[120] Furthermore, the Intervener argues that the decision ultimately made by the MOE pursuant to section 23 of the Act was one involving the exercise of judgment based on a weighing of scientific, economic, political and social considerations. This exercise of ministerial judgment is also invoked in her assessment of the effectiveness of proposed mitigation measures.

[121] The Intervener argues that this is implicit from the wording of section 23 which contemplates that the Minister will assess the "implementation of any appropriate mitigation measures" in making her decision. On the basis of the decision in *Union of Nova Scotia Indians, supra*, the Intervener submits that the Minister was at liberty to conclude that the Project, after taking into account the implementation of appropriate mitigation measures, would not result in significant adverse environmental effects.

[122] The Intervener submits that it was entirely appropriate that the imposition of mitigation measures include and incorporate conditions imposed by Alberta in relation to the Project. The Intervener here relies on *Cantwell* v. *Canada, supra.*

[123] Finally, the Intervener argues that reliance by the MOE on the RSDS is sensible and reasonable, and recognizes political and legal realities that both the federal government and the province of Alberta share a regulatory role in relation to the Project. However, the Intervener points out that the dominant responsibility and regulatory role lie with the province of Alberta who, in contrast to the limited role by the federal government, plays a continuing role in the monitoring of the Project.

[124] In conclusion, the Intervener says that the decision of the Minister is reasonable based on the evidence and the law, and should stand.

ANALYSIS

[125] The Applicants' challenge the decision of the MOE on the grounds that it was made contrary to the CEAA because it is based upon a CSR which does not meet the statutory requirements. They say the MOE should have referred the Project for further review pursuant to section 23(b), rather than referring it back to DFO pursuant to section 23(a). Alternatively, they argue that it is unreasonable because the evidence does not support the conclusion of the MOE that the Project is unlikely to cause significant adverse environmental effects.

[126] The challenge to the issuance of authorizations by the MFO is based on the deficient CSR which was not prepared in accordance with the CEAA. As well, the Applicants say that the decision of the MFO to issue these authorizations is premised upon the implementation of mitigation measures by parties other than his Department of Fisheries and Oceans and accordingly, represents prohibited delegation of a statutory duty contrary pursuant to section 17 of the CEAA and is unreasonable.

[127] The CEAA is the primary statute to be considered in relation to these applications. Certain definitions in section 2 are relevant as follows:

"comprehensive study" means an environmental assessment that is conducted pursuant to section 21 and that includes a consideration of the factors required to be considered under subsections 16(1) and (2);

"comprehensive study list" means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(d);

"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;

"mitigation" means, in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;

"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);

_ « étude approfondie_ » Évaluation environnementale d'un projet effectuée aux termes de l'article 21 et qui comprend la prise en compte des éléments énumérés aux paragraphes 16(1) et (2).

« _liste d'étude approfondie_ » Liste des projets ou catégories de projets désignés par règlement aux termes de l'alinéa 59d).

« _effets environnementaux_ » Tant les changements que la réalisation d'un projet risque de causer à l'environnement que les changements susceptibles d'être apportés au projet du fait de l'environnement, que ce soit au Canada ou à l'étranger; sont comprises parmi les changements à l'environnement les répercussions de ceux-ci soit en matière sanitaire et socio-économique, soit sur l'usage courant de terres et de ressources à des fins traditionnelles par les autochtones, soit sur une construction, un emplacement ou une chose d'importance en matière historique, archéologique, paléontologique ou architecturale.

« _mesures d'atténuation_ » Maîtrise efficace, réduction importante ou élimination des effets environnementaux négatifs d'un projet, éventuellement assortie d'actions de rétablissement notamment par remplacement ou restauration; y est assimilée l'indemnisation des dommages causés.

« _projet_ » Réalisation -- y compris l'exploitation, la modification, la désaffectation ou la fermeture -- d'un ouvrage ou proposition d'exercice d'une activité concrète, non liée à un ouvrage, désignée par règlement ou faisant partie d'une catégorie d'activités concrètes désignée par règlement aux termes de l'alinéa 59b).

« _autorité responsable_ » L'autorité fédérale qui, en conformité avec le paragraphe 11(1), est tenue de veiller à ce qu'il soit procédé à l'évaluation environnementale d'un projet.

"responsible authority", in relation to a proj ect, means a federal authority that is requir ed pursuant to subsection 11(1) to ensure th at an environmental assessment of the proje ct is conducted;

[128] As well, the following provisions are relevant:

4. The purposes of this Act are(a) to ensure that t he environmental effects of projects receive caref ul consideration before responsible authorities ta ke actions in connection with them;

(b) to encourage responsible authorities to take ac tions that promote sustainable development and t hereby achieve or maintain a healthy environmen t and a healthy economy;

(b.1) to ensure that responsible authorities carry o ut their responsibilities in a coordinated manner with a view to eliminating unnecessary duplicatio n in the environmental assessment process;

(c) to ensure that projects that are to be carried ou t in Canada or on federal lands do not cause signi ficant adverse environmental effects outside the j urisdictions in which the projects are carried out; and

(d) to ensure that there be an opportunity for publ ic participation in the environmental assessment process.

12.(1) Where there are two or more responsible a uthorities in relation to a project, they shall toget her determine the manner in which to perform the ir duties and functions under this Act and the reg ulations.

(2) In the case of a disagreement, the Agency ma y advise responsible authorities and other federal authorities with respect to their powers, duties an d functions under this Act and the manner in whi ch those powers, duties and functions may be det ermined and allocated among them.

4. La présente loi a pour objet_:

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

b) d'inciter ces autorités à favoriser un dévelo ppement durable propice à la salubrité de l'en vironnement et à la santé de l'économie;

b.1) de faire en sorte que les autorités respons ables s'acquittent de leurs obligations afin d'é viter tout double emploi dans le processus d'é valuation environnementale;

c) de faire en sorte que les éventuels effets en vironnementaux négatifs importants des proje ts devant être réalisés dans les limites du Can ada ou du territoire domanial ne débordent pa s ces limites;

d) de veiller à ce que le public ait la possibilit é de participer au processus d'évaluation envir onnementale.

12. (1) Dans le cas où plusieurs autorités resp onsables sont chargées d'un même projet, elle s décident conjointement de la façon de rempl ir les obligations qui leur incombent aux term es de la présente loi et des règlements.

(2) En cas de différend, l'Agence peut conseil ler les autorités responsables et les autres auto rités fédérales sur leurs obligations commune s et sur la façon de les remplir conjointement.

(3) Every federal authority that is in possession o f specialist or expert information or knowledge w ith respect to a project shall, on request, make av ailable that information or knowledge to the resp onsible authority or to a mediator or a review pan el.

(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 asse ssment of the environmental effects of the project or any part thereof, the responsible authority may cooperate with that jurisdiction respecting the en vironmental 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 pursua nt to the legislation of a province and that has po wers, duties or functions in relation to an assessm ent of the environmental effects of a project;

(c) a body that is established pursuant to a land cl aims agreement referred to in section 35 of the C onstitution Act, 1982 and that has powers, duties or functions in relation to an assessment of the en vironmental effects of a project; or

(d) a governing body that is established pursuant to legislation that relates to the self-government o f Indians

and that has powers, duties or functions in relatio n to an assessment of the environmental effects o f a project.

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

(a) the environmental effects of the project, inclu ding the environmental effects of malfunctions or accidents that may occur in connection with the p roject and any cumulative environmental effects t hat are likely to result from the project in combin ation with other projects or activities that have be en or will be carried out;

(3) Il incombe à l'autorité fédérale pourvue de s connaissances voulues touchant un projet de fournir, sur demande, les renseignements pert inents à l'autorité responsable ou à un médiate ur ou à une commission.

(4) L'autorité responsable peut, dans le cadre de l'examen préalable ou de l'étude approfond ie d'un projet, coopérer, pour l'évaluation envi ronnementale de celui-ci, avec l'instance qui a la responsabilité ou le pouvoir d'effectuer l'év aluation des effets environnementaux de tout ou partie d'un projet.

(5) Dans le présent article, « _instance_ » s'en tend_:

a) du gouvernement d'une province;

b) d'un organisme établi sous le régime d'une loi provinciale ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet;

c) d'un organisme, constitué aux termes d'un a ccord sur des revendications territoriales visé à l'article 35 de la Loi constitutionnelle de 19 82, ayant des attributions relatives à l'évaluati on des effets environnementaux d'un projet;

d) d'un organisme dirigeant, constitué par une loi relative à l'autonomie gouvernementale de s Indiens, ayant des attributions relatives à l'é valuation des effets environnementaux d'un pr ojet.

16. (1) L'examen préalable, l'étude approfond ie, la médiation ou l'examen par une commiss ion d'un projet portent notamment sur les élé ments suivants_:

a) les effets environnementaux du projet, y co mpris ceux causés par les accidents ou défaill ances pouvant en résulter, et les effets cumula tifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres p rojets ou activités, est susceptible de causer à l'environnement;

b) l'importance des effets visés à l'alinéa a);

(b) the significance of the effects referred to in pa ragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economicall y feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, co mprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible aut hority or, except in the case of a screening, the M inister after consulting with the responsible autho rity, may require to be considered.

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

(a) the purpose of the project;

(b) alternative means of carrying out the project t hat are technically and economically feasible and the environmental effects of any such alternative means;

(c) the need for, and the requirements of, any foll ow-up program in respect of the project; and

(d) the capacity of renewable resources that are li kely to be significantly affected by the project to meet the needs of the present and those of the fut ure.

(3) The scope of the factors to be taken into consi deration 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 r eview panel, by the Minister, after consulting the responsible authority, When fixing the terms of re ference of the mediation or review panel.

(4) An environmental assessment of a project is n ot required to include a consideration of the envir

c) les observations du public à cet égard, reçu es conformément à la présente loi et aux règle ments;

d) les mesures d'atténuation réalisables, sur le s plans technique et économique, des effets e nvironnementaux importants du projet;

e) tout autre élément utile à l'examen préalabl e, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechang e, -- dont l'autorité responsable ou, sauf dans l e cas d'un examen préalable, le ministre, aprè s consultation de celle-ci, peut exiger la prise en compte.

(2) L'étude approfondie d'un projet et l'évalua tion environnementale qui fait l'objet d'une m édiation ou d'un examen par une commission portent également sur les éléments suivants_:

a) les raisons d'être du projet;

b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

c) la nécessité d'un programme de suivi du pr ojet, ainsi que ses modalités;

d) la capacité des ressources renouvelables, ri squant d'être touchées de façon importante pa r le projet, de répondre aux besoins du présent et à ceux des générations futures.

(3) L'évaluation de la portée des éléments vis és aux alinéas (1)a), b) et d) et (2)b), c) et d) i ncombe_:

a) à l'autorité responsable;

b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mand at du médiateur ou de la commission d'exame n.

(4) L'évaluation environnementale d'un projet n'a pas à porter sur les effets environnementa ux que sa réalisation peut entraîner en réactio n à des situations de crise nationale pour lesq

onmental effects that could result from carrying o ut the project in response to a national emergency for which special temporary measures are taken u nder the Emergencies Act.

17. (1) A responsible authority may delegate to a ny person, body or jurisdiction within the meanin g of subsection 12(5) any part of the screening or comprehensive study of a project or the preparati on of the screening report or comprehensive stud y 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 acti on pursuant to subsection 20(1) or 37(1).

(2) For greater certainty, a responsible authority s hall not take a course of action pursuant to subsec tion 20(1) or 37(1) unless it is satisfied that any d uty or function delegated pursuant to subsection (1) has been carried out in accordance with this A ct and the regulations.

23. The Minister shall take one of the following c ourses of action in respect of a project after takin g into consideration the comprehensive study rep ort and any comments filed pursuant to subsectio n 22(2):

(a) subject to subparagraph (b)(iii), where, taking into account the implementation of any appropria te mitigation measures,

(i) the project is not likely to cause significant ad verse environmental effects, or

(ii) the project is likely to cause significant adver se environmental effects that cannot be justified i n the circumstances, the Minister shall refer the p roject back to the responsible authority for action to be taken under section 37; or

(b) where,

(i) it is uncertain whether the project, taking into account the implementation of any appropriate m itigation measures, is likely to cause significant a dverse environmental effects,

(ii) the project, taking into account the implement ation of any appropriate mitigation measures, is li kely to cause significant adverse environmental e ffects and subparagraph (a)(ii) does not apply, or

uelles des mesures d'intervention sont prises a ux termes de la Loi sur les mesures d'urgence.

17. (1) L'autorité responsable d'un projet peut déléguer à un organisme, une personne ou un e instance, au sens du paragraphe 12(5), l'exé cution de l'examen préalable ou de l'étude app rofondie, ainsi que les rapports correspondant s, et la conception et la mise en oeuvre d'un p rogramme de suivi, à l'exclusion de toute pris e de décision aux termes du paragraphe 20(1) ou 37(1).

(2) Il est entendu que l'autorité responsable q ui a délégué l'exécution de l'examen ou de l'ét ude ainsi que l'établissement des rapports en vertu du paragraphe (1) ne peut prendre une d écision aux termes du paragraphe 20(1) ou 37 (1) que si elle est convaincue que les attributi ons déléguées ont été exercées conformément à la présente loi et à ses règlements.

23. Après avoir pris en compte le rapport d'ét ude approfondie et les observations qui ont ét é présentées en vertu du paragraphe 22(2), le ministre_:

a) renvoie le projet à l'autorité responsable po ur une décision aux termes de l'article 37, si s ous réserve du sous-alinéa b)(iii) et compte te nu de l'application des mesures d'atténuation i ndiquées, la réalisation du projet, selon le cas _:

(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) est susceptible d'entraîner des effets envir onnementaux négatifs importants qui ne peuv ent être justifiés dans les circonstances;

b) fait procéder à une médiation ou à un exam en par une commission conformément à l'arti cle 29 dans chacun des cas suivants_:

(i) il n'est pas clair, compte tenu de l'applicati on des mesures d'atténuation indiquées, que l e projet soit susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) que la réalisation du projet, compte tenu d e l'application des mesures d'atténuation indiq

(iii) public concerns warrant a reference to a mediator or a review panel,

the Minister shall refer the project to a mediator or a review panel in accordance with section 29.

37. (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23(a), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or

(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part and shall ensure that those mitigation measures are implemented; or

(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.

(1.1) Where a report is submitted by a mediator or review panel,

(a) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

(b) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarif

uées, est susceptible d'entraîner des effets environnementaux négatifs importants et que le sous-alinéa a)(ii) ne s'applique pas,

(iii) les préoccupations du public le justifient.

37. (1) Sous réserve du paragraphe (1.1), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou si le ministre, à la suite du rapport d'étude approfondie, lui demande de prendre une décision aux termes de l'alinéa 23a), prend l'une des décisions suivantes_:

a) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circonstances, exercer ses attributions afin de permettre la mise en oeuvre totale ou partielle du projet et veiller à l'application de ces mesures d'atténuation;

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

(1.1) Une fois pris en compte le rapport du médiateur ou de la commission, l'autorité responsable est tenue d'y donner suite avec l'agrément du gouverneur en conseil, qui peut demander des précisions sur l'une ou l'autre de ses conclusions; l'autorité responsable prend alors la décision visée au titre du paragraphe (1)conformément à l'agrément.

(2) L'autorité responsable qui prend la décision visée à l'alinéa (1)a) veille, malgré toute autre loi fédérale, lors de l'exercice des attributions qui lui sont conférées sous le régime de cette loi ou de ses règlements ou selon les autres modalités qu'elle estime indiquées, à l'application des mesures d'atténuation visées à cet alinéa.

y any of the recommendations set out in the repor t; and

(c) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council refe rred to in paragraph (a).

(2) Where a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, notwithstanding any other Act of Parliament, in t he exercise of its powers or the performance of it s duties or functions under that other Act or any r egulation made thereunder or in any other manne r that the responsible authority considers necessar y, ensure that any mitigation measures referred to in that paragraph in respect of the project are imp lemented.

(3) Where the responsible authority takes a cours e of action referred to in paragraph (1)(b) in relati on to a project,

(a) the responsible authority shall file a notice of that course of action in the public registry establis hed in respect of the project pursuant to section 5 5; and

(b) notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made thereunder shall be exercised or performed that would permit that project to be carried out in whole or in part.

38. (1) Where a responsible authority takes a cou rse of action pursuant to paragraph 20(1)(a) or 37 (1)(a), it shall, in accordance with any regulations made for that purpose, design any follow-up prog ram that it considers appropriate for the project a nd arrange for the implementation of that progra m.

(3) L'autorité responsable qui prend la décisio n visée à l'alinéa (1)b) à l'égard d'un projet fai t consigner un avis de sa décision au registre public tenu aux termes de l'article 55 pour le projet, et, malgré toute autre disposition d'une loi fédérale, aucune attribution conférée sous le régime de cette loi ou de ses règlements ne peut être exercée de façon qui pourrait permet tre la mise en oeuvre du projet en tout ou en p artie.

38. (1) L'autorité responsable qui décide de la mise en oeuvre conformément aux alinéas 20 (1)a) ou 37(1)a) élabore, conformément aux r èglements pris à cette fin, tout programme de suivi qu'elle estime indiqué et veille à son app lication.

[129] As noted at the outset, the Applicants are public interest groups who seek standing to bring these applications. The arguments raised by Suncor and adopted by the Respondent Ministers have been outlined above. The Applicants, generally, take the position that they meet all the criteria of the tests set out by the Supreme Court of Canada in *Canadian Council of Churches, supra* and should be granted standing in this matter.

[130] The Supreme Court of Canada, in *Canadian Council of Churches* v. *Canada, supra*, set out a three part test for the award of public interest standing. The test provides that an applicant must

establish:

(a) there is a serious issue raised;

(b) the applicant has a genuine issue in the matter; and

(c) there is no other reasonable and effective way to bring the matter before the Court.

[131] The Respondents have focused on the involvement of ERC and TW as members of OSEC in the proceedings before the AEUB and the execution of an agreement by OSEC which indicated that it had no objection to the Project proceeding in light of the Memorandum of Understanding signed with Suncor. As well, the Respondents rely on the submission that, through OSEC, the Applicants ERC and TW raised all objections before the AEUB which they are now raising in the present application.

[132] I acknowledge that there is an apparent overlap between these arguments submitted by the Applicants in the present proceedings and those raised before the AEUB.

[133] The Respondents do not seriously argue the lack of a serious issue, and their attention is focused on the remaining two parts of the test set out by the Supreme Court of Canada in *Canadian Council of Churches, supra*. Notwithstanding the participation of ERC and TW before the AEUB, through their participation in OSEC, I am satisified that the Applicants could not fully challenge the legality of the decisions of the MOE and the MFO in the hearings before the AEUB. That Board was primarily concerned with the application of provincial legislation to the Project, not with the manner in which the federal ministers discharged their duties. That limitation is unchanged by the participation of representatives of the federal departments of Environment and Fisheries and Oceans in the hearings before the AEUB.

[134] I am satisfied that the arguments raised by Suncor in relation to PARC are insufficient to deny public interest standing to this Applicant. Although PARC was not involved in the proceedings before the AEUB, as noted above, that was not the best forum to challenge a decision made by the federal authorities, that is the Respondent Ministers.

[135] In my opinion, the Applicants have satisfied the second and third requirements of the test for standing. They are challenging the legality of the decisions made by the Respondent Ministers and this is the appropriate forum for such challenge.

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

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

[137] Further in that decision Justice Strayer said at page 48:

...I agree with McKay J., that the Court is entitled on judicial review to see if the Minister acted in good faith and took into account relevant considerations. Unless the Court is satisfied that the decision was made on completely irrelevant factors it cannot quash a decision. It is not for the Court to substitute its own assessment of the weight and nature of public concern and determine that a public review is or is not "desirable".

[138] The real issue here is the decision made by the MOE made pursuant to section 23 of the CEAA. To the extent that that decision is based upon the interpretation of the legislation, it is reviewable on a standard for correctness. See *Friends of the West Country Association, supra*, (T.D.) at page 172 where the court said:

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.

[139] The disposition of these applications requires consideration of both standards of review.

[140] I first turn to the argument raised by the Applicants concerning the alleged error in law committed by the MOE in her interpretation of the CEAA. The Applicants base this argument upon an alleged misinterpretation of section 4 of the CEAA. In my opinion, this argument cannot succeed.

[141] Section 4 imposes no duties on the MOE nor does it state how she is to discharge her duties under the Act. It is a statement of general principle. The MOE does not breach this section and the submissions alleging an error of law in relation to section 4 are without foundation.

[142] It is argued that the MOE erred in law by accepting the CSR when it failed to meet the statutory requirements. Again, assessment of the CSR requires consideration of both the issue of statutory interpretation and the exercise of discretion. The CSR is to be conducted in accordance with section 16 of the CEAA. The Federal Court of Appeal in *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans) et al, supra*, stated that section 16(1) imposed mandatory obligations upon an RA in the preparation of a CSR. Justice Rothstein commented on this point as follows at page 280:

Again, it is necessary to focus on the question of statutory interpretation. Subsection 16(1) is indeed mandatory. It requires consideration of the factors enumerated in paragraphs 16(1)(a) to (f). In particular, paragraph 16(1)(a) states that the environmental assessment shall consider the environmental effects of the project as scoped and "any cumulative environmental effects that are likely to result from the [scoped] project in combination with other projects or activities that have been or will be carried out." However, the scope of the factors to be taken into consideration pursuant to paragraph 16(1)(a) is to be determined by the responsible authority under subsection 16(3). This scoping is a discretionary decision on the part of the responsible authority.

The process involves two aspects. The first is for the responsible authority to consider the applicability of all of the factors in paragraphs 16(1)(a) to (f) to the project being assessed. The use of the word "shall" in subsection 16(1) indicates that some consideration of each factor is mandatory.

Under paragraph 16(1)(a), the relevant factor is the environmental effect of the project which includes, inter alia, cumulative environmental effects. This requires the responsible authority to consider environmental effects that are likely to result from the projects scoped under subsection 15(1), in combination with other projects or activities that have been or will be carried out.

[143] It is accepted that the scoping of the project is a matter to be determined in the discretion of the RA; see *Friends of the West Country Association, supra*, at page 28. The scoping is the first step in the assessment; the second step is to consider the cumulative environmental effects, including any mitigation measures and to make a determination about the significance of the environmental effects.

[144] It seems reasonable that the decision of the MOE to act under either section 23(a) or (b) is also a discretionary decision within her authority. Insofar as the Applicants' challenge that decision, I dismiss the argument. As long as the MOE has determined that the CSR meets the statutory requirements, she is at liberty to exercise her discretion under section 23.

[145] The assessment of significance in relation to environmental effects is a particular process involving the judgment and skill of those employees of the RA engaged in carrying out that assessment. As such, it too is a discretionary decision. In *Alberta Wilderness Association v. Express Pipelines, supra*, Mr. Justice Hugessen, speaking for the court, said as follows at page 181.

...No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have as this one in fact did, a high degree of expertise and environmental matters. In addition, the principle criteria 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.

[146] In its decision in *Inverhuron, supra*, the Federal Court of Appeal stated that the standard of review applicable to discretionary decisions of the MOE is reasonableness *simpliciter*. To the extent that the present decision involves the exercise of discretion by the MOE, it is reviewable on that standard. If the challenge in these applications was restricted to the assessment of the scope of the Project or the significance of the cumulative environmental effects, the applications would be disposed of upon the basis of reasonableness *simpliciter*.

[147] However, there are other issues to be addressed. In particular, the Applicants argue that the CSR does not comply with section 16 of the CEAA because the significance of environmental effects was assessed upon the basis of the Alberta regulatory process and regulatory initiatives, particularly the RSDS, which were relied on by the authors of the CSR to reduce significant adverse environmental effects to the level of insignificant.

[148] The certified record in these proceedings contains a decision by the MOE, in an abbreviated form. The text of the decision disclosed on the record does not provide her reasons for that decision because the MOE had invoked Cabinet confidence pursuant to the *Canada Evidence Act, supra*. No challenge was taken as to the sufficiency of the certificate of the Clerk of the Privy Council filed in relation to that invocation of privilege and no submissions were made by any party as to the effect of the claim for Cabinet confidence. In the result, the specific reasons for the decision of the MOE are not apparent on the record.

[149] The only basis for the decision of the MOE which is disclosed is that she reviewed and considered the CSR and the public comments. The conclusions of the CSR specifically refer to the Alberta process and the RSDS as constituting mitigation measures.

[150] All parties proceeded on the basis that the MOE did take the RSDS into account in making her decision and did accept it as constituting mitigation measures. Since the CEAA requires the MOE to take the CSR into account and since section 16 of that act requires the RA to consider mitigation measures in preparing the CSR, the question becomes whether reliance by the MOE upon the RSDS is a correct interpretation of the requirements of section 16 or alternatively, a reasonable decision made in the exercise of her discretion.

[151] I have earlier referred to the definition of "mitigation" provided in the CEAA. Likewise, I have referred to the decision of the Federal Court of Appeal in *Inverhuron, supra*, where the court confirmed that it is improper for a reviewing court to question the scientific information upon which the MOE relies in making a decision pursuant to section 23. I refer to paragraph 48 of that decision where the court said:

In my opinion, it is not for this Court to delve into the scientific complexities associated with determining the validity of the appellant's factual assertions. To do so would be contrary to the long-accepted principle discussed by my colleague Strayer J. in *Vancouver Island Peace Society*:

It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions ... Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section 18 of the Federal Court Act.

[152] However, the concern in the present case is not with the choice of science but whether the MOE correctly interpreted her duties under the CEAA.

[153] The public comments, listed in Appendix B, received after circulation of the CSR express many concerns and reservations about the significance of environmental effects, including cumulative environmental effects. Particularly, I note that one of the submissions before the MOE was a letter from Environment Canada, environmental protection and prairie and northern regions, dated December 17, 1998. That letter expressed the following opinion:

...As stated in our reply to your letter of December 11, 1998, Environment Canada is supportive of the Alberta Strategy to address the cumulative effects of the regional development, as proposed. **We are concerned, however, that the Minister may lack the flexibility within the current legislation to consider the Alberta Strategy as a mechanism to respond to the uncertainties associated with cumulative effects. The briefing package will have to make it clear that should Alberta fail to deliver on the strategy, the Minister does not have any legislative authority to deal with that eventuality.** She can only apply acquired knowledge to future projects. [emphasis added]

Respondent Ministers' Application Record, T-274-99, page 672

[154] In my opinion, this opinion highlights the problem with reliance by the MOE upon RSDS, as a mitigation measure, when making her decision. She has no legislative control over that process in the event of its abandonment. In my view, reliance by the MOE upon provincial regulatory

powers and initiatives, including the RSDS and industry based initiatives including the CEEMI, which are beyond enforcement or control by the federal authorities, amounts to a misinterpretation of her duty to consider mitigation factors when she reviewed the CSR. She erred in her interpretation of the Act.

[155] However, if I am in error in this conclusion, I will also consider her decision as an exercise of ministerial discretion. Viewed from that perspective, the question is whether the decision is reasonable.

[156] I am not satisfied that reliance upon processes over which she has no control constitutes a reasonable exercise of authority or discretion.

[157] Reliance by the MOE on the RSDS as a mitigation measure cannot be characterized as a discretionary decision over the choice of science to be relied on in the preparation of the CSR. While the record contains references to RSDS as being an example of the science of adaptive management, the fact remains that this is a process over which the MOE has no control and in which she participates only as a voluntary stakeholder, together with representatives from other federal departments. Although section 12 of the CEAA specifically recognizes reliance by federal authorities upon actions taken in the provincial sphere for some purposes, there is nothing in that section or elsewhere which allows the MOE or any federal RA to discharge their respective obligations by voluntary participation in provincial regulatory processes and initiatives.

[158] I turn now to the decision of the MFO in issuing the authorizations dated August 17, 1999 and December 21, 1999. In my opinion, the MFO compounded the error of law committed by the MOE when he authorized the issuance of these authorizations. Section 17 of the CEAA imposes a non-delegable duty upon the RA to his taking a "course of action pursuant to section 20(1) or 37(1). Section 37(1) allows the RA to make a decision once the MOE has referred a project back to it, pursuant to section 23(a). Section 37(1)(a) further provides that the RA is to take into account the implementation of mitigation measures when exercising any power to allow a project to proceed. In this case, I interpret this to encompass the issuance of the authorizations by the RA. In my opinion, the combined effect of these sections is that the RA has a non-delegable statutory duty to ensure the implementation of mitigation measures.

[159] There is nothing on the record to show that he did so. On the contrary, the record shows that he relied upon the mitigation measures proposed and in place for Alberta. In my opinion, this reliance was misplaced and the MFO acted unreasonably in issuing the authorizations.

[160] Finally, I turn to the question of relief. The Respondent Ministers have argued that if the Applicants are successful, then the relief sought should not necessarily be granted. They say that the relief sought is discretionary and in any event, there is little utility in granting the relief sought.

[161] In this case, counsel for Suncor advised during the hearing that the work authorized by the two authorizations had been carried out by the time these applications were heard. No affidavit in that regard was filed. It seems that a similar situation occurred in the case of *Friends of the Old Man River, supra*. In its disposition of the matter the Supreme Court of Canada upheld the decision of the Federal Court of Appeal, allowing the application for judicial review, but withheld an order of *mandamus* since the work in issue had been completed.

[162] That appears to be an appropriate resolution in the present case. It would be pointless to make an order in the nature of prohibition. The Applicants did not seek injunctive relief in relation to these applications. This omission is consistent with the position taken by ERC and TW, through OSCC before the AEUB, that it was not opposed to the Project, and is equally consistent with the challenge by the Applicants to the legality of the decisions in issue.

[163] I see no benefit in making an order to quash the decision of the MOE since no useful purpose would be served by doing so. However, I am prepared to issue a declaration that her decision was wrong in law, in view of my findings that she misinterpreted the provisions of the CEAA when she accepted the CSR and its recommendations concerning mitigation measures.

[164] I take a similar view of the relief sought in relation to the MFO. There is no benefit to quash the authorizations since the work authorized has been carried out. I am prepared to make a declaration that his decisions also were unreasonable and if there was any purpose in doing so, should be set aside.

[165] I also declare that should the need arise, the Respondent Ministers should take steps to adhere to their duties as provided in the CEAA.

[166] The final issue remaining is costs. In light of my disposition of the applications and noting the choice of the Applicants not to pursue injunctive relief in relation to these matters, costs are reserved for further submissions by the parties.

[167] The applications for judicial review are allowed and the question of costs is reserved.

"E. Heneghan"

J.F.C.C.

APPENDIX A

COMPREHENSIVE STUDY REVIEW

Executive Summary

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APPENDIX B

CERTIFIED DOCUMENTS OF THE RESPONDENTS, MINISTER OF ENVIRONMENT AND MINISTER OF FISHERIES AND OCEANS PRODUCED PURSUANT TO RULE 317/318

1 Decision of the Minister of Environment - Letter dated January 20, 1999 from Christine Stewart, Minister of the Environment to David Anderson, P.C., M.P., Minister of Fisheries and Oceans

2 Memorandum to Minister of Environment dated January 19, 1999 from Sid Gershberg, President of Canadian Environmental Assessment Agency, re. Comprehensive Study Report Suncor Millennium Project. Attachments to Memorandum to Minister of Environment - Suncor Project Millennium Background. Comprehensive Study Report Suncor Energy Inc. Project Millennium, October 1998

3 Letter dated November 4, 1998 from Wayne Wouters, Deputy Minister of Fisheries and Oceans to Mr. Sid Gershberg, President, Canadian Environmental Assessment Agency

4 Letter dated November 5, 1998 from Suncor Energy Inc. to Honourable Christine Stewart, Minister of Environment

5 Letter dated November 6, 1998 from Honourable David Anderson, Minister of Fisheries and Oceans to Honourable Christine Stewart, Minister of Environment

6 Letter dated December 10, 1998 from John Burcombe of Mouvement Au Courant to Bruce Young at Canadian Environmental Assessment Agency

7 Faxed letter dated December 10, 1998 from Priscilla Kennedy at Parlee McLaws on behalf of Anzac Metis Local #334 to Suncor Energy Inc. and Canadian Environmental Assessment Agency

8 Letter dated December 10, 1998 from Pembina Institute on behalf of Oilsands Environmental Coalition to Bruce Young, Canadian Environmental Assessment Agency and attachment Comments by Oilsands Environmental Coalition on the Comprehensive Study Report dated December 9, 1998

9 December 11, 1998 Press Release from Pembina Institute

10 Letter dated December 14, 1998 from John Burcombe of Mouvement Au Courant to Bruce Young at Canadian Environmental Assessment Agency

11 Fax dated December 14, 1998 from Marion Houston, Alberta Environmental Protection to Bruce Young, Canadian Environmental Assessment Agency attaching excerpt from

Supplemental Information Response

12 Letter dated December 17, 1998 from Glenn Hamilton, Manager Alberta Division, Environmental Protection Branch, Environment Canada to Bruce Young, Canadian Environmental Assessment Agency

13 Letter dated December 17, 1998 from Tim Hibbard, Director, Departmental Affairs Branch, Environmental Protection to Bruce Young, Canadian Environmental Assessment Agency

14 Letter dated December 18, 1998 from Fred Hnytka, Department of Fisheries and Oceans to Bruce Young, Canadian Environmental Assessment Agency

15 Letter dated December 20, 1998 from Prairie Acid Rain Coalition to Honourable Christine Stewart, Minister of Environment

16 Letter dated December 21, 1998 from Greenest City to Honourable David Anderson, Minister of Fisheries and Oceans

17 Letter dated December 21, 1998 from David Suzuki Foundation to Honourable David Anderson, Minister of Fisheries and Oceans

18 Letter dated January 7, 1999 from West Coast Environmental Law Association to Honourable Christine Stewart, Minister of Environment and Honourable David Anderson, Minister of Fisheries and Oceans

19 Letter dated January 7, 1999 from Pollution Probe to Honourable Christine Stewart, Minister of Environment

20 Letter dated January 8, 1999 from Saskatchewan Environmental Society to Honourable Christine Stewart, Minister of Environment and Honourable David Anderson, Minister of Fisheries and Oceans

21 Letter dated January 10, 1999 from Friends of the Athabasca Environmental Association to Honourable Christine Stewart, Minister of Environment and Honourable David Anderson, Minister of Fisheries and Oceans

22 Letter dated January 14, 1999 from Oil Sands Environmental Coalition to Department of Fisheries and Oceans and Canadian Environmental Assessment Agency attaching January 11, 1999 letter and bi-lateral agreement between Suncor and OSEC

23 Letter dated January 15, 1999 from Jim Nichols Deputy Minister of Alberta Environmental Protection to Mr. Sid Gershberg, President of Canadian Environmental Assessment Agency with attachment, entitled Alberta Environmental Protection Terms of Reference