

A-557-04

2006 FCA 31

Prairie Acid Rain Coalition, Pembina Institute For Appropriate Development and Toxics Watch Society of Alberta (*Appellants*)

v.

Minister of Fisheries and Oceans of Canada and TrueNorth Energy Corporation (*Respondents*)

INDEXED AS: PRAIRIE ACID RAIN COALITION v. CANADA (MINISTER OF FISHERIES AND OCEANS) (F.C.A.)

Federal Court of Appeal, Rothstein, Noël and Malone JJ.A.—Edmonton, December 13, 2005; Ottawa, January 27, 2006.

Environment — Appeal from Federal Court decision dismissing application for judicial review of Department of Fisheries and Oceans' (DFO) scoping of project subject to federal environmental assessment — Oil sands project (undertaking) primarily subject to provincial (Alberta) regulation — Undertaking requiring destruction of fish-bearing watercourse (Fort Creek) — Such destruction requiring authorization pursuant to Fisheries Act, s. 35(2), thus triggering Canadian Environmental Assessment Act (CEAA) pursuant to s. 5(1)(d) thereof — DFO determining, pursuant to CEAA, s. 15(1), scope of project subject to environmental assessment destruction of Fort Creek — Appellants arguing CEAA assessment should cover entire undertaking — CEAA, s. 15 empowering responsible authority (i.e. DFO) to determine scope of project — DFO official correctly identifying as CEAA trigger project proponent's request for authorization from Minister of Fisheries and Oceans to destroy Fort Creek fish habitat — DFO official thus having power to scope project as she did — DFO not improperly delegating assessment of project impacts on federal matters to Alberta — Scoping of project valid exercise of discretion, not unreasonable — In light of policy undertakings with potential adverse environmental effects be subject to only one environmental assessment, appropriate for DFO to rely on Alberta's performance of such assessment — Appeal dismissed.

Construction of Statutes — Canadian Environmental Assessment Act (CEAA), s. 15(1) not requiring scope of project for environmental assessment purposes be entire undertaking — S. 15(1) empowering responsible authority (in this case Department of Fisheries and Oceans) to determine scope of project — Words "in whole or in part" in s. 5(1)(d) (requiring environmental assessment) recognizing power to be exercised by federal authority under that paragraph may relate to only part of project — Such interpretation not rendering responsible authority's power to impose mitigative measures superfluous when regard had to scheme of CEAA — Fisheries Act, s. 35(2) authorization to destroy fish habitat not requiring project's scope be entire undertaking — Nothing in CEAA supporting view project scoping under s. 15(1) always including entire proposed physical work — Words of CEAA not requiring every project have measurable benefits — Narrow scoping of project not precluding Minister from referring to mediator, review panel transboundary adverse effects, effects on lands in which Indians having interest as such concerns addressed in CEAA, s. 16 screening, comprehensive study.

Constitutional Law — Distribution of Powers — Appeal from Federal Court decision dismissing judicial review of Department of Fisheries and Oceans' (DFO) scoping of project subject to environmental assessment under Canadian Environmental Assessment Act — DFO scoping project as destruction of Fort Creek fish habitat, not entire oil sands undertaking — That undertaking primarily subject to regulation by province of Alberta — Comprehensive Study List Regulations not sweeping under federal environmental assessment undertakings not subject to federal jurisdiction — Environment not within exclusive federal jurisdiction — DFO not improperly delegating assessment of project impacts on federal matters to province of Alberta as no transfer of federal powers to that province — Scoping of project as destruction of Fort Creek not implying delegation of federal responsibility to province — Agreements between Canada, Alberta reflecting policy undertakings with potential adverse environmental effects be subject to only one environmental assessment.

This was an appeal from a decision of the Federal Court dismissing the appellants' application for judicial review of a decision of the Department of Fisheries and Oceans (DFO) determining, pursuant to subsection 15(1) of the *Canadian Environmental Assessment Act* (CEAA), the scope of a project to be subject to a federal environmental assessment. The project in question, the "Fort Hills Oil Sands Project", was primarily subject to regulation by the province of Alberta. However, because the undertaking required the destruction of Fort Creek, a fish-bearing watercourse, the respondent TrueNorth (the proponent of the project) had to obtain authorization from the Minister of Fisheries pursuant to subsection 35(2) of the *Fisheries Act*. This triggered the CEAA pursuant to paragraph 5(1)(d) of that Act, and led to the impugned decision by the DFO, i.e. that the scope of the project that was to be subject to a federal environmental assessment was the destruction of Fort Creek. The appellants applied for judicial review of that determination on the basis that the CEAA assessment should cover the entire oil sands undertaking and consider all areas of federal jurisdiction and not just the destruction of fish habitat.

Held, the appeal should be dismissed.

The DFO was not required to scope the project as the entire oil sands undertaking. Subsection 15(1) of the CEAA empowers the DFO (the responsible authority) to determine the scope of the project. Paragraph 5(1)(d) of the CEAA provides that "[a]n environmental assessment of a project is required before a federal authority . . . 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." 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 that paragraph may relate only to a part of that project. This interpretation does not render a responsible authority's power to impose mitigative measures superfluous when regard is had to the scheme of the CEAA. These measures are predicated on the scoping of a project under subsection 15(1) (in this case, the destruction of Fort Creek).

The oil sands undertaking at issue was subject to provincial jurisdiction. The *Comprehensive Study List Regulations*, whose purpose 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, do not purport to sweep under a federal environmental assessment undertakings that are not subject to federal jurisdiction. The subject of environment is not one within the exclusive legislative authority of the Parliament of Canada.

While the DFO official who made the scoping decision wrongly referred to the *Inclusions List Regulations* as authority for scoping the project as the destruction of Fort Creek, this did not invalidate her scoping decision. The question was whether DFO had the power to scope the project as the destruction of Fort Creek, not whether the DFO official, in a subsequent explanation, correctly identified the source of the power relied upon by DFO. Here, the request from TrueNorth to obtain authorization from the Minister of Fisheries and Oceans of Canada under subsection 35(2) of the *Fisheries Act* for the destruction of Fort Creek was correctly identified as the CEAA trigger. Nothing in the CEAA supports the view that project scoping under subsection 15(1) must always include the entire proposed physical work.

The words of the CEAA do not require that each project have measurable benefits that can be weighed against adverse environmental effects of the project. In fact, more than one project may be triggered under the CEAA, with one project producing measurable benefits and the other not producing such benefits. The "independent utility principle", under which, where an individual project has no independent utility but is inextricably intertwined with other projects, the agency charged with considering the environmental impacts must consider all projects, was not applicable to this case.

The narrow scoping of a project does not preclude the Minister from referring to a mediator or a review panel, transboundary adverse effects or adverse effects on lands in which Indians have an interest under subsections 46(1) and 48(1). Under paragraph 16(1)(a), every screening or comprehensive study of a project must include "the environmental effects of the project." If the destruction of Fort Creek caused adverse transboundary effects or adverse effects on lands in which Indians have an interest, those concerns may be taken into account in the screening or comprehensive study being undertaken under section 16 of the CEAA. It is not necessary to rescope the project.

DFO did not improperly delegate the assessment of project impacts on federal matters to the province of Alberta. The oil sands undertaking was subject to provincial jurisdiction. There was no transfer of federal powers to the

province. DFO's decision to maintain the scope of the project as the destruction of Fort Creek was a valid exercise of its discretion that did not imply a delegation of federal responsibility to the province. This decision was reasonable. DFO circulated its proposed scoping, received submissions, and took account of the fact that the oil sands undertaking had been environmentally assessed by the province of Alberta. There are a number of agreements between Canada and Alberta that reflect the policy that undertakings with potential adverse environmental effects be subject to only one environmental assessment. Here, it was appropriate for DFO to rely on Alberta's performance of an environmental assessment.

statutes and regulations judicially considered

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 2 "project" (as am. by S.C. 1993, c. 34, s. 18(F)), 5(1)(d), 12(4) (as am. *idem*, s. 20(F)), (5), 15 (as am. *idem*, s. 21(F)), 16 (as am. *idem*, s. 22(F)), 20(2) (as am. by S.C. 2003, c. 9, s. 11), 37(1)(a) (as am. *idem*, s. 17), (2) (as am. by S.C. 1993, c. 34, s. 29(F)), 46 (as am. by S.C. 2003, c. 9, s. 21), 48 (as am. *idem*, s. 23).

Comprehensive Study List Regulations, SOR/94-438.

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12.

Fisheries Act, R.S.C., 1985, c. F-14, s. 35(2).

Inclusion List Regulations, SOR/94-637, s. 3 (as am. by SOR/99-436, s. 2).

Water Act, R.S.A. 2000, c. W-3.

cases judicially considered

applied:

Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans), [2000] 2 F.C. 263; (1999), 248 N.R. 25 (C.A.).

considered:

Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226; (2003), 223 D.L.R. (4th) 599; [2003] 5 W.W.R. 1; 11 B.C.L.R. (4th) 1; 48 Admin. L.R. (3d) 1; 179 B.C.A.C. 170; 302 N.R. 34; 2003 SCC 19; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.R. 1; 219 Sask. R. 1; 10 C.C.L.T. (3d) 157; 30 M.P.L.R. (3d) 1; 286 N.R. 1; 2002 SCC 33; *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895; (1995), 126 D.L.R. (4th) 191; 7 B.C.L.R. (3d) 1; 30 Admin. L.R. (2d) 54; 183 N.R. 39; 100 W.A.C. 81; *Dynamex Canada Inc. v. Canadian Union of Postal Workers*, [1999] 3 F.C. 349; (1999), 99 CLC 220,037; 241 N.R. 312 (C.A.).

referred to:

Zenner v. Prince Edward Island College of Optometrists, [2005] 3 S.C.R. 645; (2005), 260 D.L.R. (4th) 577; 36 Admin. L.R. (4th) 1; 342 N.R. 176; 2005 SCC 77; *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.* (2002), 312 A.R. 40; 218 D.L.R. (4th) 61; [2002] 11 W.W.R. 418; 6 Alta. L.R. (4th) 199; 31 M.P.L.R. (3d) 153; 2002 ABCA 199; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321.

APPEAL from a Federal Court decision ((2004), 10 C.E.L.R. (3d) 55; 257 F.T.R. 212; 2004 FC 1265) dismissing the appellants' application for judicial review of the scoping by the Department of Fisheries and Oceans of a project to be subject to an environmental assessment pursuant to section 15 of the *Canadian Environmental Assessment Act*. Appeal dismissed.

appearances:

Timothy J. Howard for appellants.

Bruce F. Hughson for respondent Minister of Fisheries and Oceans of Canada.

Martin K. Ignasiak for respondent TrueNorth Energy Corporation.

solicitors of record:

Timothy J. Howard, Vancouver, for appellants.

Deputy Attorney General of Canada for respondent Minister of Fisheries and Oceans of Canada.

Fraser Milner Casgrain LLP, Edmonton, for respondent TrueNorth Energy Corporation.

The following are the reasons for judgment rendered in English by

[1] ROTHSTEIN J.A.: The issue in this appeal involves the scoping of a “project” under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA).

FACTS

[2] The respondent TrueNorth Energy Corporation is the proponent of the “Fort Hills Oil Sands Project” (oil sands undertaking) which consists of an open pit mine, a crude bitumen extraction plant, a bitumen froth processing plant, a terminal to deliver oil sands to a pipeline system and utilities and off-site facilities to support the mining and processing operations.

[3] The oil sands undertaking is primarily subject to regulation by the province of Alberta. Pursuant to its *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, an environmental impact assessment was conducted. Public hearings were held by the Alberta Energy and Utilities Board. Representatives of the federal government were present and cross-examined witnesses giving evidence on behalf of TrueNorth. Environment Canada made submissions to the Board on issues including cumulative effects, air quality, migratory birds and other related environmental issues. The Department of Fisheries and Oceans (DFO) made submissions on the effect on fish and fish habitat. The DFO concluded that any direct loss in fish habitat could be compensated or mitigated.

[4] On October 22, 2002, the Alberta Energy and Utilities Board issued its decision approving the oil sands undertaking. Shortly thereafter, the Alberta Environment granted TrueNorth approvals under the *Environmental Protection and Enhancement Act* and the *Water Act*, R.S.A. 2000, c. W-3.

[5] Because the oil sands undertaking would require the destruction of Fort Creek, a fish-bearing watercourse, TrueNorth was required to obtain authorization of the Minister of Fisheries, pursuant to subsection 35(2) of the *Fisheries Act*, R.S.C., 1985, c. F-14. TrueNorth’s application for authorization under subsection 35(2) of the *Fisheries Act* triggered the CEAA pursuant to paragraph 5(1)(d) of that Act.

[6] The DFO, as the “responsible authority” under the CEAA, determined that, pursuant to subsection 15(1) of the CEAA, the scope of the project that was to be subject to a federal environmental assessment was the destruction of Fort Creek and ancillary or subsidiary works and activities, specifically:

- (a) the destruction of the bed and channel of Fort Creek;
- (b) the construction of temporary or permanent diversions of Fort Creek;
- (c) the construction of site dewatering and drainage works;
- (d) the construction and operation of associated sediment and erosion control works;
- (e) the construction of any Fort Creek crossings and associated approaches;

- (f) the construction and operation of any fish habitat compensation works as required by DFO;
- (g) the construction of camps and storage areas associated with the project; and
- (h) site clearing and removal of riparian vegetation associated with the project.

[7] The appellants are “not for profit” associations concerned with the preservation of the environment and in particular, adverse environmental effects of developments such as the oil sands undertaking. They applied to the Federal Court for judicial review of the scoping decision of the DFO, which they considered to be too narrow. They are of the view that the environmental assessment to be conducted under the CEAA, notwithstanding the Alberta hearings and decision (paragraphs 3 and 4), should cover the entire oil sands undertaking and that such federal environmental assessment should consider all areas of federal jurisdiction and not just the destruction of fish habitat. They say that the oil sands undertaking could adversely affect such matters under federal authority as migratory birds, Aboriginal peoples and water and fisheries in the Athabasca River.

[8] Russell J. dismissed the appellants’ application for judicial review [(2004), 10 C.E.L.R. (3d) 55 (F.C.)]. They now appeal to this Court from the decision of Russell J.

STANDARD OF REVIEW

[9] In *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 (C.A.), at paragraph 10, it was held that questions of interpretation of the CEAA by the Coast Guard were reviewable on a standard of correctness.

[10] The same considerations apply in this case. There is no applicable privative clause. The CEAA is a statute of general application. It is administered by a broad range of federal authorities. There is no particular expertise in the DFO relative to that of the Court in respect of the interpretation of the CEAA. The interpretation issues are legal. While there is a general public interest in matters concerning the environment, the absence of relative expertise and the nature of the question being legal suggest a correctness standard of review in respect of the interpretation by the DFO of the CEAA.

[11] However, the exercise of discretion by a responsible authority will normally be reviewed on a more deferential standard. As long as the responsible authority takes into account relevant considerations and does not take into account irrelevant considerations, the Court should not engage in a reweighing process. Here, assuming its statutory interpretations were correct, considerations involving the destruction of fish habitat and relevant mitigative measures fall within the expertise of the DFO. In these circumstances, the discretionary decisions of the DFO should be reviewed on a reasonableness standard.

[12] Russell J. conducted his review applying the correctness standard to questions of statutory interpretation and reasonableness to discretionary decisions. In doing so, he did not err.

[13] In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paragraph 43, the Supreme Court dealt with the role of a Court of Appeal reviewing a decision of a subordinate court which itself was conducting a judicial review of a decision of an administrative tribunal. The Supreme Court found that “the normal rules of appellate review of lower courts as articulated in *Housen*, . . . apply”. The *Housen* approach (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235) provides that on a question of law the appellate court reviews the subordinate court decision on a standard of correctness (paragraph 8). On all other issues, the standard of review is palpable and overriding error (paragraphs 10, 19 and 28).

[14] However, in more recent cases, the Supreme Court has adopted the view that the appellate court steps into the shoes of the subordinate court in reviewing a tribunal’s decision. See for example *Zenner v. Prince Edward Island College of Optometrists*, [2005] 3 S.C.R. 645, at paragraphs 29-45, *per* Major J. See also *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.* (2002), 312 A.R. 40 (C.A.), at paragraphs 25-26, *per* Berger J.A. The appellate court determines the correct standard of review and then decides whether the standard of review was applied correctly: see *Zenner*, at paragraphs 29-30. In practical terms, this means that the appellate court itself

reviews the tribunal decision on the correct standard of review.

ANALYSIS

Power of the DFO under subsection 15(1)

[15] The appellants say the DFO misdirected itself as to its discretion under subsection 15(1) of the CEAA and wrongly limited the scope of the project in respect of which an environmental assessment was to be conducted to the destruction of the Fort Creek fish habitat. They submit that the DFO was required to scope the project as the entire oil sands undertaking.

[16] The definition of “project” in section 2 [as am. by S.C. 1993, c. 34, s. 18(F)] of the CEAA provides:

2. (1) . . .

[. . .]

“project” means

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

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

[17] Subsection 15(1) provides:

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.

[18] The appellants’ argument that the DFO was obliged to scope the project for environmental assessment purposes as the entire oil sands undertaking ignores the words of subsection 15(1), which empower the responsible authority, the DFO in this case, to determine the scope of the project. In *Friends of the West Country*, at paragraph 12, this Court described the powers of a responsible authority under subsection 15(1) in the following words:

Subsection 15(1) is straightforward. It confers on the responsible authority . . . the power to determine the scope of the project in relation to which an environmental assessment is to be conducted.

The appellants’ approach would deprive the DFO of any discretion in respect of the scoping of a project contrary to the words of subsection 15(1).

[19] Nonetheless, the appellants refer to other provisions of the CEAA to support their view. They refer to paragraph 5(1)(d) and in particular to the words “in whole or in part”. Paragraph 5(1)(d) provides:

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

. . .

(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. [Emphasis added.]

As I understand the argument, it is that the words “in whole or in part” imply that a project must consist of an entire physical work or physical activity, although the federal power may only apply to a part of that work or activity.

[20] 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 paragraph 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.

[21] Next, the appellants say the power of a responsible authority to impose mitigative measures under provisions such as subsections 20(2) [as am. by S.C. 2003, c. 9, s. 11] or 37(2) [as am. by S.C. 1993, c. 34, s. 29(F)] of the CEEA would be rendered superfluous if the scope of a project does not include the entire physical work or activity. Subsections 20(2) and 37(2) provide:

20. . . .

(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.

. . .

37. . . .

(2) Where a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, notwithstanding any other Act of Parliament, in the exercise of its powers or the performance of its duties or functions under that other Act or any regulation made thereunder or in any other manner that the responsible authority considers necessary, ensure that any mitigation measures referred to in that paragraph in respect of the project are implemented.

[22] This argument is based on a reading of these provisions in isolation, without regard for the scheme of the Act. Provisions under which a responsible authority may require mitigative measures to be taken are predicated on the scoping of a project under subsection 15(1). In this case, the mitigative measures that the DFO may impose will pertain to the project as scoped, here, the destruction of Fort Creek. It was the environmental impact assessment conducted by the province of Alberta that considered the oil sands undertaking and imposed such mitigative measures as it thought necessary in respect of that undertaking.

[23] 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 CEEA.

[24] 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 CEEA 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.

[25] The appellants are making a policy argument that “many of the sections of the Regulations will wither away from disuse” and “management of the federal aspects of these projects will devolve by default to the provinces.” However, subsections 12(4) [as am. by S.C. 1993, c. 34, s. 20(F)] and (5) of the Act recognize that an environmental assessment may be carried out under provincial jurisdiction and that a federal responsible authority may cooperate with the province in that environmental assessment. Subsection 12(4) and paragraph 12(5)(a) provide:

12. . . .

(4) Where a screening or comprehensive study of a project is to be conducted and a jurisdiction has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part thereof, the responsible authority may cooperate with that jurisdiction respecting the environmental assessment of the project.

(5) In this section, “jurisdiction” means

(a) the government of a province;

[26] 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.

[27] The appellants’ final argument in respect of subsection 15(1) is that environmental concerns should be assessed “unconfined by any parsing of the natural world into provincial and federal pieces.” In making this argument, the appellants are addressing the scope of an assessment under section 16 [as am. by S.C. 1993, c. 34, s. 22(F)] and not the scope of the project under section 15 [as am. *idem*, s. 21(F)]. Paragraph 16(1)(a) provides:

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;

Once a project has been scoped, it is possible that the effects of other projects or activities may impact the environmental assessment of the scoped project. This was dealt with in *Friends of the West Country*. At paragraph 34, this Court stated:

Under s. 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.

However, the power to consider factors outside federal jurisdiction was expressly limited [at paragraph 36]:

Of course, in saying that a responsible authority may consider factors outside federal jurisdiction, I am restricting my comments to paragraph 16(1)(a) and subsection 16(3) and to where, once a project under federal jurisdiction has been scoped, the requirement to consider cumulative environmental effects is engaged.

The consideration of cumulative effects enables a responsible authority to consider environmental effects emanating from sources outside federal jurisdiction. However, this involves the scope of an assessment, not, as the appellants argue, the scope of a project.

Definition of Project

[28] The appellants argue that DFO incorrectly interpreted the definition of “project” in section 2 of the CEAA. For ease of reference, the definition of project is repeated here:

2. (1) . . .

“project” means

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

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

The *Inclusion List Regulations*, SOR/94-637 are the Regulations referred to in the definition of “project”. Section 3 [as am. by SOR/99-436, s. 2] of these Regulations provides:

3. The physical activities and classes of physical activities set out in the schedule are prescribed for the purpose of paragraph (b) of the definition “project” in subsection 2(1) of the *Canadian Environmental Assessment Act* except in so far as they relate to a physical work.

[29] In her affidavit in the judicial review in the Federal Court, Dorthy Majewski, Area Chief, Habitat, DFO, stated at paragraph 29:

In my opinion it is reasonable to scope the project as the activities or works that cause the harmful alteration, disruption or destruction (HADD) of fish habitat in Fort Creek. The issuance of a section 35(2) authorization is the CEAA trigger. Because such an activity is on the Inclusion List Regulations, the dewatering and partial destruction is caught, and a CEAA environmental assessment would have to be done.

[30] The appellants say that Ms. Majewski was incorrect in referring to the *Inclusion List Regulations* as authority for scoping the project as the destruction of Fort Creek. They say that the *Inclusion List Regulations* only apply to physical activities not related to a physical work. However, the destruction of Fort Creek is related to the construction of the oil sands undertaking, which is a physical work. Therefore, they say the *Inclusion List Regulations* do not apply and Ms. Majewski misdirected herself. In the view of the appellants, the destruction of Fort Creek should be part of an environmental assessment of the entire oil sands undertaking.

[31] The respondents concede that Ms. Majewski’s reference to the *Inclusion List Regulations* as the authority for scoping the environmental assessment project as the destruction of Fort Creek was incorrect. However, they say that her reference to the Regulations did not invalidate her scoping decision. They rely on concurring reasons in *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895, at paragraphs 19-20:

There is no precedent for holding that an administrative body must consciously identify the source of power it is relying on, in order for the exercise of that power to be valid.

. . .

Courts are primarily concerned with whether a statutory power exists, not with whether the delegate knew how to locate it.

and followed by Stone J.A. in *Dynamex Canada Inc. v. Canadian Union of Postal Workers*, [1999] 3 F.C. 349 (C.A.), at paragraph 122.

[32] I agree with the respondents. The question is whether DFO had the power to scope the project as the destruction of Fort Creek, not whether Ms. Majewski, in a subsequent explanation, correctly identified the source of the power relied upon by DFO.

[33] It was the request from TrueNorth to obtain 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 that was the CEAA trigger. Ms. Majewski correctly identified the subsection 35(2) authorization as the CEAA trigger. Her reference to the *Inclusion List Regulations*, while incorrect, is of no consequence.

[34] If, as the appellants seem to argue, the subsection 35(2) trigger requires that the project's scope be the entire oil sands undertaking, a responsible authority would have no discretion under subsection 15(1) of the CEAA as to the scoping of a project for federal environmental assessment purposes. Any trigger would automatically require an overall federal environmental assessment of the entire proposed physical work. Nothing in the CEAA supports the view that project scoping under subsection 15(1) must always include the entire proposed physical work.

[35] Another argument of the appellants is that each project must have measurable benefits that can be weighed against adverse environmental effects of the project. For example, they rely on subparagraph 37(1)(a)(ii) [as am. by S.C. 2003, c. 9, s. 17] which provides:

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 . . .

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

. . .

(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.

[36] They say that the justification for the adverse environmental effects of a project must arise from the project itself. Here, the destruction of Fort Creek is not in and of itself justified and therefore cannot be a project under the CEAA.

[37] While in some circumstances, the project which causes adverse environmental effects may itself have measurable benefits, I see nothing in the words of the CEAA that makes that a requirement in every case. Indeed, the indication is to the contrary. For example, subsection 15(2) provides that there may be more than one federal project that may be triggered under the CEAA. Subsection 15(2) provides:

15. . . .

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

(a) the responsible authority, or

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

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

[38] One project may produce measurable benefits while the other does not. Similarly, where a development such as the TrueNorth 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.

[39] Although the appellants did not use the term, their argument reflects what has been termed the "independent utility principle" under which, where an individual project has no independent utility but is inextricably intertwined with other projects, the agency charged with considering the environmental impacts must consider all projects. This

“independent utility principle” originated in the United States where questions of constitutional jurisdiction and the applicable statutory scheme of the relevant environmental protection legislation undoubtedly differ from those in Canada. In *Friends of the West Country*, the independent utility principle was found not to be helpful (at paragraphs 21-22). I see nothing that suggests that the independent utility principle is one that is applicable to this case.

[40] In oral argument, the appellants argued that a narrow scoping of a project would preclude the Minister from referring to a mediator or a review panel, transboundary adverse effects or adverse effects on lands in which Indians have an interest (as well as other matters in respect of Indians) under sections 46 [as am. by S.C. 2003, c. 9, s. 21] and 48 [as am. *idem*, s. 23] of the CEAA. Subsections 46(1) and 48(1) provide:

46. (1) Where no power, duty or function referred to in section 5 is to be exercised or performed by a federal authority in relation to a project that is to be carried out in a province and the Minister is of the opinion that the project may cause significant adverse environmental effects in another province, the Minister may refer the project to a mediator or a review panel in accordance with section 29 for an assessment of the environmental effects of the project in that other province.

...

48. (1) Where no power, duty or function referred to in section 5 is to be exercised or performed by a federal authority in relation to a project that is to be carried out in Canada and the Minister is of the opinion that the project may cause significant adverse environmental effects on

...

(e) lands in respect of which Indians have interests,

the Minister may refer the project to a mediator or a review panel in accordance with section 29 for an assessment of the environmental effects of the project on those lands.

[41] The argument is that the Minister cannot act under subsections 46(1) and 48(1) when a responsible authority is already performing an environmental assessment. If that environmental assessment is scoped narrowly, there is no possibility for addressing adverse environmental effects on other provinces or lands in which Indians have an interest.

[42] Again, the appellants' concern arises from a misinterpretation of the CEAA. The appellants' concern relates to the scoping of the environmental assessment under section 16 of the CEAA, not the scoping of a project under subsection 15(1). Under paragraph 16(1)(a), every screening or comprehensive study of a project must include “the environmental effects of the project.” If the destruction of Fort Creek caused adverse transboundary effects or adverse effects on lands in which Indians have an interest, those concerns may be taken into account in the screening or comprehensive study being undertaken. It is not necessary to rescope the project.

Improper Delegation

[43] The appellants say the DFO improperly delegated the assessment of project impacts in federal matters to the province of Alberta. This argument is unsupported by the facts. Delegation involves the transfer of federal power to the province. That has not occurred here. The oil sands undertaking is subject to provincial jurisdiction. The province conducted an environmental assessment of that undertaking.

[44] The DFO proposed to scope the project as the destruction of Fort Creek. It circulated its proposal and received comments from other government departments and from the appellants. It exercised its discretion to maintain the scope of the project as the destruction of Fort Creek. This decision is a valid exercise of discretion by the DFO. It does not imply a delegation of federal responsibility to the province.

WAS THE DISCRETIONARY DECISION OF THE DFO REASONABLE?

[45] Finally, the appellants say that if there was no interpretive error by DFO, the scoping decision was unreasonable. The DFO circulated its proposed scoping and received submissions. It concluded that the area of federal responsibility that was triggered was the destruction of the Fort Creek fish habitat and that TrueNorth was required to obtain authorization from the Minister of Fisheries for that project. It took account of the fact that the oil sands undertaking had been environmentally assessed by the province of Alberta. There is no basis for the argument that the scoping decision was unreasonable.

CONCLUSION

[46] As a matter of policy it is sensible that undertakings with potential adverse environmental effects be subject to only one environmental assessment. The governments of Canada and Alberta are parties to agreements that express this policy. The *Canada-Wide Accord on Environmental Harmonization* signed January 29, 1998 <http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf> and the *Sub-Agreement on Environmental Assessment* <http://www.ccme.ca/assets/pdf/envtlasesssubagr_e.pdf> share the objectives of efficiency and effective use of resources. The *Sub-Agreement on Environmental Assessment* has the particular objective of ensuring that there is a [section 1.1.2] “single environmental assessment and review process for each proposed project.”

[47] 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.

[48] For all these reasons, the appeal should be dismissed with costs to the Minister of Fisheries and Oceans of Canada and TrueNorth Energy Corporation.

NOËL J.A.: I agree.

MALONE J.A.: I agree.