A-478-07
2008 FCA 209

Minister of Fisheries and Oceans, Minister of Natural Resources and **Attorney General of Canada** (*Appellants*)

v.

MiningWatch Canada (*Respondent*)

A-479-07

Red Chris Development Company Ltd. and bcMetals Corporation (*Appellants*)

v.

MiningWatch Canada (*Respondent*)

INDEXED AS: MININGWATCH CANADA v. Canada (Minister of Fisheries and Oceans) (F.C.A.)

Federal Court of Appeal, Desjardins, Sexton, and Evans JJ.A.—Vancouver, May 15; Ottawa, June 13, 2008.

Environment — Appeals from Federal Court decision allowing application for judicial review, ordering holding of public consultation on proposed scope of corporate appellants' anticipated mine, milling operation (project) to be subjected to environmental assessment under Canadian Environmental Assessment Act — Project requiring environmental assessment pursuant to Act, ss. 5(1)(d), 5(2)(a) — Responsible authorities determining project to be tracked as comprehensive study but later changing tracking to screening report — S. 21 dealing with projects described on comprehensive study list — Since amended in 2003, public consultation now required on proposed scope of such projects — In accordance with previous judicial interpretations of s. 15(1), RAs having discretionary power to "scope", "rescope" project until final decision on environmental assessment made — S. 21 as amended not applying herein since project "as scoped" in RAs' final scoping decision not prescribed in Comprehensive Study List Regulations — Public consultation not required — Appeals allowed.

Construction of Statutes — Appeals from Federal Court decision allowing application for judicial review, ordering holding of public consultation on proposed scope of corporate appellants' anticipated mine, milling operation (project) to be subjected to environmental assessment under Canadian Environmental Assessment Act — Whether first appearance of word "project" in Act, s. 21(1) should read as "project as scoped" — Federal Court of Appeal previously holding "project" in Act, ss. 5(1)(d), 15(3) meaning "project as scoped" in accordance with s. 15(1) — In accordance with rules of statutory interpretation, first appearance of word "project" in Act, ss. 18, 21 must be given same meaning since Act not indicating different interpretation needed — S. 21(1), as amended, requiring public consultation where "project as scoped" described in Comprehensive Study List.

Administrative Law — Responsible authorities (RAs) exercising discretionary power to rescope projects under Canadian Environmental Assessment Act — Under Interpretation Act, s. 31(3), powers may be exercised as required — Scoping power of continuing nature — RAs not functus officio.

These were appeals from a Federal Court decision allowing an application for judicial review and ordering that public consultation be held on the proposed scope of the corporate appellants' anticipated mine and milling operation to be subjected to an environmental assessment under the *Canadian Environmental Assessment Act*. The corporate appellants, Red Chris Development Company Ltd. and bcMetals Corporation, are seeking to develop a gold and copper open-pit mining and milling operation in British Columbia. They submitted a project description to the BC Environmental Assessment Office (BCEAO) and two applications to the Department of Fisheries and Oceans (DFO) regarding construction of starter dams relating to tailings impoundment and stream crossings. DFO concluded that an environmental assessment was required under paragraphs 5(1)(*d*) and 5(2)(*a*) of the Act. It posted a "notice of commencement" of an environmental assessment on the Canadian Environmental Assessment Registry, stating that it would conduct a comprehensive study commencing on May 19, 2004. Based on new information and the Federal Court decision in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, it was later determined that the scope of the project only required a screening report and the notice of commencement was retroactively amended. It was subsequently amended to add Natural Resources Canada as a responsible authority (RA) and amended a third time to describe the scope of the project for the purposes of the environmental assessment.

The BCEAO and the federal environmental screening report concluded that the project was not likely to cause significant adverse environmental, heritage, social, economic or health effects. The RAs took a course of action decision pursuant to paragraph 20(1)(*a*) of the Act which determined that the project as scoped was not likely to cause significant environmental effects. On judicial review of that decision the Federal Court held that the RAs had a legal duty pursuant to subsection 21(1) of the Act to ensure public consultation with respect to the proposed scope of the project. Prior to October 2003, section 21 stated that if the project was described in the comprehensive study list, a comprehensive study was required. It was amended in 2003 to state that where a project is described in the comprehensive study list, public consultation is required.

The issue was whether the RAs have discretion to define and redefine the scope of the project and specifically whether the first appearance of the word "project" in subsection 21(1) of the Act should read as "project as scoped".

Held, the appeals should be allowed.

In 1999, the Appeal Division of the Federal Court in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* held that subsection 15(1) of the Act 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, and that under subsection 15(3), the assessment to be carried out is in respect of the "project as scoped". In 2006 in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* the Federal Court of Appeal determined that the word "project" in paragraph 5(1)(*d*) of the Act means "project as scoped" under subsection 15(1) of the Act. Given that the word "project" in paragraph 5(1)(*d*) and in subsection 15(3) means "project as scoped", the rules of statutory interpretation require that the first appearance of the word "project" in sections 18 and 21 be given the same meaning unless some different interpretation is clearly indicated by the context. Nothing in the Act indicated that an interpretation different from that previously established should be relied on.

The key difference in the former and amended versions of section 21 is a requirement of public consultation. Therefore, subsection 21(1) was read as indicating that where the project "as scoped" is described in the *Comprehensive Study List Regulations*, subsection 21(1) as amended applies and a public consultation is required. The RAs exercised their discretionary power to "scope" and "rescope" the project and made no error in doing so. Until a final decision has been made with respect to the environmental assessment, nothing prevents the RAs from rescoping. Subsection 31(3) of the *Interpretation Act* confirms that a power conferred may be exercised from time to time as required. The doctrine of *functus officio* did not apply because the scoping power given to RAs is of a continuing nature.

The Federal Court held that the RAs acted beyond their statutory powers in sidestepping the statutory requirements of section 21 as amended in the guise of a decision to rescope the project. But section 21 as

amended did not apply since the project "as scoped" in the final scoping decision was not prescribed in the *Comprehensive Study List Regulations.* A public consultation was therefore not required.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

An Act to amend the Canadian Environmental Assessment Act, S.C. 2003, c. 9, s. 12.
Canada-British Columbia Agreement for Environmental Assessment Cooperation (2004).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5, 7(1)(*a*) (as am. by S.C. 1994, c. 26, s. 23(F); 2003, c. 9, s. 3), 15 (as am. by S.C. 1993, c. 34, s. 21(F)), 18 (as am. *idem*, s. 23(F); 2003, c. 9, s. 9), 20(1)(*a*) (as am. *idem*, s. 11), 21 (as am. by S.C. 1993, c. 34, s. 26(F); 2003, c. 9, s. 12), 55(1) (as am. *idem*, s. 25), 59(*f*) (as am. *idem*, s. 29).
Comprehensive Study List Regulations, SOR/94-638, sch., s. 16(*a*),(*c*).
Exclusion List Regulations, 2007, SOR/2007-108.
Explosives Act, R.S.C., 1985, c. E-17, s. 7 (as am. by S.C. 1993, c. 32, s. 4).
Federal Courts Rules, SOR/98-106, rr. 1 (as am. by SOR/2004-283, s. 2), 400 (as am. by SOR/2002-417, s. 25(F)).
Interpretation Act, R.S.C., 1985, c. I-21, s. 31(3).
Law List Regulations, SOR/94-636.

CASES JUDICIALLY CONSIDERED

APPLIED:

Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans) (2004), 10 C.E.L.R. (3d) 55; 257 F.T.R. 212; 2004 FC 1265; affd by [2006] 3 F.C.R. 610; (2006), 265 D.L.R. (4th) 154; 55 Admin. L.R. (4th) 191; 345 N.R. 374; 2006 FCA 31; *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263; (1999), 31 C.E.L.R. (N.S.) 239; 248 N.R. 25 (C.A.).

REFERRED TO:

Housen v. Nikolaisen, [2002] 2 S.C.R. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.W. 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; *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378; (1989), 61 D.L.R. (4th) 725; [1989] 4 W.W.R. 385; 58 Man. R. (2d) 63; 50 C.C.C. (3d) 566; 69 C.R. (3d) 281; 95 N.R. 149; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385; (1992), 89 D.L.R. (4th) 218; 3 Admin. L.R. (2d) 242; 133 N.R. 345.

AUTHORS CITED

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APPEALS from a Federal Court decison ([2008] 3 F.C.R. 84; (2007), 33 C.E.L.R. (3d) 1; 318 F.T.R. 160; 2007 FC 955) allowing an application for judicial review and ordering that public consultation be held on the proposed scope of the corporate appellants' anticipated mine and milling operation to be subjected to an environmental assessment under the *Canadian Environmental Assessment Act* (CEAA). Appeals allowed.

APPEARANCES:

Ward Bansley and *Donnaree Nygard* for appellants Minister of Fisheries and Oceans, Minister of Natural Resources and Attorney General of Canada.

Brad Armstrong, Q.C. and *Jude Samson* for appellants Red Chris Development Company Ltd. and bcMetals Corporation.
Lara Tessaro and *Sean Nixon* for respondent MiningWatch Canada.

SOLICITORS OF RECORD:

Deputy Attorney General of Canada for appellants Minister of Fisheries and Oceans, Minister of Natural Resources and Attorney General of Canada.

Lawson Lundell LLP, Vancouver, for appellants Red Chris Development Company Ltd. and bcMetals Corporation.
Ecojustice Canada, Vancouver, for respondent MiningWatch Canada.

The following are the reasons for judgment rendered in English by

[1] DESJARDINS J.A.: These two appeals are from a decision of a Judge of the Federal Court (the applications Judge) (*MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, [2008] 3 F.C.R. 84) which allowed an application for judicial review and ordered that public consultation be held on the proposed scope of the corporate appellants' anticipated mine and milling operation (the proposed project) to be subjected to an environmental assessment under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (the CEAA).

[2] At issue is whether the Department of Fisheries and Oceans (DFO) and Natural Resources Canada (NRCan) (collectively known as the responsible authorities or RAs) have the discretion to define and redefine the "scope" of a project for the purposes of tracking an environmental assessment as a screening (section 18 [as am. by S.C. 1993, c. 34, s. 23(F); 2003, c. 9, s. 9]) or as a comprehensive review (section 21 [as am. by S.C. 1993, c. 34, s. 26(F); 2003, c. 9, s. 12]) under the CEAA. Specifically at issue is whether the first appearance of the word "project" in subsection 21(1) of the CEAA should read as "project as scoped".

[3] These are essentially matters of statutory interpretation.
[4] For the reasons that follow, I would allow these appeals.

RELEVANT FACTS

[5] The corporate appellants, or the proponents (Red Chris Development Company Ltd. and bcMetals Corporation), are seeking to develop a gold and copper open-pit mining and milling operation in northwestern British Columbia. Red Chris Development Company Ltd. is a wholly owned subsidiary of bcMetals Corporation. The respondent (MiningWatch) is a non-profit society interested in the environmental, social, economic, health and cultural effects of mining and in particular its effects on indigenous people.

[6] On October 27, 2003, the proponents submitted a project description to the British Columbia Environmental Assessment Office (BCEAO). On November 19, 2003, the BCEAO issued an order stating that the project was reviewable and would require an environmental assessment certificate before proceeding.

[7] The proponents triggered the federal environmental assessment process on May 3, 2004, when they submitted to DFO two applications regarding construction of starter dams related to tailings impoundment and stream crossings.

[8] On May 19, 2004, based on the information received, DFO concluded that an environmental assessment was required under paragraphs 5(1)(*d*) and 5(2)(*a*) of the CEAA.

[9] On May 21, 2004, DFO posted a "notice of commencement of an environmental assessment" (the notice of commencement) on the Registry [Canadian Environmental Assessment Registry]. The Registry consists of an Internet site and projects files. It exists for the purpose of facilitating public access to records relating to environmental assessments and providing notice in a timely manner of the assessments (see subsection 55(1) [as am. by S.C. 2003, c. 9, s. 25] of the CEAA). The notice of commencement announced that DFO would conduct a comprehensive study commencing on May 19, 2004, and described the project as an (see paragraph 94 of the applications Judge's reasons):

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

[10] The May 21, 2004 notice of commencement also indicated that the project was being assessed by the Government of British Columbia and that the Canadian Environmental Assessment Agency (the Agency) would act as the federal environmental assessment coordinator.

[11] On May 31, 2004, DFO circulated a letter to other federal departments allowing them to determine whether the project was of any relevance to them. The letter included a preliminary scoping of the project by DFO, stating that the (see paragraph 96 of the applications Judge's decision):

"… proposed project will require a Comprehensive Study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold [*sic*] under section 16(c) of CEAA's Comprehensive Study List Regulations." [Emphasis added by applications Judge.]

[12] On June 2, 2004, NRCan responded to DFO's letter stating it was likely a responsible authority on the basis of section 7 [as am. by S.C. 1993, c. 32, s. 4] of the *Explosives Act*, R.S.C., 1985, c. E-17. Explosives, including their storage, were proposed to be used in operating the proposed mine.

[13] In accordance with [Clause 14] of the *Canada-British Columbia Agreement for Environmental Assessment Cooperation (2004)*, on July 28, 2004, a draft work plan was prepared by the Agency, the RAs and the BCEAO to coordinate the federal and provincial environmental assessment of the project. On October 18, 2004, the draft work plan was revised by the Agency to set out new dates.

[14] On or about December 9, 2004, DFO wrote to the Agency outlining how at first, DFO felt that the scope of the project, taken at face value from the application, required a comprehensive study; however, upon further review and as a result of new fisheries information and the decision of the Federal Court in *TrueNorth* (cited as *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* (2004), 10 C.E.L.R. (3d) 55), it was determined that the scope of the project required only a screening report.

[15] On December 14, 2004, the online notice of commencement was retroactively amended to indicate that DFO would conduct the environmental assessment as a screening commencing on May 19, 2004.

[16] On March 11, 2005, DFO informed the BCEAO that in accordance with subsection 15(1) of the CEAA, the RAs had determined the scope of the project for the purposes of the environmental assessment under the CEAA (see paragraph 114 of the applications Judge's decision):

… will be the construction, operation, modification and decommissioning of the following physical works [emphasis added by applications Judge]:

•Tailings Impoundment Area including barriers and seepage dams in the headwaters of Trail, Quarry and NE Arm creeks.

•Water diversion system in the headwaters of Trail, Quarry, and NE Arm creeks.

•Ancillary Facilities supporting the above mentioned (i.e. process water supply pipeline intake) on the Klappan River.

•Explosives storage and/or manufacturing facility on the mine property.

The environmental assessment under the CEAA of the project as scoped above will be conducted in accordance with the requirements of s. 18(1) of the CEAA at the level of screening. [Emphasis added.]

[17] On March 15, 2005, the online notice of commencement was retroactively amended a second time, stating that both DFO and NRCan (the RAs) would conduct a screening commencing May 19, 2004. This is the first time NRCan was mentioned as an RA on the Registry. The notice of commencement continued to state that the scope of the project would be added when available.

[18] On March 24, 2005, the online notice of commencement was amended a third and final time. The notice of commencement stated that the environmental assessment was required because (see paragraph 116 of the applications Judge's decision):

… (1) NRCan was contemplating the issuance of a licence pursuant to paragraph 7(1)(*a*) of the *Explosives Act* for construction of the explosives storage and/or manufacturing facility on the mine property; (2) DFO was contemplating the issuance of authorizations under section 25 [as am. by S.C. 1991, c. 1, s. 6] of the *Fisheries Act* for the harmful alteration, disruption of fish habitat; and (3) regulations to be made by the Governor in Council were being contemplated to list the headwaters of Trail Creek as a TIA [tailings impoundment area] on Schedule 2 of the MMER [*Metal Mining Effluent Regulations*] pursuant to paragraphs 36(5)(*a*) to (*e*) of the *Fisheries Act*.

[19] The third amended notice of commencement also stated that, in accordance with subsection 15(1) of the CEAA, the RAs had determined that the scope of the project for the purposes of the environmental assessment under the CEAA would be (see paragraph 117 of the applications Judge's decision):

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

[20] On July 22, 2005, after an extensive assessment process which included input from certain federal departments (NRCan and Health Canada), the BCEAO issued its assessment report concluding that the project was not likely to cause significant adverse environmental, heritage, social, economic or health effects. On August 24, 2005, an assessment certificate was issued by the relevant B.C. provincial ministers to the proponents.

[21] Returning to the federal assessment, on January 10, 2006, the Tahltan Band Council and Iskut First Nation were specifically invited to make comments by February 10, 2006, on a draft screening report the RAs had prepared.

[22] On or about April 16, 2006, the RAs produced their environmental assessment screening report under the authority of section 18 of the CEAA. The RAs concluded that "taking into account the implementation of the mitigation measures, the Project is not likely to cause significant adverse environmental effects" (see paragraph 126 of the applications Judge's decision).

[23] On May 2, 2006, the RAs took a course of action decision pursuant to paragraph 20(1)(*a*) [as am. by S.C. 2003, c. 9, s. 11] of the CEAA. The RAs' course of action decision determined that the project as scoped by them was not likely to cause "significant adverse environmental effects" (see paragraph 128 of the applications Judge's decision).

[24] On May 10, 2006, the course of action decision was posted on the Registry. The screening report was also made public at this time. The RAs' course of action decision allowed the proponents to proceed to apply for the appropriate federal licences.

[25] On June 9, 2006, a notice of application for judicial review of the course of action decision was filed by the respondent.

[26] On September 25, 2007, the applications Judge allowed the application for judicial review, stating at paragraph 302 of his decision:

> … the present application shall be allowed and an order be made by the Court:
>
> (a) declaring that DFO correctly determined in the initial tracking decision of May 2004 that the Project would require a comprehensive study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold under paragraph 16(*c*) [of the schedule] to the CSL Regulations. Therefore, in sidestepping statutory requisites mentioned in section 21 of the CEAA as amended in 2003, in the guise of a decision to rescope the Project, the RAs acted beyond the ambit of their statutory powers;
>
> (b) quashing and setting aside the course of action decision;
>
> (c) declaring that the RAs are under a legal duty pursuant to subsection 21(1) of the CEAA as amended in 2003, to ensure public consultation with respect to the proposed scope of the Project, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of a comprehensive study to address issues relating to the Project;
>
> (d) prohibiting the exercise of any powers under paragraph 5(1)(*d*) or subsection 5(2) of the CEAA that would permit the Project to be carried out in whole or in part until a course of action has been taken by the RAs in accordance with section 37 of the CEAA, in performance of their duty to conduct an EA [environmental assessment] of the Project under section 13 of the CEAA;

[27] This decision is now appealed to us.

POSITIONS OF THE PARTIES

[28] The appellants argue that the applications Judge erred in not applying the decision of our Court in *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, [2006] 3 F.C.R. 610 (known as *TrueNorth*) to the present application. In *TrueNorth*, Rothstein J.A., as he then was, affirmed the decision of the Federal Court and determined that it was appropriate for a RA to scope a project more narrowly than proposed by the proponent so as to include only those aspects of the proposal related to the RA's jurisdiction and responsibility flowing from section 5 of the CEAA.

[29] The appellants contend that, in the present case, the scoping of the project by the RAs pursuant to section 15 [as am. by S.C. 1993, c. 34, s. 21(F)] of the CEAA precedes the determination of whether the project is to be subjected to a screening (section 18 of the CEAA) or a comprehensive study (section 21 of the CEAA). In other words, they argue that the first appearance of the word "project" in sections 18 and 21 should be read as "project as scoped".

[30] The respondent supports the decision of the applications Judge. It contends that the words of section 21 reveal that a RA "may not decide the scope of [a] project until it identifies if the project needs comprehensive study and—if it does—not until the public has been consulted on the proposed scope of [the] project" (paragraph 20 of its memorandum of fact and law).

[31] The respondent concedes that our decision in *TrueNorth* would be determinative of the issue, but says that an amendment to section 21 by *An Act to amend the Canadian Environmental Assessment Act*, S.C. 2003, c. 9 [section 12], which came into force on October 30, 2003, has effectively reversed *TrueNorth*. The respondent submits that section 21 of the CEAA was amended specifically to ensure that once a project is determined to be on the *Comprehensive Study List Regulations*, SOR/94-638, the public must be consulted regarding the scope of the project before the RAs make their scope of project determination under section 15 of the CEAA.

[32] In the case at bar, the respondent says that the project as proposed by the proponents fell under paragraphs 16(*a*) and (*c*) of the [schedule] to the *Comprehensive Study List Regulations*. Public consultation was therefore required on the four issues listed in section 21 [of the CEAA], namely: (1) the proposed scope of the project; (2) the factors proposed to be considered; (3) the proposed scope of these factors; and (4) the ability of the comprehensive study to address issues relating to the project. After the public consultation, the RA then makes its scope of project determination pursuant to section 15. The RA must then report on its scope of project decision, and on other issues, to the Minister, in accordance with paragraph 21(2)(*a*) of the CEAA. At the same time, under paragraph 21(2)(*b*), the RA must recommend to the Minister whether to continue the assessment as a comprehensive study or to refer the project to a mediation or review panel (see paragraphs 29, 30 and 31 of the respondent's memorandum of fact and law).

RELEVANT LEGISLATIVE PROVISIONS

[33] The relevant legislative provisions of the CEAA are as follows:

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.

(2) Notwithstanding any other provision of this Act,

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

…

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

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

(*b*) a screening report is prepared.

…

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

STANDARD OF REVIEW

[34] The question being reviewed by the applications Judge was a question of statutory interpretation and therefore a question of law. The applications Judge applied the standard of review of correctness in reviewing the impugned decision. None of the parties take issue with the applications Judge's standard of review determination. I can see no error with the applications Judge's determination on this point.

[35] In turn, this appeal concerns the same question of law determined by the applications Judge. Based on the standards of appellate review outlined in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, I will review the decision of the applications Judge on the standard of correctness.

ANALYSIS

[36] The respondent does not challenge the conclusions of the scoping decision found in the screening report. What the respondent challenges is the track followed to arrive at those conclusions, namely the screening process. The respondent contends that the RAs should have followed the track of a comprehensive study, where consulting the public was a mandatory requirement under subsection 21(1) of the CEAA.

[37] As stated earlier, during the course of the hearing, the respondent indicated that, had there been no amendment to section 21 of the CEAA, the respondent would not have come before the Court.

[38] This leaves us with a consideration of the case law which preceded the 2003 amendment, and then, with a consideration of section 21 as amended.

[39] The respondent (at paragraph 96 of its memorandum of fact and law) agrees with the appellants that the factual differences noted by the applications Judge (at paragraph 286 of his reasons) in distinguishing the *TrueNorth* case from the case at bar are not material to the correct interpretation of section 21 as amended.

[40] With regard to the law, the decision of this Court in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 (C.A.), at paragraph 12, *per* Rothstein J.A., establishes that subsection 15(1) of the CEAA 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 same case also establishes (paragraph 18) that, under subsection 15(3) of the CEAA, the assessment to be carried out is in respect of the "project as scoped".

[41] The decision of our Court in *TrueNorth* asserted that the word "project" in paragraph 5(1)(*d*) of the CEAA means "project as scoped" under subsection 15(1) of the CEAA (see paragraph 20 of *TrueNorth*).

[42] A project proposed by a proponent is examined by the RAs so as to determine whether, under paragraphs 5(1)(*a*),(*b*),(*c*) or (*d*) of the CEAA, the proposed project triggers a requirement that an environmental assessment be conducted. To this end, the RAs must examine the *Law List Regulations*, SOR/94-636).

[43] In the case at bar, there is no debate that an environmental assessment was triggered by virtue of paragraphs 5(1)(*d*) and 5(2)(*a*) of the CEAA.

[44] Next comes the "tracking" of the project, a word used by the applications Judge to describe under which process the environmental assessment is to be conducted—in our case, either as a screening or as a comprehensive study.

[45] Under subsection 18(1) of the CEAA, where the project is not described in the *Comprehensive Study List Regulations*, SOR/94-638 or the *Exclusion List Regulations 2007*, SOR/2007-108 (both adopted pursuant to paragraph 59(*f*) [as am. by S.C. 2003, c. 9, s. 29] of the CEAA; see also paragraph 7(1)(*a*) [as am. by S.C. 1994, c. 26, s. 23(F); 2003 c. 9, s. 3] of the CEAA) the RAs shall ensure that a screening of the project is conducted and that a screening report is prepared.

[46] Where, however, the project is described in the comprehensive study list, a comprehensive study is required pursuant to section 21.

[47] Rothstein J.A. in *TrueNorth* alluded to the *Comprehensive Study List Regulations*, at paragraphs 23 and 24 of his reasons, but he made no explicit mention of section 21 of the CEAA. He said:

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

[48] I am of the opinion that considering that the word "project" in paragraph 5(1)(*d*) and in subsection 15(3) means "project as scoped", the rules of statutory interpretation require that the first appearance of the word "project" in section 18 and section 21 be given the same meaning, unless some different interpretation is clearly indicated by the context (*R. v. Zeolkowski*, [1989] 1 S.C.R. 1378; *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385).

[49] I see nothing in the context of the CEAA which indicates that a different interpretation from the one given in *Friends of the West Country Assn.* and in *TrueNorth* should guide us.

[50] Section 21 as amended reads:

Comprehensive Study

21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the

environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.

[51] The former section 21 [as am. by S.C. 1993, c. 34, s. 26(F)] reads:

> **21.** Where a project is described in the comprehensive study list, the responsible authority shall
>
> (*a*) ensure that a comprehensive study is conducted, and a comprehensive study report is prepared and provided to the Minister and the Agency; or
>
> (*b*) refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

[52] The key difference between these two provisions relates to a requirement of public consultation, but I note that the introductory text "[w]here a project is described in the comprehensive study list", remains the same.

[53] I therefore read subsection 21(1) as indicating that where the project "as scoped" is described in the *Comprehensive Study List Regulations*, subsection 21(1) as amended applies and a public consultation is required. The public is consulted with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project (see subsection 21(1) of the CEAA).

[54] The issues that are brought to the public's attention in the consultation process are consequently those that come under federal jurisdiction.

[55] In the case at bar, the RAs first determined in May 2004 that the project required public consultation. Following receipt of further information and the release of the decision of the Federal Court in the *TrueNorth* case, the project was "rescoped". As a result, it was determined that the project "as rescoped" fell under the purview of the screening process. The RAs in doing so exercised their discretionary power to "scope" and "rescope". They made no error in doing so.

[56] Until a final decision has been made with respect to the environmental assessment, nothing prevents the RAs from rescoping. Such power is recognized in subsection 31(3) of the *Interpretation Act*, R.S.C., 1985, c. I-21, which states:

> **31.** …
>
> (3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

[57] The doctrine of *functus officio* does not apply as this appears to be a situation where the scoping power given to the RA is of a continuing nature (Brown & Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2007), at paragraph 12:6221).

[58] The applications Judge recognized the wide latitude given to the RAs to rescope. He considered it normal in view of the complexity and the evolving nature of the environmental assessment process. He explained, at his paragraphs 145 and 155:

> As appears from the evidence before me, the EA of the project has been a complex and evolving process. There have been a great number of interrelated actions and interlocutory decisions taken by the various federal and provincial authorities prior to the issuance on August 24, 2005 of an assessment certificate by the provincial ministers and the taking of the course of action decision on May 2, 2006 by the RAs. The facts of this case show that since 2003, the scope of the project has been modified a number of times by the RAs throughout the EA. This is normal under the circumstances considering that a great number of variables and scenarios must

be addressed by the proponent and considered by the federal and provincial authorities under various legislative and regulatory provisions.

…

Indeed, there was no final decision made by the RAs until they came to the conclusion in the screening report that public participation in the screening of the Project under subsection 18(3) was not appropriate in the circumstances and determined that the Project "as scoped" by them in the screening report was not likely to cause "significant adverse environmental effects" as stated in the course of action decision posted on the Registry on May 10, 2006.

[59] He further wrote, at his paragraph 295:

This is not to suggest that the RAs do not have the discretion to amend the scope of projects. To the contrary, such a ruling would be absurd, given the language of subsection 15(1) which clearly imparts discretion to the responsible authority. Further, such a ruling would violate the case law (see section C. Case law, above) which emphasizes that section 15 of the CEAA grants RAs wide latitude to scope projects in the manner they deem appropriate on a case-by-case basis. [Emphasis added.]

[60] The applications Judge appears however not to have accepted that a rescoping could be done once a public consultation had been announced. He wrote, at paragraph 284:

> Once a tracking decision had been made requiring the project to undergo a comprehensive study, it is my view that the RAs did not have the discretion to rescope the project in such a manner as to avoid the public consultation implications of section 21. [Emphasis added.]

[61] Indeed, he stated at paragraph 2 of his order what he had written at paragraph 302 No. (a) of his reasons (reproduced at paragraph 26 of my reasons for judgment):

… in sidestepping statutory requisites mentioned in section 21 of the CEAA, as amended in 2003, in the guise of a decision to rescope the Project, the RAs acted beyond the ambit of their statutory powers.

[62] No sham of any type is alleged. The respondent, as stated at the outset of this analysis, does not challenge the conclusions of the scoping decision found in the screening report. What the respondent raises is a pure question of statutory interpretation with regard to section 21 of the CEAA.

[63] Section 21 as amended does not come into operation in the case at bar since the project "as scoped" in the final scoping decision is not prescribed in the *Comprehensive Study List Regulations*. Public consultation under section 21 of the CEAA is therefore not a requirement.

CONCLUSION

[64] I would allow these appeals, set aside the decision of the applications Judge and dismiss the application for judicial review.

[65] Counsel has requested that the matter of costs be dealt with after the judgment is delivered and following written submissions under rule 400 [as am. by SOR/2002-417, s. 25(F)] of the *Federal Courts Rules* [SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2)].

[66] A copy of these reasons for judgment should be filed in A-479-07.

SEXTON J.A.: I agree.

EVANS J.A.: I agree.