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Docket: T-535-07

Citation: 2008 FC 302

Ottawa, Ontario, March 5, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

PEMBINA INSTITUTE FOR APPROPRIATE DEVELOPMENT,
PRAIRIE ACID RAIN COALITION,
SIERRA CLUB OF CANADA, and
TOXICS WATCH SOCIETY OF ALBERTA

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF ENVIRONMENT, and
IMPERIAL OIL RESOURCES VENTURES LIMITED

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by the applicants pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, respecting a report dated February 27, 2007 by the Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada (the "Panel") concerning an environmental impact assessment of the Kearl

Oil Sands Project (the “Kearl Project” or the “Project”), wherein the Panel recommended to the responsible federal authority, the Department of Fisheries and Oceans (“DFO”), that the Project receive authorization.

[2] The applicants, various non-profit organizations concerned about the environmental effects of the Kearl Project, submit that the environmental assessment conducted by the Panel did not comply with the mandatory steps in the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (“CEAA”) and in the Panel’s Terms of Reference.

BACKGROUND

[3] Imperial Oil wishes to construct and operate the Kearl Project, an oil sands mine, in northern Alberta. This project includes the design, construction, operation and reclamation of four open pit truck and shovel mines and three trains of ore preparation and bitumen extraction facilities, as well as tailings management facilities and other supporting infrastructure. It will be capable of producing over 48,000 cubic metres of bitumen per day at full production in 2018, and will terminate mining operations in 2060.

[4] The Kearl Project will be located approximately 70 kilometres north of Fort McMurray. Further, it is situated in the upper Muskeg River Watershed, a tributary of the Athabasca River, which flows through Wood Buffalo National Park to the Mackenzie River drainage basin in the Northwest Territories.

[5] The Kearl Project requires an authorization from the federal Minister of Fisheries and Oceans under section 35(2) of the *Fisheries Act*, R.S.C., 1985, c. F-14. Before any federal approval can be given, an environmental assessment under the CEAA is required.

[6] Pursuant to the Canada-Alberta Agreement for Environmental Assessment Cooperation, the Canadian Environmental Assessment Agency notified Alberta that it wished to participate with Alberta in a cooperative environmental assessment of the Kearl Project. Federally, the Canadian Environmental Assessment Agency confirmed it would carry out the role of Federal Environmental Assessment coordinator, and DFO would be the responsible authority, with Environment Canada (EC), Health Canada (HC) and Natural Resources Canada (NRCan) providing DFO with specialist advice.

[7] Imperial Oil filed its Environmental Impact Assessment (EIA) relating to the Kearl Project in July 2005. Representatives of DFO, EC, HC and NRCan assessed the information provided by Imperial Oil as part of the joint environmental assessment with Alberta.

[8] On January 18, 2006, DFO recommended to the Minister of the Environment that the Kearl Project be referred to a review panel due to the potential for the proposed project to cause significant adverse environmental effects, including cumulative effects, over large areas and on a number of valued ecosystem components. Canada entered into an agreement with the government of Alberta to conduct a joint review panel. The Joint Panel would render a project approval *decision* on behalf of Alberta authorities and make an approval *recommendation* to the responsible federal authority.

[9] The Panel held 16 days of public hearings in November 2006. In addition to the EIA report filed by Imperial Oil, 20 parties filed submissions with the Panel, a number of which also gave oral evidence and were cross-examined at the hearing.

The Panel Report

[10] On February 27, 2007, the Panel issued its report, setting out its decision for the Alberta authorities and making recommendations to DFO regarding project authorization.

[11] The Panel reviewed the project as well as its purpose, need, project alternatives, and alternative means of implementation. The Panel reviewed the views of various stakeholder groups and summarized issues relating to social and economic effects, mine plan and resource conservation, tailings management, reclamation, air emissions, surface water, aquatic resources, Cumulative Environmental Management Association (CEMA) (a voluntary partnership of stakeholders charged with identifying environmental thresholds before irreversible damage occurs from oil sands development), traditional land use and traditional ecological knowledge, the need for follow-up, and human health.

[12] The Panel recommended that DFO approve the Project given its view that provided proposed mitigation measures and recommendations were implemented, the Project was not likely to cause significant adverse environmental effects.

LEGISLATIVE CONTEXT

[13] The law governing Environmental Impact Assessments is set out by the provisions of the CEAA as interpreted in the jurisprudence of the Federal Court, Federal Court of Appeal, and the Supreme Court of Canada.

[14] The CEAA establishes a two-step decision-making process. The first step is an environmental assessment where potentially adverse environmental effects of a project are analysed (s. 5). The second step involves decision-making and follow-up where a federal authority decides, taking into consideration that assessment, if a particular project should be authorized and what follow-up measures, if any, are required to verify the accuracy of the assessment and the effectiveness of mitigation measures (ss. 37 and 38).

[15] The purpose of environmental assessment was described by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 (QL), at para. 95. While the case involved assessment under the *Environmental Assessment and Review Process Guidelines Order*, S.O.R./84-467 (the "EARPGO", predecessor to the current CEAA), I find the general principles espoused to be particularly instructive:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., Environmental Rights in Canada (1981), 245, at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles,

> to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, Environmental Approvals in Canada (1989), at p. 1.2, (SS) 1.4; D. P. Emond, Environmental Assessment Law in Canada (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making. […]

The First Step: Environmental Assessment

[16] With respect to the first step, the CEAA contemplates three "levels" of assessment: screening (ss. 18-20), comprehensive study (ss. 21-24), and mediation and panel reviews (ss. 29-36).

[17] Mediation and panel reviews are the most stringent level of assessment and are to be carried out upon a referral to the Minister by the responsible authority *after consideration of a screening report and any comments filed* where: 1) the responsible authority is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects; 2) the responsible authority is of the opinion that, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects; or 3) public concerns warrant a reference to this type of procedure (s. 20).

[18] Further, s. 25 of the CEAA indicates that the responsible authority may also refer the project to the Minister for a panel review *at any time* where it is of the opinion that the project, taking into

account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or where public concerns warrant a reference to this type of procedure.

[19] Pursuant to s. 40 of the CEAA, joint review panels involving federal and provincial authorities may be constituted by agreement or arrangement. This agreement or arrangement shall provide that the "environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement" (s. 41). Further, s. 41(c) indicates that "the Minister shall fix or approve the terms of reference for the panel." The "terms of reference" shall determine the scope of certain factors to be taken into consideration by a review panel in its assessment (s. 16(3)(b)). These terms of reference may significantly increase the obligations incumbent upon the Panel (see *Alberta Wilderness Assn. v. Cardinal River Coals (T.D.)* [1999] 3 F.C. 425, [1999] F.C.J. No. 441 (QL)).

[20] Specifically, the general duties that a review panel is mandated to fulfill are four-fold (s. 34). First, it must ensure that the information required for an assessment is obtained and made available to the public (s. 34(a)). Second, the panel is required to hold hearings in a manner that offers the public an opportunity to participate in the assessment (s. 34(b)). Third, the panel is charged with fulfilling a reporting function whereby it must prepare a report setting out "the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program" as well as a summary of public

comments received (s. 34(c)). Finally, it must submit that report to the Minister and the responsible authority (s. 34(d)).

[21] Within the ambit of these general duties, a review panel shall include a consideration of the various specific factors enumerated in ss. 16(1) and (2). These factors include the environmental effects of a project including effects of accidents and malfunctions, cumulative environmental effects, the significance of environmental and cumulative effects, public comments, technically and economically feasible mitigation measures, and any other matter relevant to a review panel assessment that the Minister, after consulting with the responsible authority, may require to be considered (s. 16(1)). Furthermore, the purpose of the project, alternative means of carrying it out, the need for and requirement of any follow-up programs, 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 are also to be considered (s. 16(2)).

[22] With respect to assessing the significance of environmental effects, the jurisprudence reveals that this assessment is not a wholly objective exercise but rather contains “a large measure of opinion and judgement.” The Federal Court of Appeal has asserted that “[r]easonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results […]” (*Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (QL), at para. 10).

[23] The adequacy and completeness of the evidence must be evaluated in light of the preliminary nature of a review panel's assessment. In *Express Pipelines*, *supra*, at para. 14, Hugessen J.A. discussed the predictive and preliminary nature of the panel's role:

> The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages … and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

This view was echoed in *Inverhuron & District Ratepayers' Association v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (QL), at para. 55, by Sexton J.A. Therefore, given the predictive function of an environmental assessment and the existence of follow-up mechanisms envisioned by the CEAA, the Panel's assessment of significance does not extend to the elimination of uncertainty surrounding project effects.

[24] Similarly, it is evident that the assessment of environmental effects, including mitigation measures, is not to be conceptualized as a single, discrete event. Instructively, in *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 F.C. 325, [1996] F.C.J. No. 1373 (QL), Mackay J. indicated, at para. 32 that he was not persuaded that the CEAA requires that all the details of mitigating measures be resolved before the acceptance of a screening report. He further asserted that the nature of the process of assessment was "ongoing and dynamic" with continuing dialogue between the proponent, the responsible authorities and interested community groups.

[25] Moreover, jurisprudence relating to the EARPGO is also instructive as to the content of the legal duty to consider mitigation measures. In *Tetzlaff v. Canada (Minister of the Environment (F.C.A.)*, [1991] 1 F.C. 641, at p. 657, Iacobucci C.J.A. described the assessment of mitigation measures in s. 12(c) of the EARPGO in the following terms: "If the initial assessment procedure reveals that the potentially adverse environmental effects that may be caused by the proposal "are insignificant or mitigable with known technologies" the proposal […] may proceed or proceed with mitigation, as the case may be." In the case of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1990), 31 F.T.R. 1, at p. 12, the decision which was upheld by the Court in *Tetzlaff*, Muldoon J. analysed s. 12(c) of the EARPGO and asserted that "since the Minister did not identify any known technologies but only vague hopes for future technology, it is not possible to consider that the recited adverse water quality effects are mitigable". Thus, in the context of a panel assessment, the possibilities of future research and development do not constitute mitigation measures.

[26] I note also that s. 16(1)(d) of the CEAA (the equivalent of s. 12(c) of the EARPGO), the provision mandating consideration of mitigation measures, adds the proviso that mitigation measures must be technically *and economically* feasible as opposed to solely technically feasible ("known technologies" in the wording of the EARPGO). This second condition, in effect, imposes an additional requirement for measures to be classified as mitigating under the CEAA: under the current Act mitigation measures must also be economically feasible in order to qualify as such.

The Second Step: Decision and Follow-up

[27] Once the panel report is completed, the federal authority responsible for the decision must take the report into consideration, and shall take a course of action that is in conformity with the approval of the Governor in Council (s. 37(1.1)). 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, either where the project is not likely to cause significant adverse environmental effects, or where it is likely to cause significant adverse environmental effects that can be justified in the circumstances (s. 37(1)).

[28] Where a federal authority decides to authorize a project following a panel review, it is mandated to design a follow-up program for the project and ensure its implementation (s. 38(2)). The results of the follow-up program may be used to implement adaptive management measures or to improve the quality of future environmental assessments (s. 38(5)).

Guiding Tenets

[29] The powers associated with the administration of the CEAA are to be exercised "in a manner that protects the environment and human health and applies the precautionary principle" (s. 4(2)).

[30] In recent amendments to the CEAA, acting in a manner consistent with the precautionary principle was specifically introduced in s. 4 as a duty bearing upon "the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities" in the administration of the CEAA.

[31] In the case of *114957 Canada Lteé (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42 (QL), at para. 31, the Supreme Court of Canada cited the definition of the precautionary principle from the Bergen Ministerial Declaration on Sustainable Development (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[32] An approach that has developed in conjunction with the precautionary principle is that of "adaptive management". In *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] F.C.J. No. 703, at para. 24, Evans J.A. stated that "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge" and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle. Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.

[33] Accordingly, the scope of the duties incumbent upon a panel must be viewed through the prism of these guiding tenets: the precautionary principle and adaptive management. As an early

planning tool, environmental assessment is tasked with the management of future risk, thus a review panel has a duty to gather the information required to fulfill this charge.

[34] In sum, the CEAA represents a sophisticated legislative system for addressing the uncertainty surrounding environmental effects. To this end, it mandates early assessment of adverse environmental consequences as well as mitigation measures, coupled with the flexibility of follow-up processes capable of adapting to new information and changed circumstances. The dynamic and fluid nature of the process means that perfect certainty regarding environmental effects is not required.

ISSUES

[35] This application involves the determination of whether the Panel committed reviewable errors by failing to consider the factors enumerated in ss. 16(1) and 16(2) of the CEAA, more particularly by relying on mitigation measures that were not technically and economically feasible and by failing to comply with the requirement to provide a rationale for its recommendations pursuant to s. 34(c)(i) of the CEAA.

[36] The applicants focus on these reviewable errors in relation to the following three issues:

A) Cumulative Effects Management Association (CEMA), Watershed Management and Landscape Reclamation;

B) Endangered Species; and

C) Greenhouse Gas Emissions

STANDARD OF REVIEW

[37] All parties agree that to the extent that the issues posed involve the interpretation of the CEAA, as questions of law, they are reviewable on a standard of correctness (*Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] F.C. 263, [1999] F.C.J. No. 1515 (QL), at para. 10; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, [2001] F.C.J. No. 18 (QL), at para. 55). However, issues relating to weighing the significance of the evidence and conclusions drawn from that evidence including the significance of an environmental effect are reviewed on the standard of reasonableness *simpliciter* (*Bow Valley*, *supra*, at para. 55; *Inverhuron*, *supra*, at paras. 39-40).

[38] The crux of the standard of review determination in the present case involves the *characterization* of the alleged errors. According to the applicants, the Panel report contains numerous legal errors relating to the interpretation of the CEAA that are reviewable on the standard of correctness. However, the respondents indicate that these alleged errors are in fact errors relating to the conclusions drawn from the evidence before the Panel and therefore are reviewable on the standard of reasonableness.

[39] As noted by Campbell J. in *Cardinal River Coals Ltd.*, *supra*, at para. 24, "it is important to appropriately characterize a perceived failure to comply [with the requirements of the CEAA] as a question of law or merely an attack on the "quality" of the evidence and, therefore the "correctness" of the conclusions drawn on that evidence" (see also *Express Pipelines Ltd.*, *supra*, at para. 10).

[40] With respect to the arguments relating to the Panel's reliance on mitigation measures that were not technically and economically feasible, there is no indication in the Report that the Panel misunderstood the legal interpretation of technically and economically feasible mitigation measures. In essence**,** what the applicants are challenging is the underlying completeness or quality of the evidence which in their view was not sufficient to allow the Panel to conclude as it did given the uncertainties that still remained regarding the Project**.** Thus, this question is reviewable on the standard of reasonableness *simpliciter*.

[41] With respect to the question of providing a "rationale" for the conclusions and recommendations of the Panel, this question relates to the interpretation of the requirements of s. 34(c)(i) of CEAA. The applicants do not attack the rationale provided but rather question whether any rationale at all was put forth by the Panel. Whether or not the Panel has provided a rationale for its conclusions and recommendations is question of law, reviewable on a standard of correctness.

ANALYSIS

A) CEMA, Watershed Management and Landscape Reclamation

i. CEMA

[42] The applicants submit that while the Panel recognized that CEMA was vital in addressing the cumulative impacts of oil sands development and had the responsibility to address most of the critical cumulative effects challenges in the Athabasca oil sands region, it also expressed deep concern at the inability of CEMA "to establish and maintain priority for critical items such as the

Water Management Framework for the Athabasca River, the Muskeg River Watershed Integrated Management Plan, and the Regional Terrestrial and Wildlife Management Framework" and cited specific examples of CEMA failing to meet timelines and complete its work.

[43] The respondent, Imperial Oil, argues that the applicants' assertion is based on a narrow reading of the Report restricted to that portion dealing solely with integrated watershed planning which is only one of the many issues addressed by the Panel. I agree.

[44] The Panel's discussion of CEMA was tied closely to regional watershed management planning. As a regional association comprised of industry and government representatives as well as community and civil society stakeholders, CEMA is expected to address the objectives of watershed management planning. Given this important role in regional effects management, it was therefore appropriate for the Panel to raise concerns regarding CEMA's functioning. Based on the Report, I could not conclude that the Panel considered CEMA as a mitigation measure, but rather as the proper vehicle for the development of environmental management frameworks.

[45] While the Panel discussed CEMA extensively and highlighted the numerous problems associated with its functioning, it also made detailed recommendations regarding its operation in order to ensure that CEMA would function properly in years to come, and to provide the ultimate decision-maker with a concrete evaluation of this key stakeholder association. I note also the Panel's comments with respect to regulatory backstopping by Alberta Environment ("AENV") in the event that CEMA is unable to meet its timelines for management frameworks. I find this to be

consistent with the precautionary principle in that if CEMA is unable to complete a management plan by March 2008, the regulator should be engaged to prevent potentially adverse environmental consequences.

ii. Watershed Management

[46] With respect to Watershed Management, I am satisfied that the Panel took into consideration mitigation measures that were both technically and economically feasible. A fair reading of the Report shows that the Panel addressed the issue of surface water extensively. In fact, the Panel considered the issue under three distinct subheadings: in-stream flow needs, integrated watershed planning, and water quality, and additionally under fish and fish habitat.

[47] Contrary to the applicants' assertion that there was no evidence or the scantest evidence upon which to evaluate the existence, nature and effectiveness of the mitigation measures, the Panel's recommendations on the issue of water quality refer to mitigation measures contained in Imperial Oil's EIA as well as the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "EPEA") approval conditions. The Panel concludes:

> […] the Joint Panel believes that by implementing a comprehensive monitoring plan, the suggested *EPEA* approval conditions, the Joint Panel's recommendation, and the mitigations identified by Imperial Oil in its EIA, the KOS [Kearl Oil Sands] Project is unlikely to result in significant adverse environmental effects on water quality. [Emphasis added] (p. 83 of the Report)

Further, as pertains to aquatic resources, the Panel concluded:

> […] The Joint Panel concludes that with the implementation of Imperial Oil's mitigation measures, the completion of an NNLP [No Net Loss Plan] satisfactory to DFO, and the Joint Panel's recommendations, the KOS

> Project is unlikely to result in significant adverse environmental effects on aquatic resources. [Emphasis added] (p. 86 of the Report)

[48] Specifically, the mitigation measures identified by Imperial Oil in its EIA for managing groundwater include the following:

(a) Recycling of process-affected waters and runoff within the Kearl Project footprint in a closed-circuit system during operations;

(b) Directing Muskeg drainage and overburden waters to polishing ponds equipped with oil separation capability, if required;

(c) Diverting natural headwater flow around construction and mining areas and discharging it into receiving streams without contact with oil sands or process-affected waters;

(d) Using a perimeter ditch and pumping system to capture seepage and runoff from the external tailings area and pumping back into the process during operations;

(e) Using a drainage system to capture and direct seepage and runoff from the external tailings area to wetlands and terminal lakes with sufficient residence time after reclaiming the external tailings area;

(f) Using wetlands and pit lakes during and after closure to provide biological remediation and settling of particulate materials in reclamation waters prior to discharge;

(g) Designing pit lakes with sufficient residence time to enhance settling and biological remediation of reclamation waters;

(h) Using reclamation waters that collect in the pit as process water until the start of the closure management system;

(i) Placing of tailings only in the central pit lake which has a large volume and long residence time;

(j) Maintaining naturally occurring, low permeability material between Kearl Lake and its surrounding mine pits to minimize seepage into the lake.

- EIA, Volume 6, at p. 5-38 and 5-39 [Imperial's Record, Vol 2, Tab 4(b) at pp. 312 and 313]

[49] Further, with respect to aquatic resources, Imperial Oil identified mitigation measures in its EIA which included the following:

a) Compensation habitat will be provided by the development of new habitat area in accordance with requirements and guidance through the appropriate regulators, such as DFO;

b) Potential changes in flow sections of the Muskeg River downstream of the Project development area will be minimized during the operational phases of the Project by flow augmentation;

c) Permanent diversion channels and drainage systems will be designed to facilitate development of sustainable aquatic ecosystems in order to mitigate losses of natural water courses habitats;

d) Drainage patterns in Wapasu Creek will be designed to mitigate flows that could change channel regime or increase downstream sedimentation or total suspended solids; and

e) The Kearl Project will include a system of environmental management protocols and construction practices designed to minimize possible effects to the aquatic environment.

- EIA, Volume 6, at p. 6-36 to 6-38 [Imperial's Record, Vol. 2, Tab 4(c) at pp. 314 to 316]

[50] Thus, contrary to the applicants' submissions, I am satisfied that there was evidence upon which the Panel could reasonably assess technically and economically feasible measures that would mitigate any significant adverse environmental effects arising from the Project on the Muskeg watershed and fish and fish habitat.

[51] When pressed at the hearing to provide specific cases of mitigation measures considered by the Panel that were not technically and economically feasible, the applicants pointed to the consolidated tailings technology and end pit lakes as two such examples.

[52] First, with respect to consolidated tailings, the applicants contend that the Panel found this measure to be technically viable but not economically feasible; nevertheless, it proceeded to rely on this technology in its assessment, in contravention of the CEAA.

[53] However, as explained by Imperial Oil's counsel, Mr. Ignasiak, and as indicated by a fair reading of the hearing transcript, it is clear that the Panel was concerned not by the tailings technology, but by one of the enhancements, a tailings thickener, proposed by Imperial Oil in order to improve on the existing technology that is used at other facilities. It is this tailings thickener, not the underlying consolidated tailings technology that has not been commercially demonstrated. The Panel then concluded that by implementing the tailings technology, of which a thickener was but a proposed enhancement, significant adverse environmental effects were unlikely to occur.

[54] Thus, I disagree with the applicants that the Panel was relying on a technology that was yet to be developed. As the respondent, Imperial Oil, aptly pointed out, if the applicants' arguments are to be accepted, it would mean that under the CEAA process, proponents must provide the Panel with only those technologies that have been used in the past. In my view this would stifle innovation in the field, which could potentially result in future benefits to the environment.

[55] Second, with respect to end pit lakes, the applicants submit that by recommending further testing of modelling predictions, the Panel erred in determining that this mitigation measure was technically and economically feasible. I cannot accept this argument. In my view, the Panel took a precautionary approach by demanding that an operator validate modelling predictions by testing end pit lake technology.

[56] Indeed, this approach is broadly consistent with the principles of adaptive management. As Evans J.A asserted in *Canadian Parks and Wilderness Society, supra,* at para. 24, "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge." The same holds true for the assessment of mitigation measures. While there does exist some uncertainty with respect to end pit lake technology, the existing level of uncertainty is not such that it should paralyze the entire project.

[57] Thus, based on the information that was before it, including the modelling predictions, the Panel accepted the measure as technically and economically feasible. The fact that uncertainty

remained regarding end pit lakes in the oil sands region is understandable given that they will only become operational upon mine site closures. Thus, the Panel recommended the validation of modelling results, including a physical test case and continued research, well in advance of the slated closure date in 60 years.

[58] In my opinion, the Panel is permitted and indeed mandated to make these kinds of recommendations regarding the proposed Project, which should include recommendations for continued study of potential impacts on valued environmental components and the development of further mitigation strategies. This is consistent with the ongoing and dynamic nature of environmental assessment referred to above and ensures that new information is obtained which facilitates the adaptation of project implementation as required.

iii. Reclamation

[59] The applicants further submit that the mitigation of certain aspects of oil sands mining, e.g., reclamation of peatlands, is not even known in general terms. Follow-up programs are not intended to replace mitigation measures under the CEAA or to be treated as vehicles for designing future mitigation measures. The applicants find support in the case of *Union of Nova Scotia Indians*, *supra*. In that particular case, mitigation measures were generally known, but the details of the specific measures had yet to be determined. For the applicants, relying on adaptive management to

address uncertainty and future risk requires at least some general understanding initially of the mitigation system in play.

[60] The respondents submit that the dynamic nature of follow-up measures and adaptive management will resolve initial uncertainties. Further, sufficient information was available to the Panel which enabled it to reasonably conclude as it did. I agree. The recommendations are not necessarily flawed because the evidence was insufficient to eliminate all uncertainty. The Panel had before it information indicating that while the reclamation of peat-accumulating wetlands remained uncertain, there is considerable experience with respect to wetland and marsh reconstruction and that Imperial Oil's closure plan called for the reconstruction of approximately 900 hectares of marsh. This type of replacement is consistent with s. 2(1) of the CEAA which defines mitigation as including "restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means".

[61] Again, I note that the Federal Court of Appeal explained in *Express Pipelines Ltd., supra,* that as the nature of the Panel's task is predictive, finality and certainty in environmental assessment can never be achieved. Hugessen J. stated at para. 10:

> No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did, a high degree of expertise in environmental matters. In addition, the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future

> results and about the significance of such results without thereby raising questions of law.

And further at para. 14, he states:

> Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

It would be impossible for a review panel to conduct the environmental assessment early in the planning stages of a project if the Panel was required to eliminate all uncertainty and precluded from commenting on follow-up activities.

[62] Thus, while uncertainties with respect to reclamation of peat-accumulating wetlands remained, they could be addressed through adaptive management given the existence of generally known replacement measures contained in Imperial Oil’s mine closure plan. Indeed, it is worth noting that the Panel cited with approval the reclamation milestones from Imperial Oil’s Project Application in its Report.

B) Endangered Species

[63] The applicants argue that the Panel failed to consider the significance of adverse environmental effects on endangered species, particularly the Yellow Rail (listed in the *Species at Risk Act*, S.C. 2002, c.29 ("SARA")), failed to provide the responsible authority with the requisite information in this regard, failed to consider mitigation measures that were technically and economically feasible, and failed to provide a rationale for its conclusion.

[64] The applicants reference the Federal Government's written submission to the Kearl Panel wherein it indicated that:

> There are 1093 [hectares] of graminoid fen within the Kearl Project area that could provide suitable habitat for Yellow Rails. It is not known how large or widely distributed the local population is, and therefore it is difficult to draw conclusions on potential impacts to the species, or to make recommendations for mitigation actions.

Based on the information before it, the Panel recommended that Alberta conduct a regional review of cumulative impacts on Yellow Rail within the next two years.

[65] For the applicants s. 79 of the SARA imposes requirements, in addition to those contained in the CEAA, on authorities mandated to ensure that an environmental assessment is conducted to "identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, [to] ensure that measures are taken to avoid or lessen those effects and to monitor them."

[66] The federal respondent submits that the Panel clearly set out its concerns regarding the Yellow Rail and made recommendations for a regional review of cumulative impacts to determine

mitigation options as well as the implementation of predevelopment surveys by Imperial Oil. Given the ongoing and dynamic nature of the environmental assessment process, complete details need not be provided at this stage: the Panel raised concerns, provided information, and made recommendations, and the final decision rested with DFO. Imperial Oil echoes the federal respondent and indicates that based on the evidence, the Panel's conclusions and recommendations were informed and rational.

[67] While I note that the Panel could have included more information regarding Environment Canada's concerns with respect to the Yellow Rail, particularly, that suitable habitat for the Yellow Rail is found in localized patches throughout the region and that this habitat cannot be reclaimed with current technology, I find the assessment of the significance of environmental effects in the Panel report to be reasonable. In my view, the Panel met its duty in the present case by acknowledging that Environment Canada expressed concern regarding the effect on the Yellow Rail due to the intensity of regional development. It made no further assessment as the information upon which such assessment could be based was not before it.

[68] The Panel recommended that in the next two years AENV in collaboration with Environment Canada, coordinate a regional review of the cumulative impacts on the Yellow Rail in the oil sands region, using appropriate regional nocturnal surveys in areas of potentially suitable habitat and that this initiative should determine the mitigation options to minimize impacts on the Yellow Rail. The Panel went on to recommend that AENV establish requirements within any *EPEA* approval to implement the findings of the Yellow Rail initiative for surveys, determination of

effects, and mitigation strategies where appropriate. The Panel expressed its expectation that Imperial Oil would implement effective Yellow Rail predevelopment surveys and habitat mitigation strategies in its reclamation plans, unless these matters were dealt with on a regional basis. Finally, the Panel recommended that AENV require Imperial Oil to avoid land clearing during the period of April 1 to August 30 of each year due to potential impacts on migratory bird species.

[69] Thus, while I agree with the applicants' assertion that further studies of the Yellow Rail population do not constitute mitigation measures, I do not believe that the Panel's recommendation was meant to be a mitigation measure. The Panel adopted an approach that was consistent with the dynamic nature of the assessment process; it highlighted concerns and made recommendations consistent with the information before it. I find the approach employed to manage the existing uncertainty to be reasonable.

C) Greenhouse Gas Emissions

[70] The applicants submit that the Panel erred by failing to provide a cogent rationale for its conclusion that the adverse environmental effects of the greenhouse gas emissions of the Project would be insignificant, and by failing to comment on the effectiveness of intensity-based "mitigation". According to Imperial Oil's EIA, the Project will be responsible for average emissions of 3.7 million tonnes of carbon dioxide equivalent per year, which equals the annual greenhouse gas emissions of 800,000 passenger vehicles in Canada, and will contribute 0.51% and 1.7% respectively, of Canada and Alberta's annual greenhouse gas emissions (based on 2002 data).

[71] The respondent, Imperial Oil, argues that the EIA that was before the Panel set out the annual greenhouse gas emissions, as well as the intensity of greenhouse gas emissions on a per barrel basis for the Project during the operating period. Further, the Project Application sets out Imperial Oil's approach to greenhouse gas management including the requirement that the most energy efficient, commercially proven and economic technology be selected to minimize emissions. There is no evidence to suggest that the Panel failed to consider all the evidence that was before it, and while it did not comment specifically on the effects of the greenhouse gas emissions, pursuant to *Cantwell v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 27, the EARPGO (predecessor to the CEAA) does not specify a particular form for the report and thus, it is not the role of this Court to insist on a particular form in the present case. At the hearing, Imperial Oil's counsel added that for the Panel to comment on the proposed intensity based mitigation measures would shift its role into the realm of policy recommendation.

[72] While I agree that the Panel is not to engage in policy recommendation, nevertheless, it is tasked with conducting a science and fact-based assessment of the potential adverse environmental effects of a proposed project. In the absence of this fact-based approach, the political determinations made by final decision-makers are left to occur in a vacuum.

[73] I recognize that placing an administrative burden on the Panel to provide an in-depth explanation of the scientific data for all of its conclusions and recommendations would be disproportionately high. However, given that the Report is to serve as an objective basis for a final

decision, the Panel must, in my opinion, explain in a general way why the potential environmental effects, either with or without the implementation of mitigation measures, will be insignificant.

[74] Should the Panel determine that the proposed mitigation measures are incapable of reducing the potential adverse environmental effects of a project to insignificance, it has a duty to say so as well. The assessment of the environmental effects of a project and of the proposed mitigation measures occur outside the realm of government policy debate, which by its very nature must take into account a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on project related environmental impacts. In contrast, the responsible authority is authorized, pursuant to s. 37(1)(a)(ii), to permit the project to be carried out in whole or in part even where the project is likely to cause significant adverse environmental effects if those effects "can be justified in the circumstances". Therefore, it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval.

[75] I am fully aware of the level of expertise possessed by the Panel. The record shows that they had ample material before them relating to the issue of greenhouse gas emissions and climate change, and thus any articulated conclusions drawn from the evidence should be accorded a high measure of deference. However, this deference to expertise is only triggered when those conclusions are articulated. Instructively, in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116 (QL), at para. 62, Iacobucci J. cited with approval the following excerpt from Kerans, R. P., *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994), p. 17 which dealt with deference to "expertise":

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. [Emphasis added]

Thus, deference to expertise is based on the cogent articulation of the rationale basis for conclusions reached.

[76] In the present case, the Panel indicated its expectation that Imperial Oil would follow through on its commitment to:

> - reduce NO_x emissions through combustion controls using low-NO_x burners for stationary sources,
> - purchase and operate low-NO_x mine equipment as soon as it is commercially available, and
> - participate in AENV's BATEA [Best Available Technology Economically Available] study and implement its findings. (p. 58 of the Report)

Further, the Panel agreed with EC and encouraged Imperial Oil to implement the use of ultra-low-sulphur diesel fuel for all of its construction and mining activities ahead of any mandatory requirements (p. 59 of the Report).

[77] Finally, the Panel supported Alberta developing appropriate *EPEA* approval requirements to address greenhouse gas emission intensity targets:

> The Joint Panel supports Alberta developing appropriate *EPEA* approval requirements to address:
>
> - fugitive emissions control (LDAR [leak detection and repair] program),
> - continuous benzene and acrolein monitoring,

- VOC [volatile organic compounds] emissions monitoring,
- participation in CEMA and WBEA [Wood Buffalo Environmental Association] work to address trace air contaminants, including but not limited to benzene and acrolein,
- participation in regional acid deposition and eutrophication monitoring programs, and
- GHG [greenhouse gas] emission intensity targets.

The Panel then concluded that:

> The KOS Project is not likely to result in significant adverse environmental effects to air quality, provided that the mitigation measures and recommendations proposed are implemented. (p. 60 of the Report)

[78] The evidence shows that intensity-based targets place limits on the amount of greenhouse gas emissions per barrel of bitumen produced. The absolute amount of greenhouse gas pollution from oil sands development will continue to rise under intensity-based targets because of the planned increase in total production of bitumen. The Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance. Without this vital link, the clear and cogent articulation of the reasons behind the Panel's conclusion, the deference accorded to its expertise is not triggered.

[79] While I agree that the Panel is not required to comment specifically on each and every detail of the Project, given the amount of greenhouse gases that will be emitted to the atmosphere and given the evidence presented that the intensity based targets will not address the problem of greenhouse gas emissions, it was incumbent upon the Panel to provide a justification for its recommendation on this particular issue. By its silence, the Panel short circuits the two step decision making process envisioned by the CEAA which calls for an *informed decision* by a responsible

authority. For the decision to be informed it must be nourished by a robust understanding of Project effects. Accordingly, given the absence of an explanation or rationale, I am of the view that the Panel erred in law by failing to provide reasoned basis for its conclusion as mandated by s. 34(c)(i) of the CEAA.

[80] As this error relates solely to one of the many issues that the Panel was mandated to consider, I find that it would be inappropriate and ineffective to require the entire Panel review to be conducted a second time (*Nanda v. Canada (Public Service Commission Appeal Board)*, [1972] F.C. 277, at para. 55). Accordingly, the application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

[81] As it was agreed upon at the hearing, the parties shall make representations in writing on the issue of costs. The applicants should file and serve their representation within 15 days from the date of this judgement. The respondents should file and serve their representations within 15 days from the date of service of the applicants' representations.

JUDGMENT

THIS COURT ORDERS that

The application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

"Danièle Tremblay-Lamer"
Judge

Annex

***Canadian Environmental Assessment Act*, S.C. 1992, c.37**	***Loi canadienne sur l'évaluation environnementale*, 1992, ch. 37**
[…]	[…]
PURPOSES Purposes	OBJET Objet
4. (1) The purposes of this Act are	4. (1) La présente loi a pour objet :
(*a*) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;	*a*) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;
(*b*) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;	*b*) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;
(*b*.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;	*b*.1) de faire en sorte que les autorités responsables s'acquittent de leurs obligations afin d'éviter tout double emploi dans le processus d'évaluation environnementale;
(*b*.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;	*b*.2) de promouvoir la collaboration des gouvernements fédéral et provinciaux, et la coordination de leurs activités, dans le cadre du processus d'évaluation environnementale de projets;
(*b*.3) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;	*b*.3) de promouvoir la communication et la collaboration entre les autorités responsables et les peuples autochtones en matière d'évaluation environnementale;
(*c*) to ensure that projects that are to be carried out in Canada or on federal lands do	*c*) de faire en sorte que les éventuels effets environnementaux négatifs importants des projets devant être réalisés dans les limites

not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and	du Canada ou du territoire domanial ne débordent pas ces limites;
(*d*) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.	*d*) de veiller à ce que le public ait la possibilité de participer de façon significative et en temps opportun au processus de l'évaluation environnementale.
Duties of the Government of Canada	Mission du gouvernement du Canada
(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle. 1992, c. 37, s. 4; 1993, c. 34, s. 19(F); 1994, c. 46, s. 1; 2003, c. 9, s. 2.	(2) Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence et les organismes assujettis aux dispositions de celle-ci, y compris les autorités fédérales et les autorités responsables, doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de la prudence. 1992, ch. 37, art. 4; 1993, ch. 34, art. 19(F); 1994, ch. 46, art. 1; 2003, ch. 9, art. 2.
Projects requiring environmental assessment	Projets visés
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	5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes :
(*a*) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;	*a*) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;
(*b*) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any	*b*) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en oeuvre le projet en tout ou en partie un financement, une garantie d'emprunt ou toute autre aide financière, sauf si l'aide financière est accordée sous forme d'allègement — notamment réduction, évitement, report, remboursement,

reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out; (*c*) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or (*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.	annulation ou remise — d'une taxe ou d'un impôt qui est prévu sous le régime d'une loi fédérale, à moins que cette aide soit accordée en vue de permettre la mise en oeuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement; *c*) une autorité fédérale administre le territoire domanial et en autorise la cession, notamment par vente ou cession à bail, ou celle de tout droit foncier relatif à celui-ci ou en transfère à Sa Majesté du chef d'une province l'administration et le contrôle, en vue de la mise en oeuvre du projet en tout ou en partie; *d*) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.
Projects requiring approval of Governor in Council (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 (*b*) the federal authority that, directly or through a Minister of the Crown in right of	Projets nécessitant l'approbation du gouverneur en conseil (2) Par dérogation à toute autre disposition de la présente loi : *a*) l'évaluation environnementale d'un projet est obligatoire, avant que le gouverneur en conseil, en vertu d'une disposition désignée par règlement aux termes de l'alinéa 59g), prenne une mesure, notamment délivre un permis ou une licence ou accorde une approbation, autorisant la réalisation du projet en tout ou en partie; *b*) l'autorité fédérale qui, directement ou par l'intermédiaire d'un ministre fédéral, recommande au gouverneur en conseil la prise d'une mesure visée à l'alinéa a) à l'égard du projet :

Canada, recommends that the Governor in Council take an action referred to in paragraph (a) in relation to that project (i) shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, (ii) is, for the purposes of this Act and the regulations, except subsection 11(2) and sections 20 and 37, the responsible authority in relation to the project, (iii) shall consider the applicable reports and comments referred to in sections 20 and 37, and (iv) where applicable, shall perform the duties of the responsible authority in relation to the project under section 38 as if it were the responsible authority in relation to the project for the purposes of paragraphs 20(1)(*a*) and 37(1)(*a*). […] Factors to be considered 16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors: (*a*) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;	(i) est tenue de veiller à ce que l'évaluation environnementale du projet soit effectuée le plus tôt possible au stade de la planification de celui-ci, avant la prise d'une décision irrévocable, (ii) est l'autorité responsable à l'égard du projet pour l'application de la présente loi — à l'exception du paragraphe 11(2) et des articles 20 et 37 — et de ses règlements, (iii) est tenue de prendre en compte les rapports et observations pertinents visés aux articles 20 et 37, (iv) le cas échéant, est tenue d'exercer à l'égard du projet les attributions de l'autorité responsable prévues à l'article 38 comme si celle-ci était l'autorité responsable à l'égard du projet pour l'application des alinéas 20(1)*a*) et 37(1)*a*). […] Éléments à examiner 16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants : *a*) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement; b) l'importance des effets visés à l'alinéa a); c) les observations du public à cet égard, reçues conformément à la présente loi et aux

(*b*) the significance of the effects referred to in paragraph (a);	règlements;
(*c*) comments from the public that are received in accordance with this Act and the regulations;	d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;
(*d*) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and	e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.
(*e*) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.	Éléments supplémentaires
Additional factors	(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants :
(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:	*a*) les raisons d'être du projet;
(*a*) the purpose of the project;	*b*) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;
(*b*) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;	*c*) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;
(*c*) the need for, and the requirements of, any follow-up program in respect of the project; and	*d*) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.
(*d*) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and	Obligations

those of the future. Determination of factors (3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(*a*), (*b*) and (*d*) and (2)(*b*), (*c*) and (*d*) shall be determined (*a*) by the responsible authority; or (*b*) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel. […] Decision of responsible authority following a screening 20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3): (*a*) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part; (*b*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects	(3) L'évaluation de la portée des éléments visés aux alinéas (1)*a*), *b*) et *d*) et (2)*b*), *c*) et *d*) incombe : *a*) à l'autorité responsable; *b*) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen. […] Décision de l'autorité responsable 20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) : *a*) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet; *b*) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants qui ne peuvent être justifiés dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une

that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or	loi fédérale et qui pourraient lui permettre la mise en oeuvre du projet en tout ou en partie;
(*c*) where	*c*) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29 :
(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,	(i) s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,
(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or	(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,
(iii) public concerns warrant a reference to a mediator or a review panel,	(iii) si les préoccupations du public le justifient.
the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.	[…]
[…]	Examen par une commission
Referral to Minister	25. Sous réserve des alinéas 20(1)*b*) et *c*), à tout moment, si elle estime soit que le projet, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, peut entraîner des effets environnementaux négatifs importants, soit que les préoccupations du public justifient une médiation ou un examen par une commission, l'autorité responsable peut demander au ministre d'y faire procéder
25. Subject to paragraphs 20(1)(*b*) and (*c*), where at any time a responsible authority is of the opinion that	
(*a*) a project, taking into account the implementation of any mitigation measures that the responsible authority considers	

appropriate, may cause significant adverse environmental effects, or (*b*) public concerns warrant a reference to a mediator or a review panel, the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29. […] Assessment by review panel 34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference, (*a*) ensure that the information required for an assessment by a review panel is obtained and made available to the public; (*b*) hold hearings in a manner that offers the public an opportunity to participate in the assessment; (*c*) prepare a report setting out (i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and (ii) a summary of any comments received from the public; and (*d*) submit the report to the Minister and the responsible authority.	conformément à l'article 29. […] Commission d'évaluation environnementale 34. La commission, conformément à son mandat et aux règlements pris à cette fin : *a*) veille à l'obtention des renseignements nécessaires à l'évaluation environnementale d'un projet et veille à ce que le public y ait accès; *b*) tient des audiences de façon à donner au public la possibilité de participer à l'évaluation environnementale du projet; *c*) établit un rapport assorti de sa justification, de ses conclusions et recommandations relativement à l'évaluation environnementale du projet, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public; *d*) présente son rapport au ministre et à l'autorité responsable. Pouvoirs de la commission 35. (1) La commission a le pouvoir d'assigner devant elle des témoins et de leur

Powers of review panel 35. (1) A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to (*a*) give evidence, orally or in writing; and (*b*) produce such documents and things as the panel considers necessary for conducting its assessment of the project. Enforcement powers (2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and other things as is vested in a court of record. […] Decision of responsible authority 37. (1) Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report: (*a*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, (i) the project is not likely to cause significant adverse environmental effects, or (ii) the project is likely to cause significant	ordonner de : *a*) déposer oralement ou par écrit; *b*) produire les documents et autres pièces qu'elle juge nécessaires en vue de procéder à l'examen dont elle est chargée. Pouvoirs de contrainte (2) La commission a, pour contraindre les témoins à comparaître, à déposer et à produire des pièces, les pouvoirs d'une cour d'archives. […] Autorité responsable 37. (1) Sous réserve des paragraphes (1.1) à (1.3), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou, si le projet lui est renvoyé aux termes du paragraphe 23(1), le rapport d'étude approfondie, prend l'une des décisions suivantes : *a*) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circonstances, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;

adverse environmental effects that can be justified in the circumstances, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part; or (*b*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part. Approval of Governor in Council (1.1) Where a report is submitted by a mediator or review panel, (*a*) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report; (*b*) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarify any of the recommendations set out in the report; and (*c*) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (*a*). […]	*b*) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux qui ne sont pas justifiables dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient permettre la mise en oeuvre du projet en tout ou en partie. Agrément du gouverneur en conseil (1.1) Une fois pris en compte le rapport du médiateur ou de la commission, l'autorité responsable est tenue d'y donner suite avec l'agrément du gouverneur en conseil, qui peut demander des précisions sur l'une ou l'autre de ses conclusions; l'autorité responsable prend alors la décision visée au titre du paragraphe (1) conformément à l'agrément. […] Programme de suivi Décision au titre de l'al. 20(1)*a*) : suivi

Follow-up Program Consideration of follow-up — decision under paragraph 20(1)(*a*) 38. (1) Where a responsible authority takes a course of action under paragraph 20(1)(*a*), it shall consider whether a follow-up program for the project is appropriate in the circumstances and, if so, shall design a follow-up program and ensure its implementation. Mandatory follow-up — decision under paragraph 37(1)(*a*) (2) Where a responsible authority takes a course of action under paragraph 37(1)(a), it shall design a follow-up program for the project and ensure its implementation. […] Joint Review Panels Definition of “jurisdiction” 40. (1) For the purposes of this section and sections 41 and 42, "jurisdiction" includes (*a*) a federal authority; (*b*) the government of a province; (*c*) any other agency or body established pursuant to an Act of Parliament or the legislature of a province and having powers, duties or functions in relation to an assessment of the environmental effects of a project; (*d*) any body established pursuant to a land claims agreement referred to in section 35 of	38. (1) Si elle décide de la mise en œuvre conformément à l’alinéa 20(1)*a*), l’autorité responsable examine l’opportunité d’un programme de suivi dans les circonstances; le cas échéant, elle procède à l’élaboration d’un tel programme et veille à son application. Décision au titre de l’al. 37(1)*a*) : suivi (2) Si elle décide de la mise en œuvre conformément à l’alinéa 37(1)a), l’autorité responsable élabore un programme de suivi et veille à son application. […] Examen conjoint Définition d’« instance » 40. (1) Pour l’application du présent article et des articles 41 et 42, « instance » s’entend notamment : *a*) d’une autorité fédérale; *b*) du gouvernement d’une province; *c*) de tout autre organisme établi sous le régime d’une loi provinciale ou fédérale ayant des attributions relatives à l’évaluation des effets environnementaux d’un projet; *d*) de tout organisme, constitué aux termes d’un accord sur des revendications territoriales visé à l’article 35 de la Loi constitutionnelle de 1982, ayant des attributions relatives à l’évaluation des effets environnementaux d’un projet;

the Constitution Act, 1982 and having powers, duties or functions in relation to an assessment of the environmental effects of a project; (*e*) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and (f) an international organization of states or any institution of such an organization. Review panels established jointly with another jurisdiction (2) Subject to section 41, where the referral of a project to a review panel is required or permitted by this Act, the Minister (*a*) may enter into an agreement or arrangement with a jurisdiction referred to in paragraph (1)(a), (b), (c) or (d) that has powers, duties or functions in relation to the assessment of the environmental effects of the project, respecting the joint establishment of a review panel and the manner in which the environmental assessment of the project is to be conducted by the review panel; and (*b*) shall, in the case of a jurisdiction within the meaning of subsection 12(5) that has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part of it, offer to consult and cooperate with that other jurisdiction respecting the environmental assessment of the project. […] Conditions 41. An agreement or arrangement entered	*e*) du gouvernement d'un État étranger, d'une subdivision politique d'un État étranger ou de l'un de leurs organismes; f) d'une organisation internationale d'États ou de l'un de ses organismes. Examen conjoint (2) Sous réserve de l'article 41, dans le cas où il estime qu'un examen par une commission est nécessaire ou possible, le ministre : *a*) peut conclure avec l'instance visée à l'alinéa (1)a), b), c) ou d) exerçant des attributions relatives à l'évaluation des effets environnementaux du projet un accord relatif à la constitution conjointe d'une commission et aux modalités de l'évaluation environnementale du projet par celle-ci; *b*) est tenu, dans le cas d'une instance, au sens du paragraphe 12(5), qui a la responsabilité ou le pouvoir d'entreprendre l'évaluation des effets environnementaux de tout ou partie du projet, d'offrir de consulter et de coopérer avec celle-ci à l'égard de l'évaluation environnementale du projet. […] Conditions de l'examen conjoint 41. Les accords conclus aux termes des paragraphes 40(2) ou (3) et les documents visés au paragraphe 40(2.1) contiennent une disposition selon laquelle l'évaluation environnementale du projet prend en compte les éléments prévus aux paragraphes 16(1) et (2) et est effectuée conformément aux exigences et modalités supplémentaires qui y

into pursuant to subsection 40(2) or (3), and any document establishing a review panel under subsection 40(2.1), shall provide that the environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement and shall provide that	sont contenues ainsi que les conditions suivantes :
(*a*) the Minister shall appoint or approve the appointment of the chairperson or appoint a co-chairperson, and shall appoint at least one other member of the panel;	*a*) le ministre nomme le président, ou approuve sa nomination, ou nomme le coprésident et nomme au moins un autre membre de la commission;
(*b*) the members of the panel are to be unbiased and free from any conflict of interest relative to the project and are to have knowledge or experience relevant to the anticipated environmental effects of the project;	*b*) les membres de la commission sont impartiaux, non en conflit d'intérêts avec le projet et pourvus des connaissances et de l'expérience voulues touchant les effets environnementaux prévus du projet;
(*c*) the Minister shall fix or approve the terms of reference for the panel;	*c*) le ministre fixe ou approuve le mandat de la commission;
(*d*) the review panel is to have the powers and immunities provided for in section 35;	*d*) les pouvoirs et immunités prévus à l'article 35 sont conférés à la commission;
(*e*) the public will be given an opportunity to participate in the assessment conducted by the panel;	*e*) le public aura la possibilité de participer à l'examen;
(*f*) on completion of the assessment, the report of the panel will be submitted to the Minister; and	*f*) dès l'achèvement de l'examen, la commission lui présentera un rapport;
(*g*) the panel's report will be published.	*g*) le rapport sera publié.
1992, c. 37, s. 41; 1993, c. 34, s. 32(F); 1998, c. 25, s. 164; 2003, c. 9, s. 20.	1992, ch. 37, art. 41; 1993, ch. 34, art. 32(F); 1998, ch. 25, art. 164; 2003, ch. 9, art. 20.
[…]	[…]

FEDERAL COURT

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