Date: 20080613

Dockets: A-478-07
A-479-07

Citation : 2008 FCA 209

CORAM : **DESJARDINS J.A.**
SEXTON J.A.
EVANS J.A.

A-478-07

BETWEEN:

MINISTER OF FISHERIES AND OCEANS,
MINISTER OF NATURAL RESOURCES, and
ATTORNEY GENERAL OF CANADA

Appellants

and

MININGWATCH CANADA

Respondent

A-479-07

BETWEEN:

RED CHRIS DEVELOPMENT COMPANY LTD. and
BCMETALS CORPORATION

Appellants

and

MININGWATCH CANADA

Respondent

Heard at Vancouver, British Columbia, on May 15, 2008.

Judgment delivered at Ottawa, Ontario, on June 13, 2008.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: SEXTON J.A.
EVANS J.A.

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] These two appeals are from a decision of a judge of the Federal Court (the applications judge) (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2007] F.C.J. No. 1249,

2007 FC 955) 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*, 1992, S.C., 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) or as a comprehensive review (section 21) 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 and bcMetals Corporation), are seeking to develop a gold and copper open pit mining and milling operation in north-western 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 BC 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". 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) 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:

> 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.
>
> (See paragraph 94 of the applications judge's reasons.)

[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

> 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.
>
> (See paragraph 96 of the applications judge's decision.)

[12] On June 2, 2004, NRCan responded to DFO's letter stating it was likely a responsible authority on the basis of section 7 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 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 FC 1265), 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 section 15(1) of the CEAA, the RAs had determined the scope of the project for the purposes of the environmental assessment under the CEAA:

> "will be the construction, operation, modification and decommissioning of the following physical works :
>
> - Tailings Impoundment Area including barriers and seepage dams in the headwaters of Trail, Quarry and NE Arm creeks.
> - Water diversion system in the headwaters of Trail, Quarry, and NE Arm creeks.
> - Ancillary Facilities supporting the above mentioned (i.e. process water supply pipeline intake) on the Klappen 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.]
>
> (See paragraph 114 of the applications judge's decision.)

[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:

> a. NRCan was contemplating the issuance of a license pursuant to paragraph 7(1)(*a*) of the *Explosives Act* for construction of the explosives storage and/or manufacturing facility on the mine property;
>
> b. DFO was contemplating the issuance of authorisations under section 25 of the *Fisheries Act* for the harmful alteration, disruption of fish habitat; and
>
> c. 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*.
>
> (See paragraph 116 of the applications judge's decision.)

[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:

> […] 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.
>
> (See paragraph 117 of the applications judge's decision.)

[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 BC 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*) 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 licenses.

[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:

> [302] […] the present application shall be allowed and an order be made by the Court:
>
> a) declaring that DFO correctly determined in the initial tracking decision of May 2004 that the Project would require a comprehensive study level review based on a proposed ore production capacity of up to 50 000 tonnes/day which exceeds the threshold of 600 tonnes/day threshold under item 16(*c*) of the CSL. Therefore, in sidestepping statutory requisites mentioned in section 21 of the CEAA as amended in 2003, in the guise of a decision to re-scope the Project, the RAs acted beyond the ambit of their statutory powers;
>
> b) quashing and setting aside the Course of Action Decision;

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

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

[…]

[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 FCA 31 [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 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" (para. 20 of their 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, 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 *Comprehensive Study List Regulations*. Public consultation was therefore required on the four issues listed in section 21, 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 paras 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:

Projects requiring environmental assessment 5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority	**Projets visés** 5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes :
[…]	[…]
(d) under a provision prescribed pursuant to paragraph 59(*f*), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.	d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59*f*), 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,	**Projets nécessitant l'approbation du gouverneur en conseil** (2) Par dérogation à toute autre disposition de la présente loi :
(a) an environmental assessment of a project is required before the Governor in Council, 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	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 59*g*), prenne une mesure, notamment délivre un permis ou une licence ou accorde une approbation, autorisant la réalisation du projet en tout ou

	en partie;
[…]	[…]
Scope of project 15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by (a) the responsible authority; or (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.	**Détermination de la portée du projet** 15. (1) L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.
[…]	[…]
Screening 18. (1) Where a project is not described in the comprehensive study list or the exclusion list made under paragraph 59(*c*), the responsible authority shall ensure that (a) a screening of the project is conducted; and (b) a screening report is prepared.	**Examen préalable** 18. (1) Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion établie par règlement pris en vertu de l'alinéa 59*c*), l'autorité responsable veille : a) à ce qu'en soit effectué l'examen préalable; b) à ce que soit établi un rapport d'examen préalable.
[…]	[…]
Public consultation 21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive	**Consultation** 21. (1) Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable veille à la tenue d'une consultation publique sur les propositions relatives à la portée du projet en matière d'évaluation environnementale, aux éléments à prendre en compte dans le cadre de l'évaluation et à la portée de ces éléments ainsi que sur la question de savoir

study to address issues relating to the project.	si l'étude approfondie permet l'examen des questions soulevées par le projet.

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 SCC 33, 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 para. 96 of its memorandum of fact and law) agrees with the appellants that the factual differences noted by the applications judge (at para. 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 regards 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 para. 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 (para. 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 para. 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* (LLR) 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/94.328 or the *Exclusion List Regulations*, SOR/2007-108 (both adopted pursuant to para. 59(*f*) of the CEAA; see also para. 7(1)(*a*) 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:

> 23 The appellants' next argument is based on the *Comprehensive Study List Regulations*, SOR/94-438. Many of the projects listed in these Regulations are under provincial jurisdiction with a limited federal role. Nonetheless, they argue that projects listed in these Regulations must be subject to an environmental assessment under the CEAA.
>
> 24 The purpose of the Regulations appears to be that when a listed project is scoped under subsection 15(1), a comprehensive study, rather than a screening, will be required in respect of that project. But it does not purport to impose on a responsible authority exercising its discretion under subsection 15(1) of the 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 **Public consultation** 21. (1) Where a project is described in the comprehensive study list, the responsible authority shall ensure public consultation with respect to the proposed scope of the project for the purposes of the environmental assessment, the factors proposed to be considered in its assessment, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.	**Étude approfondie** **Consultation** 21. (1) Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable veille à la tenue d'une consultation publique sur les propositions relatives à la portée du projet en matière d'évaluation environnementale, aux éléments à prendre en compte dans le cadre de l'évaluation et à la portée de ces éléments ainsi que sur la question de savoir si l'étude approfondie permet l'examen des questions soulevées par le projet.

[51] The former section 21 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.	21. Dans le cas où le projet est visé dans la liste d'étude approfondie, l'autorité responsable a le choix: a) de veiller à ce que soit effectuée une étude approfondie et à ce que soit présenté au ministre et à l'Agence un rapport de cette étude; b) de s'adresser au ministre afin qu'il fasse effectuer, aux termes de l'article 29, une médiation ou un examen par une commission.

[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-121, which states:

Powers to be exercised as required	**Modalités d'exercice des pouvoirs**
(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.	(3) Les pouvoirs conférés peuvent s'exercer, et les obligations imposées sont à exécuter, en tant que de besoin.

[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 12:6221-2).

[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:

> 145 As appears from the evidence before me, the EA of the Project has been a complex and evolving process. There have been a great number of interrelated actions and interlocutory decisions taken by the various federal and provincial authorities prior to the issuance on August 24, 2005 of an assessment certificate by the Provincial Ministers and the taking of the Course of Action Decision on May 2, 2006 by the RAs. The facts of this case show that since 2003, the scope of the Project has been modified a number of times by the RAs throughout the EA. This is normal under the circumstances considering that a great number of variables and scenarios must be addressed by the Proponent and considered by the federal and provincial authorities under various legislative and regulatory provisions.
>
> 155 … 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:

> 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 section 15(1) which clearly imparts discretion to the responsible authority. Further, such a ruling would violate the case law (see section C. Case law, above) which emphasizes that section 15 of the CEAA grants RAs wide latitude to scope projects in the manner they deem appropriate on a case-by-case basis.
>
> [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:

> 284 Once a tracking decision had been made requiring the project to undergo a comprehensive study, it is my view that the RAs did not have the discretion to re-scope the project in such a manner as to avoid the public consultation implications of section 21. …
>
> [Emphasis added.]

[61] Indeed, he stated at paragraph 2 of his order, reproduced at paragraph 27 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 re-scope 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 regards 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 329 of the *Federal Courts Act*.

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

"Alice Desjardins"
J.A.

"I agree.
J. Edgar Sexton J.A."

"I agree.
John M. Evans J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-478-07 A-479-07
STYLE OF CAUSE:	Minister of Fisheries and Oceans, et al. v. MiningWatch Canada
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 15, 2008
REASONS FOR JUDGMENT BY:	DESJARDINS J.A.
CONCURRED IN BY:	SEXTON J.A. EVANS J.A.
DATED:	June 13, 2008

APPEARANCES:

Ward Bansley Donnaree Nygard	For the appellants Minister of Fisheries and Oceans, Minister of Natural Resources and Attorney General of Canada
Brad Armstrong Jude Samson	For the appellants Red Chris Development Company Ltd. and bcMetals Corporation
Lara Tessaro Sean Dixon	For the respondent MiningWatch Canada

SOLICITORS OF RECORD:

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Ecojustice Canada Vancouver, B.C.	For the respondent MiningWatch Canada