Backgrounder on Scoping under CEAA

Authors:

Meinhard Doelle, Marine & Environmental Law Institute, Dalhousie Law School
Arlene Kwasniak, Faculties of Environmental Design and Law, University of Calgary

1. Introduction

The Basics

An environmental assessment is required under the *Canadian Environmental Assessment Act*[1] ("CEAA") where a proponent proposes a *project* for which there is a CEAA section 5 decision to be made by a federal authority (Section 5 trigger). The CEAA defines "project' as any "proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to" a physical work". 'An example of a physical work is a bridge, a building, or a park bench. "Project" also means any physical activities set out in the *Inclusion List Regulations.*[2] These regulations set out activities that do not relate to a physical work yet are subject to the Act. Examples include dumping of certain substances, some aviation activities and killing of migratory birds. Section 5 of the CEAA sets out the circumstances which trigger an assessment of a project. It states that an environmental assessment of a project is required before a federal authority exercises a power or performs a duty in respect of a project. The powers or duties listed under subsection 5(1) may be paraphrased as where a federal authority:

a. is a proponent of a project,
b. makes or authorizes payment, loans money or guarantees a loan to enable the project to proceed.
c. leases or otherwise provides federal land for the project, or
d. must issue a permit, licence or other approval, or take some other action to enable a project to proceed, where the regulatory provision relating to the approval or action is included in the *Law List Regulation*.[3]

Under the Act it also is possible for the Minister to require an assessment of a project where there is no section 5 trigger, where the project involves transboundary effects. [4]

"Scoping" is the term used to describe the process of a federal authority deciding what is included in a project or what will be considered in the environmental assessment of a project. "Federal authority" means a federal Minister, department or agency, or other

[1].S.C. 1992, c. C-37
[2] CEAA, s. 2.
[3] S.O.R./1994-636.
[4] CEAA. ss. 46 and 47.

bodies prescribed under regulation.[5] A "responsible authority" or "RA" is any federal authority that has a responsibility by virtue of a section 5 trigger to ensure that an environmental assessment is carried out.[6]

The former sense of "scoping" determines "scope of project" and the latter "scope of assessment" relating to the project. Scope of project determines the nature and extent of the project. For example, assume that a forestry company proposes to carry out forestry operations that involve harvesting and replanting trees, constructing forestry roads, where the roads will cross and disturb fish-bearing streams. Also assume that the CEAA is triggered because the proponent requires an approval under the federal *Fisheries Act* [7]in order to lawfully disturb fish habitat. What is the scope of the project? Is it the entire proposed forestry operation? Is it the stream crossing and the roads? Is it only the part of the proposal that triggered the CEAA, the stream crossings?[8] As will be seen, courts have determined that federal decision-makers responsible for making scoping decisions have broad discretion to scope a project narrowly or broadly.

After the scope of a project is identified, the scope of the assessment of the project must be determined. The focus of the scope of assessment is section 16. This section includes mandatory and discretionary factors. For discretionary factors, the scoping process will determine whether these factors are included in the scope of assessment or not. For factors included, the scoping process then requires a determination of the scope of each of the factors. Through the scoping process, a range of environmental impacts of the project are described. The narrower a project is scoped, the narrower will be the range of environmental impacts. For example, the environmental impacts of an entire forestry operation will be far broader than the environmental impacts of only a stream crossing.

Scoping, the CEAA decision, and the final federal action decision

Decisions made on scope are critical to the environmental assessment process. They will determine how the project is defined for purposes of the assessment, what issues can be raised, and what impacts will be considered. As a result, scoping can have a fundamental impact on the assessment process. In addition, how a project and assessment are scoped are critical to how the federal decision-maker in relation to the project makes the final CEAA decision, which is whether the project is likely to result in significant adverse environmental effects (the "final CEAA decision").[9] It stands to reason that the broader a project is scoped and the broader the scope of assessment of impacts, the more likely there are to be significant adverse environmental effects. For example, there are more likely to be significant adverse environmental effects from a project that includes the whole proposed forestry operation including harvesting trees, forestry roads, and stream crossings, than if the project is only the stream crossings.

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[5] CEAA s. 2. The Act excludes some bodies from bodies from the definition.
[6] CEAA s. 2.
[7] R.S.C. 1985 c. F-14 .
[8] This scoping question was one of the issues in the *Sunpine* case discussed later in this paper.
[9] CEAA, ss. 20 and 37.

The final CEAA decision, in turn, is critical to the final decision that is made relating to the section 5 provision that triggered the CEAA (the "final federal action decision"). This decision might be whether to grant a regulatory authority to carry out a project, whether to lease federal land to enable it to proceed, or to provide federal funds for it.

Scoping, the preamble and the purpose sections

It is important for both the final CEAA decision and the final federal action decision to consider the issue of scoping in the context of the overall objectives of CEAA.

Based on the preamble and the purpose section of the Act, the overall objective is for the environmental assessment process to contribute to the Government of Canada's goal of achieving sustainable development. This is to be done by integrating environmental factors into planning and decision making processes, and by including the public in the process. Other purposes identified including precaution, and a desire to cooperate with other jurisdictions.

For individual environmental assessments carried out under the Act to contribute to these objectives, any decision on scope would strive to take into account these objectives. For purposes of the scoping process, the following questions are proposed as representative of these objectives in the context of the scope determinations to be made under the Act:

- What is relevant in light of the ultimate purpose of making federal action decisions that help us achieve sustainable development?
- What is necessary to apply the final CEAA decision test?
- What is constitutionally appropriate?
- What is practically appropriate?

The first question would generally suggest broad scoping to ensure the implications of the section 5 decision on sustainable development are fully considered. The second question suggests a sufficient scope to identify all potential adverse environmental effects as defined in the Act to consider their likelihood in relation to the project. The third question would take the broad scope mandated under the first two questions and refine it according to the constitutional boundaries within which the federal government operates. The last question would invite consideration of whether there are practical reasons to further refine, limit, or broaden the scope. Issues such as the cost and time involved, as well as cooperation with other jurisdictions would be considered here.

In the end, it is the specific provisions in the Act dealing with scoping that are critical in understanding how scope determinations are made. The context offered through the preamble and purpose section becomes relevant particularly in the context of the exercise of discretion granted decision makers with respect to scope under the Act. In other words, one might expect that discretion on scoping would be exercised in light of the purposes of the Act and the constitutional boundaries within which the federal government operates. In the following sections, the specific scoping provisions under CEAA, case law interpreting them, as well as efforts by the Canadian Environmental Assessment Agency to offer guidance and direction on the scoping process are

considered. As well, examples are provided to compare CEAA scoping decisions with those in other jurisdictions.

2. Scoping in the context of the CEAA

Under the CEAA, the starting point for the scoping process is a determination that there is a project as defined in the Act for which a federal authority is exercising a duty, power, or function included in section 5. [10] It is the role of section 5 in combination with the definitions of project and federal authority to determine whether an assessment is to be carried out. It is the role of sections 15 and 16 to determine the scope of the project and scope assessment of a project to be carried out under the Act.

As set out in the introduction, the scope of an assessment under CEAA can be broadly separated into two components: the scope of the project to be assessed and the scope of the assessment of the project. The scope of the project is about the links between the project as proposed by the proponent, CEAA's definition of project, the triggering process, and section 15. Essentially, the decision in scoping a project to be made is whether the scope of the project to be assessed is as proposed by the proponent, limited to the undertaking or physical activity that triggered the Act, or whether there are other undertakings, activities or physical works that should be included.

It is important to distinguish what physical work or *Inclusion List* physical activity triggered the CEAA from what is the scope of project for the purposes of environmental assessment. The role of the scope of project determination is to make the transition from identifying an undertaking or physical activity sufficient to trigger an assessment to determining how the project should be defined for assessment purposes. Other than the undertaking or physical activity that triggered the assessment, what should be included as part of the project to be assessed?

The key provision for this transition is section 15. It deals with three aspects of the scope of the project to be assessed. Subsection 15(1) assigns responsibility for making the scoping determination. The responsibility to determine the appropriate scope of project with the responsible authority for screenings and comprehensive studies and with the Minister of the Environment for assessments carried out by way of panel review or mediation. Subsection 15(2) grants discretion to the decision maker to combine projects that are closely related so that they can be considered as one project for purposes of the assessment. Subsection 15(3) sets a minimum standard for the scope of projects that are related to a physical work.

It is the third subsection that has proven most critical and most controversial in the scoping process. It provides that in the case of an undertaking in relation to a physical work, the scope of the project to be assessed shall include all other undertakings in relation to that physical work that are likely to be carried out. The language in subsection

[10] This is subject to the transboundary provisions mentioned earlier, which may result in the application of the process in the absence of a federal authority exercising a section 5 power, duty or function. For guidance on whether the Act applies, see How to Determine if the Act Applies (CEAA, October 2003)

15(3) closely mirrors that of the definition of project. In particular, it specifically lists the same undertakings included in the definition, namely "construction, operation, modification, decommissioning, abandonment or other undertaking".

A number of critical issues arise out of the provisions of section 15. The general issue is about the degree and nature of the discretion granted in this section for the Minister or responsible authority to determine the scope of the project. This relates to the relationship between subsections 15(1) and (3). A more specific issue is the relationship required between the undertakings and the physical work in subsection 15(3). There is also some question around the scope of the physical work as distinct from the undertakings to be considered.[11] A number of these issues have been the subject of court challenges, the most significant of which are discussed below.

The scope of assessment then takes the project as scoped under section 15, considers which factors under section 16 are to be considered in the assessment of the project, and determines what the scope of each of the factors should be. Some factors are mandatory, others will be discretionary. More specifically, a number of factors in subsection 16(2) are discretionary for screenings, but mandatory for comprehensive studies, panel reviews and mediation. Those in subsection 16(1) are required for all assessments. The responsibility to determine the appropriate scope of assessment also depends on the process. It rests with the RA for screenings and comprehensive studies and with the Minister of the Environment for assessments carried out by way of panel review or mediation.

The first group of factors are those required to be included in any assessment under the Act, regardless of whether the assessment is carried out by way of a screening, comprehensive study, panel review or mediation. These mandatory factors include the following:

- environmental effects of the project, including:
    - 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,
- the significance of the effects,
- comments from the public that are received in accordance with the Act, and

[11] A practical question is to what extent the scoping process is driven by the undertaking or activity that triggered the process, and to what extent it is driven by what the proponent is proposing. In other words, what should the starting point be? Should we start with what the proponent is proposing to do as the scope of project and add or subtract when appropriate, or should we start with the undertaking or activity that triggered the assessment and add to it as appropriate?

- mitigation measures that are technically and economically feasible.

The second category of factors in section 16 consists of those required for a comprehensive study, mediation and a panel review, but optional for a screening. They include the following:

- the purpose of the project,
- alternative means of carrying out the project that are technically and economically feasible,
- 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.

In addition to these two categories, the decision maker can, at his or her discretion, add any other factor to the scope of the assessment. Examples provided in section 16 include the need for and alternatives to the project. Community and traditional knowledge may be considered in carrying out the assessment, as may the results of any regional environmental assessments.

Subsections 16(1) and (2) collectively establish which factors are to be considered for a given assessment. They do not identify, however, how far assessors have to go in considering these factors. Similar to the scope of project, the determination of the scope of each of these factors is left to the authority in charge of the environmental assessment process. In the case of a screening and a comprehensive study, this is the RA, in the case of mediation or a panel review, the Minister of the Environment has this responsibility.

The relationship between the scope of the assessment and the final CEAA decision test is of instructive. The final CEAA decision test is phrased in terms of whether the project is likely to cause significant adverse environmental effects, with some variations depending on the process. For higher levels of assessment, there is an additional consideration of whether significant adverse effects are justified in the circumstances. Assuming that the purpose of the process is to inform the final CEAA decision, it is important to consider how the factors in section 16 relate to this test. When considered in this light, one would expect the focus of section 16 to be on the following:

- identify potential environmental effects of the project,
- determine which are adverse,
- determine which are significant,
- determine which are likely (and confirm causation),
- consider the ability to mitigate the effects identified

- identify factors which may be relevant in considering whether significant adverse effects are justified in the circumstances.[12]

What is an environmental effect is determined through the definitions of "environment" and "environmental effect", suggesting a narrow focus on biophysical effects and limited socio-economic effects. Anything that does not fit within these definitions would only be relevant if it informed the decision whether significant effects are justified in the circumstances. CEAA's purpose section provides an alternative perspective. While the section does refer to significant adverse effects, it also suggests that federal decision-makers are to be encouraged to "take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy" and to "ensure that projects are considered in a careful and precautionary manner". What makes a consideration of these two very different perspectives on the scope of assessment particularly interesting is that there are a number of factors included in section 16 that do not comfortably fit with the narrower perspective, one that seeks to focus the assessment on likely significant adverse effects. To illustrate, applying the broader perspective would suggest the potential inclusion of any factor that would contribute to federal decision-makers understanding of whether and how the proposed project could contribute to sustainable development. As well, it would suggest considering impacts that could cause serious harm but are not likely. For example, it is difficult to reconcile the requirement to consider malfunctions and accidents with the reference in the final test to "likely". In most cases, malfunctions and accidents will not be likely, but their impact may be very serious if they do occur. Similarly, there may be challenges in fully reconciling the consideration of public comments, community and traditional knowledge, the need for a project, and similar factors with the final test, which appears mainly science focussed.[13]

There are two ways to reconcile these apparent inconsistencies. One is to suggest that the various factors that do not seem directly relevant to whether a project is likely to cause a significant adverse environmental effect are all intended to be applied to the "justified in the circumstances". In other words, the information gathered from the inclusion of these factors will allow the final decision maker to consider whether a project should be permitted to proceed in spite of a significant adverse environmental effect. There are some difficulties with this interpretation. One is that some of these factors, such as malfunctions and accidents, are required for screenings, which do not allow significant effects to be justified. Another is that it is not clear that all these factors are designed to gather information to determine whether a significant adverse effect can be justified.

The alternative interpretation is that these factors are included because the environmental assessment is designed to do more than inform the final CEAA decision. Rather, the process serves a dual function, to inform the final CEAA decision, and to more generally inform the federal decision-maker to encourage the promotion of sustainable development and the application of the precautionary principle. It is important to note, in

[12] See also CEAA Guide : "Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects" (CEAA, 1994) at page 7

[13] This view is certainly expressed in the CEAA guide: "Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects" (CEAA, 1994) at page 6

this regard, that a favourable determination that the project is not likely to cause significant adverse environmental effects does not require federal decision- makers to approve a project when making the final federal action decision. After a determination of no likely significant adverse environmental effects, the federal authority may respond negatively in the final federal action decision. CEAA gives the decision maker the discretion to exercise the duty, power, or function in a manner that does not permit the project to proceed (sections 20 and 37).[14] In keeping with CEAA's purpose section, this discretion permits the decision maker to reject the project if it is found to be inconsistent with sustainable development, or precaution.[15]

The purpose of the assessment not only affects the relevance of various factors, it can also shape the way we interpret their application. This is particularly apparent with respect to cumulative effects. "Cumulative effects" refer to a consideration of the interaction between the effects of the proposed project and others that have been carried out or may be carried out in the future. If the main purpose of an assessment under the Act is to identify likely significant adverse environmental effects of the project, this might suggest that a limited scope of cumulative effects is appropriate, for example, one that simply seeks to confirm that the proposed location is not one that is particularly vulnerable to the predicted impacts. If the purpose extends to promoting sustainable development through the assessment process, however, a much broader scope for the cumulative effects analysis might be warranted.[16]

There is another important link between the scope of assessment under section 16 and the final CEAA decision test of likely significant adverse environmental effects. The final CEAA decision test does not limit likely significant adverse environmental effects to those identified through the assessment or to those identified by the final decision maker. This suggests that the discretion under subsection 16(3) to exclude factors or limit their scope may be limited to the elimination of issues that are known up front to be insignificant. In other words, it would be reasonable to conclude that an implied limit on the discretion in subsection 16(3) is that the federal decision-maker cannot eliminate issues from the scope of assessment that are relevant for the final determination of whether the project is likely to cause significant adverse environmental effects.

3. Federal Guidance on Scoping

The Agency has offered some guidance on scoping since the implementation of the Act in 1995. It has done so directly through guidance documents on scoping, and by

[14] The sections state that the decision maker "*may* exercize any power or perform any duty or function that would permit the project to be carried out in whole or in part" [emphasis added] it does not state that the decision maker *shall* do this.

[15] There may be other reasons why a decision maker might refuse to permit the project to proceed. For example, there may be reasons specific to the legislation under which a permit is issued that support a refusal.

[16] As will be discussed below, case law on cumulative effects have also explored close connections between the scope of project and cumulative effects suggesting that undertakings not included in the scope of project could still be considered, though in a more limited manner, in the context of a cumulative effects analysis.

addressing specific issues within the broader context of scoping, such as guidance material on cumulative effects, cultural heritage, climate change, and biodiversity. Finally, guidance documents on other aspects of the Act, such as the final project decision, also have some relevance to the scoping issue.

The Agency issued an Operational Policy Statement on scoping on September 25, 1998.[17] The Policy Statement affirms that scope of project and scope of assessment decisions must be made on a case by case basis, but does suggest a number of considerations for the determination of the scope of the project and the scope of the assessment of the project. The following is a list of some of the key considerations identified:

- How does the proponent describe the project?
- What is the purpose of the project?
- Is the project physically or inevitably linked to other physical works?
- Will other physical works occur because of federal support for the proposed project?
- What other federal departments are involved?
- Are responsible authorities in the principle project or in more ancillary activities?
- Can boundaries for the scope be established in light of results of other environmental assessments of the project previously carried out?
- What technical, scientific, and policy information is available for the assessment?
- What are the expectations of stakeholders?
- Focus should be on potential environmental effects on valued ecosystem components
- Mitigation measures considered should apply to the project, not to other existing or planned activities (i.e. in the context of cumulative effects, cannot mitigate activities this project is interacting with).

In addition to the operational policy statement, a number of other guidance documents have been released that affect how scoping decisions may be made under the Act. The 1994 guide on Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects, for example, offers some insights into the factors and scope of factors considered to be relevant to the final project decision. Detailed guidance has been offered on the consideration of cumulative effects, much of which is intended to assist with the challenge of setting an appropriate scope for the consideration of cumulative effects.[18] Other guidance relevant for the scoping process address how to address scoping issues for climate change, biodiversity, need and alternatives, and physical and cultural heritage. [19]

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[17] OPS - EPO/1 – 1998

[18] See A Reference Guide for the Canadian Environmental Assessment Act; Addressing Cumulative Environmental Effects (CEAA, 1994), and the Cumulative Effects Assessment Practitioners Guide (CEAA, 1999). See also Operational Policy Statement March 1999. OPS-EPO/3- 1999. Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act

[19] See Incorporating Climate Change Considerations in Environmental Assessment: General Guidance for Practitioners (CEAA, 2003), A Guide on Biodiversity and Environmental Assessment (CEAA, 1996), Operational Policy Statement Addressing "Need for", "Purpose of"

A more authoritative statement on scope of assessment is included in the 2005 Cabinet Directive on Implementing the Canadian Environmental Assessment Act. Federal decision-makers are directed to ensure a timely, predictable, coordinated and efficient scoping decision consistent with four more specific policies set out in the directive. The first policy states that in case where the section 5 decision to be made relates to the entire proposal, the scope of project shall include the entire proposal. When there is more than one section 5 decision to be made, the scope determinations made shall ensure that there is only one federal assessment, either by agreeing on a joint scope of project, or by considering separate projects within one assessment. Components of a proposal other than those that directly trigger section 5 decisions are to be included as much as possible if they have the potential to cause adverse environmental effects on areas of federal jurisdiction. Finally, if the proposal or any of its components are subject to environmental assessments in other jurisdictions, the scope determination is to facilitate cooperation, to facilitate an efficient and timely assessment.[20]

In late 2006 the Agency published its most recent general guidance on the Cabinet Directive, the "Interim Approach for Determining Scope of Project for Major Development Proposals with Specific Regulatory Triggers under the Canadian Environmental Assessment Act"[21] (the "Interim Approach"). This guidance document covers "major development proposals" that are considered to be those on the comprehensive study list and other large-scale projects that involve multiple jurisdictions. The application of the Interim Approach is further limited to projects triggered through the following key regulatory triggers under paragraph 5(1) (d):

- subsection 35(2) of the *Fisheries Act*;
- paragraph 5(1)(a) of the *Navigable Waters Protection Act*;
- subsection 7(1) of the *Explosives Act*; and/or
- subsection 127(1) of the *Canadian Environmental Protection Act, 1999*.

For projects who meet these criteria, the interim approach provides that scoping is to be determined as follows:

> "If components of the proposal other than the component directly related to the powers, duties or functions referred to in section 5 of the Act might cause adverse environmental effects on areas of federal jurisdiction, a scope of project determination that includes as much as possible these other components, so that the potential adverse environmental effects on areas of federal jurisdiction can be considered."

In other words, a major project should be scoped to include components directly linked to the regulatory trigger that might cause adverse environmental effects related to a

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"Alternatives to" and "Alternative Means" under the Canadian Environmental Assessment Act (CEAA, OPS-EPO/2 - 1998) , and Reference Guide on Physical and Cultural Heritage Resources (CEAA,1996)

[20] 2005 Cabinet Directive, Part II

[21] (CEAA. 9-22.2006).

matters within federal jurisdiction ("trigger elements"), and other components of a project within federal jurisdiction that might cause adverse environmental effect ("non-trigger elements"). Consider our proposed forestry operations example. Suppose that the *Law List* provision that triggered the CEAA was subsection 35(2) of the *Fisheries Act,* since the proponent needed authorization to disturb fish habitat in building a bridge. Applying the Interim Approach, this trigger element would be part of the scope of project. As well, any other elements of the proposal that involve federal jurisdiction that could cause adverse environmental effect also should be included in scope. For example, if migratory birds or navigation would be impacted by the bridge, these elements would be included in scope of project.[22] However, according to the Interim Approach, what would not be included in scope of project are matters solely within provincial jurisdiction. Taking our example, if the proposed forestry operation is entirely on provincial public lands, the operation would not be included in scope of project, even though it is the project proposed by the proponent. Later, we argue that there is no constitutional or case law rule requiring eliminating from scope of project or scope of assessment matters within provincial jurisdiction. It is reasonable to conclude that it is within an RA's discretion to scope a project to include matters within provincial jurisdiction, and, where appropriate, such matters should be included in scope of project.[23]

4. Scoping Cases

Following the entry into force of the CEAA in 1995, scoping issues soon began to dominate judicial review applications on federal environmental assessments reminiscent of the cases that established the EARP Guidelines Order as legally binding. With respect to scope of project, critical decisions were made early. In particular, two cases stand out from the early CEAA case law, *Manitoba Future Forest Alliance v. Canada* (Manitoba Forest)[24] and *Friends of the West Country Association v. Canada* (*Sunpine).*[25]

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[22] The Canadian Constitution (*Constitution Act, 1867,* formerly the *British North America Act, 1867,* (U.K.) 30 & 32 Vict., c. 3) allocated "heads of legislative power" between the federal and provincial governments. The allocation is meant to be exclusive in that if the Constitution gives legislative power to one level of government, the other level may not legislate in the area. Although the Constitution allocates residual legislative powers (over areas not listed as a head of power) to the federal government, under the "Peace, Order, and Good Government" provision (s. 91), rarely is it clear whether a matter truly is residual, and the federal government has not aggressively pursued residual authority. Where legislative authority is not clear, courts may find that both levels of government have some authority to legislate in an area subject to court produced rules for resolving disputes. Federal constitutional jurisdictional authority particularly relevant to environmental assessment (either expressed in the Constitution, or determined by courts) are: navigation and shipping, seacoast and inland fisheries, Indians and lands reserved for Indians, toxic substances (regulated under the *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33), ocean pollution and ocean mammals, migratory birds, and to a limited degree, migratory bird habitat, resources, federal land and resources and activities on or impacting federal land , trade and commerce, and interprovincial and international impacts. Provincial legislative jurisdiction includes matters relating to provincial public land and resources (e.g. public lands, forestry, range, wildlife, and most oil and gas and other resources), property and civil rights and local works and undertakings (including most environmental and natural resource management).

[23] See M. Doelle, "CEAA, New Uncertainties, but a Step in the Right Direction" (1994) 4 J. Env. L. & Prac. 59.

[24] *Manitoba Future Forest Alliance v. Canada (Minister of the Environment)* [1999] F.C.J. No. 903

Sunpine is a key case in that it considered both scope of project (s. 15 factors) and scope of assessment (s. 16 factors).[26] It was the first case to consider in any detail the scope under the CEAA. This case involved an application by Sunpine Forest Products for approval under the *Navigable Waters Protection Act* (NWPA) to construct two bridges. It was undisputed before the court that the construction of a bridge is an undertaking in relation to a physical work, and as such constitutes a project. It was also not disputed that the permit required under the NWPA for the construction of the bridges triggered an assessment under paragraph 5(1) (d) of CEAA, and made the Minister or Fisheries and Oceans a RA as a result of its responsibility at the time for the Canadian Coast Guard and the NWPA.

The RA in this case determined the scope of the projects to be the construction of the bridges, without considering the logging road or the related harvesting activities to be part of the project. The assessment under the Act was carried out on that basis, and the two bridges were approved by the RA after concluding that the construction of the bridges was not likely to cause significant adverse environmental effects. The decision to approve the construction of the two bridges was challenged on a number of grounds, including that the scope of project determination made by the RA violated subsection 15(3).

In this case, the evidence before the court was that the two proposed bridges were part of a "Mainline Road". This logging road was in turn found by Justice Gibson to be part of extensive new forestry operations in the general vicinity of a small community in the foothills of the Rocky Mountains, Astrakhan, Alberta. The issue before the court was whether the subsection 15(3) of CEAA required the RA to include the logging road and logging operations as part of the project to be assessed, or whether the scope of the project could be limited to the construction of the two bridges.

Subsection 15(3) requires that all undertakings in relation to a physical work that are proposed by the proponent, or, in the opinion of the RA, likely to be carried out be included as part of the project to be assessed. Clearly, in this case, the construction of the logging road and the resulting logging activities were proposed by the proponent. There also appeared to be no dispute that these activities were undertakings. At the heart of the case was therefore whether these other logging activities were sufficiently related to the bridges to constitute undertakings "in relation to" the bridges.

Relying on U.S. law dealing with the *National Environmental Policy Act* (NEPA)[27], Justice Gibson applied an independent utility test to determine whether there was a sufficient relationship to require the RA to include these undertakings as part of the

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[25] *Friends of the West Country Association v. Canada (Minister of Fisheries and Oceans)* [1998] 4 F.C. 340, overturned in part on appeal by the FCA

[26] See A. Kwasniak, *The Friends of the West Country v. Minister of Fisheries and Oceans Director, Marine Programs, Canadian Guard (F.C.T.D.)* – the "Sunpine Decision", *Alberta Law Review,* vol. 36, No, 4 (1998), 1032.

[27] See discussion later in this paper.

project to be assessed. Essentially, Justice Gibson concluded that because the bridges have no utility independent of the logging road, the road was in relation to the two bridges. Gibson referred extensively to federal guidance documentation in support for his conclusion.[28] The court drew on the SCC decision in *Quebec (Attorney General)* v. *Canada (National Energy Board)* to support a generous interpretation of scope. In reaching his conclusion, Gibson emphasises that subsection 15(3) is mandatory in nature in requiring all undertakings in relation to the physical work (the bridges) proposed by the proponent to be included in the scope of the project.

In the *Manitoba Forest* case, the proponent submitted a forest management plan (FMP) to the province involving some 11 million hectares of forest land in Manitoba. The management plan identified a number of new activities the proponent was intending to implement in the area, including the construction of hundreds of kilometres of logging roads, the conversion and expansion of existing pulp and paper mills, the construction of a new mill, and other related forest activity. In short, the proponent intended to significantly increase timber harvesting and related manufacturing in this area. The proposed logging roads involved dozens of stream crossings across watercourses that were navigable.

It was undisputed in the case that the construction of a stream crossing was an undertaking in relation to a physical work that triggered an assessment under the CEAA and identified the Canadian Coast Guard a RA due to its responsibility for the administration of the *Navigable Waters Protection Act (*NWPA). What was in dispute was the scope of the project to be assessed. The Coast Guard had identified the project for purposes of the Act as the construction of a bridge over a navigable watercourse and granted a NWPA permit following an assessment of the construction of the bridge. The applicants challenged the permit granted on the basis that the RA failed to comply with Subsection 15(3) of the CEAA in limiting the project to the construction of the bridge.

More specifically, the applicants argued that subsection 15(3), which requires inclusion of all undertakings in relation to the physical work (the bridge) proposed by the proponent or otherwise likely to be carried out, requires the inclusion of other undertakings identified in the FMP, such as the construction of the logging road, timber harvesting, and the processing of the timber at the various pulp and paper mills. Essentially, the applicants argued that these activities were undertakings in relation to the bridge that were proposed by the proponent, and that subsection 15(3) therefore required their inclusion under the scope of the project.

At the heart of the case was the meaning of "undertakings in relation to the physical work". It was undisputed that the logging roads, the harvesting activities, and the expansion of the pulp and paper mills were undertakings, and that they were proposed by the proponent. What was in dispute was whether these undertakings were "in relation to" the physical work that triggered the assessment, the bridge.

[28] Trial decision, ¶¶ 34 to 40

The respondents took the position that an undertaking had to be part of the life cycle of the physical work in order to be in relation to the physical work. The basis for this argument was that the listed undertakings, "construction, operation, modification, decommissioning, abandonment" essentially described the life cycle of the physical work, and that any other undertaking had to be of the same class and therefore also part of the life cycle of the physical work.

Justice Nadon accepted this interpretation and applied the life cycle test to conclude that the other undertakings in the FMP did not have to be included in the scope of project under subsection 15(3). He essentially held that subsection 15(3) requires the inclusion of undertakings in relation to a physical work that are part of the life cycle of the physical work. Anything beyond the life cycle of the physical work is discretionary. In the process, the court appears to similarly limit the definition of project to undertakings that are part of the life cycle of the physical work. In coming to this conclusion, the court specifically rejected the independent utility test adopted by Gibson in *Sunpine*.

It is clear from these decisions that courts were still struggling to understand the Act as a whole. It is unfortunate that some of the first cases brought before the Federal Court on the CEAA were on a critical issue such as the scope of project. Both Nadon and Gibson, for example, use the term scope of assessment instead of scope of project in discussing subsection 15(3), suggesting that the link to 15(1) may not have been properly considered. Nadon furthermore is not consistent in recognizing that according to the definition, it is actually the undertaking that is the project, not the physical work. Most importantly, neither case adequately deals with the critical issue of the relationship that needs to be established to require undertakings to be included within the scope of the project under subsection 15(3)

While the decision in *Manitoba Forest* case was not appealed, the judgement of Gibson in *Sunpine* was appealed to the Federal Court of Appeal.[29] This gave the Court of Appeal the opportunity to provide much needed clarity on the role of subsection 15(3) in determining the scope of projects. It would appear that the parties to this appeal essentially asked the court to choose between the independent utility test adopted by Gibson at trial, and the life cycle analysis adopted by Justice Nadon in *Manitoba Forest*. The court acknowledged the relationship between subsections 15(1) and (3), but still appeared to consider 15(3) in isolation based on procedural grounds particular to this case.[30] It demonstrated a better understanding of the distinction between the physical work and the project. It did not, however, offer a convincing analysis on the central issue before it, the meaning of "in relation to" in the context of what undertakings have to be included in the scope of project in light of subsection 15(3). The Court of Appeal discounted Gibson's reliance on the principle of independent utility stating "I do not find the independent utility principle helpful for the purpose of interpreting subsection 15(3)

[29] *Minister of Fisheries and Oceans v. Friends of the West Country Association* (12 October 1999), Ottawa A-550-98 (F.C.A.)
[30] It appears that the respondents failed to cross-appeal the trial decision on subsection 15(1)

of the CEAA."[31] It stated that the U.S. originating test was inappropriately applied without considering its applicability in the Canadian or CEAA context. The court then proceeded to adopt the life cycle of the physical work test applied in *Manitoba Forest*.

Unfortunately, the Court of Appeal in *Sunpine* never provides a convincing rational for why the relationship between the undertakings and the physical work in 15(3) should be restricted to the life cycle of the physical work. It is interesting that the court does point out that the section uses the term "in relation to" rather than "of". It is surprising then that Justice Rothstein, writing for the unanimous court does not deal with the obvious question, which is why the section uses the phrase "in relation to" rather than simply "of", when the latter would have been quite sufficient and clear if the legislators' intent was to mandate a life cycle approach.

The appellate decision in *Sunpine* also considered section 16, scope of assessment. On the facts, the RA refused to consider any matters when scoping the assessment that were not within federal jurisdiction (such as navigation, fisheries, migratory birds, etc) believing that the federal government was limited to consider only matters within federal jurisdiction when conducting a cumulative effects assessment under section 16. The court rejected this approach stating that:

> "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 implicit in a cumulative effects assessment that both the project as scoped and sources outside that scope are to be considered."[32]

The court ruled that the RA "erred in declining to exercise the discretion conferred on it in its cumulative effects analysis … by excluding consideration of effects from other projects or activities because they were outside … federal jurisdiction."[33] Accordingly, an RA must not intentionally limit his or her exercise of discretion to solely those matters within federal jurisdiction.

The court also ruled that some consideration of cumulative effects is mandatory, but the scope of the cumulative effects assessment is discretionary. The court could have limited the application of subsection 16(3) to the depth of the analysis to determine whether there are cumulative effects of concern. Alternatively, the discretion in subsection 16(3) could have been applied with respect to uncertain future projects. The court did not take either of these more limited approaches to discretion, but rather concluded that subsection 16(3)

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[31] *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] F.C.J. 1515, and (F.C.A.) ¶ 22.

[32] *Minister of Fisheries and Oceans v. Friends of the West Country Association* (12 October 1999), Ottawa A-550-98 (F.C.A.) at ¶. 34

[33] *Ibid.* at ¶ 40.

grants discretion to determine which projects should be included in the cumulative effects analysis.[34]

The end result is that the RA had to consider whether the project as scoped (i.e. the construction of the two bridges) in combination with other projects or activities, was likely to cause cumulative environmental effects, but it was entitled to decide not to consider the road or the harvesting in this analysis.[35] The Court concluded that the selection of which projects to consider (i.e. whether to include the road or the planned logging activities) was within the discretion of the RA. Here the responsibility authority had failed to turn its mind to the issue of cumulative effects all together. This was a violation of its obligations under paragraph 16(1)(a).[36]

The case of *Citizen's Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment)*[37] is another early case of the Federal Court being asked to determine the limits on responsible authorities' discretion to determine the scope of a project to be assessed under the Act. This case involved one proponent who was proposing two related projects in Newfoundland and Labrador. The two projects were some distance apart, a nickel mine in Voise's Bay and a proposed smelter in Argentia. The nickel mine triggered an assessment under CEAA, as did the smelter.

The Minister responsible for scoping decided that the projects were not sufficiently linked to justify a joint assessment under subsection 15(2), that the smelter was not an undertaking in relation to the mine, and that there was no need for a cumulative effects assessment given the great distance between the two projects. The issue before Justice MacKay of the Federal Court, Trial Division, was whether the smelter had to be assessed as part of the nickel mine in light of subsections 15(2) or (3). The applicants essentially argued that the fact that it was acknowledged that one would not proceed without the other, that both involved the same proponent, and that the mine was to be the main supplier of raw material for the smelter required a single assessment.

With respect to subsection 15(3), MacKay applied the life cycle analysis first adopted in *Manitoba Future Forest Alliance* to conclude that the inclusion of the construction of a different physical work would clearly be discretionary. This left subsection 15(2), a provision that the court also concluded provides discretion to decide whether or not to combine these two projects under a single assessment. The trend was clear at this point.

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[34] FCA decision, ¶¶r 24 - 28

[35] The Sunpine Court of Appeal approach to scope of project and cumulative effects has since been applied fairly consistently to give broad discretion to responsible authorities. See for example *Lavoie v. Canada (Minister of the Environment) [2000] F.C.J. No. 1238* at par 105- 125. See also Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage) (C.A.) [2001] F.C.J. No. 18, par 24 – 34 on scope of project, and 38 – 47 on the cumulative effects assessment. See also Environmental Resources Centre v. Canada (Minister of the Environment) 2001 FCT 1423 at par 142 – 146.

[36] It is important to note that the court reached this conclusion having accepted that the activities in question, the logging road and harvesting activities, were themselves outside federal jurisdiction. Nevertheless, the RA was authorized to consider them, and in fact had to turn its mind to whether they should be included in the cumulative effects analysis. (See par 34 of FCA decision)

[37] [1999] F.C.J. No. 273

The federal court has accepted the life cycle approach to the scope of project with all its implications, and is more generally favouring interpretations of scoping powers that leave broad discretion to those responsible for the decisions.

With some of the critical issues on scope of project addressed by the Court of Appeal in *Sunpine,* the focus started to shift to the scope of the assessment. The issue of cumulative effects had already started to occupy courts, in part because it was introduced as an alternate argument in early applications challenging the scope of project. The Federal Court Trial decision in *Alberta Wilderness Association v. Cardinal River Coals Ltd* (Cheviot).[38] is of interest on cumulative effects as well as other scope of assessment issues.

The *Cheviot* case involved the environmental assessment of a proposed open pit coal mine close to Jasper National Park in Alberta. The proposed mine was located 2.8 km east of the park boundary, involved some 30 pits plus roads, railway lines and transmission lines over an area 23 km long and 3.5 km wide. The project was expected to generate millions of tons of waste rock. The CEAA was triggered as a result of the destruction of fish habitat, which required an approval under section 35(2) of the *Fisheries Act.* The project was referred to a joint federal-provincial review panel under a Joint Panel Agreement that listed the factors in subsections 16(1)(a) to (e) and 16(2) as required factors. The Joint Panel filed a report recommending that the project be allowed to proceed. The applicants challenged the decision of the Minister of Fisheries and Oceans to grant an authorization under subsection 35(2) of the *Fisheries Act*. The two grounds for the challenge of interest here are that the Panel's cumulative effects assessment was inadequate and that it failed to adequately consider alternative means of carrying out the project.[39]

On the issue of cumulative effects, the court concluded that the panel was obligated to consider the impacts of the project in light of other mining developments and forest activities in the area. In particular, the cumulative impacts of the proposed mining project on carnivores were to be considered by the panel in carrying out its review. The court concluded that this obligation was established in paragraph 16(1)(a) and confirmed in the joint panel agreement, and that there was abundant evidence before the panel that future forest and mining activity was likely, and that there was at least a potential for cumulative effects resulting from the project in combination with likely future mining and forestry projects. By failing to consider these interactions between the project and likely future mining and forestry project, the Panel failed to comply with section 16.

On the surface, this decision is clearly at odds with the Court of Appeal in *Sunpine*. In that case, the court concluded that the RA has the discretion to decide whether to include likely future activities such as a logging road or other logging activities. There is no suggestion in that decision that this discretion is qualified. There is no indication that it

[38] [1999] F.C.J. No. 441

[39] An additional statement with relevance to the scope of assessment relates to the use of the Valued Environmental Components (VEC) analysis. The court states at par 54 that the panel can make use of this approach, however, it does not limit its "duty to meet the requirements of section 16".

has to take into account whether the environmental impacts are likely to interact. Here, the court is clearly requiring the panel to consider all likely activities with environmental impacts that may interact with those of the project. How are these cases to be reconciled?

One way to reconcile these cases is on the basis that *Sunpine* dealt with a self assessment scenario, whereas *Cheviot* involved a Panel. This means in *Sunpine* the RA made the scoping decision and carried out the assessment. Here, the scoping decision had to be made by the Minister, whereas the assessment was carried out by the Panel. The court focussed on the actions of the Panel, seeming to assume on limited evidence that it was instructed to carry out a broad cumulative effects assessment. The implication would be that the Minister, by failing to specifically limit the scope of the cumulative effects assessment, had in fact determined that all likely future activities were to be included. The panel then did not have any choice but to carry out a broad assessment. This would suggest that the Minister perhaps could have determined, similar to the RA in *Sunpine*, to limit the cumulative effects assessment to certain projects or certain impacts.

It is important to note that neither case offers a clear statement on whether there are restrictions on the discretion to narrow the scope of a cumulative effects assessment, let alone what those restrictions might be. Similarly, neither case speaks to whether there are restrictions on how broadly cumulative effects may be scoped. At what point is an assessment no longer complying with the requirement in paragraph 16(1) (a) to consider the likely cumulative effects of the project?

With respect to alternative means, the court concluded that once a determination is made that alternative means have to be considered, the alternative means identified have to be considered thoroughly. It is not enough to conclude that the preferred option is not likely to cause significant adverse effects. In this case, the alternative means to the proposed open pit mine was identified in the terms of reference to be subsurface mining. The panel did identify subsurface mining as an alternative, but failed to consider the environmental effects of this alternative in a meaningful way.[40] What the panel should have done was to carry out a comparative analysis of the environmental impacts of open pit mining and subsurface mining. By failing to consider subsurface mining option thoroughly, the panel failed to comply with paragraph 16(2) (b). The RA was therefore not entitled to rely on the panel report for compliance with CEAA.

As with other scoping issues, the case raises questions about the connection between scope of an assessment, the final CEAA decision, and the final federal action decision. If the main purpose of the assessment is to inform the final CEAA decision of likely significant adverse environmental effects, one might conclude that the consideration of alternatives would only be relevant if the main proposal was associated with likely significant adverse environmental effects. This was in fact the position of the court in

[40] An important underlying point was that the panel could not justify its failure to fully consider alternative means or cumulative effects by the limited information put before it by the proponent and federal authorities. The court points to the considerable power of the panel to compel the submission of evidence (see, for example, ¶ 75).

Inverhuron & District Ratepayers Assn. v. Canada.[41] If there is to be a point in considering alternatives regardless of whether the main option is associated with significant effects, this would suggest the court may be placing some importance on the broader objective of encouraging federal decision-makers to promote sustainability or precaution through their decisions, something that requires something more than rejecting projects if there are significant adverse environmental effects.[42]

In *Sharp v. Canada (Transportation Agency)*[43] the Federal Court of Appeal was asked to consider an appeal of an approval granted by the Canadian Transportation Agency of the construction of a 12.6 km line of railway in Central Alberta. The line was to service a chemical facility of Union Carbide. The approval sought was under subsection 98(2) of the *Canada Transportation Act*, a provision that is included in the *Law List Regulation*. The construction of the railway line meets the definition of project under the CEAA. The regulator, the Transportation Agency was therefore an RA and required to carry out an environmental assessment in accordance with the requirements of the Act. At issue was the extent to which the assessment had to include an assessment of the need for and alternatives to the line, including the option of using existing lines to service the facility.

The Court found that the Transportation Agency had exercised its discretion under paragraph 16(1) (e) to consider the need for and alternatives to this project. The Transportation Agency accepted Union Carbide's position that it could not rely on the existing line because it required direct access to CRP, whereas the existing line was owned by CN. In other words, the need was an economic need. The Transportation Agency did consider other alternatives, including trucking, but did not consider the use of the existing line owned by CN as part of its alternatives assessment. It did so essentially based on its acceptance of Union Carbide's submissions on the need for the railway line.

The appellants asked the court to require the Transportation Agency to consider the existing railway line owned by CN as an alternative to the proposed line. The Court concluded that the Transportation Agency was entitled to reject this alternative based on Union Carbide's submission that this alternative did not meet its needs. The Court essentially confirmed the RA's broad discretion under subsection 16(3) to determine the scope of factors in subsections 16(1) and (2).

Two recent cases have returned to the issue of scope of project. These cases still apply the basic principles from *Sunpine*, so substantively they do not add much new. Essentially, these cases conclude that outside the lifecycle of the physical work that triggered the assessment, the RA (or the Minister) has broad discretion to determine the scope of the project. The standard of review consistently applied to the exercise of discretion has been reasonableness *simpliciter*. What is new in these two cases is the extent to which they have permitted responsible authorities to exercise discretion to avoid

[41] [2000] F.C.J. No. 682 (FCTD at ¶ 81)
[42] See R. B. Gibson, "Favouring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the Canadian Environmental Assessment Act" (2000) 10 J. Env. L. & Prac. 39
[43] (C.A.) [1999] F.C.J. No. 948

conducting a thorough environmental assessment of the project as proposed by the proponent.

The first of these cases is that of *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)* (Wood Buffalo).[44] The issue here was whether an environmental assessment of a proposed winter road had to consider the planned future conversion into an all season road as part of the project under subsection. 15(3). The Court applied the life cycle approach from *Sunpine* to conclude that the all-season road is not part of the life cycle of the winter road and therefore it was within the RA's discretion not to include it in scope of project. The underlying issue here was that an all-season road would have required a comprehensive study.[45] Accordingly, by scoping narrowly the need for a comprehensive study was avoided.

While the difference between *Sunpine* and *Wood Buffalo* may seem subtle, on the facts the *Wood Buffalo* court moved considerably in allowing ever broader discretion to responsible authorities. In *Sunpine*, the physical work was a bridge, whereas the undertakings the applicants were seeking to have included under subsection 16(3) were at least somewhat separate from the bridge (the logging road and logging operations), linked in their functionality more than in their nature. In *Wood Buffalo* we have a declared intention from the proponent to develop a winter road and turn it into an all season road. The undertaking essentially was the same physical work. Nevertheless, the court concluded that the planned upgrade to an all season road was not part of the life cycle of the winter road.[46]

The second of these recent cases revisiting the scope of project issue is even more startling on the facts. It is the case of *Prairie Acid Rain Coalition* v. *Minister of Fisheries and Oceans* [47](True North). The respondent in the case, True North Energy Corporation, was the proponent of an oil sands project in Fort Hills, Alberta. The project had been approved by provincial regulators following a provincial environmental assessment. The project involved the destruction of Fort Creek. Because Fort Creek is "frequented by fish", the destruction of the creek required an approval under subsection 35(2) of the *Fisheries Act*. This, in turn, triggered an assessment under the CEAA.

The Department of Fisheries and Oceans, the RA, proceeded with the assessment by determining the scope of project. It defined the project as a river destruction project, not as an oil sands project. Essentially, the RA limited the scope of the project to the aspect of the overall project over which it had regulatory responsibility. Like *Wood Buffalo* narrow scoping avoided a comprehensive study. In addition, the RA contended that "the scope of the project should be limited to those elements over which the federal government can assert authority, either directly or indirectly".[48] The Applicant's

[44] [2001] F.C.J. No. 1543
[45] Note that a challenge to the application of the new National Parks legislation went to the FCA (where the challenge was dismissed), and that a separate challenge on the duty to consult went to the SCC (resulting in the decision to quash the approval as a result of failure to comply with duty to consult)
[46] Wood Buffalo, Par 59 - 64
[47] [2004] F.C.J. No. 1518.
[48] *Ibid.*, ¶ 63, referring to the RA's representative's affidavit.

contested this arguing that the Supreme Court of Canada had already established that the scope of assessment is not limited to the regulatory power that triggered the assessment.[49] The Applicants further argued that, just as it was a mistake of law for the RA in *Sunpine* to limit scope of assessment to matters perceived to be within federal jurisdiction, it was a mistake in law to limit scope of project in this manner.

Relying on previous case law, Russell, J., for the Federal Court Trial Division, dismissed the Applicants' appeal, finding that the Department's narrow scoping was reasonable.[50] However, it is important to note that the Court did not conclude that broader scoping would be unreasonable. In Russell's words "And even if a broader scoping decision might have been reasonable, it does not mean that a decision to scope more narrowly is necessarily unreasonable".[51] Nevertheless, the Trial Division Court found that it was proper at law for the RA to limit scope of project to matters within federal jurisdiction, though it was within discretion to consider any federal heads of power.[52]

The Applicants appealed the Trial Division's decision to the Federal Court of Appeal.[53] The Applicants maintained that the Trial court erred in not ruling that the CEAA should be applied to require that the project be scoped as an oil sands development. The appellate division did not agree and dismissed the appeal. It is important that the court did not address the issue as to whether an RA should limit scope of project to matters within federal constitutional powers. The court only found that on the facts the RA's limiting scope to the destruction of the stream bed was reasonable. Several passages of the decision indicate that scoping broader than the section 5 trigger would be entirely appropriate. As well, the decision appears to be carefully crafted so that it does not limit scope to matters within federal jurisdiction. It suggests in places that such limitation might be expedient, especially where there is a provincial environmental assessment, but it does not say that such limitation is required by law. Here are some examples:

- The court found that it might be entirely appropriate not to limit scope to the power to be exercised under section 5 of the CEAA (the trigger).[54] In stating this, the court did not address whether scoped matters must be within federal jurisdiction.
- In numerous places the court found that the RA's narrow scope was reasonable since the Province of Alberta's environmental assessment was scoped to cover the entire oil sands project, and hence, in the spirit of harmonization and efficiency, it was proper that the federal assessment be scoped narrowly.[55] The court did not

[49] *Ibid.,* referring to *Friends of the Oldman River v. Canada,* [1992] 1 S.C.R. 3.
[50] *Ibid.*, ¶ 212.
[51] *Ibid.,* ¶ 213.
[52] *Ibid.,* ¶¶ 242 and 243.
[53] [2006] F.C.J. No. 129
[54] *Ibid.* , at ¶ 20. The trigger was the destruction of fish habitat by the destruction of Fort Creek. However the RA scoped to project to include matters beyond the trigger, including However, the project, as scoped, involves more than the destruction of the creek, it also included the construction of camps and storage areas required to carry out the destruction of the creek, and these matters did not require any federal permits.
[55] *Ibid.,* at, e.g., ¶¶ 24-26, and 46-47.

say that the RA constitutionally or legally limited to matters within federal jurisdiction.

- The court stated that "Nothing in the CEAA supports the view that project scoping under subsection 15(1) must always include the entire proposed physical work." [56]

It also is noteworthy that the court found that the RA could consider the provincial assessment, under which the project was scoped, as an oil sands project when carrying out the final CEAA decision, whether significant adverse environmental effects are justified in the circumstances. In the court's words "… where a development such as the True North oil sands undertaking is assessed under provincial environmental assessment procedures, I see no reason why the benefits of that undertaking, even if not within a federally scoped project, cannot be considered as justification for adverse environmental effects of the federally scoped project."[57] In other words, in making the final CEAA decision, the federal authority is not limited to considering only effects from the project as scoped by the federal authority. In the court's words it was reasonable and efficient for the federal RA to consider the provincial assessment in making a federal decision:

> "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."[58]

In the end, as reflected in the last quote from the case, the court's decision in large part was based on policy considerations in view of the fact that there was a provincial assessment. Although the decision states that it is appropriate for the federal government to "respect" provincial jurisdiction, the case is not a precedent for the proposition that matters within provincial jurisdiction are out of bounds in respect of federal scoping.[59] If it were, it would be inconsistent with the prior ruling on this point by the Supreme Court of Canada in the Oldman River Dam case.

4. Closing comments on cases interpreting scope of project under the CEAA

Discretion to scope narrowly

The cases considered demonstrate that there is broad discretion to determine the scope of a project, and that subsection 15(3) only requires undertakings that are part of the life cycle of the physical work to be included. The cases to date have centered mainly on the reasonable exercise of discretion issue. Courts have emphasized that responsible authorities have broad discretion to determine the scope of projects to be assessed and concluded on a number of fact scenarios that it was reasonable for the RA to scope

[56] *Ibid,* ¶ 34.
[57] *Ibid.,* ¶¶ 35 and 36.
[58] *Ibid.,* ¶ 47.
[59] *Ibid.,* ¶ 26.

projects narrowly, even where the scoped project is only a part of the proponent's undertaking.

As discussed, some courts justified the narrow scoping decision as reasonable because a provincial assessment had already been or was being conducted. However, they did not provide clear indication what the scope of the provincial assessment was, or how provincial assessment reasonably could relate to a federal scoping decision, the final CEAA decision, or the final federal action decision. Nevertheless, courts have ruled that it is appropriate for FA's to consider matters under provincial jurisdiction when carrying out duties and exercising discretion under federal legislation.

The implication of these cases, in particular, the *True North* Federal Court of Appeal Ruling, is that the discretion to limit the scope of a project is indeed broad. In *True North,* short of limiting the scope of the project for the environmental assessment to something less than what is assessed under section 35 of the *Fisheries Act*, the RA in this case could not have scoped the project more narrowly. It is difficult to think of a case where it is clearer that the project assessed is inevitably linked and will enable another project with potentially devastating environmental impacts to proceed. The debate on the legal issues in *True North* will likely continue until the issue of scoping is addressed by the SCC. In the mean time, the practical implications have been to allow departments unwilling to carry out meaningful environmental assessment to circumvent the Act.

Discretion to scope broadly

A word of caution regarding these cases is in order. Although the combined effect of these decisions is that an RA decision to scope narrowly so as not to exceed what triggered the CEAA may be within discretion under the CEAA, the cases do not compel such narrow scoping. Broad scoping is permissible under the CEAA. There are no decisions that unquestionably limit scope of project to matters within federal jurisdiction. Although *True North* at the trial court level suggested that the RA acted appropriately by limiting the scope of project to matters within federal jurisdiction, the court did not unquestionably rule that it was beyond federal authority to scope otherwise. The appellate decision did not directly speak to this issue, and the court's decision did not turn on it. The court of appeal did, however, approve of the federal authority relying on the provincial assessment in making decisions under federal legislation. In the end, the issue in that case, like the others, was whether narrow scoping was reasonable under the CEAA and not whether the CEAA requires it.

Because no cases compel FA's to scope only within federal jurisdiction, the Interim Approach inappropriately limits the exercise of discretion since it states that they should only include factors within federal jurisdiction when scoping a project. What the Interim Approach fails to recognize, as was so clearly recognized by Mr. Justice LaForest in the *Oldman Dam* decision, is that environmental assessment is, in part, an information gathering exercise. There are no constitutional limitations on gathering information. Once it comes to making regulatory decisions, such as whether to grant a *Fisheries Act* subsection 35(2) approval, a federal authority can only regulate matters that relate to factors within federal jurisdiction. But nothing in the Constitution or the cases limits the

exercise of gathering information relevant to making that decision. For example, a federal authority might be quite interested in whether a proposed project will create jobs, or for that matter, take away jobs, even though job creation is not expressly within federal jurisdiction.

Remaining issues

There are other remaining issues to be explored by the courts that emanate from 2003 changes to CEAA impacts on the scoping process. In particular, as mentioned earlier, the CEAA purpose section now incorporates the precautionary principle. It remains to be seen whether this will encourage courts to take a fresh look at the scope of project and scope of assessment issues.

Overall, the opportunity to salvage the scoping process through the courts appears bleak in light of *True North*. Legislative changes may be required to deal with the reality that not all RA's are exercising their considerable discretion in a manner that ensures a meaningful environmental assessment process. In the least, until legislative changes, the Agency should develop guidelines to support and compel broad scoping decisions when appropriate. This requires revamping the Interim Approach, which currently limits discretion in setting the scope of a project to matters within federal jurisdiction.

5. Other Jurisdictions

Introduction

This section briefly considers other jurisdiction to draw contrasts between the Canadian national approach in the CEAA to other approaches. The approaches considered are environmental assessment under national U.S. legislation, and environmental assessment under Canadian provincial legislation.

U.S. national environmental assessment

National Environmental Policy Act - Introduction

The *National Environmental Policy Act*[60] ("NEPA"), enacted in 1970, governs the requirements for, and processes of national environmental assessment in the United States. NEPA applies whenever a federal agency proposes to fund, carry out, or permit an action that could "significantly affect the quality of the human environment".[61] The Act applies to policies, legislation and programs, as well as to projects. The Council on Environmental Quality, ("CEQ"), established by the NEPA[62], promulgates NEPA guidelines and regulations.

The range of projects that NEPA applies to in the U.S. is considerably larger than the range of projects that the CEAA applies to in Canada. This is because in the U.S. the federal government has primary jurisdiction over air and water quality generally, and so a

[60] 42 U.S.C. 4332; 40 C.F.R. 1500.2.
[61] 42 U.S.C. 4332 (2)(c), and R. Bass, A. Herson, and K. Bogdan, *The NEPA Book,* (Solano Press: California) 2001, at 25, hereinafter "The NEPA Book".
[62] 42 U.S.C. 4344.

proponent must obtain federal statutory authorization to carry a project that impacts air or water quality wherever the project is located. As well, the federal government owns considerable public lands and resources throughout the U.S. and so a proponent requires federal authority to explore for and develop such resources. The great breadth of federal jurisdiction over developments has resulted in fewer jurisdictional issues concerning environmental assessment in the U.S. than there are in Canada.

The NEPA process may be divided into three stages. First an agency screens a proposed action to determine if the action is exempt from further assessment.[63] If a proposed action is not exempt then the agency conducts an environmental assessment to determine if the proposed action could significantly affect the quality of the human environment. Unless the agency makes a finding of no significant impact (a "FONSI") the proposed action is moved to the third stage, the preparation of an environmental impact statement (an "EIS").

NEPA and scoping

The primary scoping issue for federal agencies concerns whether a project may be scoped in a manner to justify a FONSI, for if there is a FONSI, no EIS is required. The temptation for agencies is to segment projects that would likely result in a significant impact on the human environment, into parcels that avoid a finding of significant environmental effect. CEQ regulations set criteria that agencies must follow in determining scope of project. They require that Agencies adhere to regulatory criteria in determining scope including that proposals "or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement". [64]

Specific regulatory scoping criteria mandates that agencies consider in a single EIS:

> Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> > (i) Automatically trigger other actions which may require environmental impact statements.
> > (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
> > (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.[65]

Courts have interpreted these provisions to require that a proposed action A be evaluated in the same EIS with another proposed B unless A and B have *independent utility.*[66] The

[63] Like the CEAA, the NEPA enables exclusions from the assessment process for actions that do not have a significant impact on the environment (40 C.F.R. 1508.4.).
[64] *Ibid.,* s. 1502.4(a).
[65] *Ibid.,* § 1508.25(a). As well, the CEQ provisions require that cumulative actions, similar actions, and alternatives be considered in the same EIS (*Ibid.,* § 1508.25(a)(2) and (3) and § 1508 (b). These inform scope of assessment in contrast to scope of project.
[66] *The NEPA Book, supra* note 61, at 32.

Ninth Circuit explained the independent utility test in *Thomas v. Peterson.*[67] The case concerned two proposed actions: timber harvesting and timber sales, and contrasting a road into the area that would be harvested. The Court found that the two actions must be scoped together since the road did not have independent utility other than in relation to the harvesting. Another way that courts have applied the test is by ascertaining whether it would be "irrational, or at least unwise" to proceed with one action without the other. For example, in *Blue Ocean Preservation Society v. Secretary. Department of Energy*[68]a Hawaii District Court rules that it would be irrational and unwise to carry out any of four phases of a geothermal energy project which ultimately would provide 500 megawatts of power (enough to service the entire state of Hawaii), without carrying out the others. The phases were a (1) geothermal assessment program, (2) the laying of deep water cable, (3) drilling 25 commercial scale exploration wells to verify the geothermal resource, and (4) construction of the 500 megawatt project.[69] It would make no sense to carry out the any of the phases without the reasonable possibility that the other phases would be carried out. Hence, all four phases had to be included in one EIS.

The Independent Utility Test and the CEAA

As discussed earlier, the Court of Appeal in *Sunshine* and *Manitoba Forests* cases frowned upon or rejected the use of the independent utility test in determining scope of project under section 15 of the CEAA. The Court of Appeal in *True North,* did not reject the test, but did not find it to be applicable on the facts.[70]

Provincial and Territorial assessment and scoping

All of the provinces and territories have some kind of environmental assessment legislation.[71] Although particulars of environmental assessment processes differ, they are all similar in many ways to the federal process.[72] Provincial legislation typically requires that proponents of certain projects obtain a provincial statutory authority before commencing construction or operation. For some proposals statutes require or give a statutory delegate the right to require an environmental impact assessment ("EIA") to assist with making the decision and for imposing mitigation measures to lessen environmental impacts.

As set out in this paper, federal environmental assessment process is most often triggered by a proponent requiring a statutory authorization under a federal statute or regulation.

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[67] 753 F.2d at 759 §60.
[68] 754 F. Supp. 1450.
[69] *Ibid.*
[70] *True North,* Court of Appeal, *supra,* note 53, ¶ 39.
[71] This section in part is excerpted from a paper by Arlene Kwasniak titled "Other Mechanisms for Protecting Wildlife and Habitat" published by the Canadian Institute for Resources Law Wildlife Law and Policy paper series (CIRL: Calgary, 2007).
[72] A useful, though somewhat dated, reference for finding provincial and territorial environmental assessment legislation and policies is S. Dupuis & P. LeBlanc, *Directory of Environmental Assessment Practices in Canada* (Hull: Canadian Environmental Assessment Agency, 1995). This document was prepared for the Canadian Environmental Assessment Agency and may be accessed from the Agency's website:<http://www.ceaa.gc.ca/0012/0005/biblio_e.htm>.

By contrast, most provincial and territorial EIA requirements are triggered by a proponent desiring to carry out a project under some description of an activity. For example, in Alberta, the *Environmental Protection and Enhancement Act* (EPEA)[73] governs most environmental assessment matters. The schedule to the Act sets out which projects may be assessed. A regulation sets out which of these projects must be assessed. Under this regulation, mainly large-scale projects such as sizeable pulp mills, oil refineries and dams, are always subject to the EIA process. The same regulation sets out which projects are exempt from assessment.[74] For any assessable project that falls between, any person appointed as a Director under EPEA may determine whether environmental assessment is needed. Saskatchewan takes a broader "all in" approach in contrast to the more common "project list" approach. The Saskatchewan *Environmental Assessment Act*[75] requires a Ministerial review including an environmental assessment of a development. The definition of "development" includes any "project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to have an affect on any unique, rare or endangered feature of the environment".[76]

Since "Law List type triggers" typically do not exist under provincial and territorial regimes, there are not issues regarding whether the scope of project should be limited to what triggered the environmental assessment process or whether it should be more extensive. However there are scoping issues similar to those found in the United States under the NEPA. Proponents may attempt to either describe a project so that it does not meet the threshold requirement for environmental assessment or segment or split a project in a manner that avoids triggering an assessment. For example, in Alberta, an assessment is mandatory if a project is "a tourism facility that is expected to attract more than 250 000 visitors per year" that is adjacent to certain legislatively designated protected areas.[77] If a project can reasonably be described as attracting fewer than 250,000 visitors a year or if it can be segmented to render this result, an assessment may be avoided. For example the *Castle-Crown Wilderness Coalition v. Alberta*[78] case concerned a recreational and housing development that was staged and segmented throughout many years. Between 1987 and 1994 the proponent proposed a development consisting of expanded ski terrain, 8 ski lifts, two 18 hole golf course, 200 hotel units, 288 multi-family developments and associated parking, waste, and water requirements. The proposal triggered an environmental assessment and the project was approved subject to numerous conditions. Then, between 1996 and 2002 the proponent proposed numerous expansions, including installing chairlifts, creating a new day lodge and converting a

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[73] R.S.A. 2000, c. E-12.

[74] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93. Section 47 of EPEA gives the Environment Minister the right to order an EIA on any proposal to carry out an exempt activity.

[75] *Environmental Assessment Act*, S.S. 1979-80, c. E-10.1.

[76] *Ibid*., s. 2(d) (i).

[77] *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta. Reg. 111/93., schedule 1(f).

[78] [2005] A.J. No. 1150.

mobile home trailer park into a cabin subdivision. None of these triggered a provincial environmental assessment.

In 2002 the proponent proposed further expansions including increased ski terrain, 2 new ski lifts, increased housing units by over 100%, and increased visitors which the proponent estimated to be up to 142,000 persons per year. The Appellants argued that the 142,000 figure only took into account winter visitors and not summer visitors. They maintained that the expansion would not be economically viable as a "winter only" facility and that when summer visitors were counted in the numbers increased to over 250,000 persons per year. Accordingly, they argued, a mandatory environmental assessment was triggered. The decision maker, the Director, without much explanation, accepted the proponent's lower estimations. The Court ruled that this determination was factual, and conferring a high degree of deference to the Director's decision, dismissed the appeal.[79]

Although provincial and territorial scoping issues are not identical to the federal CEAA scoping issues discussed in this paper, they illuminate scoping issues that warrant mentioning. Federal EA is not immune to the kind of narrow scoping approaches that one finds at a provincial or territorial level to avoid assessment. There can be segmentation, project splitting, and narrow project description to avoid federal triggers.

[79] *Ibid.,* ¶ 34. The Appellant raised other grounds for appeal which the Court rejected as well.