Date: 20070925

Docket: T-954-06

Citation: 2007 FC 955

Ottawa, Ontario, September 25, 2007

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MININGWATCH CANADA

Applicant

and

MINISTER OF FISHERIES AND OCEANS,
MINISTER OF NATURAL RESOURCES,
ATTORNEY GENERAL OF CANADA,
RED CHRIS DEVELOPMENT COMPANY LTD.
and BCMETALS CORPORATION

Respondents

REASONS FOR ORDER AND ORDER

TABLE OF CONTENTS

1) *The Applicant*

2) *The Respondents*

B. LEGISLATIVE SCHEME

1) *Types of environmental assessment (tracks)*

a) Screening

b) Comprehensive study

c) Review panel or mediator

2) *The nature of scoping*

C. CASE LAW

1) *Bowen*

2) *Manitoba's Future Forest Alliance*

3) *Friends of the West Country Assn.*

4) *Canadian Parks and Wilderness Society*

5) *TrueNorth*

a) Factual background

b) Judicial review application

c) Decision in first instance

d) Decision in appeal

D. COURSE OF ACTION DECISION REVIEWABLE

IX - CONCLUSION

REASONS FOR ORDER AND ORDER

I – INTRODUCTION

[1] Red Chris Development Company Ltd. (RCDC), a wholly-owned subsidiary of bcMetals Corporation (bcMetals), (collectively the Proponent), wishes to develop an open pit mining and milling operation for the production of copper and gold in the form of copper concentrates from deposits located in north-western British Columbia. This proposed mine development is known as the "Red Chris porphyry copper-gold mine project" (the Project).

[2] MiningWatch Canada (the Applicant) is a federally registered non-profit society. Functioning as a coalition of member organizations, the Applicant is principally interested in the environmental, social, economic, health and cultural effects of mining, in particular its effects on indigenous peoples.

[3] The Applicant challenges the legality of decisions or actions taken by the department of Fisheries and Oceans (DFO) and Natural Resources Canada (NRCan) in conducting the environmental assessment (EA) of the Project under the purported authority of various provisions of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 32, as amended (the CEAA).

[4] The minister of Fisheries and Oceans and the minister of Natural Resources are represented in this proceeding by the Attorney General of Canada (collectively the Crown). The Proponent and the Crown are respondents in this judicial review application (collectively the Respondents). The

Respondents support the decisions or actions taken by the DFO and NRCan (collectively the responsible authorities or the RAs).

[5] For the reasons below, I have decided to allow the present application. Current legislative and regulatory provisions mentioned in the present reasons for order are reproduced in Appendix "A".

II – THE PROJECT

[6] The "Red Chris property" is the sole asset of RCDC and consists of mineral claims that cover an area of approximately 110 square km surrounding the proposed mine site. It is located within the Tahltan Nation traditional territory, in a sparsely populated area which is about 18 km southeast of the village of Iskut, 80 km south of Dease Lake and 450 km north of Smithers.

[7] More particularly, the proposed mine is situated on a terrace located on the Togadin Plateau on the boundary of two regional watersheds: the Klappan and Iskut River. The Project site is divided by White Rock Canyon Creek flowing into Coyote Creek and the Iskut River to the northwest; Quarry Creek, flowing into the Klappan River to the northeast; and the Trail Creek System draining to the south through Kluea and Todagin Lakes and the Iskut River.

[8] The Project falls within the Togadin Resource Management Zone of the Cassiar Iskut-Stikine Land and Resource Management Plan (CIS-LRMP), which recognizes mineral exploration, mine development and mine access as appropriate activities.

[9] The Project is based on the mill production rate of 30 000 tonnes of ore per day for sale to the export market, over a projected mine life of 25 years. The mine site would be accessed by a new long access road which would intersect highway 37 on the south side by Coyote Creek. The 550 tonnes of concentrate produced per day at the mill would be transported to the deep-sea port of Stewart situated about 200 km to the south of the proposed development. The Project is expected to require 228 million in capital expenditures and would generate 250 direct full-time jobs.

[10] Apart from the Project, current or reasonable foreseeable projects and mining activities in this area include: the Galore Creek project, an open pit mine that would process up to 60,000 tonnes per day of ore and produce up to 2,000 tonnes per day of gold-copper concentrate; the existing Tom McKay Lake waste rock and tailings project, near the Eskay Creek mine; the current and proposed Kemess North and existing Kemess South projects; and the Mount Klappan project.

[11] The power requirements for the Project are estimated at 37 megawatts (mw). Currently, the nearest existing source of power is BC Hydro's substation located at Meziadin Junction, approximately 220 km south of the proposed mine site. RCDC proposes the construction of a new power line that would run parallel to the proposed new mine access road and link with the anticipated BC Hydro power line. RDCC has made a commitment not to begin construction until there is a commitment by the Province to build the power line.

[12] The proposed mining operation is a conventional shovel and truck open pit mine. Blast holes will be loaded with bulk explosives. Mine explosives would be stored in two separate areas close to the open pit. The explosives facilities would comprise a powder magazine, an emulsion tank with a

20,000 kg capacity, silos holding ammonium nitrate, and an explosives plant and garage (the explosives factory and magazine).

[13] It is expected that open pit mining would continue at a rate of 10.95 million tonnes (mt) of ore per year for 17 years, after which low-grade ore recovered from the stockpile would be processed for the remaining eight years. Plant design would be based on a standard porphyry copper flow sheet employing SAG and ball milling, flotation, regrinding, thickening and filtering to produce a concentrate for export with a moisture content of 8%. The Project would produce a total of 1.85 billion pounds of copper and 1,187,000 ounces of gold contained in concentrate.

[14] During the lifetime of the mine, the owner or operator would be depositing a deleterious substance (tailings) into a tailings impoundment area (TIA). The site proposed is in a Y-shaped valley approximately 3.5 km northeast of the Red Chris' deposit. Construction of three dams would be required at the south, north, and the northeast arms of the valley. The total catchment area for the tailings impoundment including diverted areas would be around 2700 ha. The total diverted area would be around 1100 ha.

[15] During operations, water from the TIA would be discharged into Quarry Creek and following closure, water would be discharged into the unnamed Creek below Northeast Dam. Flows in Quarry Creek would likely increase by a predicted 119%. In the post-closure period, both water quantity and quality within Quarry Creek are predicted to return to pre-development conditions, as discharges from the TIA would then be released around the Northeast Dam into Northeast Arm Creek. Flow changes in the creek system downstream of the Northeast Dam are expected to be

small during the mining operation but will increase substantially following closure due to the release of runoff water from the TIA through the Northeast Dam. In the post closure period, the tailings impoundment overflow through the Northeast Dam is expected to increase the new annual discharge by 157%.

[16] The proposed TIA would adversely affect some fish habitat, watercourses and aquatic resources. The two beaver dam colonies within the TIA site would be displaced from the TIA site during mine operations, as would mink, waterfowl and Western Toad, with the potential for their gradual return after reclamation of the site following mine closure. The water quality may also be affected by acid rock drainage and metal leaching (ARD/ML), a natural geologic event caused by the oxidation of acid rocks. Subsequent metal leaching and acidic runoff may reduce local water quality in the receiving environment if management of materials and treatment of runoff is not undertaken.

[17] All waste rock generated by the Project would be placed within the North waste rock dump by the operator of the mine. The North dump has been sited by RCDC so that all drainage from the dumpsite would gravity-flow into the TIA during the mine's operation and life. The TIA would operate under a surplus water balance requiring the discharge of water to the receiving environment. Over the operating life of the mine (years 1 through 18) the amount of excess water to be discharged in the environment has been estimated by RCDC to average 6 million m^3 per year (16,400 m^3 per day). In the post-closure period, the amount of water to be discharged to the receiving environment would be 13 million m^3 per year (35,600 m^3 per day). RCDC would treat or otherwise manage the excess-tailings impoundment water to be released to the receiving environment, if necessary.

During the mine's operation life, the excess water to be released from the proposed tailings impoundment would be discharged by pump and pipeline to the north of the impoundment into the upper reaches of Quarry Creek that drains toward the Klappan River.

III – REQUIREMENT OF AN ENVIRONMENTAL ASSESSMENT (EA)

A. DIVIDED AUTHORITY

[18] The contemplated mine and mill, as well as associated works and activities related to the Project, all fall under the heads of local works and undertakings, property and civil rights, and matters of a purely local nature, and are thus under the jurisdiction of the Province of British Columbia (sections 92(10), (13) and (16) of the *Constitution Act, 1867*, 30 and 31 Victoria, c.3 (U.K.), as amended (the Constitution Act, 1867)).

[19] However, the effect of the Supreme Court decision in *Friends of Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, is to confer on Parliament the power to provide for an environmental impact assessment in any matter within federal jurisdiction. This includes, among other matters, navigation (s. 91(10)), fisheries (s. 91(12)), federal public lands and Indian reserves (ss. 91(1A) and 91(24)), international and interprovincial rivers, interprovincial and international transportation and communication (s. 92(10)(a)), and the activities of industries within federal jurisdiction (s. 91, opening words and s. 92(10)(a), (b) and (c)).

[20] Indeed, in *Friends of Oldman River Society*, above, the dam on the Oldman River had an effect on navigable waters, fisheries and lands reserved for the Indians (there was an Indian reserve downstream from the dam site). These effects justified a wide-ranging environmental assessment

encompassing the impact of the dam on those three subject matters, as well as any other federal matters that turned out to be implicated. Parliament had the power to provide for an environmental assessment as an incident of any institution or activity that was otherwise within federal jurisdiction. Moreover, "the scope of the assessment is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility" [emphasis added]. On the other hand, the province also had authority to provide for environmental impact assessment of the project, both under provincial powers over natural resources and property and civil rights and also by virtue of its power to spend money.

[21] That being said, the criminal law power under section 91(27) of the Constitution Act, 1867 provides broad power to Parliament to prohibit activities that are harmful to the environment. This power has been used to uphold the *Canadian Environmental Protection Act*, R.S.C. 1985, c.16 (4th suppl.), which establishes a regulatory structure for the identification and control of toxic substances (*R. v. Hydro-Québec*, [1997] 3 S.C.R. 213).

B. PARTICULAR ASPECTS

1) *Protection of fish habitat*

[22] In the present case, the proposed mine development contemplates the construction of barriers and seepage dams, water supply and associated works, and of a tailings management facility as well as a water diversion system. This attracts Parliament's jurisdiction over water resources and fisheries. Indeed, the *Fisheries Act*, R.S.C. 1985, c.F-14, as amended (the Fisheries Act) deals with the protection of fisheries and fish habitat. The two primary sections of the Fisheries Act that deal with environmental protection are section 35, protecting fish habitat and paragraph

36(3), prohibiting the deposit of any “deleterious substance” in water frequented by fish unless the deposit is authorized by regulations made by the Governor in Council.

[23] Apart from the contemplated harmful alteration, disruption or destruction of fish habitat (HADD), which requires an authorization from the Minister of Fisheries and Oceans pursuant to subsection 35(2) of the Fisheries Act, once the mine and mill will be in operation, deleterious substances (tailings) are likely to be deposited in water frequented by fish. The metals will come from milling operations, and from the precipitation runoff and groundwater draining through the North waste dump and across and through the exposed rock and the open pit walls.

[24] Moreover, over time, a significant proportion of the waste rock in the North waste dump and in the exposed wall rock is expected to become acidic, generating increased concentrations of metal contaminants that will require treatment to produce an acceptable quality of effluent for release to receiving waters.

[25] The *Metal Mining Effluent Regulations*, SOR/2002-222, as amended (the MMER) applies in respect of mines that exceed the threshold of an effluent flow rate of 50 m^3 per day and deposit a “deleterious substance” in any water or place referred to in subsection 36(3) of the Fisheries Act (paragraph 2(1) of the MMER). The substances are set out in column 1 of Schedule 4 of the MMER and any acutely lethal effluent is prescribed as deleterious substances.

[26] Paragraph 1(1) of the MMER defines an “effluent” as “an effluent — mine water effluent, milling facility effluent, tailings impoundment area effluent, treatment pond effluent, treatment

facility effluent other than effluent from a sewage treatment facility, seepage and surface drainage — that contains a deleterious substance." Pursuant to section 4 of the MMER, the deposit of the deleterious substance in an effluent must not exceed certain levels of concentration and the deposit is conditional on the owner or operator complying with sections 6 to 27 of the MMER which prescribes effluent monitoring conditions. In the present case, RCDC recognizes that the MMER would apply and that monitoring will be necessary under the MMER if the Project is carried forward.

[27] In particular, section 6 of the MMER prohibits an owner or operator of a mine to combine an effluent with water or any other effluent for the purpose of diluting the effluent before it is deposited. However, the prohibition mentioned at section 6 of the MMER does not apply, and the owner or operator of a mine may deposit or permit the deposit of waste rock on an effluent that contains any concentration of deleterious substance into a TIA that is a water or place set out in schedule 2 of the MMER. Again, such authority to deposit will be conditional on the owner or operator complying with sections 7 to 28 of the MMER.

[28] In British Columbia, there are three TIAs currently mentioned in schedule 2 of the MMER: South Kemess Creek; Albino Lake and Tom MacKay Lake. Therefore, an amendment by the Governor in Council will be required to add the headwaters of Trail Creek as a TIA.

[29] Moreover, section 27.1 of the MMER (which came into force on October 3, 2006), obliges the owner or operator of the mine to prepare a "habitat compensation plan" for approval by the minister of Fisheries and Oceans. The purpose of a habitat compensation plan is to offset the loss of

fish habitat resulting from the deposit of a deleterious substance into the TIA. The basis of this requirement is DFO's "Policy for the Management of Fish Habitat" (1988). Key to this policy is the principle of "no net loss" with regard to works and undertakings. This policy has been applied to mining projects since 1986, and habitat compensation agreements have been negotiated for a number of mining projects.

2) *Air-borne contaminants and other environmental risks*

[30] In the case at bar, potential sources of air-borne contaminants from the Project include the construction and operation of the TIA and the explosives factory. Indeed, in its material submitted to the provincial and federal authorities, RCDC has identified air contaminants generated by construction equipment, drilling, blasting, loading, hauling and grading associated with construction of the tailings dams.

[31] Environmental effects pertaining to the explosives factory and magazine are general safety concerns, effluent management, waste handling, spill contingency and malfunction and accidents. The explosives factory also has associated exhaust gases and potential fugitive dust generated during construction by bulldozing, levelling, hammering, lifting and hauling equipment.

[32] Furthermore, licences will be required for the explosives factory and magazine contemplated in the Project. Under federal statutory law, the minister of Natural Resources may issue licences for factories and magazines under paragraph 7(1)(*a*) of the *Explosives Act*, R.S.C., 1985, c. E-17, as amended(the Explosives Act). The Explosives Regulatory Division (ERD) within NRCan also issues mechanical ammonium nitrate fuel oil (AN/FO) certificates, which are granted

to companies producing AN/FO with powered equipment to be discharged directly into a borehole at a specified location, mine or quarry owned by the company to which the certificate is issued.

3) *Endangered species*

[33] In 2002, Parliament adopted comprehensive legislation binding on Her Majesty in right of Canada or a province to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity; and to manage species of special concern to prevent them from becoming endangered or threatened: the *Species at Risk Act,* S.C. 2002, c. 29, as amended (SARA), sections 5 and 6.

[34] Pursuant to subsection 79(1) of SARA, every person who is required by or under an Act of Parliament to ensure than an EA of a project is conducted, must notify the minister of the Environment that a project is likely to affect a listed wildlife species or its initial habitat.

[35] In the case at bar, such notice was given to the minister of the Environment by DFO in February 2005. In this regard, the Western Toad, found within the proposed TIA site, is listed in Schedule 1 of SARA.

[36] Accordingly, pursuant to subsection 74(2), the RAs must ensure that measures are taken to avoid or lessen those effects and to monitor them. Further, these measures must be taken in a manner that is consistent with any applicable recovery strategy and actions plans.

C. TRIGGERS TO THE EA OF THE PROJECT

[37] In the case at bar, the Project is subject to the requirement of an EA under both the *Environmental Assessment Act*, S.B.C. 2002, c. 43, as amended (the Provincial Act) and the CEAA.

1) *Provincial triggers*

[38] For the purposes of the present judicial review application, it is not necessary to undergo a detailed analysis of all relevant provisions of the Provincial Act except to note that under section 8 of same, an environmental assessment certificate is required before a "reviewable project" can proceed.

[39] Indeed, RCDC's proposal to construct, operate, dismantle and abandon the Project constitutes a reviewable project, as contemplated by Part 3 of the *Reviewable Projects Regulation*, B.C. Reg. 370/02, as amended, because the proposed copper-gold mine is a new facility with a production capacity of greater than 75,000 tonnes per year of mineral ore.

[40] An environmental assessment certificate under the *Environmental Assessment Act*, S.B.C. 2002, c.43, as amended (the EAA); a permit under the *Mines Act*, R.S.B.C. 1996, c. 293, as amended (the MA); a special use permit under the *Forest Practices Code of British Columbia*, R.S.B.C. 1996, c. 159, as amended (the FPC); and a licence to cut under the *Forest Act*, R.S.B.C. 1996, c. 157, as amended (the FA) must be delivered or issued by the responsible provincial authorities for the purpose of enabling the Project to be carried out in whole or in part.

2) *Federal triggers*

[41] Under federal law, pursuant to paragraph 5(1) of the CEAA, an EA is required for a "project" if a "federal authority" is the proponent of the project; provides financial assistance to enable the project to be carried out; administers federal lands or transfers the administration and control of those lands to a province for the purpose of enabling the project to be carried out; or issues a prescribed permit or licence or grants a prescribed approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part [emphasis added].

[42] However, an EA is not required under section 5 of the CEAA where the project is described in the "Exclusion List" (EL) found in the *Exclusion List Regulations*, SOR94-634, as amended (the ELR), made under paragraph 59(c)(ii) of the CEAA (see section 7 of the CEAA). The EL applies to the following general areas: agriculture; electrical and nuclear energy; oil and gas pipelines; forestry; water projects; transportation; national parks; national parks reserves; national historic sites; and historic canals. The EL exempts projects with insignificant environmental effects from EAs. The Project is not mentioned on the EL.

[43] As can be seen, an EA under the CEAA can only be conducted with respect to a "project" and there must be a "federal authority" involved. Both of these conditions are met in the present case.

a) Definition of "project"

[44] The Project has been fully described in the preceding section of the present reasons (see above, I - The Project). To summarize, the Project comprises the following undertakings: two open

pits; a mine camp, maintenance shop and associated works; a processing plant; a TIA and associated water diversion system; waste rock dump and low grade ore stockpiles; an explosives factory and magazine; water supply and associated works; any off-site or on-site compensation or mitigation projects as may be required; a new access and haul road and related infrastructure; a new power line; any other physical works on facility activities included in constructing, operating and decommissioning the above facilities.

[45] In relation to a "physical work", paragraph 2(1) of the CEAA defines a "project" as being "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work". Moreover, a project can also be "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)" [emphasis added]. The Project comes within the scope of the definition of project found in paragraph 2(1) of the CEAA.

[46] In this regard, the *Inclusion List Regulations*, SOR/94-637, as amended (the ILR), made pursuant to paragraph 59(b) of the CEAA, sets out those physical activities and classes of physical activities not relating to physical works which, nonetheless, must be considered as a "project". The broad areas to which the ILR applies include: national parks and protected areas; oil and gas projects; nuclear and related facilities; defence; transportation; waste management; fisheries; flora and fauna; projects on aboriginal lands; northern projects (Yukon and Northwest Territories); and forests. Part VII of the Schedule entitled "Physical activities and classes of physical activities" (the IL) deals with "fisheries".

[47] More particularly, the IL applies to a number of activities carried out in the water body or adjacent to a water body, which includes: 1) the harmful alteration, disruption or destruction of fish habitat (HADD) by means of physical activities, or by means of draining or altering the water levels of a water body, or by means of erosion control measures, that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the Fisheries Act; and 2) the deposit of a deleterious substance in an effluent that requires authorization under regulations made by the Governor in Council pursuant to subsection 36(5) of the Fisheries Act (see items 42 to 47 of the Schedule to the ILR). Accordingly, any such physical activities contemplated in the Project are covered by the IL, and thus come under the ambit of the CEAA.

b) Federal authority

[48] In the case at bar, no federal authority is the proponent of the Project or provides financial assistance to enable the Project to be carried out. However, as explained below, at least two federal authorities, DFO and NRCan, must take certain regulatory actions in order to permit the Project to be carried out in whole or in part. Paragraph 5(2) of the CEAA further makes it clear that an EA is also required before the Governor in Council issues a prescribed permit or licence or grants a prescribed approval or takes any other action for the purpose of enabling the project to the carried out in whole or in part.

[49] In this regard, the *Law List Regulations*, SOR 194-636 as amended, (the LLR) made pursuant to subsections 59(f) and (g) of the CEAA, lists the provisions of any Act of Parliament or any regulation made pursuant to any Act of Parliament that confer powers, duties or functions on

federal authorities or the Governor in Council (Cabinet), the exercise of which requires an EA under paragraph 5(1)(d) or subsection 5(2) of the CEAA. This list is exhaustive, not open, and therefore any powers, duties or functions found outside the law list will not require an EA.

[50] In the case at bar, an EA is mandatory under paragraph 5(1)(d) and 5(2)(a) of the CEAA because the Project requires: 1) an authorization from the minister of Fisheries and Oceans pursuant to subsection 35(2) of the Fisheries Act for the HADD of fish habitat; 2) the issuance of a licence by the minister of Natural Resources under paragraph 7(1)(*a*) of the Explosives Act for the contemplated explosives factory and magazine; and, 3) an amendment by the Governor in Council of Schedule 2 of the MMER taken under the authority of subsection 36(5) of the Fisheries Act to include the headwaters of Trail Creek as a TIA (see Schedule I, Part I, items 5 and 6 and Schedule II, items 5 of the Law List Regulations).

D. EA PROCESS UNDER THE CEAA

[51] In conducting an EA under the provisions of the CEAA, the Government of Canada, the minister of Environment, the Canadian Environmental Assessment Agency (the Agency), and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities (RAs), shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

[52] In this regard, a RA shall not exercise any power or perform any duty or function referred to in section 5 of the CEAA in relation to a project unless it takes a “course of action” pursuant to

paragraph 20(1)(a) or 37(1)(a) of the CEAA (subsection 11(2) of the CEAA). The CEAA is binding on Her Majesty in right of Canada or a province (section 3 of the CEAA).

[53] Where there are two or more RAs in relation to a project, as in the case at bar, they must together determine the manner in which to perform their duties and functions and follow the procedures set out in the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181 (subsection 12(1) and paragraph 59(a) of the CEAA).

[54] A federal environmental assessment coordinator will coordinate the participation of federal authorities in the environmental assessment process for a project where a screening or comprehensive study is or might be required and to facilitate communication and cooperation among them and with provinces (section 12.1 of the CEAA). In the case at bar, the federal environmental assessment coordinator for the Project was the Agency (sections 12.4 and 61of the CEAA).

[55] Every federal authority that is in possession of specialist or expert information with respect to a project shall, on request, make available information or knowledge to the RA (subsection 12(3) of the CEAA). In this case at bar, Environment Canada and Health Canada, as expert federal authorities, provided expert advice to the RAs. More particularly, advice was received from Environment Canada on water quality, hydrology, wildlife, climate, air quality and potential malfunctions and accidents. Expert advice was received on health matters from Health Canada.

[56] Some clarification must be made with respect to the content of Schedule 2 of the MMER and the role of the federal authorities involved in the EA of the Project. In this case, prior to any action by the Governor in Council under the MMER, the RAs shall consider the applicable reports and comments referred to in sections 20 and 32 of the CEAA, and make their recommendations to the Cabinet accordingly.

[57] That being said, where a screening or comprehensive study of a project is to be conducted and a jurisdiction, such as a government of a province, has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part thereof, the RA may cooperate with that jurisdiction respecting the environmental assessment of the project (subsection 12(4) of the CEAA).

[58] In this regard, the "Canada-British Columbia Agreement for Environmental Assessment Cooperation (2004)" (the Agreement), provides that where Canada and British Columbia have an environmental assessment responsibility for a proposed project, such as the Project, a cooperative environmental assessment will be administered under the Agreement, to generate the type, level, and quality of information to meet the environmental assessment requirements of each government, while maintaining the existing roles and responsibilities of each level of government (see sections 11 and 20 of the Agreement) [emphasis added].

[59] Indeed, the contacts and the authorities required to ensure that an EA of the project is conducted in accordance with the CEAA or its regulations must develop, as early as practicable in the cooperative environmental assessment process, a project-specific work plan of a cooperative EA

that may include the scope of the project to be assessed and the factors and scope of the factors to be considered (section 14 of the agreement).

IV – FACTUAL BACKGROUND

A. PROVINCIAL ASSESSMENT

[60] On October 2, 1995, American Bullion Minerals, the previous owner of the Project, submitted an application (the Original Application) to the BCEAO for a project approval certificate for the Project under the *Environmental Assessment Act*, R.S.B.C. 1996, c.119 (the Former Provincial Act).

[61] The final project report specifications for the Project were issued by the BCEAO on June 18, 1996, and an assessment of the Project under the Former Provincial Act was in progress when the Provincial Act came into effect on December 30, 2002. A transition order issued under the Provincial Act required the submission of the information in the project report specifications to be submitted by June 18, 2003, or the current EA would be terminated.

[62] On June 17, 2003, RCDC formally withdrew from the environmental assessment process with the intention of re-entering the process by submitting a new project description at a future date.

[63] On October 27, 2003, a new project description based on a nominal mill production rate of 25,000 tonnes per day for a period of 18 years was submitted to BCEAO by RCDC. The new project description also described the Project and the proposed scope of studies for the EA of the Project.

1) *Preliminary decision*

[64] On November 19, 2003, BCEAO issued an order pursuant to paragraph 10(1)(c) of the Provincial Act stating that the Project was reviewable and that an environmental assessment certificate would be required prior to the Project proceeding. BCEAO set up an interagency committee (the Working Group) to provide advice to RCDC and to assist in the review of the terms of reference and other documentation provided by RCDC. First Nations and provincial and federal government agencies were represented in the Working Group.

2) *Terms of reference*

[65] The provincial environmental process does not require public consultation on the "terms of reference", which set the scope of the Project. On March 25, 2004, RCDC submitted "draft terms of reference" for the application to the BCEAO (the Draft Terms of Reference), which were made available for comment to provincial and federal agencies, local government and the Tahltan and Iskut First Nations, but not the public. In its foreword, the following explanation was provided by RCDC:

> These Terms of Reference have been developed by RCDC in accordance with the BCEAA in order to define the information requirements necessary for inclusion in an Application for an Environmental Assessment Certificate ("AEAC") in order to allow for a determination of the significance of potential environmental, heritage, social, economic and health effects of the Project and the adequacy of measures proposed to prevent or mitigate such effects.
>
> In anticipation that the Project will also be subject to review under the Canadian Environmental Assessment Act ("CEAA"), these Terms of Reference also include the information requirements necessary to meet the requirements of CEAA. In such case, it is expected that the cooperative environmental assessment process will

> be undertaken as provided for in the Canada-British Columbia Agreement for Environmental Assessment Cooperation. [emphasis added]

[66] On June 18, 2004, BCEAO approved final terms of reference for the Project (the ATOR). The passage contained in the foreword of the Draft Terms of Reference remained unchanged despite the fact that an EA under the CEAA had commenced in the meantime, that is on May 19, 2004 (see next subsection of the present reasons of order, Federal Assessment).

[67] On June 30, 2004, RCDC wrote BCEAO to advise that the Project was revised to a production mill capacity of 27,500 tonnes per day for a period of 18 years.

3) *Section 11 order*

[68] On August 4, 2004, BCEAO issued an order under section 11 of the Provincial Act stipulating the scope of the Project, the scope of assessment, and the procedures and methods for the review of the application and application supplement would be submitted by the Proponent to the Project Director within three years (the Section 11 Order).

[69] In particular, the Section 11 Order scoped the Project as follows:

1. Open pit mine
2. 27, 500 tonne per day mill
3. Tailings management facility
4. Waste Rock Storage Facility
5. Low Grade Ore Stockpile
6. Mine camp and associated works

7. New access/haul roads and related infrastructure
8. Upgrade of existing access roads and associated infrastructure
9. Water supply and associated works
10. Use of existing roads by concentrate trucks
11. Power supply and related infrastructure
12. Maintenance shop
13. Explosives storage and/or manufacturing facility
14. Any on or off-site compensation or mitigation works, as required
15. Ancillary facilities
16. Activities included in construction, operating, maintaining, and dismantling and abandoning the above facilities
17. Any other physical works or activities which, in the view of the Project Director, form an integral part of the project.

[70] Moreover, the Section 11 Order provided that the assessment of the Project would include consideration of the potential for environmental, social, economic, health and heritage effects, and the potential for effects on the interests of First Nations groups and would take into account practical means to prevent or reduce any potential adverse effects of the Project to an acceptable level.

[71] The Section 11 Order also established parameters and a time-frame with respect to the environmental assessment process, including the requirement for public consultation:

(a) The “pre-application stage” would focus on identifying Project-related issues to be addressed, based on consultations conducted by RCDC and/or the BCEAO with interested and potentially affected parties, including the public, First Nations, federal and provincial government agencies and local governments;

(b) The “application review stage” would focus on review of the application itself to determine whether or not identified concerns had been satisfactorily addressed, and would conclude with a decision made by responsible provincial ministers on the application, in this case the minister of Sustainable Resource Management, the minister of Water, Land and Air Protection and/or the minister of Energy and Mines (collectively the Provincial Ministers).

[72] The application review stage would be 180 days and was to commence after the Project Director had notified RCDC that the application had been accepted for review (section 3 of the *Prescribed Time Limits Regulations*, B.C. Reg. 372/2002). Prior to a final decision being made by the Provincial Ministers, the Project Director would hold a formal public comment period of 65 days in this case (section 7 of the *Public Consultation Policy Regulation*, B.C. Reg. 373/02). There would also be a First Nations consultation program.

[73] Following the expiry of the consultation process, the Project Director would then prepare an assessment report, outlining the issues raised during the review of the application, as well as any identified practical means to avoid or reduce impacts to an acceptable level. The Project Director would provide relevant government agencies, local governments and First Nations with an opportunity to review and comment on the draft assessment report.

[74] The assessment report would next be referred for action to the Provincial Ministers. While it was expected that their decision would be rendered within 180 days of the date on which the Project Director had notified RCDC that the application had been accepted for review, prior to submitting the assessment report to the Provincial Ministers, the Project Director could, nevertheless, suspend for any valid reason the 180 day time limit for completing the review of the application.

4) *The Application and the Application Supplement*

[75] On September 24, 2004, RCDC submitted its formal "Application for an Environmental Assessment Certificate" (the Application) for review under the Provincial Act. The Application was screened by BCEAO, federal agencies, First Nations groups and some provincial agencies to ensure that it met the ATOR.

[76] On October 20, 2004, the Project Director accepted the Application with changes required to the Application. By letter dated October 28, 2004, RCDC submitted a revised version of the Application, incorporating the necessary changes. The multi-volume Application was then distributed to federal and provincial agencies, local governments, First Nations groups and to the public.

[77] Copies of the revised Application were received by BCEAO on November 2, 2004 and distributed to federal and provincial agencies, local government and the First Nations in the Working Group. The 180 day application review period began on November 2, 2004.

[78] A two-volume supplement (the Application Supplement) was submitted to BCEAO by RCDC on November 12, 2004 and was accepted for review on November 30, 2004. The Application Supplement was also distributed to federal and provincial agencies, local governments, First Nations groups and to the public. The Application Supplement contains the results of studies and field work conducted during the summer field season of 2004.

[79] RCDC, in a letter dated December 21, 2004 to BCEAO, amended certain features of the Application based on the results of a feasibility study. However, it was not expected by RCDC that these changes would have a significant effect on the overall scope of the Project as presented in the Application, other than extending the planned mine life from 18 to 25 years and bringing the daily mill throughput from 27 500 to 30 000 tonnes per day.

5) *Public consultation*

[80] Apart from the consultations undertaken by RCDC and BCEAO prior to the submission of the Application and Application Supplement, a formal 65 day public comment period was advertised on the BCEAO's website and in local papers (the Provincial Notice).

[81] The Provincial Notice gave a brief description of the Project and indicated that, for the purposes of the EA review, the Project included the on-site and off-site physical works and activities associated with the construction, operation, maintenance on the weeks listed in same. The works listed are the same as the ones mentioned in the Section 11 Order. The Provincial Notice mentioned that RCDC had submitted an application for an environmental assessment certificate (the EA application) under the EAA as well as applications for a permit under the MA, a special use permit

under the FPC, and a licence to cut under the FA for the development of the Project (the concurrent permit applications). The Provincial Notice invited comments on the EA Application and concurrent permit applications and indicated that the purpose of the public comment period which began on November 17, 2004 and ended on January 21, 2005, was "to document specific issues as they relate to the technical review of the EA application." However, there is no reference whatsoever in the Provincial Notice to the environmental assessment process launched under the CEAA or to any application made to the federal authorities by RCDC under subsection 35(2) of the Fisheries Act or under paragraph 7(1)(a) of the Explosives Act, or that an amendment by the Governor in Council of Schedule 2 of the MMER will be required in order to include the headwaters of Trail Creek as a TIA.

[82] A total of ten public comments were submitted to BCEAO during this public comment period. These public comments raised concerns on the following aspects of the Project: environmental protection, wildlife and fisheries habitat, the local recreational tourism industry, as well as social and community concerns. There were no comments submitted by the Applicant.

[83] Some federal agencies responded as well. NRCan submitted extensive comments to BCEAO regarding not only the explosives facility but also with respect to other major components of the Project: mine waste management; protection surface and groundwater quality; acid drainage, seismic hazard issues; geological engineering, slope stability and related hazards for the open pit, waste rock dumps and tailings storage facilities; and hydrogeology and hydrology aspects. Comments were also submitted by Health Canada on water quality, fish as a food source, noise and socio-economic aspects of the Project. DFO did not make written comments to BCEAO.

[84] Sometime in February 2005, RCDC submitted its response to the various comments received by BCEAO, including those made by NRCan and participants. NRCan submitted additional comments to RCDC's responses in March and April 2005.

6) *Consultations with First Nations*

[85] On April 11, 2005, at the specific request of RCDC, the 180 day review period was temporarily suspended so that RCDC could address concerns that had been raised by the Iskut and Tahltan First Nations Group. The 180 day review period recommenced on June 30, 2005, after further consultation efforts were undertaken by RCDC, including meetings with First Nations groups on April 5, April 26, May 4 and May 20, 2005, and after RCDC had provided further reports and information to BCEAO, as requested by BCEAO.

7) *Assessment report*

[86] The results of BCEAO's EA are contained in its July 22, 2005 assessment report (the BCEAO Report), in which BCEAO concluded that the Project is not likely to cause significant adverse environmental, heritage, social, economic, or health effects. In addition, the BCEAO Report provides further information concerning the review process, the scope of review, the issues considered, and the means adopted to prevent or reduce any potentially significant adverse effect of the Project.

[87] The BCEAO report dealt with all provincial and federal aspects of the Project, including: the potential effects to existing drainage patterns and the quality of water resulting from mine site

discharges to receiving waters, as well as from TIA discharges; the potential impacts to fish and fish habitat and the necessity of a compensation plan for the loss of fish habitat due to the TIA; the potential impacts on wildlife including certain species at risk red or blue-listed provincially, or of a "special concern" federally (such as the Western Toad). The concerns identified both by the provincial or federal authorities, as well as by the public and by the Tahltan and Iskut people are mentioned in the BCEAO report.

[88] The Project was initially considered to be a comprehensive study review under the CEAA and then changed to a CEAA screening level review, as discussed below at paragraphs 93 to 97 and paragraphs 108 to 111. That being said, factors related to a comprehensive study were also included in the BCEAO report. As the case may be, they included:

- the effects of the environment on the Project;
- the environmental impacts of accidents and malfunctions;
- alternatives;
- cumulative environmental effects of the Project over a regional scale; and
- follow-up monitoring programs.

[89] In particular, the BCEAO report noted that a cumulative effects assessment (CEA) had been conducted by RCDC. The following projects were considered in the CEA: Galore Creek project; Forrest Kerr hydroelectric project; Tom McKay Lake waste rock and tailings project; Kemess North and South Project; Sustut Cooper project; Strousay lead/zinc project; and mineral exploration activity in the region. The BCEAO report stated:

> Based on this information, EAO is satisfied there are no significant cumulative environmental effects associated with the construction,

> operation and decommissioning of the Project. However, as a CEAA requirement, the federal RAs will make their own separate determination of cumulative environmental effects associated with the construction, operation and decommissioning of the Project in a CEAA screening report.

[90] In its general review conclusions, the BCEAO report stated, in part:

> Based on the information provided by the Proponent, the Project is not likely to cause significant adverse environmental, heritage, social, economic, or health effects, taking into account the implementation of mitigation measures committed to by the Proponent.
>
> Federal Responsible Authorities are preparing a separate CEAA Project screening report based on sections of this report. Federal RAs have stated that they expect to conclude that the Project is not likely to cause significant adverse environmental effects, assuming the implementation of proposed mitigation measures and monitoring programs. [emphasis added]

8) *Environment assessment certificate*

[91] On July 25, 2005, BCEAO's Executive Director recommended that an environment assessment certificate be granted and on August 24, 2005, an assessment certificate was issued by the Provincial Ministers.

B. FEDERAL ASSESSMENT

[92] The federal environment assessment process was formally triggered when, on or about May 3, 2004, bcMetals (on behalf of RCDC) submitted to DFO two applications under subsection 35(2) of the Fisheries Act to cover the contemplated construction of the starter dams for the tailings impoundment proposed for upper Trail Creek, as well as for the stream crossing of White Rock Canyon Creek and Coyote Creek for the proposed preferred and alternative access road alignments.

Prior to May 2004, federal departments' actual involvement in the EA of the Project was limited to their participation to various meetings of the Working Group.

1) *Preliminary decision*

[93] On or about May 19, 2004, based on the information provided by RCDC both to BCEAO (in October 2003 and February 2004) and to DFO (May 2004), DFO concluded that an EA of the Project was required under section 5 of the CEAA. This preliminary decision was supported by the following findings and analysis of the scope of the Project:

> Fisheries and Oceans Canada (DFO) received your application for Authorization under Section 35(2) of the federal *Fisheries Act* dated May 3, 2004, concerning components related to the proposed Red Chris Porphyry Copper-Gold Mine Project. To expedite future correspondence or inquiries, please refer to your referral title and file numbers when you contact us.
>
> | | |
> |---|---|
> | HRTS Referral File No.: | **03-HPAC-PA1-000-000116** |
> | Habitat File No.: | **PRHQ-5300-10-083** |
> | Referral Title: | **Red Chris Porphyry Cooper-Gold Mine Project** |
>
> It is our understanding that the proposed mine development consists of:
>
> - Open pit mine
> - 25,000 tonne per day mill
> - Tailings Impoundment Area
> - Waste rock storage facility(ies)
> - Mine camp and associated works
> - Water supply
> - Ancillary facilities
> - Explosives storage and/or manufacturing facility
> - Maintenance shop
> - New access/haul roads and related infrastructure
> - Upgrade of existing access roads and related infrastructure
> - Use of existing Highway 37 & 37A by concentrate haul trucks
> - Power supply and associated works

- Any off-site or on-site compensation or mitigation works, as required
- Any other physical works or activities which form an integral part of the project.

as outlined in the following submitted information:

- Red Chris Porphyry Copper-Gold Mine Project Description. Prepared by Red Chris Development Company Ltd. October, 2003
- Red Chris Mine Access Review. Prepared by Allnorth Consultants Ltd. February 2004
- Application for Works or Undertakings Affecting Fish Habitat: Red Chris copper-gold mine development Project dated May 3, 2004.

If the above information has changed since the time of your submission, you should consult with us to determine if the information in this letter still applies.

Based on the information provided, DFO has concluded that your proposal is likely to result in the harmful alteration, disruption or destruction of fish habitat. The harmful alteration, disruption or destruction of fish habitat is prohibited unless authorized by DFO pursuant to subsection 35(2) of the *Fisheries Act*. In reviewing your proposal, we will consider the Department's Policy for the Management of Fish Habitat, which provides that no authorizations be issued unless acceptable measures for any habitat loss are developed and implemented by the proponent.

Please be advised that subsection 35(2) of the *Fisheries Act* has been included in the list of laws that trigger the *Canadian Environmental Assessment Act* (CEAA). This means that Fisheries and Oceans Canada is required to conduct an environmental assessment of your project, as prescribed by the CEAA, before deciding to issue an authorization. Your project information will be circulated to other federal government departments for their review and comments. If, as a result of this review, we are satisfied that the project, after taking into account the implementation of any mitigation measures, is not likely to cause significant adverse environmental effects, an authorization under the *Fisheries Act* may be issued. [emphasis added]

2) *Notice of Commencement*

[94] On or about May 21, 2004, a "Notice of Commencement of an environmental assessment" (the Notice of Commencement) was posted on the Registry announcing that DFO would conduct a comprehensive study commencing on May 19, 2004, and describing the Project as an:

> OPEN PIT MINE WITH ASSOCIATED INFRASTRUCTURE INCLUDING TAILINGS IMPOUNDMENT AREA, ACCESS ROADS, WATER INTAKE, TRANSMISSION LINES AND ACCESSORY BUILDINGS (E.G. MAINTENANCE, CAMPSITE) The scope of the project will be added when available.

[95] The Notice of Commencement further made reference to the fact that an EA under section 5 of the CEAA was required for "this project" because DFO may issue a permit or licence under subsection 35(2) of the Fisheries Act. The Notice of Commencement also indicated that the Project was being assessed by the Government of British Columbia and that the Agency would act as the Federal Environmental Assessment Coordinator for this EA.

3) *Initial tracking decision*

[96] It may not have been entirely clear on what legal basis it was initially determined by DFO in mid-May 2004, that the proper track to follow in the EA of the Project was that of a comprehensive study and not a screening. However, this issue is clarified for the benefit of other federal departments in a letter prepared by DFO dated May 31, 2004, where it is clearly stated that "DFO has determined that the proposed project will require a Comprehensive Study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold under Section 16(c) of CEAA's Comprehensive Study List Regulations". [emphasis added]

[97] Moreover, other federal departments were informed at the same time, by the letter of May 31, 2004, that the Project as scoped by DFO encompassed the proposed mine and mill as well as certain accessory physical works:

> A preliminary scope of the project under CEAA will include:
>
> **(i) Principal project**
>
> Construction and operation of an open pit gold-copper mine and mill with an ore production rate of up to 50 000 tonnes per day.
>
> **(ii) Accessory physical works**
>
> Under the CEAA linkage principal: tailings impoundment area, low grade stockpiles, waste rocks storage facility(ies), mine camp and associated works, water supply, ancillary facilities, explosives storage and/or manufacturing facility, maintenance shop, new access/haul roads and related infrastructure, upgrade of existing access roads and related infrastructure, use of Highway 37 & 37A by concentrate haul trucks, power supply and associated works, any off-site or on-site compensation and mitigation works as required, and any other physical works or activities which form an integral part of the project.
>
> Should another RA be identified or new information relevant to the scope of project be forthcoming, the final scope of the project may include accommodating adjustments to the above. The final scope of document will be reflected in a separate "Scoping Document" under development by DFO pursuant to Section 21(1) of the CEAA. DFO will be initiating the Sec 21 public consultation exercise on scoping soon and will be consulting other RAs on the content of the scoping document. [emphasis added]

4) *Departments' responses*

[98] Transport Canada (TC) promptly responded in writing to DFO. Its response states that "[t]he scoping appears to be correct based on the information received to date" but advises that TC may have a paragraph 5(1)(d) trigger, namely section 5(1) of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, for bridges crossing navigable waterways. At a later date, however, upon

further examination of Project information for the access road, TC determined that it would not require an approval under this Act and it was, thus, no longer an RA.

[99] On June 2, 2004, NRCan responded in writing to advise that NRCan was likely to be an RA, as there was a paragraph 5(1)(d) trigger, namely section 7 of the Explosives Act.

[100] On June 10, 2004, Indian and Northern Affairs Canada responded in writing to DFO in accordance with section 12(3) of the CEAA. It advised that it had no section 5 triggers but that it would respond as required by subsection 12(3) of the CEAA.

[101] On June 18, 2004, Health Canada responded in writing to DFO to advise that it had no section 5 triggers, but that it would provide specialist or expert knowledge as required pursuant to subsection 12(3) of the CEAA.

5) *Minister of Environment*

[102] In July 2004, the Agency submitted a lengthy briefing document regarding many aspects of the CEAA, including ongoing CEAA assessments, to the incoming minister of the Environment, the Honourable Stéphane Dion (the Briefing Book). At page 1, it was explained that:

> As a result of recent revisions to the *Canadian Environmental Assessment Act* (the Act) proclaimed though Bill C-9, the responsible authority (RA) must consult the public on its proposed approach, report on this consultation to the Minister of Environment, and recommend to the Minister whether the environmental assessment (EA) be continued by means of a comprehensive study, or the project be referred to a mediator or review panel. The Minister's decision is known as the EA track decision.

[103] The Agency also advised the minister of the Environment that the Project would receive comprehensive study under the Bill C-9 revised Act:

> DFO is the RA, but had not yet formally identified the scope of the project for the purposes of the comprehensive study. The review will be conducted in a single, cooperative review with British Columbia. The RA is expected to initiate a 30-day public consultation period on the draft scope of the project in August. A recommendation to the Minister of the EA track decision is expected in September.

6) *Work plan*

[104] On July 28, 2004, in accordance with section 14 of the Agreement, a draft work plan was prepared by the Agency for the cooperative EA of the Project (the Draft Work Plan). It mentioned that the Project exceeded both the threshold of 3,000 tonnes per day of ore production and the threshold of 600 tonnes per day in ore production capacity for gold listed respectively under paragraphs 16(a) and (c) of the Comprehensive Study List (CSL). The plan set out a tentative Project review schedule, including the public consultation for a CEAA comprehensive study and the preparation of same within the provincial legislated timelines, based on the assumption that RCDC's application would have been accepted for formal detailed review by September 14, 2004.

[105] On October 18, 2004, the Draft Work Plan was revised by the Agency and new dates were inscribed, this time based on the assumption that RCDC's application would have been accepted for formal detailed review by October 27, 2004 (and not September 14, 2004). The Project was still to be assessed by the RAs by way of a comprehensive study and the public was to be invited to make comments to the RAs with respect to the proposed scope of the Project, the factors proposed to be considered in the EA, the proposed study of the factors and the ability of the comprehensive study to address issues relating to this project.

[106] In this regard, it was mentioned in the Draft Work Plan:

> - The Agency will set out a public comment period for the comprehensive study report (CSR) and publish a notice setting out the date on which the report will be available, the location where the report is available and the deadline for filing comments on the conclusions and recommendations of the report.
>
> - The Agency will work with RAs making reasonable efforts to complete the public comment period on the comprehensive study report so as to allow the timing of the environmental assessment decisions of both levels of government to be coordinated.
>
> - The goal is to produce a comprehensive study report which is, to the extent possible, based on the assessment report that accurately reflects the assessment findings under both CEAA and BCEAA, and which is completed within the provincial legislated timelines.

[107] As already mentioned in the previous subsection of these reasons for order (Provincial Assessment), by October 18, 2004, RCDC's application had already been submitted and by October 20, 2004, the Project Director had accepted the Application with changes required to the Application. However, the steps described in the Draft Work Plan to complete, within the provincial 180 days time limit, a joint cooperative EA, leading to the production of a comprehensive study, were not followed or respected by the RAs.

7) *Subsequent tracking decision*

[108] On or about December 9, 2004, Mr. Richard Wex of DFO wrote a letter (the Wex letter) to Mr. Steve Burgess of the Agency, stating the following:

In early May 2004, DFO, NRCan and Transport Canada (TC), which at the time advised that it was a RA, jointly initiated an EA for the Red Chris Proposal. At the onset, from the DFO perspective, there was little fisheries data available and DFO was therefore not in a position to clearly identify all aspects of the proposal that would require authorization. At the proposed minesite there were a number of components of the proposed project which had the potential to affect fish habitat. As a result and consistent with DFO's policy on early triggering which took effect this past summer, DFO tentatively contemplated with NRCan and TC to include the TIA, the mill, the mine pit, the waste rock pile, the low grade stock pile and access roads in the scope of the project. With little detailed information on CEAA triggers and respective regulatory responsibilities and pressure to get a harmonized federal-provincial EA process started, the approach of all RAs seemed to have been to take the proponent's developmental proposal at its face value. With the proposed capacity of the mill exceeding the threshold for a comprehensive study pursuant to s.16(a) of the Comprehensive Study Regulations, a comprehensive study was initiated.

Since that initial scoping exercise, which continued into the fall under the guidance of the CEA Agency, a number of events occurred to cause DFO to re-evaluate our proposed scope of project. DFO had asked the proponent to overlay project components over fish habitat. The proponent gathered additional fisheries data, and presented the overlay to DFO in early November. DFO has recently completed its review of the new information and determined that the mill, mine pit, waste rock pile, low grade stock pile and access roads would in fact not likely result in impacts to fish habitat that would require authorization under the Fisheries Act.

…

During this time, the Federal Court handed down its decision in the True North case. This decision, consistent with previous decisions of the court, underlines the importance of considering the nature of CEAA triggers and the RAs regulatory responsibilities in the process of exercising the RAs project scoping discretion.

As a result of the new fisheries information, and consistent with the direction provided by the courts including the most recent decision in True North, DFO has reviewed its approach to scoping the Red Chris mine proposal by focussing, among other things, on its CEAA triggers and regulatory responsibilities, and determined a new proposed scope of project. As a result, there will no longer be a requirement for a comprehensive study since the mill will not be

> included in our scope of project. Accordingly, a Screening Report will be prepared.
>
> We will now proceed to work with NRCan with the next steps to conduct an EA under the CEAA in relation to the Red Chris mine proposal. To this end DFO has agreed with NRCan to assume the "lead" RA role. [emphasis added]

[109] Despite the reference made in the Wex letter to the "overlay to DFO" in early November 2004 of "additional fisheries data", the Court was unable to find in the record any documentary evidence supporting the statement made "that the mill, mine pit, waste rock pile, low grade stock pile and access roads would in fact not likely result in impacts to fish habitat that would require authorization under the Fisheries Act". Quite the contrary, the documentary evidence on record shows that the Trail Creek system provides an important spawning and rearing system for the only inlet-spawning rainbow trout stock of Kluea Lake, and also that rainbow trout and bull trout also spawn in reaches of Quarry Creek and North East Arm Creek of the extent of the proposed TIA. Baseline Studies have also showed that there are rainbow trout present within the lower reaches of Trail Creek, up to and including the proposed location of the South Dam of the TIA and in Kluea Lake downstream of Trail Creek. According to the documentary evidence, the proposed TIA will therefore adversely affect some fish habitat, watercourses and aquatic resources by flooding and infilling the upper reaches of Trail Creek and diverting its flows to Quarry Creek during operations and to North East Arm Creek after mine closure. Indeed, a fisheries compensation plan has been submitted by RCDC.

[110] The Wex letter also refers to the decision rendered by this Court on September 16, 2004 in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265 (the TrueNorth decision - first instance). The Court notes at this point that Justice Russell's decision in

TrueNorth confirms the broad power under section 15 of the CEAA to scope a project. The latter was subsequently upheld by the Federal Court of Appeal on January 27, 2006, *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 (the TrueNorth decision - appeal). Leave for appeal to the Supreme Court of Canada was dismissed without reasons on July 20, 2006. Counsel for the parties in the present case do not agree on the scope and application of the TrueNorth decisions. These decisions, which are based on the provisions of the CEAA as they read before the coming into force of the Bill C-9 amendments, will be further discussed in the subsequent section where the Court analyzes the merits of the present application.

[111] On December 14, 2004, the online Notice of Commencement was retroactively amended to indicate that DFO would conduct a screening commencing on May 19, 2004 (the First Amended Notice of Commencement). There is no explicit reference to the fact that a comprehensive study had been previously announced in May 2004. Moreover, the First Amended Notice of Commencement continued to describe the Project as follows:

> OPEN PIT MINE WITH ASSOCIATED INFRASTRUCTURE INCLUDING TAILINGS IMPOUNDMENT AREA, ACCESS ROADS, WATER INTAKE, TRANSMISSION LINES AND ACCESSORY BUILDINGS (E.G. MAINTENANCE, CAMPSITE)
> The scope of the project will be added when available.

The references to the fact that the Project was being also being assessed by the government of British Columbia and that the Agency would act as the Federal Environmental Assessment Coordinator are still mentioned. While the 65 day public consultation process in British Columbia had already started in November 2004 and was due to expire on January 21, 2005, there is no formal

invitation made to the public in the Notice of Commencement to submit their comments with respect to the Project through the former environmental assessment process.

8) *Unresolved issue respecting the amount of water*

[112] The last meeting of the Working Group, established by BCEAO in November 2003 to provide advice and support on the Project, was held on January 11, 2005. The potential effects of the Project on fisheries habitat, as well as various mitigation and compensation options were specifically discussed on that occasion. It appears that there were still a number of important issues left unanswered, one being the amount of water that would be transferred between watersheds as a result of the operation of the TIA:

> Federal agencies need to know the amount of the operation of the TIA. The comprehensive study threshold which determines the EA track is 10 million m^3 per year or greater. The precise amount can be determined by calculations. The proponent responded that it is anticipated that a total of 6 to 7 million m^3 of water per year would be discharged to quarry creek, beginning in approximately 2 or 3 mine operation. The proponent will provide a letter stating the amount of water to be diverted. [emphasis added]

[113] On February 25, 2005, in a letter addressed by DFO to the Agency, DFO confirmed that they intended to await resolution or clarification of the outstanding issues prior to completing their review of the Project. The precise amount of water to be diverted continued to remain a concern: "At the January 11, 2005 meeting in Smithers, RCDC was informed by the CEA Agency of the CEAA Comprehensive Study Regulation (sic) threshold for the "…diversion of 10M m3/a or more of water from a natural water body into another material water body …" (Part III, Item 9). RCDC committed to calculating the amount of water proposed to be diverted from the Trail Creek to the Quarry Creek watershed. To date, this information has still not been provided."

9) The Scoping Decision of March 2005

[114] In a letter dated March 11, 2005, DFO informed BCEAO that the RAs had "determined the scope of project for the purposes of an environmental assessment under the CEAA in relation to the Red Chris Project" (the Scoping Decision of March 2005). Specifically, the letter stated:

> In accordance with subsection 15(1) of the CEAA, the responsible authorities have determined that the scope of the project for the purposes of the environmental assessment under the CEAA will be the construction, operation, modification and decommissioning of the following physical works:
>
> - Tailings Impoundment Area including barriers and seepage dams in the headwaters of Trail, Quarry and NE Arm creeks.
> - Water diversion system in the headwaters of Trail, Quarry, and NE Arm creeks.
> - Ancillary Facilities supporting the above mentioned (i.e. process water supply pipeline intake) on the Klappan River.
> - Explosives storage and/or manufacturing facility on the mine property.
>
> The environmental assessment under the CEAA of the project as scoped above will be conducted in accordance with the requirements of s. 18(1) of the CEAA at the level of screening. [emphasis added]

[115] On March 15, 2005, the online Notice of Commencement was amended retroactively for a second time, stating that both DFO and NRCan would conduct a screening of the Project commencing May 19, 2004 (the Second Amended Notice of Commencement). This was the first time that NRCan's involvement as a RA was mentioned. Accordingly, the Notice of Commencement was amended to also state that an environmental assessment was required under section 5 of the CEAA pursuant to paragraph 7(1)(a) of the Explosives Act. Furthermore, the Notice of Commencement continued to state that the scope of the project would be added when available.

[116] On March 24, 2005, the online Notice of Commencement was amended a third and final time (the Third Amended Notice of Commencement) in order to specify that an EA was required because: 1) NRCan was contemplating the issuance of a license pursuant to paragraph 7(1)(a) of the Explosives Act for construction of the explosives storage and/or manufacturing facility on the mine property; 2) DFO was contemplating the issuance of authorisations under section 25 of the Fisheries Act for the harmful alteration, disruption of fish habitat; and 3) Regulations to be made by the Governor in Council were being contemplated to list the headwaters of Trail Creek as a TIA on Schedule 2 of the MMER pursuant to paragraphs 36(5)(a) to (e) of the Fisheries Act.

[117] Furthermore, the Third Amended Notice of Commencement stated that, in accordance with subsection 15(1) of the CEAA, the RAs had determined that the scope of the Project for the purposes of environmental assessment under the CEAA would be:

> […] the construction, operation, modification and decommissioning of the following physical works: Tailings Impoundment Area including barriers and seepage dams in the headwaters of Trial, Quarry and NE Arm creeks. Water diversion system in the headwaters of Trail, Quarry, and NE Arm creeks. Ancillary Facilities supporting the above mentioned (i.e. process water supply pipeline intake) on the Klappan River. Explosives storage and/or manufacturing facility on the mine property. [emphasis added]

[118] It appears from the documentary evidence on record that as of March 2005, when the "scoping decision" which appears on the Third Amended Notice of Commencement was made, the RAs were still struggling to obtain key information from RCDC. The exact scope of the Project remained a matter of concern. In a letter dated March 30, 2005, addressed by NRCan to BCEAO in the context of its first draft report , NRCan stressed that "[i]t would be difficult for us to complete the EA before understanding potential impacts and whether or not they can be mitigated" [emphasis

added]. Key outstanding issues needed to be clarified or resolved by RCDC including "[s]pecification of planned discharged locations from and the TMF, post closure"; "[d]ilution in the TMF to manage water quality for various metals"; "the management of low-grade material if it cannot be processed"; "[t]iming of discharges"; "the volume of till available in the immediate vicinity of the project"; "geological and geotechnical complexity of the open pit site and the potential for slope instabilities on the south walls of the open pit"; "[t]errain Hazards Along Access Roads"; "the availability of larger borrow pits for material to be used as cover material fro the waste rock dump"; "bedrock contact depth" (with respect to the tailing storage facilities); the nature of certain "modification to the mine plan and how this is going to affect the mine facilities"; and finally: "we need the total volume of water that will be diverted from one water body to another and we need to resolve the issue regarding the SARA species of the Western Toad" [emphasis added].

[119] It must be remembered that the Project "as scoped" by the RAs in March 2005 included the water diversion system and that item 9 of the CSL had been identified by the Agency at the January 11, 2005 meeting as a threshold that could be potentially exceeded. If this was the case, even "as scoped" by the RAs, the EA of the Project would have needed to be conducted by way of a comprehensive study and not a screening.

[120] On April 1, 2005, DFO advised the Agency that it was unable to provide significant comments with respect to the draft assessment report prepared by BCEAO. Moreover, further clarification was needed from RCDC with respect to the habitat compensation plan: "To date, no further information has been received from RCDC to allow DFO to initiate the MMER process with Environment Canada". In addition, DFO advised the Agency that it had received no response from

RCDC about water diversion while "[i]tem 9 of the CEAA Comprehensive Study Regulations … was identified by the Agency at the January 11, 2005 meeting in Smithers as a threshold that may be potentially exceeded."

10) *Provincial assessment*

[121] As aforementioned in the previous subsection (Provincial Assessment), the BCEAO report was released on or around July 22, 2005. It concluded that based on the information provided by RCDC, the Project was not likely to cause significant adverse environmental effects taking account the implementation of mitigation measures committed to by RCDC.

[122] Again, it is useful to be reminded here that the BCEAO report further stated in its review conclusions:

> Federal RAs are preparing a separate CEAA Project screening report based on sections of this report. Federal RAs have stated that they expect to conclude that the Project is not likely to cause significant adverse environmental effects, assuming the implementation of proposed mitigation measures and monitoring programs. [emphasis added]

[123] That being said, it took several months for the RAs to complete the EA of the Project.

11) *Consultations with the First Nations*

[124] In keeping with the intent of the RAs to consult First Nations in the review of the Project, on January 10, 2006, the Tahltan band council and the Iskut First Nation were specifically invited to make comments by February 10, 2006 respecting a draft of a screening report the RAs had agreed to disclose prior to finalizing the screening report. No prior disclosure of such draft report was made

on the Internet site and no such solicitation to receive comments from the general public was made by the RAs in the case at bar.

12) *Screening Report*

[125] The RAs completed their EA and produced a screening report on or about April 16, 2006, under the purported authority of section 18 of the CEAA (the Screening Report).

[126] The Screening Report stated that it was "based on information collected through the cooperative federal/provincial EA process …" (section 7 of the Screening Report). The RAs concluded that "taking into account the implementation of the mitigation measures, the Project is not likely to cause significant adverse environmental effects". The scope of the Project, as described at page 10 of the Screening Report, was larger than that described in the Third Amended Notice of Commencement and contained the following three additions:

> - The deposit of a deleterious substance (tailings) into a Tailing Impoundment Area (TIA);
> - Any works or undertakings required as mitigation and compensation for the harmful alteration, disruption or destruction (HADD) of fish habitat associated with construction of the TIA that may require an authorization under the *Fisheries Act*; and
> - Any works or undertakings required as compensation fro the deposit of tailings into the TIA that may require an authorization under the *Fisheries Act*.

[127] With regards to the subject of consultation, the Screening Report read as follows:

> The BCEAO led consultations with the Proponent, local governments, First Nations, federal and provincial agencies, and other communities of interest (with emphasis in Stewart, Iskut, Dease Lake, and Telegraph Creek) to provide opportunities to review the proposed development and to ensure their input into the EA process. The RAs have used the information collected from these consultations to inform their screening decision. A summary of

> consultation efforts with First Nations can be found in Sections 3 and 5.4, and Appendices E and F of the BCEAO report. A summary of community consultation efforts undertaken by the Proponent and BCEAO are presented in Section 3.2 of the BCEAO report.
>
> The RAs are satisfied that this effort towards public consultation provided sufficient and satisfactory opportunities for public input into the Red Chris EA process. Based on the extent of consultation that has been conducted by the Government of BC and the Proponent, and the information that the RAs received from this consultation, the RAs are of the opinion that public participation in the screening of the Project under CEAA 18(3) is not appropriate under these circumstances. [emphasis added]

13) *The Course of Action Decision*

[128] On May 2, 2006, the RAs took a course of action under the purported authority of paragraph 20(1)(a) of the CEAA (the Course of Action Decision). More particularly, the RAs determined that the Project "as scoped" by them was not likely to cause "significant adverse environmental effects".

[129] The Course of Action Decision was posted on the Registry on May 10, 2006. At this time, the general public was able to consult the Screening Report.

[130] Under the Course of Action Decision, RCDC and related contractors could proceed with the process of applying for a license as issued by NRCan pursuant to paragraph 7(1)(a) of the Explosives Act. DFO could also proceed as appropriate with a subsection 35(2) Fisheries Act authorization for the HADD of fish habitat. Furthermore, DFO was required to consider the Screening Report in relation to determining whether to recommend to the Governor in Council the designation of the headwaters of Trail Creek as a TIA on Schedule 2 of the MMER pursuant to paragraphs 36(5) (a) to (e) of the Fisheries Act. As of the date this application for judicial review

was heard, specifically in June 2007, no authorization or license had yet been delivered or issued and no action had yet been taken by the Cabinet.

V – THE PRESENT APPLICATION

[131] A notice of application for the present judicial review was filed by the Applicant on June 9, 2006. Essentially, the Court is asked to determine whether the RAs have been under the legal duty, since the EA was announced on the Registry in May 2004, to conduct a comprehensive study and to consult the public prior to taking a course of action decision in respect of the Project.

[132] At issue in this case, is the right of the RAs to make the Course of Action Decision under the purported authority of paragraph 20(1)(a) of the CEAA. The Applicant claims that section 20 of the CEAA does not apply to the EA of the Project. The Applicant states that pursuant to section 13 of the CEAA, any course of action decision taken in this case must be made under section 37 of the CEAA before the Project is allowed to proceed and before authorizations or licences are given or issued by the RAs in accordance with the Fisheries Act and the Explosives Act respectively. Finally, the applicant contends that the Governor in Council ought to amend Schedule 2 of the MMER.

[133] The Applicant has abandoned its earlier request for a declaration that the Project falls under item 9 of the CSL, as it exceeds the water diversion volume threshold of 10 million m^3 per year. However, the Applicant maintains its request that the Project be declared a “project” for which a comprehensive study is required as it exceeds the ore production capacities provided in items 16(a) and/or 16(c) of the CSL. It also seeks an order in the form of a declaration declaring, *inter alia*, that

the RAs were under a legal duty pursuant to subsection 21(1) of the CEAA to ensure public consultation with respect to the proposed scope of the Project, the proposed factors to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the Project. The Applicant further seek an order declaring that the RAs erred in law or acted without jurisdiction in failing to perform their legal duty pursuant to subsection 21(1) of the CEAA.

[134] Furthermore, the Applicant requests an order in the nature of *certiorari* quashing and setting aside the Course of Action Decision. It also seeks an order prohibiting the exercise of any powers under paragraph 5(1)(d) or subsection 5(2) of the CEAA that would permit the Project to be carried out in whole or in part. Alternatively, it seeks an order in the nature of a *mandamus* compelling the RAs, the Minister of Fisheries and Oceans, the Minister of Natural Resources and the Governor in Council, as represented by the Attorney General, to refrain from exercising any power, duty or function that would permit the Project to be carried out in whole or in part until a course of action has been taken in relation to the Project in accordance with paragraph 37(1)(a) of the CEAA, in performance of their duty to conduct an EA under section 13 of the CEAA.

VI – STANDARD OF REVIEW

[135] The Federal Court of Appeal has already addressed the issue of the standard of review in *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage*), [2001] F.C.J. No. 18 (*Bow Valley*). At para. 55, Justice Linden noted in this regard:

> The leading case dealing with sections 15 and 16 of the Act is a decision of this Court in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* [citation omitted]. Writing for the unanimous Court, Rothstein J.A. concluded that the

> interpretation of the Act, a statute of general application, is a question of law reviewable on a correctness standard [citation omitted]. Consequently, this standard of review of statutory interpretation issues will be employed in this case. However, in that case, this Court did not rule on the appropriate standard of review for discretionary decisions of substance pursuant to the authority granted in the Act. The Trial Judge in that case has held that the standard of review for such cases should be reasonableness. Applying the *Pushpanathan* factors, this would be appropriate in this case particularly because there is no privative clause, and because the level of expertise in administering the Act is minimal in this and most, if not all, other responsible authorities. The Court determines that the standard of review applicable to the issues of jurisdiction and applicability of the impugned legislative and regulatory provisions to the Project raised by the Applicant is that of correctness. In coming to this conclusion, all four contextual factors mentioned in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 S.C.C. 19 (presence or absence of a privative clause or statutory right of appeal; expertise of the tribunal relative to that of the reviewing court on the issue in question; purposes of the legislation and of the provision in particular; and, nature of the question) have been considered by the Court.

[136] The Court must determine whether, as alleged by the Applicant, the Project falls under items 16(a) and/or 16(c) of the CSL and whether the RAs are required by section 21 of the CEAA to consult the public on the scope of the Project and the scope of the assessment prior to making any scoping or course of action decisions with respect to the Project. The Respondents submit on the contrary that section 21 does not apply since the Project “as scoped” under section 15 by the RAs is not mentioned on the CSL; therefore, the impugned decisions or actions made by the RAs were authorized by section 18 of the CEAA.

[137] As can be seen, the Court must interpret and determine the scope of sections 15 and 21 of the CEAA. The nature of the questions of law and of law and fact involved in this case is

determinative. Accordingly, the statutory interpretation issues raised in this case will be decided on a correctness standard.

VII – PRELIMINARY ISSUES RAISED BY THE RESPONDENTS

[138] For the reasons indicated below (section VIII – Merits of the case), I find that DFO correctly determined in May of 2004 that the Project is included in the CSL. The wording of section 21 of the CEAA, as amended in 2003, made public consultation mandatory. This is a clear and straightforward requirement, the significance of which appears not to have been lost on the RAs who subsequently re-tracked the Project under the *aegis* of a scoping decision thereby avoiding the rigors of the requisite public consultation process. I have accordingly decided to grant the present judicial review application. However, the Court must deal with two preliminary issues raised by the Respondents. First, the Proponent and the Attorney General contend that the Applicant did not file its application in a timely manner. Second, the Proponent challenges the Applicant's standing in the matter.

A. DELAY

[139] The Applicant filed its notice of application for judicial review on June 9, 2006. This is within 30 days from the date the Course of Action Decision was announced on the Registry.

1) *Parties' submissions*

[140] The Respondents urge the Court to conclude that this judicial review is time-barred pursuant to the 30 day time limit for filing a notice of application for judicial review, such period beginning from the time when the decision or order being reviewed was first communicated to the Applicant:

section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the FCA). Subsection 18.1(2) of the FCA further provides that this time may be extended, either before or after the expiry of the thirty days.

[141] The Respondents' position is that the 30 day limitation period commenced when the "scoping decision" mentioned in the Third Amended Notice of Commencement was communicated to the public on March 24, 2005 (the Scoping Decision of March 2005). The Respondents submit that scoping decisions made under the CEAA constitute judicially reviewable decisions and that the Applicant should not be permitted to collaterally attack the legality of the Scoping Decision.

[142] On the contrary, the Applicant asserts that the application was filed on time. It submits that the 30 day limitation period began on May 10, 2006, the date the notice of the Screening Report was communicated to the public. The Applicant contends that environmental assessments under the CEAA are, by their nature, a continuing process. Ms. Kuyek states in her affidavit that throughout 2005, she raised the Applicant's concerns with various delegates or employees of the Ministry of Environment, DFO and the Agency. Moreover, the Applicant says that until May 10, 2006, Ms. Kuyek continued to believe that the RAs would facilitate public participation.

[143] Alternatively, in the event that the Court determines that the time limitation began upon communication of the Scoping Decision of March 2005, the Applicant, as described in its written reply, has requested leave for an extension to file.

2) *Determination by the Court*

[144] The Applicant is not time-barred from bringing its application which was filed within 30 days after the communication of the Course of Action Decision. Moreover, I note that the Applicant is not challenging either the Scoping Decision of March 2005 or the final scoping decision contained in the Screening Report, but instead alleges an ongoing breach of the duty to ensure that a comprehensive study be conducted by the RAs as required by section 21 of the CEAA, which breach culminated in the taking of the Course of Action Decision, based on the conclusions contained in the Screening Report.

[145] As appears from the evidence before me, the EA of the Project has been a complex and evolving process. There have been a great number of interrelated actions and interlocutory decisions taken by the various federal and provincial authorities prior to the issuance on August 24, 2005 of an assessment certificate by the Provincial Ministers and the taking of the Course of Action Decision on May 2, 2006 by the RAs. The facts of this case show that since 2003, the scope of the Project has been modified a number of times by the RAs throughout the EA. This is normal under the circumstances considering that a great number of variables and scenarios must be addressed by the Proponent and considered by the federal and provincial authorities under various legislative and regulatory provisions.

[146] The affiant who submitted an affidavit on behalf of the Crown was directly involved in the Project when the Scoping Decision of March 2005 was made. This affiant acknowledges that the Project as scoped only included the construction, operation, modification and decommissioning of four physical works, specifically the TIA; the water diversion system in the headwaters of Trail

Creek and Northeast Arm Creeks; ancillary facilities supporting the aforementioned; and the explosive storage and manufacturing facility. To this extent, until February 8, 2007, the time of the cross-examination on his affidavit, the affiant was apparently unaware that three additional components had been added to the Project following the Scoping Decision of March 2005. Upon questioning by counsel for the Applicant, the affiant stated that he was unable to explain how the changes had happened. He further acknowledged that he was unaware of any notice ever being given to the public regarding this addition to the scope of the Project.

[147] That being said, when the Scoping Decision of March 2005 was announced, the federal agencies were still waiting to receive from RCDC its calculations and relevant data with respect to the amount of water to be diverted from the Trail Creek to the Quarry Creek watershed. Since the project "as scoped" by the RAs in March 2005 included the water diversion system in the headwaters of Trail, Quarry and NE Arm creeks, the precise amount of water to be diverted was a key element of the EA conducted by the RAs. Indeed, the resulting expansion of the water structure both during the mine life and after its closure would determine the level of assessment by the RAs (screening or comprehensive study) since a comprehensive study is required in the case of the proposed construction, decommissioning or abandonment of a structure for the diversion of 10 million m^3 or more of water from a natural water body into another natural water body or an expansion of such structure that would result in an inverse in the diversion capacity of more than 35 percent (item 9 of Part III – Water Projects of the CSL).

[148] The courts have consistently ruled that a "decision" to be subject to judicial review must be a final decision, not an interlocutory, procedural ruling. The rationale for this is that applications for

judicial review of an interlocutory ruling may ultimately be totally unnecessary: a complaining party may be successful in the end result, making the applications for judicial review of no value. Also, the unnecessary delays and expenses associated with such applications can bring the administration of justice into disrepute.

[149] In *Szczecka* v. *Canada (Minister of Employment and Immigration)* (1993), 116 D.L.R. (4th) 333 (F.C.A.), Justice Létourneau stated for the Federal Court of Appeal that:

> […] unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgement. Similarly, there will not be any basis for judicial review, especially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several Court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses, which interfere with the sound administration of justice and ultimately bring it into disrepute.

[150] In *Groupe G. Tremblay Syndics Inc.* v. *Canada (Superintendent of Bankruptcy*), [1997] 2 F.C. 719 (T.D.), Madam Justice Tremblay-Lamer, in the context of a section 18.1 proceeding, stated: "The decisions in respect of which judicial review is available are those that make a final ruling on the merits of a case."

[151] Although her statements were made in the context of criminal proceedings, I think McLachlin J.'s remarks in *R. v. Seaboyer; R. v. Gayme,* [1991] 2 S.C.R. 577 (S.C.C.) are apposite here:

> […] I would associate myself with the view that appeals from rulings on preliminary enquiries ought to be discouraged. While the law must afford a remedy where one is needed, the remedy should, in general, be accorded within the normal procedural context in which an issue arises, namely the trial. Such restraint

> will prevent a plethora of interlocutory appeals and the delays which inevitably flow from them. It will also permit a fuller view of the issue by the reviewing courts, which will have the benefit of a more complete picture of the evidence and the case.

[152] Both the Applicant and the Proponent agree that after the Scoping Decision of March 2005 was made public, the RAs changed the scope of their project determination, adding three additional project components to the four already mentioned. Although counsel for the Proponent submitted at the hearing that the three components added in the Screening Report after March 2005 were only "refinements" of the Scoping Decision of March 2005, this nevertheless demonstrates a changing of the actual scope. It cannot be said then, that the Scoping Decision of March 2005 was a "final" decision.

[153] The facts of this case are also distinguishable from *The Citizens' Mining Council of Newfoundland and Labrador v. Canada (Minister of Environment)*, [1999] F.C.J. No. 273 (*Citizens' Mining*), wherein Justice Mackay had to decide whether a decision under 15 of the CEAA was a final decision and therefore subject to judicial review. Based on the evidence before him, Justice Mackay concluded as follows:

> With respect, I am not persuaded that judicial review is premature in regard to a decision, by the responsible authority, determining the scope of the project which will be assessed, and which assessment that authority will later approve or disapprove. That decision is not merely a recommendation; rather it meets a statutory requirement and provides the basis for the process of the assessment from that point on and, as a consequence, in my opinion it is a decision subject to judicial review.

[154] In *Citizens' Mining*, the application was brought approximately eight months after the terms of reference limiting the panel review to the project were finalized and approximately seven months after one of the applicant's principals was told that the terms of reference for that assessment would

not be revisited (see *Citizens' Mining*, above, at para. 41). These extraordinary circumstances justified a departure from the normal rule that interlocutory decisions are not judicially reviewable.

[155] In this application for judicial review, however, no such extraordinary circumstances arise. The Applicant was not informed that the Scoping Decision of March 2005 was a final one. Although the evidence suggests that the Scoping Decision of March 2005 was communicated to the Applicant, for the reasons explained by Ms. Kuyek in her affidavit, it was not unreasonable for the Applicant to believe that the Scoping Decision of March 2005 would be modified and the RAs would remedy what it believed to be an unlawful process by restoring the process mandated by s.21 of the CEAA. In this regard, both sides acknowledge that the Applicant corresponded with representatives of the Agency and of DFO following the issuance of the Scoping Decision of March 2005 to object to the lack of public consultation. Indeed, there was no final decision made by the RAs until they came to the conclusion in the Screening Report that public participation in the screening of the Project under subsection 18(3) was not appropriate in the circumstances and determined that the Project "as scoped" by them in the Screening Report was not likely to cause "significant adverse environmental effects" as stated in the Course of Action Decision posted on the Registry on May 10, 2006.

[156] In *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] F.C.J. No. 1746 (C.A.), the Alberta Wilderness Association, the Canadian Nature Federation, the Canadian Parks and Wilderness Society, the Jasper Environmental Association, and the Pembina Institute for Appropriate Development (collectively the appellants), were seeking an order of prohibition against the minister of Fisheries and Oceans from issuing authorizations under the Fisheries Act on the

basis that the EA conducted by the Joint Review Panel, did not comply with the statutory requirements stipulated in the CEAA. In this case, the report prepared by the panel consisted of an EA of a proposal of the Cardinal River Coals Ltd. to build and operate a 20 km open pit coal mine three kilometres east of Jasper National Park in Alberta.

[157] The Application Judge had dismissed the application on the preliminary basis that the federal response issued by the minister of Fisheries and Oceans had not been challenged previously by the appellants and therefore served as a barrier to the appellants' claim. Consequently, the merits of the appellants' arguments were not addressed. The decision of the Application Judge was set aside by the Federal Court of Appeal and the matter referred back to the Court for determination on the merits.

[158] In *Alberta Wilderness Assn.*, Justice Sexton noted at paras. 15-18:

> In a preliminary motion prior to this appeal, the respondents sought to strike out the appellants' original application on the basis that it was time-barred. Hugessen J., starting at paragraph 3, made the following comments:
>
> > Rather I think the Report should be seen as an essential statutory preliminary step required by the Canadian Environmental Assessment Act prior to a decision by the Minister to issue an authorization under section 35 of the Fisheries Act.
> >
> > That decision has not been made and I think it is a fair reading of the Applicants' Originating Notice of Motion that it seeks primarily to prohibit the Minister from making it on the grounds that the Panel Report is fatally defective.
> >
> > Prohibition (like mandamus and quo warranto) is a remedy specifically envisaged in section 18 of the Federal Court Act and like them it does not require

> that there be a decision or order actually in existence as a prerequisite to its exercise.
>
> I agree with the view presented in this passage, which was adopted by Gibson J. in *Friends of the West Country Association v. Canada (Ministry of Fisheries and Oceans)*, [1998] F.C.J. No. 976 (T.D.) [Q.L.] at page 7.
>
> I agree with the decisions of *Bowen v. Canada*, [1997] F.C.J. No. 1526 (T.D.) [Q.L.], *Friends of West Country, supra,* and *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), 22 C.E.L.R. (N.S.) 293 (F.C.T.D.) which hold that an environmental assessment carried out in accordance with the Act is required before a decision such as the Minister's authorization in the present case can be issued. This view is reinforced by the decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.) which confirmed that the guidelines that were a pre-cursor to CEAA (the Environmental Assessment and Review Process Guidelines Order SOR/84-467) were mandatory rather than directory in nature and, thus, failure to comply with them would deny the responsible authority the jurisdiction to proceed.
>
> The requirements of CEAA are legislated directions that are explicit in mandating the necessity of an environmental assessment as a pre-requisite to Ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. It is equally clear that any assessment must be conducted in accordance with the Act, including for example, the requirement imposed under s. 16 of CEAA. The fact that a federal response has been issued and remains unchallenged does not change these requirements. Thus, the appellants are entitled to argue the merits of their case. [emphasis added]

[159] Accordingly, this application for judicial review of the Course of Action Decision is not time-barred since it has been served and filed within 30 days of the communication of the Course of Action Decision. In view of my conclusion that this application is timely, it is not necessary to consider whether leave to extend the time to file ought to be granted to the Applicant.

B. STANDING

1) *Proponent's submissions*

[160] With respect to standing, the Proponent contends that the Applicant has not raised a serious issue, that it does not have a genuine interest in the subject matter and that there are other directly affected parties who chose not to come forth with an application for judicial review.

[161] The Proponent submits in this regard that the Applicant has not challenged the substantive outcome of the Course of Action Decision and that the issues raised by the Applicant have already been decided by this Court and the Federal Court of Appeal in the TrueNorth case, above. The Proponent notes that the Applicant is an advocacy group headquartered in Ottawa who does not represent any group of local citizens or interest groups directly affected by the Project. First Nations groups who are directly affected by the Project have not made an application for judicial review. Moreover, the Proponent stresses that the Applicant has chosen not to participate in the cooperative environment assessment process. Indeed, the Applicant has not made any submissions on the merits of the Project to BCEAO, the RAs or RCDC.

2) *Tri-part test*

[162] The jurisprudence of the Supreme Court of Canada establishes that standing will be granted to a public interest group who wishes to challenge the exercise of administrative authority, as well as legislation, where the following tri-part test is met: a serious issue is raised; the Applicant shows a genuine interest; and there is no other reasonable and effective manner in which the issue may be brought to the Court (*Thorson v. Attorney General of Canada et al*, [1975] 15 S.C.R. 138; *Minister*

of Justice of Canada v. Borowski, [1986] 2 S.C.R. 607 at pages 339-340; *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236, at para. 33 and following).

[163] In applying this tri-part test, this Court has consistently rejected the proposition that the words "directly affected" used in subsection 18.1(1) of the FCA should be given a restricted meaning. Indeed, it has been decided in the past that an applicant who satisfies the requirements of discretionary public interest standing may seek relief under subsection 18.1(1) of the FCA even though not "directly affected", when the Court is otherwise convinced that the particular circumstances of the case and the type of interest which the applicant hold justify status being granted (see *Friends of the Island v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229 (T.D.) at paras. 75 to 80; *Sunshine Village Corp. v. Canada (Minister of Canadian Heritage)*, [1996] F.C.J. No. 1118, at paras. 65 to 72; *Citizens' Mining*, above, at paras. 30 to 33; *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, at paras. 27 to 34).

3) *Exercise of the Court's discretion to allow standing*

[164] I accept the arguments submitted in writing and orally at the hearing on behalf of the Applicant. In the exercise of my discretion, I have considered all three factors of the tri-part test, as well as the purpose of the CEAA and the particular circumstances of this case.

[165] The fundamental purpose of the CEAA is to ensure that projects requiring an EA are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause "significant adverse environmental effects" (paragraph 4(a) of the CEAA). Another underlying purpose is to ensure that

there are opportunities for timely and meaningful public participation throughout the environmental assessment process (paragraph 4(d) of the CEAA) [emphasis added]. Therefore, operational provisions found in the CEAA and its regulations must be interpreted and applied in a manner consistent with these purposes.

[166] For the purpose of facilitating public access to records related to environmental assessments and providing notice in a timely manner of the assessments, there is a registry called the Canadian Environmental Assessment Registry (the Registry), consisting of an Internet Site and projects files (subsection 55(1) of the CEAA). Within fourteen days after the commencement of an EA under the CEAA, notice of its commencement must be posted on the Agency's Internet site (paragraph 55.1(2)(a) of the CEAA). The notice shall include a description of the scope of the project in relation to which an EA is to be conducted, as determined under section 15 of the CEAA (see paragraph 55.1(2)(c) of the CEAA). In the preceding section (see IV – Factual Background, particularly subsection B. Federal Assessment), I have examined the measures taken by the RAs and/or the Agency to inform the general public.

[167] In addition to any requirement to notify the public or opportunities for public participation flowing from the provisions of the CEAA, an obligation on the Crown (though not on private companies or individuals) to consult First Nations exists where aboriginal rights may be affected by a project (see *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70). Indeed in *Taku River Tlingit First Nation*, above, the Supreme Court of Canada held that the process engaged in by the Province of British Columbia in respect of the EA of a mining project

contemplated in the traditional territory of the Taku River Tlingit First Nation fulfilled the requirements of its duty to consult and accommodate. However, it is not necessary in this case to determine whether or not the particular requirement to consult and accommodate the members of the Tahltan and Iskut nations has been satisfied by the provincial and federal authorities involved in the EA of the Project.

[168] A serious issue is raised by the Applicant with respect to the legality of the Course of Action Decision which is a final decision for the purpose of the present judicial review. In this instance, the Applicant is contesting that the impugned decision represents a departure from a positive duty to consult the public. To this effect, the issue of public participation is of import, not just in this case, but for future projects across Canada. Comprehensive studies as stated, mandate public consultation.

[169] Section 21 of the CEAA which the Applicant alleges to be applicable in the case at bar, has been amended substantially in 2003. The current and enhanced version of this provision was introduced by section 12 of the *Act to amend the Canadian Environmental Assessment Act*, S.C. 2003, c.9 (the Bill C-9 amendments). The former text of section 21 of the CEAA is also reproduced at the end of the present reasons for order (see Appendix "A"). The Bill C-9 amendments came into effect on October 30, 2003 and apply to the Project.

[170] The TrueNorth decisions invoked by the Respondents to sustain the legality of the impugned actions or decisions are based on the law as it read prior to the Bill C-9 amendments.

[171] Section 21 of the CEAA now makes public consultation mandatory when conducting an EA by means of a comprehensive study. Specifically, the new provision provides that "[w]here a project is described in the comprehensive study list, the RA shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project" [emphasis added].

[172] Moreover, the new section 21 of the CEAA provides that when making an EA by means of a comprehensive study, the RA must also report to the minister of the Environment after the public consultation regarding: the scope of the project, the factors to be considered in its assessment and the scope of those factors; the public concerns in relation to the project; the potential of the project to cause adverse environmental effects; and the ability of the comprehensive study to address issues relating to the project. The RA must also recommend to the minister of the Environment to continue with the EA by means of a comprehensive study or to refer the project to a mediator or review panel (subsection 21(2) of the CEAA). Again, such requirements do not exist where a screening is conducted by the RA. [emphasis added]

[173] A duty to consult the public at an early stage on key aspects of the environment assessment process is, therefore, one fundamental aspect introduced by the Bill C-9 amendments. Another one is participant funding. Previous subsection 58(1.1) required the Minister to establish a participant funding program to facilitate the public's participation in mediations and assessment by a review panel. The Bill C-9 amendments expand this program by extending participant funding to

comprehensive studies and also clarifies that the participant funding program applies to joint assessment by a review panel as well. The program is administered by the Agency.

[174] The Notice of Commencement which was posted on the Registry on May 23, 2004, announced that DFO would conduct a comprehensive study commencing on May 19, 2004. It can seriously be argued by the Applicant that this created a legitimate expectation that the general public would be consulted in accordance with section 21 of the CEAA. Moreover, at the time that the RAs changed "track" and chose to proceed by way of a screening, the documentation on file shows that the public consultation process under the provincial EA was well underway. Indeed, it was completed prior to the announcement made on the Registry of the Scoping Decision of March 2005.

[175] In the end result, there was no public consultation with respect to the screening report prepared in 2006 under the purported authority of section 18 of the CEAA. This contrasts sharply with the evidence on file that the public has been consulted by the RAs with respect to the comprehensive study prepared in the case of the Galore Creek Gold – Silver – Copper mine, which is also located in the area where the Red Chris property is situated.

[176] Relevant documentary evidence produced by the Applicant (the affidavit of Ms. Kuyek), which I find admissible and accept to consider in this proceeding, shows that on January 25, 2005, the DFO, NRCan and TC decided to conduct a comprehensive study commencing on January 11, 2005 of the Galore Creek Gold – Silver – Copper mine in British Columbia and that the general public, including the Applicant, had the opportunity to be consulted by the RAs on the scope of the project and factors to be considered despite the fact that a joint cooperative EA was also in progress.

[177] Therefore, other mines are currently being scoped by RAs with differing results. This brings a state of uncertainty with respect to the correct interpretation and application of section 21 of the CEAA which is mandatory.

[178] I defer to the reasoning of Justice Cory in *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236, at para. 38 wherein it was elucidated that the issues of standing and of whether there is a reasonable cause of action are closely related and indeed tend to merge. In the case at bar, compliance with the CEAA raises a serious and justiciable question of law.

[179] The Applicant also shows a genuine interest in the issues raised in this application for judicial review. More than a mere *bona fide* interest and concern about social and environmental issues is necessary to obtain public interest standing. In *Citizens' Mining*, above, at para. 30, this Court determined that an applicant seeking public interest standing must demonstrate: "… a longstanding reputation and it must do significant work on the subject-matter of the challenge, and its interest must be greater than that possessed by a member of the general public."

[180] Based on the evidence before me, MiningWatch clearly satisfies this requirement. It is a federally-registered non-profit society that functions as a coalition of environmental, social justice, aboriginal and labour organizations from across Canada. By focusing on federal aspects of mining development, the Applicant enjoys the highest possible reputation and has demonstrated a real and continuing interest in the problems associated mine development. Indeed, MiningWatch has made submissions before the House Committee on Bill C-19, the predecessor of the 2003 amendments to

the CEAA, and has published studies critical of failed mitigation plans in relation to mine development.

[181] The Applicant's lack of participation in the provincial environment assessment process is not a barrier to the granting of standing in this judicial review as the provincial forum would not have been to appropriate place for the Applicant to raise its concerns about the conduct of the RAs, all of whom are federal departments. Further, this Court has ruled that the lack of participation in an assessment does not preclude an interested party from seeking standing: *Sierra Club,* above, at para. 68. Finally, I am also of the view that since Ms. Kuyek raised the Applicant's concerns with various delegates or employees of the Ministry of Environment, DFO and the Agency throughout 2005, this suggests an involvement with the Project that prevents the striking out of the application on the ground of lack of standing.

[182] Although the Applicant raises a serious issue and has a genuine interest in the subject matter of this application, public interest standing may still be denied if there are other persons who are more directly affected than the Applicant, and are reasonably likely to institute proceedings to challenge the administrative action in question. The rationale for this final requirement is that those most directly affected by administrative action are often in the best position to bring to the court the information necessary for an appropriate resolution of the dispute.

[183] It is obvious that members of the general public as well as aboriginal groups/individuals living geographically proximal to the Project may have an interest in this judicial review. However, given the complexities and interconnectedness of modern society (as discussed by the Supreme

Court in *Canadian Council of Churches*, above, at para. 29), I am not persuaded that geographical proximity ought to be the determinative factor when assessing public interest standing.

[184] Instead, I import the reasoning of Justice Mackay in *Citizens' Mining* that public interest standing should be accorded "where the applicant has a genuine interest and there is no evidence of another or others with a genuine interest that could reasonably be expected to bring a challenge." I disagree that that just because others might share the Applicant's concerns, but have not commenced legal action, the Applicant should be denied standing. In the case at bar, there is no evidence to suggest that others might raise the important issue raised by the Applicant concerning both the scope of section 21 of the CEAA, as amended by Bill C-9, and its application in relation to the Project.

[185] In sum, MiningWatch represents a coalition of approximately twenty groups that express a communal concern and seek to challenge a decision that might otherwise be essentially beyond review. In my view, the Applicant is the only one to demonstrate sufficient interest or the means to launch this judicial review.

[186] Therefore, standing is accorded to the Applicant under the doctrine of public interest.

VIII – MERITS OF THE CASE

[187] Essentially, the Court is faced with a "chicken or the egg" conundrum. Once an EA has been "triggered" pursuant to section 5 of the CEAA, does a RA have jurisdiction to re-scope a project listed in the CSL in a manner that will prevent the RA from conducting a comprehensive study?

A. PARTIES SUBMISSIONS

[188] Through counsel, parties made extensive submissions in writing and at the hearing on the merits of this case. While particular arguments are not necessarily reflected in the following paragraphs, I have considered all such arguments prior to making the order which follows the present reasons. The main submissions made by the parties can be summarized as follows.

1) *The Applicant*

[189] The Applicant contends that tracking must follow the rules set out in sections 18 and 21 of the CEAA and that scoping of the project under section 15 is determined only after identifying the correct assessment track. In support of its contentions, it points out that whereas the former version of section 21 did not make public consultation mandatory, the current version provides that "[w]here a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment…" [emphasis added]. The Applicant interprets this to mean that "tracking" must take place prior to any scoping of the project for the purpose of the EA. It points out that the definition of "project" at section 2 of the CEAA is a general term that does not make a distinction between federal and provincial projects and cannot be construed as a "project as scoped". Therefore, in the case at bar, when identifying the "track" to be followed, the RAs should have looked at the project that was described in the proposal to BCEAO.

[190] Moreover, according to the Applicant, "where a project is described in the comprehensive study list" is a condition precedent to the application of section 21. As such, where the "project" that

has been proposed is set out in the CSL, the EA must be carried out by means of a comprehensive study. In the case at bar, as the project description that was submitted to BCEAO contained mine production thresholds exceeding those prescribed by paragraphs 16(a) and (c) of the CSL, the project is "described in the comprehensive study list" and the EA should have proceeded by means of comprehensive study. Furthermore, it is clear by the use of the term "proposed scope", which was added to section 21 by Bill C-9 amendments, that public consultation must take place prior to the actual scoping decision. Indeed, to interpret section 21 otherwise would be to allow RAs to circumvent public consultation by narrowing the scope of a project in order to exclude components that are described in the CSL.

[191] The Applicant further submits that the CEAA does not give the RAs the power to convert comprehensive studies into screenings. It points out that section 21.1 of the CEAA, which was added in 2003, explicitly allows the minister of the Environment to decide to either refer the project to a responsible authority so that it may continue the comprehensive study or refer the project to a mediator or review panel. No such provision exists with regards to the RAs. It further notes the CEAA does not provide to anyone the power to downgrade a comprehensive study to a screening.

[192] At the hearing, counsel for the Applicant specified that the Applicant does not submit that a project must always be scoped to include all of its elements. Rather, such determinations must be made on a case-by-case basis. Counsel further argued that if the minister of the Environment believed that the scope of the project was too narrow, after public consultation, the Minister could refer the project to a review panel or mediation.

[193] The Applicant also submits that the TrueNorth decisions which are invoked by the Respondents should be distinguished from the case at bar. First, the Applicant points out the TrueNorth decisions related to the judicial review of a scoping decision, whereas in the case at bar, the Applicant alleges that following the taking of action based on a screening report, there was a breach of the duty to ensure public consultation pursuant to section 21 of the CEAA. It points out that section 21 was not mentioned at all by the Federal Court of Appeal. Second, the TrueNorth decisions pertain to the former version of the CEAA that was in force prior to the Bill C-9 amendments. The Applicant further submits that Parliament could not have contemplated the TrueNorth decisions when making the amendments, as they were rendered after the coming into force of Bill C-9 amendments which made public consultation on the scope of the project compulsory. Indeed, in oral argument, counsel for the Applicant that had Parliament indicated not amended this section in 2003, it would not be before the Court today.

2) *The Respondents*

[194] For their part, the Respondents contend that “scoping” determines the “tracking” of a project.

[195] The Proponent submits the Applicant’s arguments were already dealt with in the TrueNorth decisions. Even where the entire proposal contains some components that are included on the CSL, a RA may scope the project down to focus on those components that require a federal permit, licence or approval. Furthermore, in TrueNorth, the Federal Court of Appeal confirmed that the scoping decision under section 15 of the CEAA is made prior to the decisions to proceed by means

of either screening or comprehensive study. The Proponent submits that Bill C-9 amendments did not change that order and points out that no amendments were made to section 15.

[196] The Crown submits that section 21 of the CEAA is only triggered if a component of the proposed scope of the project, as determined by the RA under section 15, appears on the CSL. The Crown further argues that a RA may amend the scope of the project at any time after section 21 is engaged. If the scope is amended so that none of the components of the project appear on the CSL, section 21 ceases to apply. It submits that in the TrueNorth decision, the Federal Court of Appeal confirmed that "project" for purposes of assessment is not the proposal, but is determined by the RA pursuant to the exercise of its discretion under section 15 of the CEAA. The Crown submits that the Federal Court of Appeal in TrueNorth has decided that "project" for the purposes of the CEAA must be read as "project as scoped" under section 15 of the CEAA. According to the Crown, the term "project" must therefore be read throughout the CEAA as "project as scoped", including at section 21.

[197] While the Crown's written submissions also focused on the constitutional aspect of TrueNorth, at the hearing, counsel for the Crown clarified that he did not believe that their position differed from that of the Proponent. In any event, counsel for the Crown submits that this issue does not have to be determined in the case at bar.

B. LEGISLATIVE SCHEME

[198] In *Bow Valley*, above, the Federal Court of Appeal, at para. 19, affirmed that the basic framework for an environmental assessment was as follows:

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

[199] It is not necessary to come back to the particular elements which have triggered the need to conduct an EA under section 5 of the CEAA in the case of the Project. In this regard, I will refer only to what has already been mentioned in section III – Requirement of an Environmental Assessment (EA), above. That being said, I will now examine two particular legal aspects that need clarification: 1) the types of environmental assessment (tracks) and 2) the nature of scoping.

1) *Types of environmental assessment (tracks)*

[200] Section 14 of the CEAA provides that there are four types of environmental assessments: screening, comprehensive study, mediation and assessment by a review panel. These types of assessments are also commonly referred to as “tracks”. Where applicable, the EA also includes the design and implementation of a follow-up program.

[201] The majority of projects requiring an EA under section 5 of the CEAA will undergo a self-directed EA, which can involve either a screening or a comprehensive study.

[202] Pursuant to section 13 of the CEAA, where a project is described in the CSL or is referred to a mediator or a review panel, notwithstanding any other Act of Parliament, no power, duty or function confirmed by or under the Act and any regulation made thereunder shall be exercised or

performed that would permit the project to be carried out in whole or in part unless an EA of the project has been completed and a course of action has been taken in relation to the project in accordance with paragraph 37(1)(a) of the CEAA.

a) Screening

[203] Section 18 of the CEAA, which the Respondents allege to be applicable in the case at bar, provides that where a project is not described in the CSL or the EL, the RA shall ensure that a screening of the project is conducted and that a screening report is prepared.

[204] Under subsection 16(1) of the CEAA, the screening will include a consideration of the following factors: the environmental effects of the project, the significance of the environmental effects, comments from the public received in accordance with the CEAA and the regulations, measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project, and any other matter relevant to the screening that the RA may require.

[205] In the context of a screening, public consultation is not necessarily mandatory. Where it is not required by regulations, the latter will only occur if the RA is of the opinion that public participation in the screening of a project is appropriate in the circumstances (subsection 18(3) of the CEAA). In such cases, the RA will include, on the Internet site, a description of the scope of the project, the factors to be taken into consideration in the screening and the scope of those factors or an indication of how such a description may be obtained (paragraph 18(3)(a) of the CEAA).

[206] Again, if the RA is of the opinion that public participation in the screening of a project is appropriate, before taking a course of action under section 20 of the CEAA, the RA will give the public an opportunity to examine and comment on the screening report and on any record relating to the project that has been included in the Registry and will give adequate notice of that opportunity (paragraph 18(3)(b) of the CEAA). After taking into consideration the screening report and any comments filed pursuant to subsection 18(3) of the CEAA), the RA can then take one of the courses of action described at section 20 of the CEAA.

[207] As it was explained earlier, the Course of Action Decision made by the RAs on May 2, 2006 is based on paragraph 20(1)(a) of the CEAA, which reads as follows:

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):	20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) :
(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;	a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;

[emphasis added]

[208] Indeed, the RAs took the Course of Action Decision without any input from the public in the EA process under the CEAA on the grounds that public consultation in the provincial EA process "provided sufficient and satisfactory opportunities for public input into the Red Chris EA process". In this regard, the RAs noted: "Based on the extent of consultation that has been conducted by the Government of BC and the Proponent, and the information that the RAs received from this consultation, the RAs are of the opinion that public participation in the screening of the Project under CEAA 18(3) is not appropriate under these circumstances".

b) Comprehensive study

[209] Section 21 provides that a comprehensive study must be conducted in the case of a project mentioned on the CSL. Section 21 has been substantially amended in 2003. The amendments introduced by Bill C-9 will be discussed later.

[210] A comprehensive study constitutes a more thorough environmental assessment than a screening. Indeed, where a comprehensive study is required, in addition to the factors considered under subsection 16(1) of the CEAA, the following factors will also be considered: the purpose of the project; alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means; the need for, and the requirements of, any follow-up program in respect of the project; and the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future (subsection 16(2) of the CEAA).

[211] The CSL referred to in section 21 of the CEAA, which the Applicant alleges to be applicable to the Project, categorizes projects or classes of projects for which a comprehensive study is required where the Governor in Council is satisfied that the project or any project within the class is likely to have significant adverse environmental effects. The CSL is appended as a schedule of the CSL Regulations.

[212] In a manner similar to the EL and the IL already mentioned above (see Section III – Requirement of an EA), the CSL is divided into parts reflecting its general areas of application, including: national parks and protected areas; electrical generating stations and transmission lines; water projects; oil and gas projects; minerals and mineral processing; nuclear and related facilities; industrial facilities; defence; transportation; and water management.

[213] Pursuant to section 3 of the CSL Regulations, the proposed construction, decommissioning or abandonment of a metal mine, other than a gold mine with an ore production capacity of 3 000 tonnes per day or more, or a gold mine other than a placer mine, with an ore production capacity of 600 tonnes per day or more are prescribed projects and classes of projects for which a comprehensive study is required (see items 16(a) and (c) of Part 5 - Minerals and Mineral Processing of the Schedule to the CSL Regulations).

[214] Moreover, a comprehensive study is required in the case of the proposed construction, decommissioning or abandonment of a structure for the diversion of 10 million m^3 or more of water from a natural water body into an other natural body water or an expansion of such structure that would result in an increase in the diversion capacity of more than 35 percent (Item 9 of Part III –

Water Projects of the CSL). However, in view of the fact that the Applicant has abandoned its request that a declaration be made in this regard, it is not necessary to determine whether or not the Project also falls under item 9 of the CSL, as it may exceed the water diversion volume threshold of 10 million m^3 per year in the post-closure period of the mine (see the estimates mentioned at section II - The Project).

[215] The Bill C-9 amendments also added sections 21.1 and 21.2 to the CEAA.

[216] Section 21.1 of the CEAA provides that after the public consultation, the minister of the Environment must take into account the RA's report and its recommendation, and then either refer the project to the RA so that it may continue the comprehensive study and ensure that a comprehensive study report is prepared and provided to the minister of the Environment and to the Agency or refer the project to a mediator or review panel. If the minister of the Environment refers the project to the RA, this decision is final; the project may not be later referred to a mediator or review panel (subsection 21.1(2) of the CEAA).

[217] Furthermore, pursuant to the new section 21.2 of the CEAA, the RA must then ensure that the public is provided with an opportunity in addition to those provided under subsection 21(1) and section 22 of the CEAA, to participate in the comprehensive study, subject to a decision with respect to the timing of the participation made by the federal environmental assessment coordinator under paragraph 12.3(c) of the CEAA.

[218] Section 22 of the CEAA, which also deals with comprehensive studies, has not been amended. After receiving a comprehensive study report in respect of a project, the Agency publishes a notice setting out, *inter alia*, the address for filing comments on the conclusions and recommendations of the report and any person may file comments with the Agency relating to the conclusions and recommendations and any other aspect of the comprehensive study report. Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusions and recommendations and any other aspects of the comprehensive study report.

[219] Pursuant to subsection 23(1) of the CEAA, after taking into consideration the comprehensive study report and any comments filed, the minister of the Environment may refer the project to the RA for action under section 37 of the CEAA and issue an environmental assessment decision statement that sets out the minister of the Environment's opinion as to whether, taking into account the implementation of any mitigation measures that the minister of the Environment considers appropriate, the project is or is not likely to cause significant adverse environmental effects and sets out any mitigation measures or follow-up program that the minister of the Environment considers appropriate, after having taken into account the views of the RAs and other federal authorities concerning the measures and program.

c) Review panel or mediator

[220] The CEAA confers broad discretionary power upon the RAs or the minister of the Environment to choose a "higher" track than that of a screening or a comprehensive study.

[221] Indeed, subject to paragraphs 29(1)(b) and (c) of the CEAA, where at any time a RA is of the opinion that a project, taking into account the implementation of any mitigation measures that the RA considers appropriate, may cause significant adverse environmental effects, or public concerns warrant a reference to a mediator or a review panel, the RA may request the minister of the Environment to refer the project to a mediator or a review panel (section 25 of the CEAA).

[222] Similarly, where at any time the minister of the Environment is of the opinion that a project for which an environmental assessment may be required under section 5 of the CEAA, taking into account the implementation of any appropriate mitigation measures, may cause significant adverse environmental effects, or public concerns warrant a reference to a mediator or a review panel, the minister of the Environment may, after offering to consult with the jurisdiction within the meaning of subsection 12(5) of the CEAA, where the project is to be carried out and after consulting with the RA or, where there is no RA in relation to the project, the appropriate federal authority, refer the project to a mediator or a review panel (section 28 of the CEAA).

2) *The nature of scoping*

[223] Establishing the scope of a project to be assessed is a very fact-specific endeavor, one which requires a careful examination of the works that are being carried out in relation to the project in question.

[224] For example, in *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, the Supreme Court of Canada considered the question of the scope of the project for the purposes of assessment under the *National Energy Board Act*, R.S.C. 1985, c. N-7. Hydro-Québec

had applied for licenses to export electricity to the United States. The National Energy Board (the Board) approved the licenses subject to two environmental conditions related to the proposed electricity generating facilities. One condition required that, prior to their construction, the electricity generating facilities undergo an environmental assessment.

[225] The Supreme Court ruled that, in assessing the scope of the assessment, the proper question to ask was whether the construction of the new facilities "is required to serve, among other needs, the demands of the export contract." The Supreme Court further held that the Board was not limited in its scope of inquiry to the "environmental ramifications of the transmission of power by a line of wire." Thus, the environmental effects of the electricity generating facilities were related to the Board's power to grant an export license and came within the scope of the assessment.

[226] Subsection 15(1) of the CEAA which the Respondents invoke to sustain the legality of the decisions or actions taken by the RAs, provides that the scope of the project in relation to which an EA is to be conducted is determined by the RA; where the project is referred to a mediator or review panel, the scope is determined by the minister of the Environment, after consulting with the RA.

[227] Pursuant to subsection 15(2), the RA may combine two or more projects to which the Act applies into the same EA if it determines that the projects are so closely related that they can be considered as forming a single project. This power is discretionary.

[228] Moreover, subsection 15(3) of the CEAA further provides:

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of	(3) Est effectuée, dans l'un ou l'autre des cas suivants, l'évaluation environnementale de toute opération — construction, exploitation, modification, désaffectation, fermeture ou autre — constituant un projet lié à un ouvrage :
(a) the responsible authority, or	a) l'opération est proposée par le promoteur;
(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority, likely to be carried out in relation to that physical work.	b) l'autorité responsable ou, dans le cadre d'une médiation ou de l'examen par une commission et après consultation de cette autorité, le ministre estime l'opération susceptible d'être réalisée en liaison avec l'ouvrage.
	[emphasis added]

[229] While not binding, the guidelines explain how the Agency envisions the operation of the EA process, which is a complex one. Indeed, courts have relied on the Agency's publications in order to describe the EA process: *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)*, [2000] 2 F.C. 263 (C.A.), *Citizens' Mining*, above; *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)* (1999), 170 F.T.R.161 (T.D.), *Bow Valley*, above.

[230] The RAs must first determine whether the CEAA applies. To answer this question, the RA must determine if:

1) there is a "project" as defined by the CEAA;

2) the project is not excluded by the CEAA or one of its regulations;

3) the project involves a “federal authority”; and/or

4) the project involves an action that triggers the need for an EA under the CEAA.

[231] Second, the RA determines which EA track to follow. In this regard, the Guide to the preparation of a comprehensive study for proponents and responsible authorities mentions:

> The majority of federal projects requiring an environmental assessment will undergo a self-directed EA, which can involve either a screening or a comprehensive study. Both are considered self-directed environmental assessments because the responsible authority:
>
> - determines the scope of the environmental assessment;
> - ascertains the factors to be considered;
> - directly manages the environmental assessment process; and
> - ensures that an environmental assessment report is drawn up.
>
> Although the majority of self-directed EAs will involve screenings, some will require a comprehensive study, which involves a more intensive and rigorous assessment of a proposed project’s environmental effects.
>
> A project will undergo a comprehensive study when it:
> - is prescribed within the Comprehensive Study List Regulations;
> - Has not been referred directly by the RA to the Minister for mediation or panel review; and
> - Takes place inside of Canada.
>
> The RA must review the Comprehensive Study List Regulations to determine if the project, for which it is proposing to exercise a power, is described on the list. Where it is unclear whether a project is on the list, the RA should seek advice from the Agency.

[232] In this regard, the Guide to the preparation of a comprehensive study mentions:

> It is up to the responsible authorities to determine the scope of the project (s.15), and the scope of the factors to be taken into consideration during the comprehensive study (ss. 16(1), ss. 16(2) and ss (3)). The *Federal Coordination Regulations* require that the

> RAs and expert departments together determine the scope of the project, the factors to be considered and the scope of the factors. The best practice is for federal authorities to agree on one scope that satisfies all their EA responsibilities. However, this is not a legal requirement.
>
> It is highly recommended that the scoping exercise be undertaken in consultation with the proponent, stakeholders groups, expert departments and the Agency. Scoping sessions should be held as early as possible in the process. The success of the environmental assessment process will often depend on how well this step is undertaken. The scoping exercise sets the parameters for the comprehensive study and provides a rationale for the design of the studies which may be required. [emphasis added]

[233] As noted by Justice Linden in *Bow Valley*, above, at paras. 25-27:

> The Act does not define the process of scoping of the project. Neither does it define the term "scope." Nor does it provide any direction to the responsible authority in determining which physical works should be included within the scope of the project. The Responsible Authority's Guide, however, suggests the use of the principal project/accessory test to ensure consistency in scope of the project determinations. According to the principal project/accessory test, the principal project, i.e., either the undertaking with respect to a physical work or the physical activity, must always be included in the scope of the project. The scope should also include other physical works or physical activities which are accessory to the principal project.
>
> The Responsible Authority's Guide suggests two criteria be used in determining what constitutes an accessory to the principal project: interdependence and linkage. If the principal project cannot proceed without the undertaking of another physical work or activity, then that other physical work or activity may be considered as a component of the scoped project. Furthermore, if the decision to undertake the principal project makes the decision to undertake another physical work or activity inevitable, then that other physical work or activity may also be considered as a component of the scoped project.
>
> The Operational Policy Statement issued by the Agency entitled "Establishing the Scope of the Environmental Assessment" provides

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

[234] As can be seen, the process of scoping involves several issues, namely the scope of the project itself, the scope of the environmental assessment, the scope of the factors to be considered, and scoping “interested parties” (see the definition in section 2 of the CEAA). I will now examine the relevant case law with respect to the interpretation of the powers granted to the RAs in this regard.

[235] In the case at bar, it is not contemplated that the Project will be completed in several phases (however the two projected open pits would eventually merge into one) or that RCDC will not construct the projected mine and mill which have been excluded by the RAs in the Scoping Decision of March 2005. Neither is it a case where the RAs have decided to include in the scoping exercise components of a project which had for instance, been excluded by a proponent in its description of the contemplated project. As it was previously explained, it was initially determined by DFO in May 2004 that a comprehensive study, preceded by a public consultation with respect to the scope of the Project and factors to be considered in the EA of the Project, would be prepared by

the RAs. However, the RAs later determined that the Project "as scoped" by them was no longer included in the CSL.

C. CASE LAW

[236] The interpretation of section 15 has been the subject of significant judicial consideration.

1) *Bowen*

[237] In *Bowen v. Canada (Attorney General)*, [1997] F.C.J. No. 1526 (T.D.), the applicants contested a decision of the minister of Canadian Heritage to close the airstrips in Banff and Jasper National Parks. More specifically, the applicants alleged the screening process, which the Department of Heritage undertook to determine the environmental effects of decommissioning the airstrips, was in violation of the requirements under the CEAA to complete a comprehensive study. In this decision, the Court assessed the scheme under the former version of the CEAA. The Court then evaluated whether the decision of the Governor in Council was "in relation to a physical work." Having identified the project as the decommissioning of airstrips, the Court next considered whether the project was on the comprehensive study list. Justice Campbell noted in this regard:

> Under s. 1 of the Comprehensive Study List, since each decommissioning is in relation to a physical work in a national park, a comprehensive study is required, but only if the decommissioning is contrary to the management plan for the park concerned.

[238] Finding that the decommissioning of airstrips was contrary to the management plan for the parks concerned, the Court determined the project was on the CSL. Justice Campbell further noted:

> Therefore, I find that a comprehensive study is required respecting any decision to decommission either the Banff or Jasper airstrips. I also find that the fact that screening assessments have already been done is an irrelevant consideration as far as the law is concerned,

> although undoubtedly, the results will be of practical assistance in the development of the required comprehensive studies.

[239] In light of this finding, the Court concluded, therefore, a comprehensive study was required and that the screening was *ultra vires*.

2) *Manitoba's Future Forest Alliance*

[240] The case of *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)* (1999), 170 F.T.R.161 (T.D.) involved the construction of a bridge and an environmental assessment undertaken by the Canada Coast Guard. The proponent of the project was also undertaking the conversion and expansion of an existing pulp mill, the construction of a new pulp mill, the construction of hundreds of kilometres of logging roads and other related forestry activities. The approval was challenged on the basis of the narrow scoping of the project. Justice Nadon found that, when determining the scope of the project under subsection 15(1) of the CEAA, the responsible authority was required under subsection 15(3) to assess not just those undertakings proposed by the proponent but also those which were likely to be carried out in relation to the bridge.

[241] Justice Nadon at para. 53, imported the following passage from the respondent's memorandum into his judgment:

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

[242] However, based on the particular facts in that case, the Court concluded that the Coast Guard was not required to include the forestry operations, the pulp mills or the construction of the new roads in the scope of the project since the forestry operations were not undertakings related to the bridge or likely to be carried out in relation to that project.

3) *Friends of the West Country Assn.*

[243] In *Friends of the West Country Assn.*, above, the breadth of subsections 15(1) and (3) of the CEAA was reviewed by this Court and the Federal Court of Appeal. In first instance, the Court found no reviewable error in the manner in which the Coast Guard exercised its discretion in defining the projects subject to environmental assessment review. In particular, the Court found no error in the Coast Guard, not including the main line road and the proposed Sunpine forestry operations within the scope of the bridge projects. However, the Court went on to consider subsection 15(3). In this regard, my colleague Justice Gibson concluded that the RA was obliged to include within "the scope of the environmental assessment" (as opposed to the "projects") the road and perhaps the forestry operations because they were "in relation to" the bridges.

[244] The appeal was dismissed and it was ordered that the matter be redetermined in the accordance with the reasons of Justice Gibson as modified by the reasons of the Federal Court of Appeal. In this regard, Justice Rothstein who wrote the reasons of the Court of Appeal stated that while the scope of the project is to be determined by the RA, it may include more than just the physical work that triggered CEAA review, where there are other physical activities in relation to a particular work. However, subsection 15(3), is "subsidiary" to subsection 15(1), and as stated by

Justice Rothstein in the latter case "… the words in subsection 15(3) do not have the effect of re-scoping a project to something wider than that was determined under subsection 15(1)".

[245] That being said, Justice Rothstein opined at paras. 34 and 39:

> Under paragraph 16(1)(a), the responsible authority is not limited to considering environmental effects solely within the scope of a project as defined in subsection 15(1). Nor is it restricted to considering only environmental effects emanating from sources within federal jurisdiction. Indeed, the nature of a cumulative effects assessment under paragraph 16(1)(a) would appear to expressly broaden the considerations beyond the project as scoped.
>
> …
>
> […] It is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects. I do not say that is the case here. I only observe that a finding of insignificant effects of the scoped projects is sufficient to open the possibility of cumulative significant environmental effects when other projects are taken into account. For this reason, I do not think the insignificant effects finding precludes the application of the cumulative effects portion of paragraph 16(1)(a) or subsection 16(3) in this case.
>
> [emphasis added]

[246] Accordingly, the Federal Court of Appeal determined that the Coast Guard had erred in declining to exercise the discretion conferred on it in its cumulative effects analysis under paragraph 16(1)(a) by excluding consideration of effects from other projects or activities because they were outside the scoped projects or were outside federal jurisdiction.

4) *Canadian Parks and Wilderness Society*

[247] The courts have recognized that the need to establish the scope of a project to be assessed is particularly important when looking at a project that may involve different phases or developments

over the course of several years. For example, in *Canadian Parks and Wilderness Society v. the Minister of Canadian Heritage*, [2001] F.C.J. No. 1543, 2001 FCT 1123 (T.D.); affd [2003] F.C.J. No. 703, 2003 FCA 197, the minister of Canadian Heritage treated an EA of a winter road as one project and determined that any future proposal to build an all-season road would be a new project. The EA was challenged, based in part on the scope of the assessment. The challenge was not successful and it was determined that the minister of Canadian Heritage had acted within the scope of her jurisdiction by considering the winter road and possible all-season road as two separate projects.

5) *TrueNorth*

[248] I will now analyze the two TrueNorth decisions rendered by this Court in 2004 and the Federal Court of Appeal in 2006. The relevant facts of that case, as set out by my colleague Justice Russell in TrueNorth – first instance, are explained below. Like the cases mentioned above, the TrueNorth decisions are also based on the provisions of the CEAA as they read prior to the Bill C-9 amendments. However, the text of section 15 has remained the same.

a) Factual background

[249] In August 2000, TrueNorth Energy Corporation announced its plans to develop an oil sands extraction mine near Fort McMurray, Alberta, which required the removal of oil-laden soil. The development necessitated the destruction of Fort Creek, a fish-bearing stream that ran through the area of the proposed mine. Consequently, an authorization to destroy fish and fish habitat (HADD) was required by section 35 of the Fisheries Act. DFO, the responsible authority in that case,

received a formal application for authorization in April 2001, which triggered an environmental assessment pursuant to paragraph 5(d) of the CEAA.

[250] The Province of Alberta was also conducting a review of TrueNorth's proposal. In July 2001, DFO obtained TrueNorth's environmental impact assessment (EIA), which had been required by the Province of Alberta for the purpose of its review of the TrueNorth's proposal. The EIA identified fish tainting as a potential issue of high significance. Fish tainting, a long-term declining quality of fish, is caused either by natural seepage or by the deposit of a deleterious substance into waters frequented by fish. In this regard, the EIA contemplated the possibility of the deposit coming from the operations of TrueNorth's mine. The Court noted in *obiter* at para. 9, that although "[t]he deposit of a deleterious substance into waters frequented by fish is prohibited by s. 36(3) of the Fisheries Act, [it] was not subject to an authorization under subsection 35(a) of the Fisheries Act [sic]". It is worthwhile to reiterate that TrueNorth's proposal, unlike in the case at bar, did not include a TIA.

[251] Almost one year later, in May 2002, TrueNorth provided DFO with a consultant's report that reduced the potential fish tainting effects to the level of negligible. In July 2002, Environment Canada provided its expert advice and urged that further studies be conducted, although it did not necessarily dispute TrueNorth's assessment that the fish tainting effects would be negligible.

[252] In July 2002, DFO participated as an intervener in the hearings conducted by the province through the Alberta Energy and Utilities Board (AEUB) in relation to the TrueNorth mining proposal.

[253] The following month, in August 2002, DFO circulated a preliminary scoping decision in a letter, identifying the scope of the project in relation to which an environmental assessment was to be conducted as being the destruction of the bed and channel of Fort Creek and other associated activities:

1. The destruction of the bed and channel of Fort Creek
2. The construction of temporary or permanent diversions of Fort Creek
3. The construction of site de-watering and drainage works
4. The construction and operation of associated sediment and erosion control works
5. The construction of any Fort Creek crossings and associated approaches
6. The construction and operation of any fish habitat compensation works as required by DFO
7. The construction of camps and storage areas associated with (1) through (7)
8. Site clearing and removal of riparian vegetation associated with (1) through (8)

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

[255] DFO consulted with other federal authorities before determining the scope of the project, pursuant to section 8 of the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181. Responses were received from Health Canada, Parks Canada, NRCan and Environment Canada. Of all of these federal authorities, only Environment Canada recommended that the scope of the project be expanded

beyond that proposed in DFO's letter. Specifically, it recommended that the scope of the project be expanded "to include the entire project as defined by TrueNorth Energy Ltd. in its combined application to the Alberta Energy Utilities Board and Alberta Environment". Furthermore, in October 2002, three non-profit organizations also submitted a letter through their counsel arguing that the proposed scoping was too narrow and that a comprehensive study was required.

[256] In December 2002, DFO issued its final scoping decision with scoping unchanged from its August 2002 preliminary decision. With regards to this decision, Justice Russell writes:

> In arriving at the final scoping Decision, Ms. Majewski [Area Chief, Habitat with the DFO] was guided by the principles that the determination must be reasonable and made on a case-by case basis. Ms. Majewski determined the scope of the project to be that which includes the undertakings and activities that require authorization under s. 35(2) of the *Fisheries Act* and give rise to the application of CEAA and the ancillary works and activities. Accordingly, she scoped in the destruction of the bed channel of Fort Creek because it entails physical activities prescribed to be a "project" for the purpose of CEAA pursuant to Part VII of the Schedule of the Inclusion List Regulations. The remaining elements of her scoping Decision entail the ancillary works and activities, including a Fort Creek diversion channel.
>
> Had the water flows of Fort Creek into a diversion channel exceeded limits shown in s. 9 of the *Comprehensive Study List Regulations*, a comprehensive study would have been required. Since this was not the case, Ms. Majewski concluded that the environmental assessment under CEAA should be conducted at a screening level.
>
> In reaching her final Decision on scoping Ms. Majewski took into consideration all comments, including those made by the Applicants' counsel, as well as the findings of the provincial hearing.

b) Judicial review application

[257] The non-profit organizations who had earlier made representations to DFO applied to this Court for judicial review of DFO's December 2002 scoping decision. They submitted that DFO had wrongly limited the scope of the project to the destruction of the Fort Creek and should instead have scoped the entire oil sands undertaking. They argued that DFO had erred in its interpretation of the scope of the federal assessment power under the CEAA and of the definition of "project", and had unreasonably exercised its discretion in determining the scope of the project to be assessed. Specifically, the applicants submitted that the destruction of Fort Creek was an impact of the project and not a separate project in and of itself. Because the oil sands project exceeded two separate thresholds set out in Part IV of the CSL, a comprehensive study of the project was required.

[258] The applicants stressed that Ms. Majewski had wrongly assumed that where an EA was triggered, "the scope of the project should be limited to those elements over which the federal government can validly assert authority, either directly or indirectly. The EA scope of project should correspond to the federally regulated undertaking involved in the application". The applicants argued that this demonstrated that DFO mistakenly believed that a federal authority could only look at what it could validly regulate. However, according to the applicants, in *Friends of Oldman River Society*, above, the Supreme Court of Canada had established that the scope of assessment was not confined to the particular head of power under which the federal authority had decision-making responsibility and once the initiating department had been given authority to embark on the assessment, its review must consider the environmental effect on all areas of federal jurisdiction.

c) Decision in first instance

[259] On September 16, 2004, Justice Russell dismissed the application. In coming to his conclusion, he noted, at para. 234:

> In my view, then, the Oldman River case, although directing that assessment, once appropriately initiated, can consider the impact of a project on all areas of federal jurisdiction, does not suggest that the scope of an assessment does not have to be connected to the relevant head of federal power that is engaged by an application. In fact, I am of the view that there was behind the judgment of LaForest J. in Oldman River an assumption that the exercise of legislative power can only give a mandate to examine matters that are related to the heads of federal responsibility affected.
>
> In any event, I am of the view that the scoping mandate of DFO is to be found in CEAA itself and not by reference to a decision such as that in Oldman River, that dealt specifically with the constitutionality of a particular Guidelines Order. [emphasis added]

[260] Justice Russell further observed, at para. 243:

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

[261] Moreover, Justice Russell held that nothing in the definition of “project” in the CEAA prevented the destruction of Fort Creek from being a project in its own right.

[262] Although former section 21 of the CEAA was mentioned in Justice Russell’s summary of the parties’ submissions, it was not explicitly mentioned in his analysis. That being said, it is clear that Justice Russell’s comments above are directed exclusively to the “scope of an assessment”

under section 5 of the CEAA, which in this case “specifically limits a scoping decision to the relevant head of federal jurisdiction occupied by the responsible authority”.

d) Decision in appeal

[263] The applicants appealed the decision rendered by the Court. On January 27, 2006, the Federal Court of Appeal dismissed the appeal.

[264] First, with regards to the applicants’ argument that the words “in whole or in part” in paragraph 5(1)(d) implied that a project must consist of an entire physical work or physical activity, Justice Rothstein who wrote the reasons of the Federal Court of Appeal stated:

> The appellants have misconstrued paragraph 5(1)(d). The project referred to in paragraph 5(1)(d) is the project as scoped by the responsible authority under subsection 15(1). The words "in whole or in part" recognize that within a project as scoped by a responsible authority, the power to be exercised by a federal authority under subsection 5(1)(d) may relate only to a part of that project. In this case, TrueNorth requires authorization from the Minister of Fisheries and Oceans of Canada under subsection 35(2) of the Fisheries Act for the destruction of the Fort Creek fish habitat. However, the project, as scoped, involves more than the destruction of Fort Creek: for example, construction of camps and storage areas required to carry out the destruction of Fort Creek. Although the construction camps and storage areas are scoped as part of the destruction of the Fort Creek project, TrueNorth will not require permits under paragraph 5(1)(d) for them. [emphasis added]

[265] It is interesting to note that in these passages, no direct mention is made by Justice Rothstein to former section 21. Justice Rothstein’s reasoning in TrueNorth suggests that the word “project” which is broadly defined at section 2 of the CEAA must have a more restrictive meaning when it is used in paragraph 5(1)(d) of the CEAA: “[t]he project referred to in paragraph 5(1)(d) is the project as scoped by the responsible authority under subsection 15(1)” [emphasis added]. However, this

leaves the question whether the word “project” used elsewhere in other provisions of the Act should be read as the project scoped by the RA or as the project proposed by the proponent. In other words, does the scope of the project proposed by the proponent or determined by the RA have an effect on the level of assessment itself?

[266] Without directly answering this question, Justice Rothstein rejected the applicants’ argument that projects listed in the CSL must be subject to an EA under the CEAA, stating at para. 23 and 24:

> The appellants' next argument is based on the *Comprehensive Study List Regulations*, SOR/94-438. Many of the projects listed in these Regulations are under provincial jurisdiction with a limited federal role. Nonetheless, they argue that projects listed in these Regulations must be subject to an environmental assessment under the CEAA.
>
> The purpose of the Regulations appears to be that when a listed project is scoped under subsection 15(1), a comprehensive study, rather than a screening, will be required in respect of that project. But it does not purport to impose on a responsible authority exercising its discretion under subsection 15(1) of the CEAA the requirement to scope a work or activity as a project merely because it is listed in the Regulations. In this case, the oil sands undertaking is subject to provincial jurisdiction. The Comprehensive Study List Regulations do not purport to sweep under a federal environmental assessment undertakings that are not subject to federal jurisdiction. Nor are the Regulations engaged because of some narrow ground of federal jurisdiction, in this case, subsection 35(2) of the Fisheries Act. See *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at pages 71-72.
>
> …
>
> The appellants may not be satisfied with a province conducting an environmental assessment, but the subject of the environment is not one within the exclusive legislative authority of the Parliament of Canada. Constitutional limitations must be respected and that is what has occurred in this case. [emphasis added]

[267] Indeed, in TrueNorth, Justice Rothstein stated:

> In this case the Alberta provincial authorities were conducting an environmental assessment. It would be inefficient for two assessments to be performed. It was both legally appropriate and efficient from a policy perspective for the DFO to rely on Alberta's performance of an environmental assessment.

[268] I read these passages to mean that the mere fact that a particular undertaking appears to be covered by the CSL, does not mean that an EA must be conducted under section 5 of the CEAA. There must always be a federal trigger present. However, I am not sure that Justice Rothstein meant by this that a RA could use section 15 to discard the application of former section 21 where it has already been decided that a joint assessment of the project proposed by a proponent, as in this case, would be conducted by the provincial and federal authorities. In the case at bar, it was initially announced by the RA in spring 2004 and subsequently recognized by the BCEAO that the Project would be jointly assessed at the level of a comprehensive study, and in this regard, a draft working plan was jointly developed during the autumn of 2004 in accordance with the Agreement (see paragraph 58 above).

[269] Leave for appeal to the Supreme Court of Canada of the judgment of the Court of Appeal in TrueNorth was dismissed without reasons on July 20, 2006.

D. COURSE OF ACTION DECISION REVIEWABLE

[270] In May 2004, based on the information provided by RCDC, the Notice of Commencement posted on the Registry announced that a comprehensive study commencing on May 19, 2004 would be conducted with respect to the Project. It is apparent in the correspondence and various documents emanating from DFO and the Agency that while DFO, “had not yet formally identified the scope of the project for the purposes of the comprehensive study”, the RAs would consult the public on the

proposed scope of the project and other aspects mentioned at section 21 of the CEAA (see DFO's Notice to Federal Authorities, the Briefing Book and the Draft Work Plan).

[271] As stated in the Briefing Book addressed to the minister of the Environment in July 2004, the tracking decision taken by DFO in May 2004 was consistent both with the scheme of the CEAA and Bill C-9 amendments which now oblige the RAs to consult the public on their proposed approach, report on this consultation to the minister of the Environment, and recommend to the latter whether the EA be continued by means of a comprehensive study, or the project be referred to a mediator or a review panel.

[272] The decision taken in December 2004 to suddenly re-track the Project appears to have been based on inexistent "new" fisheries data. This contrasts sharply with the decision made in January 2005 to conduct a comprehensive study commencing on January 22, 2005, of the Galore-Creek Gold-Silver-Copper mine, where the Agency has established a $50,000 participant funding program to assist groups and/or individuals to take part in the federal EA of the proposed project, which exceeds threshold production listed under paragraphs 16(a), (b) and (c) of the CSL. Indeed, the general public was subsequently invited to comment on the scope of the project and on the scope of the factors contained in the document entitled "Comprehensive Study Scoping Document for the NovaGold Canada Inc. Proposed Galore-Creek Gold-Silver-Copper Mine Project in North-Western British Columbia" dated November 30, 2005.

[273] What is really at issue in this case is whether the RAs may legally refuse to conduct a comprehensive study on the grounds that the Project as re-scoped by them does not include a mine and milling facility anymore.

[274] Overall, sections 2, 5, 13, 14, 15, 16 and 18 and the new section 21 of the CEAA, as I read them together, and having in mind the purpose of the CEAA and the intention of Parliament, support the Applicant's principal proposition that where a project is described in the CSL, the RA must now ensure public consultation with respect to the proposed scope of the project for the purposes of the EA, the factors proposed to be considered in its assessment, the proposed scope of those factors are the ability of the comprehensive study to address issues relating to the project.

[275] Subsection 21(1) of the CEAA is of particular importance for this case. It reads as follows:

21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.	21. (1) Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable veille à la tenue d'une consultation publique sur les propositions relatives à la portée du projet en matière d'évaluation environnementale, aux éléments à prendre en compte dans le cadre de l'évaluation et à la portée de ces éléments ainsi que sur la question de savoir si l'étude approfondie permet l'examen des questions soulevées par le projet.

[emphasis added]

[276] In comparison, the former version of section 21, which has been repealed by Bill C-9, read as follows:

21. Where a project is described in the comprehensive study list, the responsible authority shall	21. Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable a le choix:
(a) ensure that a comprehensive study is conducted, and a comprehensive study report is prepared and provided to the Minister and the Agency; or	a) de veiller à ce que soit effectuée une étude approfondie et à ce que soit présenté au ministre et à l'Agence un rapport de cette étude;
(b) refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.	b) de s'adresser au ministre afin qu'il fasse effectuer, aux termes de l'article 29, une médiation ou un examen par une commission.
	[emphasis added]

[277] While I do not need to resort on the guidelines, I am comforted by the fact that my interpretation is in accord with same. I note that according to the guidelines, large-scale projects with potentially significant environmental effects identified on the CSL, such as marine terminals; highways; airstrips; electrical generating stations; dams and reservoirs; artificial islands for oil and gas production; oil sands processing plants and mines; oil refineries; oil and gas pipelines; metal and uranium mines; pulp and paper mills; and certain military constructions will usually undergo the rigorous assessment of a “comprehensive study”.

[278] While these guidelines are not legally binding – what counts are the actual applicable legislative and regulatory provisions – they provide a strong indication that the present project is one of these large-scale projects which Cabinet wanted to undergo the rigorous assessment of a

comprehensive study. I doubt very much that Cabinet's intention in adding to the CSL mining projects exceeding any of the thresholds mentioned at items 16, 17 and 18 of the CSL, was to restrain the scope of an assessment by way of a comprehensive study to mines located on Crown lands or operated by a federal authority.

[279] According to the original wording of paragraph 59(d) of the CEAA, which section came into force on January 19, 1995, Parliament wholly reserved to Cabinet the discretion to decide what projects to describe in the CSL. It must be assumed that this was not meant to be the project "as scoped" by the RA, otherwise the exercise of Cabinet's plenary discretion would be futile and useless. Cabinet has exercised the discretion by promulgating and amending the CSL Regulations from time to time. As I read the CSL, the EL and the IL, projects mentioned in these regulations, refer to the project described by a proponent.

[280] Moreover, since the amendments brought by Bill C-9 in October 2003, the power to add a project in the CSL has been transferred by Parliament from Cabinet to the minister of Environment (the Bill C-9 Amendments, above, at s.29 (2.1)). Section 58(1)(i) of the amended CEAA, (the version, it bears re-iterating, that is applicable to the case at bar), now provides that the minister of the Environment may "make regulations prescribing any project or class of projects for which a comprehensive study is required where the Minister is satisfied that the project or any project within that class is likely to have significant adverse environmental effects."

[281] The corollary to this is also true: if the minister does not wish to have mining projects, such as the present Project, to be "tracked" for the purpose of an EA as one requiring a comprehensive

study, the minister may simply suppress the same from the current CSL. In my opinion, this legislative amendment is significant since, in the event that the government determines projects have been either omitted from or wrongly included in the CSL, it makes for an even easier process to rectify such an oversight.

[282] As stated in the preamble of the CEAA, an EA is a tool used to help achieve the goal of sustainable development by providing "an effective means of integrating environmental factors into planning and decision-making processes."

[283] I am not persuaded that once public consultation is required under section 21 of the CEAA, it is possible to avoid the entire public consultation process by narrowing the scope of the project in order to reduce it to the level of a screening. Once a project has been included in the CSL, section 21.1 grants the minister of the Environment the discretion to either continue with the comprehensive study or to refer the project to a mediator or review panel in accordance with section 29. The legislative scheme, thus, only allows the minister of the Environment to maintain a comprehensive study or to upgrade it to a more in-depth process. No provision in the CEAA empowers the minister of the Environment to downgrade a comprehensive study to a screening. Likewise and more significantly to the case at bar, no provision in the CEAA empowers a responsible authority to downgrade a comprehensive study to a screening.

[284] Once a tracking decision had been made requiring the project to undergo a comprehensive study, it is my view that the RAs did not have the discretion to re-scope the project in such a manner as to avoid the public consultation implications of section 21. To allow them to do so would violate

not only the plain meaning of the legislation in question, but also the spirit of the entire legislative scheme, as amended, which is designed to foster public participation for projects with significant potential environmental repercussions.

[285] Counsel for the Proponent asserts that the current case is virtually on all fours with TrueNorth in that:

- TrueNorth proposed to develop an oil sands extraction mine;
- The entire mining project was the subject of a full provincial environmental assessment;
- Viewed as a whole, the mine included a processing facility with a capacity of 30 000 m^3/d and a mine with a capacity of 15 000 m^3/d, which meant that it was described on the comprehensive study list;
- The only federal authorization for the project was the Fisheries Act authorization for harm to the fish habitat; and
- The RA (DFO) determined pursuant to section 15(1) of the CEAA that the scope of the project that was to be subject to a federal environmental assessment was the destruction of Fort Creek and ancillary works and activities.

[286] First, it is trite law that this Court is bound by the judgment of the Federal Court of Appeal in TrueNorth. While I agree with the Proponent that there are some similarities between the two cases, the Proponent fails to note a few factual differences which, in my opinion, limit its applicability to this case:

- In TrueNorth, the applicants were seeking the judicial review of a scoping decision made pursuant to section 15 of the CEAA. In this case, the Applicant alleges an ongoing breach of the duty to ensure public consultation in accordance with section 21 of the CEAA, which breach culminated in the communication of the Course of Action Decision Report, and whose legality must be examined in light of the factual context of the case.
- There is no evidence in TrueNorth to indicate the responsible authorities originally decided the project ought to be tracked as a comprehensive study, only to modify the decision at a later date. Indeed, in TrueNorth, the evidence before this Court and the Federal Court of Appeal was that the project was always intended to undergo a screening and not a comprehensive study. Again, this suggests to me that the TrueNorth decision should be applied cautiously and only to the extent that the facts of this case are directly on point with the facts in that case.
- There was no TIA to be constructed by the proponent in TrueNorth.
- There was no explosives factory and magazine involved in TrueNorth. Not only does a federal licence under the Explosives Act needs to be issued by the minister of Natural Resources, but the explosives factory and magazine will be constructed on the mine site. Indeed, the facilities are to be located approximately 400-450 m apart and 450-500 m north of the ultimate toe of the waste rock storage area.
- Physical activities in relation to the carrying of the Project go beyond the harmful alteration, disruption, or destruction of fish habitat (HADD) but contemplates the deposit of a deleterious substance (tailings) into a TIA which is also included in the Project “as scoped” by the RAs.

- The tailings in question are produced by physical activities carried on the mine site. The metals will come from milling operations and from precipitation runoff and ground water draining through the north waste dump and across and through the exposed rock in the open pit walls.

[287] Second, given that the vast majority of the analysis of the Federal Court of Appeal in TrueNorth focused on section 15 of the CEAA, I find that it is of limited applicability to a case, such as this one, where an analysis of section 21 as it now reads since the coming into force of Bill C-9 amendments, is of central importance to the resolution of the issues raised by the Applicant. Upon a careful reading of the Federal Court of Appeal decision, I note that it does not once reference the former section 21 expressly in its reasons, although at paragraphs 23 and 24 of the same cited above, it dismisses the argument made by the appellants that the projects listed on the CSL must be subject to an EA under section 5 of the CEAA.

[288] Third, and perhaps most significantly, although the TrueNorth decision was rendered by this Court in September, 2004, it was issued in consideration of the former section 21, which did not refer to the "proposed scope" of a project. As aforementioned, the CEAA was amended in October, 2003. All parties agree and I support their view that only the new version of the CEAA applies in this situation. Even in the decision of this Court in TrueNorth, I do not find that former section 21 is rigorously scrutinized. Indeed, former section 21 seems to refer to the project as "listed" on the CSL and not to the project as "scoped" under section 15. I, therefore, do not believe I am bound by the TrueNorth decision to the extent that it was deciding issues outside the particular context of sections 5 and 15.

[289] It is worthwhile to briefly highlight a few of the differences between the former and the amended versions of section 21 in order to emphasize why I am of the view that the TrueNorth decision is of limited applicability to the case at bar. Firstly, while the former section 21 of the CEAA did not make public consultation mandatory, the current version does. Furthermore, it is clear that the language of "proposed scope", as added to the new section 21, mandates that public consultation must take place prior to the actual scoping decision. Finally, under the new CEAA, once a "project" that has been proposed is set out in the CSL, the environmental assessment must be carried out by means of a comprehensive study.

[290] Accordingly, I am of the opinion that the TrueNorth decision of the Federal Court of Appeal remains the law with respect to a scoping decision made pursuant section 15, if such an EA were commenced prior to October, 2003. However, I am not of the view that it applies to assessments commenced after October 2003 pursuant to section 21 of the CEAA.

[291] Therefore, I do not view the discretion to scope a project under section 15 of the CEAA as the "full discretion" alleged by the Respondents. Instead, the RAs are bound procedurally by the requirements of new section 21 of the CEAA, such that if the project proposed by a proponent is on the comprehensive study list, there is a duty to consult the public, assuming that there is a section 5 trigger. After public consultations, the scoping exercise shall set the parameters for the comprehensive study and provide a rationale for the design of the studies which may be required, on a case-by-case basis.

[292] It is not entirely clear to the Court why, once it had been determined the Project, as described by the RCDC, was included in the CSL, the decision was subsequently made to downgrade the extent of the assessment required to that of a screening. To this effect, the only affiant to submit an affidavit on behalf of the Crown was an individual who was employed by DFO as the acting manager of the Major Projects Review Unit for the Pacific Region from February to August 2005.

[293] This affiant was only involved in the Project for approximately six months out of an approximately twenty-four month environmental assessment, and interestingly, was not involved in the Project during the time in question when the re-tracking decision of December 2004 was made. Nevertheless, according to the cross-examination of the affiant on his affidavit, he was aware the Project would no longer be addressed as a comprehensive study within the initial weeks of his tenure as acting manager.

[294] The Project is currently based on the mill production rate of 30 000 tonnes of ore per day for sale to the export market, over a projected mine life of 25 years. I do not need to rest my decision on the fact that the re-scoping of the Project has all the characteristics of a capricious and arbitrary decision which was taken for an improper purpose. It is sufficient to declare that DFO correctly determined in the initial tracking decision of May 2004 that the Project would require a comprehensive study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold under item 16(c) of the CSL. In view of this conclusion, I do not need to determine whether the proposed construction, decommissioning or abandonment of the Red Chris porphyry copper-gold mine also falls under

item 16(a) of the CSL as it is a metal mine, other than a gold mine, with an ore production capacity of 3 000 tonnes or more per day.

[295] Therefore, in sidestepping statutory requisites mentioned in section 21 of the CEAA as amended in 2003, in the guise of a decision to re-scope the Project, the RAs acted beyond the ambit of their statutory powers. Thus, in my opinion the RAs committed a reviewable error, which error culminated in the communication of the Course of Action Decision, by deciding to forego the public consultation process that the Project was statutorily mandated to undergo under section 13 of the CEAA. This is not to suggest that the RAs do not have the discretion to amend the scope of projects. To the contrary, such a ruling would be absurd, given the language of section 15(1) which clearly imparts discretion to the responsible authority. Further, such a ruling would violate the case law (see section C. Case law, above) which emphasizes that section 15 of the CEAA grants RAs wide latitude to scope projects in the manner they deem appropriate on a case-by-case basis.

[296] The consequences of downgrading the Project from a comprehensive study to a screening were known and understood by the RAs at all relevant times. According to the evidence on record, the RAs were well aware that environmental groups, including the Applicant, would be unhappy with the re-tracking decision. Likewise, the RAs understood that the minister of the Environment would no longer have any decision-making power with respect to the Project and that, as a consequence of the decision to re-track the Project, the general public would not have the opportunity to submit comments with respect to the proposed scope of the Project, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of a comprehensive study to address issues relating to the Project.

[297] Setting aside the Course of Action Decision will therefore endorse a fundamental purpose of the CEAA, which premises that public participation is meant to improve the quality and influence the outcome of an EA. Public consultation on the parameters mentioned in section 21 of the CEAA as it now reads since the Bill C-9 amendments, undoubtedly improves the EA and decision-making process.

[298] I must take into account the fact that there was no public consultation whatsoever by the RAs prior to the taking of the Course of Action Decision with respect to the draft screening report. While I recognize that the public was invited to make comments in the 65 day period mentioned in the Provincial Notice, this concerned exclusively the provincial EA process. Again, considering the particular and very unusual circumstances of this case which have been set out in great detail above (IV – Factual Background), I find that judicial intervention is necessary and in the public interest.

[299] In *Friends of Oldman River Society*, above, by the time the application was heard, the dam at issue was 40% completed. By the time the appeal got to the Supreme Court, the dam was almost entirely completed. Despite these facts, the Supreme Court rejected the respondents' arguments that granting prerogative relief would be futile.

[300] The facts in the case at bar are more favourable to relief, as construction has not started on the Project. A comprehensive study will involve public participation, additional section 16 considerations, and mandatory follow-up, and thus cannot be said to be futile.

IX – CONCLUSION

[301] Having considered the particular circumstances of this case, the conduct of the parties and the representations made by counsel, I am satisfied that relief should be granted in the exercise of the Court's remedial powers under section 18 and 18.1 of the FCA.

[302] Accordingly, the present application shall be allowed and an order be made by the Court:

a) declaring that DFO correctly determined in the initial tracking decision of May 2004 that the Project would require a comprehensive study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold under item 16(c) of the CSL. Therefore, in sidestepping statutory requisites mentioned in section 21 of the CEAA as amended in 2003, in the guise of a decision to re-scope the Project, the RAs acted beyond the ambit of their statutory powers;

b) quashing and setting aside the Course of Action Decision;

c) declaring that the RAs are under a legal duty pursuant to subsection 21(1) of the CEAA as amended in 2003, to ensure public consultation with respect to the proposed scope of the Project, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of a comprehensive study to address issues relating to the Project;

d) prohibiting the exercise of any powers under paragraph 5(1)(d) or subsection 5(2) of the CEAA that would permit the Project to be carried out in whole or in part until a course of action has been taken by the RAs in accordance with section 37 of the CEAA, in performance of their duty to conduct an EA of the Project under section 13 of the CEAA;

e) reserving the Court's full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid, pending receipt and consideration of parties' submissions with respect to costs.

[303] Moreover, unless the Court directs otherwise, submissions with respect to costs shall be made in writing and addressed to the registrar of the Court within the following timeframe:

a) Applicant's submissions: October 9, 2007;

b) Respondent's submissions: October 23, 2007; and

c) Applicant's reply: October 30, 2007.

ORDER

THIS COURT ORDERS AND DECLARES that

1. the present application is allowed;
2. DFO correctly determined in the initial tracking decision of May 2004 that the Project would require a comprehensive study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold under item 16(c) of the CSL. Therefore, in sidestepping statutory requisites mentioned in section 21 of the CEAA as amended in 2003, in the guise of a decision to re-scope the Project, the RAs acted beyond the ambit of their statutory powers;;
3. the Course of Action Decision is quashed and set aside;
4. the RAs are under a legal duty pursuant to subsection 21(1) of the CEAA as amended in 2003, to ensure public consultation with respect to the proposed scope of the Project, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of a comprehensive study to address issues relating to the Project;
5. the exercise of any powers under paragraph 5(1)(d) or subsection 5(2) of the CEAA that would permit the Project to be carried out in whole or in part is prohibited until a course of action has been taken by the RAs in accordance with section 37 of the CEAA, in performance of their duty to conduct an EA of the Project under section 13 of the CEAA;

6. the Court is reserving full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid, pending receipt and consideration of parties' submissions with respect to costs.

7. Unless the Court directs otherwise, submissions with respect to costs shall be made in writing and addressed to the registrar of the Court within the following timeframe:

   a) Applicant's submissions: October 9, 2007;

   b) Respondent's submissions: October 23, 2007; and

   c) Applicant's reply: October 30, 2007.

"Luc Martineau"

Judge

APPENDIX "A"

Canadian Environmental Assessment Act, S.C. 1992, c. 32, as amended

Definitions	**Définitions**
2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
"comprehensive study" means an environmental assessment that is conducted pursuant to sections 21 and 21.1, and that includes a consideration of the factors required to be considered pursuant to subsections 16(1) and (2); ;	«étude approfondie » Évaluation environnementale d'un projet effectuée aux termes des articles 21 et 21.1 et qui comprend la prise en compte des éléments énumérés aux paragraphes 16(1) et (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);	«liste d'étude approfondie » Liste des projets ou catégories de projets désignés par règlement aux termes de l'alinéa 59 d).
[…]	[…]
"exclusion list" means a list of projects or classes of projects that have been exempted from the requirement to conduct an assessment by regulations made under paragraph 59(c) or (c.1);	«liste d'exclusion » «liste d'exclusion » Liste des projets ou catégories de projets soustraits à l'évaluation par règlement pris en vertu des alinéas 59c) ou c.1).
"federal authority" means	«autorité fédérale »
(a) a Minister of the Crown in right of Canada,	a) Ministre fédéral;
(b) an agency of the Government of Canada, a parent Crown corporation, as defined in subsection 83(1) of the Financial Administration Act, or any other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs,	b) agence fédérale, société d'État mère au sens du paragraphe 83(1) de la Loi sur la gestion des finances publiques ou autre organisme constitué sous le régime d'une loi fédérale et tenu de rendre compte au Parlement de ses activités par l'intermédiaire d'un ministre fédéral;

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

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

but does not include the Executive Council of — or a minister, department, agency or body of the government of — Yukon, the Northwest Territories or Nunavut, a council of the band within the meaning of the Indian Act, Export Development Canada, the Canada Pension Plan Investment Board, a Crown corporation that is a wholly-owned subsidiary, as defined in subsection 83(1) of the Financial Administration Act, The Hamilton Harbour Commissioners as constituted pursuant to The Hamilton Harbour Commissioners' Act, a harbour commission established pursuant to the Harbour Commissions Act, a not-for-profit corporation that enters into an agreement under subsection 80(5) of the Canada Marine Act or a port authority established under that Act;

[…]

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

[…]

"project" means

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

c) ministère ou établissement public mentionnés aux annexes I et II de la Loi sur la gestion des finances publiques;

d) tout autre organisme désigné par les règlements d'application de l'alinéa 59e).

Sont exclus le conseil exécutif et les ministres du Yukon, des Territoires du Nord-Ouest et du Nunavut, ainsi que les ministères et les organismes de l'administration publique de ces territoires, tout conseil de bande au sens donné à « conseil de la bande » dans la Loi sur les Indiens, Exportation et développement Canada, l'Office d'investissement du régime de pensions du Canada, les sociétés d'État qui sont des filiales à cent pour cent au sens du paragraphe 83(1) de la Loi sur la gestion des finances publiques, les commissions portuaires constituées par la Loi sur les commissions portuaires, les commissaires nommés en vertu de la Loi des commissaires du havre de Hamilton, la société sans but lucratif qui a conclu une entente en vertu du paragraphe 80(5) de la Loi maritime du Canada et les administrations portuaires constituées sous le régime de cette loi.

[…]

«partie intéressée » Toute personne ou tout organisme pour qui le résultat de l'évaluation environnementale revêt un intérêt qui ne soit ni frivole ni vexatoire.

[…]

«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 59

relation to that physical work, or

(b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b);
"responsible authority" , in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted;

[…]

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

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

"screening report" means a report that summarizes the results of a screening;

[…]

Purposes

4. (1) The purposes of this Act are

(a) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse

b).

[…]

«autorité responsable »
"responsible authority"
«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.

«examen préalable » Évaluation environnementale qui, à la fois :

a) est effectuée de la façon prévue à l’article 18;

b) prend en compte les éléments énumérés au paragraphe 16(1).

«rapport d’examen préalable » Rapport des résultats d’un examen préalable.

[…]

Objet

4. (1) La présente loi a pour objet :

a) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu’ils n’entraînent pas d’effets environnementaux négatifs

environmental effects;

(b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

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

(b.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;

(b.3) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;

(c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

(d) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

Projects requiring environmental assessment

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

importants;

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

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

b.2) de promouvoir la collaboration des gouvernements fédéral et provinciaux, et la coordination de leurs activités, dans le cadre du processus d’évaluation environnementale de projets;

b.3) de promouvoir la communication et la collaboration entre les autorités responsables et les peuples autochtones en matière d’évaluation environnementale;

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

d) de veiller à ce que le public ait la possibilité de participer de façon significative et en temps opportun au processus de l’évaluation environnementale.

Projets visés

5. (1) L’évaluation environnementale d’un projet est effectuée avant l’exercice d’une des attributions suivantes :

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

a) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;

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

b) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en oeuvre le projet en tout ou en partie un financement, une garantie d'emprunt ou toute autre aide financière, sauf si l'aide financière est accordée sous forme d'allègement — notamment réduction, évitement, report, remboursement, annulation ou remise — d'une taxe ou d'un impôt qui est prévu sous le régime d'une loi fédérale, à moins que cette aide soit accordée en vue de permettre la mise en oeuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement;

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

c) une autorité fédérale administre le territoire domanial et en autorise la cession, notamment par vente ou cession à bail, ou celle de tout droit foncier relatif à celui-ci ou en transfère à Sa Majesté du chef d'une province l'administration et le contrôle, en vue de la mise en oeuvre du projet en tout ou en partie;

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

d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.

Projects requiring approval of Governor in Council

Projets nécessitant l'approbation du gouverneur en conseil

(2) Notwithstanding any other provision of this Act,

(2) Par dérogation à toute autre disposition de la présente loi :

(a) an environmental assessment of a project is required before the Governor in Council,

a) l'évaluation environnementale d'un projet est obligatoire, avant que le gouverneur en

under a provision prescribed pursuant to regulations made under paragraph 59(g), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part; and

(b) the federal authority that, directly or through a Minister of the Crown in right of Canada, recommends that the Governor in Council take an action referred to in paragraph (a) in relation to that project

(i) shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made,

(ii) is, for the purposes of this Act and the regulations, except subsection 11(2) and sections 20 and 37, the responsible authority in relation to the project,

(iii) shall consider the applicable reports and comments referred to in sections 20 and 37, and

(iv) where applicable, shall perform the duties of the responsible authority in relation to the project under section 38 as if it were the responsible authority in relation to the project for the purposes of paragraphs 20(1)(a) and 37(1)(a).

[…]

Action suspended

13. Where a project is described in the comprehensive study list or is referred to a mediator or a review panel, 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

conseil, en vertu d'une disposition désignée par règlement aux termes de l'alinéa 59g), prenne une mesure, notamment délivre un permis ou une licence ou accorde une approbation, autorisant la réalisation du projet en tout ou en partie;

b) l'autorité fédérale qui, directement ou par l'intermédiaire d'un ministre fédéral, recommande au gouverneur en conseil la prise d'une mesure visée à l'alinéa a) à l'égard du projet :

(i) est tenue de veiller à ce que l'évaluation environnementale du projet soit effectuée le plus tôt possible au stade de la planification de celui-ci, avant la prise d'une décision irrévocable,

(ii) est l'autorité responsable à l'égard du projet pour l'application de la présente loi — à l'exception du paragraphe 11(2) et des articles 20 et 37 — et de ses règlements,

(iii) est tenue de prendre en compte les rapports et observations pertinents visés aux articles 20 et 37,

(iv) le cas échéant, est tenue d'exercer à l'égard du projet les attributions de l'autorité responsable prévues à l'article 38 comme si celle-ci était l'autorité responsable à l'égard du projet pour l'application des alinéas 20(1)a) et 37(1)a).

[…]

Suspension de la prise de décision

13. Dans le cas où un projet appartient à une catégorie visée dans la liste d'étude approfondie, ou si un examen par une commission ou un médiateur doit être effectué, malgré toute autre loi fédérale, l'exercice d'une attribution qui est prévu par cette loi ou ses règlements pour mettre en

the project to be carried out in whole or in part unless an environmental assessment of the project has been completed and a course of action has been taken in relation to the project in accordance with paragraph 37(1)(a).

oeuvre le projet en tout ou en partie est subordonné à l'achèvement de l'évaluation environnementale de celui-ci et à la prise d'une décision à son égard aux termes de l'alinéa 37(1)a).

Environmental assessment process

14. The environmental assessment process includes, where applicable,

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

(b) a mediation or assessment by a review panel as provided in section 29 and the preparation of a report; and

(c) the design and implementation of a follow-up program.

Processus d'évaluation environnementale

14. Le processus d'évaluation environnementale d'un projet comporte, selon le cas :

a) un examen préalable ou une étude approfondie et l'établissement d'un rapport d'examen préalable ou d'un rapport d'étude approfondie;

b) une médiation ou un examen par une commission prévu à l'article 29 et l'établissement d'un rapport;

c) l'élaboration et l'application d'un programme de suivi.

Scope of project

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

(a) the responsible authority; or

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

Détermination de la portée du projet

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

Same assessment for related projects

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

(b) where at least one of the projects is

Pluralité de projets

(2) Dans le cadre d'une évaluation environnementale de deux ou plusieurs projets, l'autorité responsable ou, au moins un des projets est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable,

referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

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

peut décider que deux projets sont liés assez étroitement pour être considérés comme un seul projet.

All proposed undertakings to be considered

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

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

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

Projet lié à un ouvrage

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

a) l'opération est proposée par le promoteur;

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

Factors to be considered

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

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to

Éléments à examiner

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

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;

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

in paragraph (a);

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

c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;

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

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

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

Additional factors

Éléments supplémentaires

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

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

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

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

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

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

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

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

Determination of factors

Obligations

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

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

Factors not included

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

Community knowledge and aboriginal traditional knowledge

16.1 Community knowledge and aboriginal traditional knowledge may be considered in conducting an environmental assessment.

Regional studies

16.2 The results of a study of the environmental effects of possible future projects in a region, in which a federal authority participates, outside the scope of this Act, with other jurisdictions referred to in paragraph 12(5)(a), (c) or (d), may be taken into account in conducting an environmental assessment of a project in the region, particularly in considering any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out.

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

a) à l'autorité responsable;

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

Situations de crise nationale

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

Connaissances des collectivités et connaissances traditionnelles autochtones

16.1 Les connaissances des collectivités et les connaissances traditionnelles autochtones peuvent être prises en compte pour l'évaluation environnementale d'un projet.

Études régionales

16.2 Les résultats d'une étude des effets environnementaux de projets éventuels dans une région, faite hors du champ d'application de la présente loi et à laquelle une autorité fédérale a collaboré avec des instances, au sens des alinéas 12(5)a), c) ou d), peuvent être pris en compte dans l'évaluation environnementale d'un projet à réaliser dans cette région, notamment dans l'évaluation des effets cumulatifs que la réalisation du projet, combinée à celle d'autres projets ou activités déjà complétés ou à venir, est susceptible de produire sur l'environnement.

Publication of determinations

16.3 The responsible authority shall document and make available to the public, pursuant to subsection 55(1), its determinations pursuant to section 20.

[…]

Screening

18. (1) Where a project is not described in the comprehensive study list or the exclusion list made under paragraph 59(c), the responsible authority shall ensure that

(a) a screening of the project is conducted; and

(b) a screening report is prepared.

Source of information

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

Public participation

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances — or where required by regulation — the responsible authority

(a) shall, before providing the public with an opportunity to examine and comment on

Publication des décisions

16.3 L'autorité responsable consigne et rend accessibles au public, conformément au paragraphe 55(1), les décisions qu'elle prend aux termes de l'article 20.

[…]

Examen préalable

18. (1) Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion établie par règlement pris en vertu de l'alinéa 59c), l'autorité responsable veille :

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

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

Information

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

Participation du public

(3) Dans les cas où elle estime que la participation du public à l'examen préalable est indiquée ou dans les cas prévus par règlement, l'autorité responsable :

a) verse au site Internet, avant de donner au public la possibilité d'examiner le rapport

the screening report, include in the Internet site a description of the scope of the project, the factors to be taken into consideration in the screening and the scope of those factors or an indication of how such a description may be obtained;

d'examen préalable et de faire des observations à son égard, une description de la portée du projet, des éléments à prendre en compte dans le cadre de l'examen préalable et de la portée de ceux-ci ou une indication de la façon d'obtenir copie de cette description;

(b) shall give the public an opportunity to examine and comment on the screening report and on any record relating to the project that has been included in the Registry before taking a course of action under section 20 and shall give adequate notice of that opportunity; and

b) avant de prendre sa décision aux termes de l'article 20, donne au public la possibilité d'examiner le rapport d'examen préalable et tout document relatif au projet et de faire ses observations à leur égard et un avis suffisant de cette possibilité;

(c) may, at any stage of the screening that it determines, give the public any other opportunity to participate.

c) peut donner au public la possibilité de prendre part à toute étape de l'examen préalable qu'elle choisit.

Timing of public participation

Moment de la participation

(4) The responsible authority's discretion under subsection (3) with respect to the timing of public participation is subject to a decision made by the federal environmental assessment coordinator under paragraph 12.3(c).

(4) L'exercice du pouvoir discrétionnaire dont dispose l'autorité responsable, dans le cadre du paragraphe (3), de déterminer à quel moment peut se faire la participation du public est assujetti à toute décision pouvant être prise par le coordonnateur fédéral de l'évaluation environnementale en vertu de l'alinéa 12.3c).

[…]

[…]

Decision of responsible authority following a screening

Décision de l'autorité responsable

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

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

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible

a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures

authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;

d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;

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

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

(c) where

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

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

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

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

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

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

(iii) si les préoccupations du public le justifient.

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

Mitigation measures — extent of authority

(1.1) Mitigation measures that may be taken into account under subsection (1) by a responsible authority are not limited to measures within the legislative authority of Parliament and include

(a) any mitigation measures whose implementation the responsible authority can ensure; and

(b) any other mitigation measures that it is satisfied will be implemented by another person or body.

Mesures d'atténuation — étendue des pouvoirs

(1.1) Les mesures d'atténuation que l'autorité responsable peut prendre en compte dans le cadre du paragraphe (1) ne se limitent pas à celles qui relèvent de la compétence législative du Parlement; elles comprennent :
a) les mesures d'atténuation dont elle peut assurer l'application;

b) toute autre mesure d'atténuation dont elle est convaincue qu'elle sera appliquée par une autre personne ou un autre organisme.

Responsible authority to ensure implementation of mitigation measures

(2) When a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, with respect to any mitigation measures it has taken into account and that are described in paragraph (1.1)(a), ensure their implementation in any manner that it considers necessary and, in doing so, it is not limited to its duties or powers under any other Act of Parliament.

Application des mesures d'atténuation

(2) Si elle prend une décision dans le cadre de l'alinéa (1)a), l'autorité responsable veille à l'application des mesures d'atténuation qu'elle a prises en compte et qui sont visées à l'alinéa (1.1)a) de la façon qu'elle estime nécessaire, même si aucune autre loi fédérale ne lui confère de tels pouvoirs d'application.

Assistance of other federal authority

(2.1) A federal authority shall provide any assistance requested by a responsible authority in ensuring the implementation of a mitigation measure on which the federal authority and the responsible authority have agreed.

Appui à l'autorité responsable

(2.1) Il incombe à l'autorité fédérale qui convient avec l'autorité responsable de mesures d'atténuation d'appuyer celle-ci, sur demande, dans l'application de ces mesures.

Prohibition of actions in furtherance of project

(3) Where the responsible authority takes a course of action pursuant to paragraph (1)(b)

Interdiction de mise en œuvre

(3) L'autorité responsable qui prend la décision visée à l'alinéa (1)b) à l'égard d'un

in relation to a project, the responsible authority shall publish a notice of that course of action in the Registry and, notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made under it shall be exercised or performed that would permit that project to be carried out in whole or in part.

projet est tenue de publier un avis de cette décision dans le registre, et aucune attribution conférée sous le régime de toute autre loi fédérale ou de ses règlements ne peut être exercée de façon à permettre la mise en œuvre, en tout ou en partie, du projet.

Time for decision

(4) A responsible authority shall not take any course of action under subsection (1) before the 15th day after the inclusion on the Internet site of
(a) notice of the commencement of the environmental assessment;

(b) a description of the scope of the project; and

(c) where the responsible authority, in accordance with subsection 18(3), gives the public an opportunity to participate in the screening of a project, a description of the factors to be taken into consideration in the environmental assessment and of the scope of those factors or an indication of how such a description may be obtained.

Versement préalable de documents

(4) L'autorité responsable ne peut prendre une décision dans le cadre du paragraphe (1) avant le quinzième jour suivant le versement au site Internet des documents suivants :
a) l'avis du début de l'évaluation environnementale;

b) la description de la portée du projet;

c) dans le cas où l'autorité responsable donne, au titre du paragraphe 18(3), la possibilité au public de participer à l'examen préalable, la description des éléments à prendre en compte dans le cadre de l'évaluation environnementale et de la portée de ceux-ci ou une indication de la façon d'obtenir copie de cette description.

Public consultation

21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

Consultation

21. (1) Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable veille à la tenue d'une consultation publique sur les propositions relatives à la portée du projet en matière d'évaluation environnementale, aux éléments à prendre en compte dans le cadre de l'évaluation et à la portée de ces éléments ainsi que sur la question de savoir si l'étude approfondie permet l'examen des questions soulevées par le projet.

Report and recommendation

Rapport et recommandation

(2) After the public consultation, as soon as it is of the opinion that it has sufficient information to do so, the responsible authority shall
(a) report to the Minister regarding

(i) the scope of the project, the factors to be considered in its assessment and the scope of those factors,

(ii) public concerns in relation to the project,

(iii) the potential of the project to cause adverse environmental effects, and

(iv) the ability of the comprehensive study to address issues relating to the project; and

(b) recommend to the Minister to continue with the environmental assessment by means of a comprehensive study, or to refer the project to a mediator or review panel in accordance with section 29.

(2) L'autorité responsable, dès qu'elle estime disposer de suffisamment de renseignements et après avoir tenu la consultation publique :
a) fait rapport au ministre de la portée du projet, des éléments à prendre en compte dans le cadre de l'évaluation, de la portée de ceux-ci, des préoccupations du public, de la possibilité d'effets environnementaux négatifs et de la question de savoir si l'étude approfondie permet l'examen des questions soulevées par le projet;

b) lui recommande de poursuivre l'évaluation environnementale par étude approfondie ou de la renvoyer à un médiateur ou à une commission conformément à l'article 29.

Minister's decision

21.1 (1) The Minister, taking into account the things with regard to which the responsible authority must report under paragraph 21(2)(a) and the recommendation of the responsible authority under paragraph 21(2)(b), shall, as the Minister considers appropriate,

(a) refer the project to the responsible authority so that it may continue the comprehensive study and ensure that a comprehensive study report is prepared and provided to the Minister and to the Agency; or

(b) refer the project to a mediator or review panel in accordance with section 29.

Décision du ministre

21.1 (1) Le ministre, prenant en compte tous les éléments qui doivent lui être signalés dans le cadre de l'alinéa 21(2)a) et les recommandations de l'autorité responsable et selon ce qu'il estime indiqué dans les circonstances :

a) renvoie le projet à l'autorité responsable pour qu'elle poursuive l'étude approfondie et qu'elle veille à ce qu'un rapport de cette étude lui soit présenté, de même qu'à l'Agence;

b) renvoie le projet à la médiation ou à l'examen par une commission conformément à l'article 29.

Decision final

(2) Despite any other provision of this Act, if the Minister refers the project to a responsible authority under paragraph (1)(a), it may not be referred to a mediator or review panel in accordance with section 29.

Public participation

21.2 Where a project has been referred to a responsible authority under paragraph 21.1(1)(a), the responsible authority shall ensure that the public is provided with an opportunity, in addition to those provided under subsection 21(1) and section 22, to participate in the comprehensive study, subject to a decision with respect to the timing of the participation made by the federal environmental assessment coordinator under paragraph 12.3(c).

[…]

Referral by Minister

28. (1) Where at any time the Minister is of the opinion that

(a) a project for which an environmental assessment may be required under section 5, taking into account the implementation of any appropriate mitigation measures, may cause significant adverse environmental effects, or

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

the Minister may, after offering to consult with the jurisdiction, within the meaning of subsection 12(5), where the project is to be carried out and after consulting with the responsible authority or, where there is no

Caractère définitif de la décision

(2) Malgré toute autre disposition de la présente loi, le projet que le ministre renvoie à l'autorité responsable au titre de l'alinéa (1)a) ne peut faire l'objet d'une médiation ou d'un examen par une commission conformément à l'article 29.

Participation du public à l'étude approfondie

21.2 En plus des consultations publiques prévues au paragraphe 21(1) et à l'article 22, l'autorité responsable à laquelle le projet est renvoyé en vertu de l'alinéa 21.1(1)a) est tenue de veiller à ce que le public ait la possibilité de prendre part à l'étude approfondie. Elle est toutefois assujettie à toute décision éventuellement prise par le coordonnateur fédéral de l'évaluation environnementale en vertu de l'alinéa 12.3c) quant au moment de la participation.

[…]

Idem

28. (1) À tout moment, le ministre, après avoir offert de consulter l'instance, au sens du paragraphe 12(5), responsable du lieu où le projet doit être réalisé et après consultation de l'autorité responsable, ou, à défaut, de toute autorité fédérale compétente, s'il estime soit qu'un projet assujetti à l'évaluation environnementale aux termes de l'article 5 peut, compte tenu de l'application des mesures d'atténuation indiquées, entraîner des effets environnementaux négatifs importants, soit que les préoccupations du public le justifient, peut faire procéder à une médiation ou à un examen par une commission conformément à l'article 29.

responsible authority in relation to the project, the appropriate federal authority, refer the project to a mediator or a review panel in accordance with section 29.

[…]

Decision of responsible authority

37. (1) Subject to subsections (1.1) to (1.3), 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 subsection 23(1), 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; 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

[…]

Autorité responsable

37. (1) Sous réserve des paragraphes (1.1) à (1.3), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou, si le projet lui est renvoyé aux termes du paragraphe 23(1), le rapport d'étude approfondie, 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 œuvre totale ou partielle du projet;

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.

be carried out in whole or in part.

[…]

Powers to facilitate environmental assessments

58. (1) For the purposes of this Act, the Minister may

[…]

(i) make regulations prescribing any project or class of projects for which a comprehensive study is required where the Minister is satisfied that the project or any project within that class is likely to have significant adverse environmental effects.

Regulations

59. The Governor in Council may make regulations

(a) respecting the procedures and requirements of, and the time periods relating to, environmental assessment and follow-up programs, including the conduct of assessments by review panels established pursuant to section 40 and the timing of taking a course of action pursuant to section 20 or 37 where two or more federal authorities are likely to exercise a power or perform a duty or function referred to in section 5 with respect to the same project;

[…]

(b) prescribing, for the purpose of the definition “project” in subsection 2(1), any physical activity or class of physical activities;

(c) exempting any projects or classes of projects from the requirement to conduct an assessment under this Act that

[…]

Évaluation environnementale

58. (1) Pour l’application de la présente loi, le ministre peut :

[…]

i) prendre des règlements désignant des projets ou des catégories de projets pour lesquels une étude approfondie est obligatoire, s’il est convaincu que ceux-ci sont susceptibles d’entraîner des effets environnementaux négatifs importants.

Règlements

59. Le gouverneur en conseil peut, par règlement :

a) régir les procédures, les délais applicables et les exigences relatives à l’évaluation environnementale et au programme de suivi, notamment le moment de la prise de mesures au titre des articles 20 ou 37 quand plusieurs autorités fédérales sont susceptibles d’exercer les attributions visées à l’article 5, ainsi que les évaluations effectuées par une commission aux termes de l’article 40;

[…]

b) désigner une activité concrète ou une catégorie d’activités concrètes pour l’application de la définition de « projet » au paragraphe 2(1);

c) soustraire à l’évaluation exigée par la présente loi des projets ou des catégories de projets :

(i) in the opinion of the Governor in Council, ought not to be assessed for reasons of national security,

(ii) in the case of projects in relation to physical works, in the opinion of the Governor in Council, have insignificant environmental effects, or

(iii) have a total cost below a prescribed amount and meet prescribed environmental conditions;

[…]

(f) prescribing, for the purposes of paragraph 5(1)(d), the provisions of any Act of Parliament or any instrument made under an Act of Parliament;

(g) prescribing the provisions of any Act of Parliament or any regulation made pursuant to any such Act that confer powers, duties or functions on the Governor in Council, the exercise or performance of which require an environmental assessment under subsection 5(2);

(i) dont, à son avis, l'évaluation ne serait pas indiquée pour des raisons de sécurité nationale,

(ii) qui sont liés à un ouvrage et dont, à son avis, les effets environnementaux ne sont pas importants,

(iii) qui remplissent les conditions de nature environnementale prévues par règlement et dont le coût total est en-deçà du seuil réglementaire

[…]

f) déterminer, pour l'application de l'alinéa 5(1)d), des dispositions de toute loi fédérale ou de textes pris sous son régime;

g) désigner les dispositions législatives ou réglementaires fédérales conférant des attributions au gouverneur en conseil pour l'exercice desquelles le paragraphe 5(2) exige une évaluation environnementale;

Section 21 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 32 before it was amended in 2003

[…]

Comprehensive study

21. Where a project is described in the comprehensive study list, the responsible authority shall

(a) ensure that a comprehensive study is conducted, and a comprehensive study

[…]

Étude approfondie

21. Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable a le choix:

a) de veiller à ce que soit effectuée une étude approfondie et à ce que soit présenté au

report is prepared and provided to the Minister and the Agency; or

(b) refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

[…]

ministre et à l'Agence un rapport de cette étude;

b) de s'adresser au ministre afin qu'il fasse effectuer, aux termes de l'article 29, une médiation ou un examen par une commission.

[…]

Explosives Act, R.S.C. 1985, c. E-17, as amended

[…]

Licences and permits

7. (1) The Minister may issue

(a) licences for factories and magazines;

[…]

[…]

Délivrance

7. (1) Le ministre peut délivrer :

a) des licences pour des fabriques et poudrières;

[…]

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

[…]

Harmful alteration, etc., of fish habitat

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

Alteration, etc., authorized

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

[…]

Détérioration de l’habitat du poisson, etc.

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

Exception

(2) Le paragraphe (1) ne s’applique pas aux personnes qui détériorent, détruisent ou perturbent l’habitat du poisson avec des moyens ou dans des circonstances autorisés par le ministre ou conformes aux règlements

Governor in Council under this Act.

Deposit of deleterious substance prohibited

36. (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[…]

pris par le gouverneur en conseil en application de la présente loi.

Dépôt de substances nocives prohibé

36. (3) Sous réserve du paragraphe (4), il est interdit d'immerger ou de rejeter une substance nocive — ou d'en permettre l'immersion ou le rejet — dans des eaux où vivent des poissons, ou en quelque autre lieu si le risque existe que la substance ou toute autre substance nocive provenant de son immersion ou rejet pénètre dans ces eaux.

[…]

Species at Risk Act, S.C. 2002, c. 29, as amended

[…]

Notification of Minister

79. (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

[…]

Definitions

79. (3) The definitions in this subsection apply in this section.

[…]

"project"
«projet »
"project" means a project as defined in subsection 2(1) of the Canadian

[…]

Notification du ministre

79. (1) Toute personne tenue, sous le régime d'une loi fédérale, de veiller à ce qu'il soit procédé à l'évaluation des effets environnementaux d'un projet notifie sans tarder à tout ministre compétent tout projet susceptible de toucher une espèce sauvage inscrite ou son habitat essentiel.

[…]

Définitions

79. (3) Les définitions qui suivent s'appliquent au présent article.

[…]

«projet »
"project"
«projet » S'entend au sens du paragraphe 2(1) de la Loi canadienne sur l'évaluation

Environmental Assessment Act.

[…]

environnementale.

[…]

REGULATIONS

Comprehensive Study List Regulations, SOR/94-638, as amended

[…]

General

3. The projects and classes of projects that are set out in the schedule are prescribed projects and classes of projects for which a comprehensive study is required.

[…]

SCHEDULE
(Section 3)

[…]

PART V
MINERALS AND MINERAL PROCESSING

16. The proposed construction, decommissioning or abandonment of

(a) a metal mine, other than a gold mine, with an ore production capacity of 3 000 t/d or more;

(b) a metal mill with an ore input capacity of 4 000 t/d or more;

(c) a gold mine, other than a placer mine, with an ore production capacity of 600 t/d or more;

[…]

Dispositions Générales

3. Les projets et les catégories de projets figurant à l'annexe sont ceux pour lesquels une étude approfondie est obligatoire.

[…]

ANNEXE
(article 3)

[…]

PARTIE V
MINERAIS ET TRAITEMENT DES MINERAIS

16. Projet de construction, de désaffectation ou de fermeture :

a) d'une mine métallifère, autre qu'une mine d'or, d'une capacité de production de minerai de 3 000 t/d ou plus;

b) d'une usine métallurgique d'une capacité d'admission de minerai de 4 000 t/d ou plus;

c) d'une mine d'or, autre qu'un placer, d'une capacité de production de minerai de 600 t/d ou plus;

(d) a coal mine with a coal production capacity of 3 000 t/d or more; or

(e) a potash mine with a potassium chloride production capacity of 1 000 000 t/a or more.

d) d’une mine de charbon d’une capacité de production de charbon de 3 000 t/d ou plus;

e) d’une mine de potasse d’une capacité de production de chlorure de potassium de 1 000 000 t/a ou plus.

Inclusion List Regulations, SOR/94-637, as amended

[…]

SCHEDULE
(Section 3)

[…]

PART VII
FISHERIES

42. The destruction of fish by any means other than fishing, where the destruction requires the authorization of the Minister of Fisheries and Oceans under section 32 of the Fisheries Act or authorization under regulations made by the Governor in Council under that Act.

43. The harmful alteration, disruption or destruction of fish habitat by means of physical activities carried out in a water body, including dredge or fill operations, that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the Fisheries Act or authorization under regulations made by the Governor in Council under that Act.

44. The harmful alteration, disruption or destruction of fish habitat by means of

[…]

ANNEXE
(article 3)

[…]

PARTIE VII
PÊCHES

42. La destruction de poissons par d’autres moyens que la pêche, qui nécessite l’autorisation émanant du ministre des Pêches et des Océans prévue à l’article 32 de la Loi sur les pêches ou l’autorisation prévue dans tout règlement pris par le gouverneur en conseil en application de cette loi.

43. La détérioration, la destruction ou la perturbation de l’habitat du poisson par des activités concrètes exercées dans un plan d’eau, notamment des opérations de dragage ou de remblayage, qui nécessitent l’autorisation du ministre des Pêches et des Océans prévue au paragraphe 35(2) de la Loi sur les pêches ou l’autorisation prévue dans tout règlement pris par le gouverneur en conseil en application de cette loi.

44. La détérioration, la destruction ou la perturbation de l’habitat du poisson par le

draining or altering the water levels of a water body that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the Fisheries Act or authorization under regulations made by the Governor in Council under that Act.

vidage d’un plan d’eau ou la modification de son niveau d’eau, qui nécessitent l’autorisation du ministre des Pêches et des Océans prévue au paragraphe 35(2) de la Loi sur les pêches ou l’autorisation prévue dans tout règlement pris par le gouverneur en conseil en application de cette loi.

45. The harmful alteration, disruption or destruction of fish habitat by means of erosion control measures adjacent to a water body that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the Fisheries Act or authorization under regulations made by the Governor in Council under that Act.

45. La détérioration, la destruction ou la perturbation de l’habitat du poisson par des mesures de contrôle de l’érosion le long d’un plan d’eau, qui nécessitent l’autorisation du ministre des Pêches et des Océans prévue au paragraphe 35(2) de la Loi sur les pêches ou l’autorisation prévue dans tout règlement pris par le gouverneur en conseil en application de cette loi.

46. The harmful alteration, disruption or destruction of fish habitat by means of the removal of vegetation in or adjacent to a water body that requires the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the Fisheries Act or authorization under regulations made by the Governor in Council under that Act.

46. La détérioration, la destruction ou la perturbation de l’habitat du poisson par l’enlèvement de la végétation dans un plan d’eau ou le long de celui-ci, qui nécessitent l’autorisation du ministre des Pêches et des Océans prévue au paragraphe 35(2) de la Loi sur les pêches ou l’autorisation prévue dans tout règlement pris par le gouverneur en conseil en application de cette loi.

46.1 The harmful alteration, disruption or destruction of fish habitat by means of physical activities intended to establish or modify more than 500 m of continuous natural shoreline and that require the authorization of the Minister of Fisheries and Oceans under subsection 35(2) of the Fisheries Act or authorization under regulations made by the Governor in Council under that Act.

46.1 La détérioration, la perturbation ou la destruction de l’habitat du poisson par suite d’activités concrètes visant à mettre en valeur ou à modifier plus de 500 m d’un rivage naturel continu, qui nécessitent l’autorisation du ministre des Pêches et des Océans prévue au paragraphe 35(2) de la Loi sur les pêches ou l’autorisation prévue dans tout règlement pris par le gouverneur en conseil en application de cette loi.

47. The deposit of a deleterious substance that requires authorization under regulations made by the Governor in Council pursuant to subsection 36(5) of the Fisheries Act.

47. L’immersion ou le rejet d’une substance nocive qui nécessitent l’autorisation prévue dans tout règlement pris par le gouverneur en conseil en application du paragraphe 36(5) de la Loi sur les pêches.

[…]

[…]

Metal Mining Effluent Regulations, SOR/2002-222, as amended

Interpretation

1. (1) The following definitions apply in these Regulations.

"Act" means the Fisheries Act. (Loi)

[…]

"deleterious substance" means a substance prescribed under section 3 except as otherwise prescribed by these Regulations. (substance nocive)

"effluent" means an effluent — mine water effluent, milling facility effluent, tailings impoundment area effluent, treatment pond effluent, treatment facility effluent other than effluent from a sewage treatment facility, seepage and surface drainage — that contains a deleterious substance. (effluent)

[…]

Application

2. (1) These Regulations apply in respect of mines and recognized closed mines that

(a) at any time after these Regulations are registered, exceed an effluent flow rate of 50 m3 per day, based on effluent deposited from all the final discharge points of the mine; and

Définitions et interprétation

1. (1) Les définitions qui suivent s'appliquent au présent règlement.

«Loi» La *Loi sur les pêches*. (*Act*)

[…]

«substance nocive» Toute substance désignée aux termes de l'article 3, sauf disposition contraire du présent règlement. (deleterious substance)

«effluent» Effluent — effluent d'eau de mine, effluent d'installations de préparation du minerai, effluent de dépôts de résidus miniers, effluent de bassins de traitement, effluent d'installations de traitement, à l'exclusion de l'effluent d'installations de traitement d'eaux résiduaires, eaux d'exfiltration et eaux de drainage superficiel — qui contient une substance nocive. (*effluent*)

[…]

Champ d'application

2. (1) Le présent règlement s'applique aux mines et aux mines fermées reconnues qui présentent les caractéristiques suivantes :

a) après l'enregistrement du présent règlement, elles ont, à un moment quelconque, un débit d'effluent supérieur à 50 m3 par jour, déterminé d'après les rejets d'effluent à partir de tous leurs points de rejet final;

(b) deposit a deleterious substance in any water or place referred to in subsection 36(3) of the Act.

b) elles rejettent une substance nocive dans les eaux ou les lieux visés au paragraphe 36(3) de la Loi.

[…]

[…]

Authority to Deposit

4. (1) Subject to subsection (2), the owner or operator of a mine may deposit, or permit the deposit of, an effluent that contains a deleterious substance in any water or place referred to in subsection 36(3) of the Act if a transitional authorization permits the deposit or if

Rejet autorisé

4. (1) Sous réserve du paragraphe (2), le propriétaire ou l'exploitant d'une mine peut rejeter — ou permettre que soit rejeté — un effluent contenant des substances nocives dans les eaux ou les lieux visés au paragraphe 36(3) de la Loi si une autorisation transitoire le permet ou si les conditions suivantes sont réunies :

(a) the concentration of the deleterious substance in the effluent does not exceed the authorized limits set out in Schedule 4;

a) la concentration des substances nocives dans l'effluent ne dépasse pas les limites permises prévues à l'annexe 4;

(b) the pH of the effluent is equal to or greater than 6.0 but is not greater than 9.5; and

b) le pH de l'effluent est égal ou supérieur à 6,0 mais ne dépasse pas 9,5;

(c) the deleterious substance is not an acutely lethal effluent.

c) la substance nocive n'est pas un effluent à létalité aiguë.

(2) The authority in subsection (1) is conditional

(2) Le propriétaire ou l'exploitant ne peut se prévaloir du droit que lui confère le paragraphe (1) que s'il satisfait aux exigences prévues :

(a) in the case of a transitional authorization that permits the deposit, on the owner or operator complying with section 36; and

a) à l'article 36, dans le cas où une autorisation transitoire permet le rejet;

(b) in the other case, on the owner or operator complying with sections 6 to 27.

b) aux articles 6 à 27, dans l'autre cas.

Authority to Deposit in Tailings Impoundment Areas

Autorisation de rejeter dans un dépôt de résidus miniers

5. (1) Despite section 4, the owner or

5. (1) Malgré l'article 4, le propriétaire ou

operator of a mine may deposit or permit the deposit of waste rock or an effluent that contains any concentration of a deleterious substance and that is of any pH into a tailings impoundment area that is either

(a) a water or place set out in Schedule 2; or

(b) a disposal area that is confined by anthropogenic or natural structures or by both, other than a disposal area that is, or is part of, a natural water body that is frequented by fish.

(2) The authority in subsection (1) is conditional on the owner or operator complying with sections 7 to 28. (SOR/2006-239, s. 2.)

Prohibition on Diluting Effluent

6. The owner or operator of a mine shall not combine effluent with water or any other effluent for the purpose of diluting effluent before it is deposited.

[…]

Compensation Plan

27.1 (1) The owner or operator of a mine shall submit to the Minister for approval a compensation plan and obtain the Minister's approval of that plan before depositing a deleterious substance into a tailings impoundment area that is added to Schedule 2 after the coming into force of this section.

(2) The purpose of the compensation plan is to offset for the loss of fish habitat resulting from the deposit of a deleterious substance into the tailings impoundment area.

l'exploitant d'une mine peut rejeter — ou permettre que soient rejetés — des stériles ou un effluent, quel que soit le pH de l'effluent ou sa concentration en substances nocives, dans l'un ou l'autre des dépôts de résidus miniers suivants :

a) les eaux et lieux mentionnés à l'annexe 2;

b) toute aire de décharge circonscrite par une formation naturelle ou un ouvrage artificiel, ou les deux, à l'exclusion d'une aire de décharge qui est un plan d'eau naturel où vivent des poissons ou qui en fait partie.

(2) Le propriétaire ou l'exploitant ne peut se prévaloir du droit que lui confère le paragraphe (1) que s'il satisfait aux exigences prévues aux articles 7 à 28. (DORS/2006-239, art. 2.)

Interdiction de diluer

6. Il est interdit au propriétaire ou à l'exploitant d'une mine de combiner un effluent avec de l'eau ou avec tout autre effluent dans le but de le diluer avant son rejet.

[…]

Plan compensatoire

27.1 (1) Le propriétaire ou l'exploitant d'une mine présente au ministre un plan compensatoire pour approbation et doit obtenir celle-ci avant de rejeter des substances nocives dans tout dépôt de résidus miniers qui est ajouté à l'annexe 2 après l'entrée en vigueur du présent article.

(2) Le plan compensatoire a pour objectif de contrebalancer la perte d'habitat du poisson consécutive au rejet de substances nocives dans le dépôt de résidus miniers.

(3) The compensation plan shall contain the following elements:

(a) a description of the location of the tailings impoundment area and the fish habitat affected by the deposit;

(b) a quantitative impact assessment of the deposit on the fish habitat;

(c) a description of the measures to be taken to offset the loss of fish habitat caused by the deposit;

(d) a description of the measures to be taken during the planning and implementation of the compensation plan to mitigate any potential adverse effect on the fish habitat that could result from the plan's implementation;

(e) a description of measures to be taken to monitor the plan's implementation;

(f) a description of the measures to be taken to verify the extent to which the plan's purpose has been achieved;

(g) a description of the time schedule for the plan's implementation, which time schedule shall provide for achievement of the plan's purpose within a reasonable time; and

(h) an estimate of the cost of implementing each element of the plan.

(4) The owner or operator shall submit with the compensation plan an irrevocable letter of credit to cover the plan's implementation costs, which letter of credit shall be payable upon demand on the declining balance of the implementation costs.

(5) The Minister shall approve the

(3) Le plan compensatoire comporte des dispositions portant sur les éléments suivants:

a) une description de l'emplacement du dépôt de résidus miniers et de l'habitat du poisson atteint par le rejet de substances nocives;

b) l'analyse quantitative de l'incidence du rejet sur l'habitat du poisson;

c) les mesures visant à contrebalancer la perte d'habitat du poisson;

d) les mesures envisagées durant la planification et la mise en oeuvre du plan pour atténuer les effets défavorables sur l'habitat du poisson qui pourraient résulter de la mise en oeuvre du plan;

e) les mesures de surveillance de la mise en oeuvre du plan;

f) les mécanismes visant à établir dans quelle mesure les objectifs du plan ont été atteints;

g) le délai pour la mise en oeuvre du plan, lequel délai permet l'atteinte des objectifs prévus dans un délai raisonnable;

h) l'estimation du coût de mise en oeuvre de chacun des éléments du plan.

(4) Le propriétaire ou l'exploitant présente, avec le plan compensatoire, une lettre de crédit irrévocable couvrant les coûts de mise en oeuvre du plan et payable sur demande à l'égard du coût des éléments du plan qui n'ont pas été mis en oeuvre.

compensation plan if it meets the requirements of subsections (2) and (3) and the owner or operator has complied with subsection (4).

(5) Le ministre approuve le plan compensatoire si les exigences des paragraphes (2) et (3) ont été remplies et si le propriétaire ou l'exploitant s'est conformé aux exigences du paragraphe (4).

(6) The owner or operator shall ensure that the compensation plan approved by the Minister is implemented.

(6) Le propriétaire ou l'exploitant veille à ce que le plan compensatoire soit mis en oeuvre.

(7) If the measures referred to in paragraph (3)(f) reveal that the compensation plan's purpose is not being achieved, the owner or operator shall inform the Minister and, as soon as possible in the circumstances, identify and implement all necessary remedial measures. (SOR/2006-239, s. 14.)

(7) Si les mécanismes visés à l'alinéa (3)f) révèlent que les objectifs n'ont pas été atteints, le propriétaire ou l'exploitant en informe le ministre et, le plus tôt possible dans les circonstances, détermine et prend les mesures correctives nécessaires à l'atteinte des objectifs. (DORS/2006-239, art. 14.)

Deposits from Tailings Impoundment Areas

Rejets à partir de dépôts de résidus miniers

28. (1) The owner or operator of a mine shall deposit effluent from a tailings impoundment area only through a final discharge point that is monitored and reported on in accordance with the requirements of these Regulations.

28. (1) Le propriétaire ou l'exploitant d'une mine ne rejette l'effluent provenant d'un dépôt de résidus miniers qu'à un point de rejet final faisant l'objet d'un suivi et de rapports conformément aux exigences du présent règlement.

(2) The owner or operator of a mine shall comply with section 6 and the conditions prescribed in paragraphs 4(1)(a) to (c) for all effluent that exits a tailing impoundment area.

(2) Il remplit les conditions prévues aux alinéas 4(1)a) à c) et se conforme à l'article 6 lorsqu'il rejette un tel effluent.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-954-06
STYLE OF CAUSE:	**MININGWATCH CANADA and MINISTER OF FISHERIES AND OCEANS, MINISTER OF NATURAL RESOURCES, ATTORNEY GENERAL OF CANADA, RED CHRIS DEVELOPMENT COMPANY LTD. and BCMETALS CORPORATION**
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	June 19, 20, 21, 2007
REASONS FOR ORDER AND ORDER:	Martineau, J.
DATED:	September 25, 2007

APPEARANCES:

Lara Tessaro Ryan Fritsch	FOR THE APPLICANT
Ward Bansley Lorne LaChancé	FOR THE RESPONDENT THE CROWN
Brad Armstrong Jude Samson	FOR THE RESPONDENTS RED CHRIS DEVELOPMENT AND BCMETALS CORPORATION

SOLICITORS OF RECORD:

Sierra Legal Defence Vancouver, BC	FOR THE APPLICANT
Lawson Lundell LLP Vancouver, BC	FOR THE RESPONDENTS (RED CHRIS DEVELOPMENT AND BCMETALS CORPORATION
John Sims, Q.C. Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT THE CROWN