

Old Puzzle, New Pieces

*Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment

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*I. Introduction*

Almost two decades after breaking jurisprudential ground respecting the federal government's jurisdiction to conduct environmental assessments (EA),<sup>1</sup> the Supreme Court of Canada recently – some might even say finally – rendered two decisions respecting the correct interpretation and application of Canada's current EA legislation, the *Canadian Environmental Assessment Act*.<sup>2</sup>

In *Miningwatch Canada v Canada (Fisheries and Oceans)* (known as *Red Chris*, after the name of the proposed project),<sup>3</sup> released in January 2010, the Court overturned over a decade of Federal Court of Appeal jurisprudence regarding the correct sequencing of the *CEAA* scheme. Prior to this decision, it was generally established that federal authorities with EA responsibilities under the Act had the discretion to determine the “scope” of the projects that would be subject to the federal EA process and consequently the level or “track” of EA (most often either a “screening” or the more rigorous “comprehensive study”) that would be required. The Court held that such an interpretation was untenable in light of the plain wording of the Act. Rather, it is the entire project as proposed by proponents that determines both the kind of EA that a project will undergo and also its minimum scope.

In *Quebec (Attorney General) v Moses* (hereafter *Vanadium*),<sup>4</sup> released in May 2010, the Court was primarily concerned with the potential conflict between the *CEAA* and the *James Bay and Northern*

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<sup>1</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*].

<sup>2</sup> SC 1992, c 37 C-15.2, as amended [*CEAA*].

<sup>3</sup> 2010 SCC 2, [2010] 1 SCR 6 [*Red Chris*].

<sup>4</sup> 2010 SCC 17, [2010] 1 SCR 557 [*Vanadium*].

*Quebec Agreement (JBNQA)*.<sup>5</sup> The Province of Quebec intervened early in the proceedings, however, resulting in the certification of a constitutional question raising the applicability of the *CEAA* and its regulations to a proposed vanadium mine in territory covered by the *JBNQA*, construction and operation of which was expected to impact fish and fish habitat. While recognizing that such projects fall within provincial jurisdiction under section 92A of the *Constitution Act, 1867*, the Court observed that any project in Canada that puts fish habitat at risk cannot proceed without a permit from the federal Fisheries Minister. Moreover, the Minister may not issue a permit until after the completion of an EA of the mine pursuant to the *CEAA*. In the Court's opinion, there was nothing unconstitutional about this result.

Both decisions – and *Red Chris* especially – have been lauded by environmental groups as reaffirming a broad role for the federal government in the assessment of natural resource projects,<sup>6</sup> a role some would argue was firmly established in *Friends of the Oldman River v Canada (Minister of Transport)*<sup>7</sup> only to be progressively eroded by decades of Federal Court and Federal Court of Appeal jurisprudence.<sup>8</sup>

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<sup>5</sup> The federal legislation implementing the *JBNQA* is the *James Bay and Northern Quebec Native Claims Settlement Act*, SC 1976-77, c 32. The Agreement is implemented in Quebec through the *Act approving the Agreement concerning James Bay and Northern Québec*, RSQ, c C67.

<sup>6</sup> Counsel for MiningWatch Ecojustice, Press Release (22 December 2010) online: <<http://www.ecojustice.ca/media-centre/press-releases/supreme-court-of-canada-gives-public-a-voice-on-major-industrial-projects>>. The Sierra Club of Canada, on the other hand, issued a more subdued response bearing in mind that the SCC allowed the unlawful screening EA to stand: "Sierra Club Canada is disturbed that today's Supreme Court of Canada's decision allows the Red Chris mine in British Columbia to go ahead despite acknowledging the federal government violated the [*CEAA*]. While Sierra Club Canada is pleased that the Supreme Court reaffirmed Canada's environmental laws, we are concerned that the Red Chris mine will be allowed despite avoiding a rigorous assessment" (22 December 2010) online: <<http://www.sierraclub.ca/en/media/release/still-no-justice-environment-canada>>.

<sup>7</sup> In application upon application before the Federal Court and Court of Appeal, environmental groups consistently argued that *Oldman River* provided for a broad federal role in EA; see text accompanying note 42. But see *contra* Mark Warkentin, *Friends of the Oldman River Society v Canada (Minister of Transport)* (1992) 26 UBC L Rev 313 at 327: "By locating environmental jurisdiction within existing powers, the Court appears to have put an end to speculation about a broader role for the federal government in environmental regulation."

<sup>8</sup> This jurisprudence is discussed in Part 2 B. See also Meinhard Doelle, "The Implications of the SCC *Red Chris* Decision for EA in Canada" (2010) 20 J Envtl L & Prac 161 at 162; Shaun Fluker "MiningWatch Canada v Canada (Fisheries and Oceans: Hoisted on One's Own Petard?)" (2010) 20 J Envtl L & Prac 151.

Others might suggest a more nuanced view of the two decisions, recognizing that many of the lower courts' difficulties can be traced back to certain inconsistent passages from *Oldman River* that have never been adequately resolved. Whatever the case, following *Red Chris and Vanadium*, there appears to be no general legal barrier, whether administrative or constitutional, that would prevent the federal government from assessing the environmental impacts of resource projects in their entirety, rather than simply those aspects or components of such projects which require federal funding or regulatory approval.

To the extent that these decisions are considered victories,<sup>9</sup> however, they may be short-lived. As was the case with *Oldman River*, these two decisions come at a time when the current federal EA regime is under severe scrutiny; a significant seven-year parliamentary review slated to begin in June of 2010 is now expected to commence in 2011.<sup>10</sup> Moreover, the federal government has already introduced and passed legislation which effectively reverses the *Red Chris* decision. Tucked away in Part 20 of the 2010 budget implementation legislation,<sup>11</sup> the so-called *Jobs and Economic Growth Act (JEGA)*, lies section 15.1, an amendment to the *CEAA* which explicitly grants the Minister of the Environment the power to scope projects down to their components in circumstances as yet unspecified. The *JEGA* also scaled down public participation in the comprehensive study process.<sup>12</sup>

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<sup>9</sup> Even the Canadian Environmental Assessment Agency seemed to find a bright line in the *Red Chris* decision, stating that it "provides clarity to responsible federal authorities and will contribute to a more timely overall environmental assessment and regulatory process"; see Agency Website (1 November 2010) online: <<http://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=2A4FCC42-3F54-4BA1-9F2F-DE714DF8D1D4>>.

<sup>10</sup> The Standing Committee on Environment and Sustainable Development review of the *CEAA* is anticipated in either February or March of 2011; the delay is attributable to the lengthy review of Bill C-649. Email correspondence to author from Clerk of the Standing Committee on Environment and Sustainable Development GL Desforges, December 13th, 2010.

<sup>11</sup> Bill C-9, *An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures*, given Royal Assent 12 July 2010, SC 2010, c12 [*JEGA*].

<sup>12</sup> For a critical commentary of the changes brought about by the *JEGA*, see Adam Driedzic and Laura Bowman, "Now You CEAA- It, Now You Don't" *Environmental Law Centre Blog*, (22 December 2010) online: <<http://environmentallawcentre.wordpress.com/2010/04/09/now-you-ceaa-it-now-you-dont/>>; Robert B. Gibson, "Three Analyses of the Amendments to the Canadian Environmental Assessment Act made through the Budget Implementation Act 2010" (2010) 51 *CELR* (3d) 184.

Both decisions, however, have implications that transcend the immediate legislative context, and it is those implications that are the subject matter of this article. In Part 2, we provide the background necessary to properly situate these two decisions: a brief overview of the *CEAA* scheme as previously understood and a summary of the Federal Court and Court of Appeal jurisprudence that sustained that interpretation. Part 3 focuses on the *Red Chris* and *Vanadium* decisions themselves, beginning with a summary of the facts and issues in each case, including their treatment in the lower courts.

In Part 4, we suggest that *Red Chris* and *Vanadium* represent a departure from the Supreme Court's previous, more contextual, approach to environmental law issues – arguably a negative development, particularly if the trend continues. In spite of this, when viewed in their full context both *Red Chris* but especially *Vanadium* constitute subtle but important advancements in Canadian environmental law and may provide some much needed clarity to the question of federal jurisdiction in the EA context.

## 2. The *CEAA* before *Red Chris* and *Vanadium*<sup>13</sup>

### A) The *CEAA* Scheme

The process and purpose of EA was succinctly summarized by La Forest J in *Oldman River*:

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making...

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.... In short, environmental impact assessment is simply descriptive of a process of decision-making.<sup>14</sup>

Although that decision was written in the context of the previous federal EA regime, the *Environmental Assessment and Review Process Guidelines Order* (*EARPGO*),<sup>15</sup> in the subsequent *CEAA* Parliament retained this two-step decision-making process. The basic framework was well summarized

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<sup>13</sup> What follows is a simplified overview of the *CEAA* scheme. Readers interested in a more detailed overview are referred to Beverly Hobby *et al*, *Canadian Environmental Assessment Act – An Annotated Guide* (Aurora: Canada Law Book, 2008 (updated)); and Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide And Critique* (Markham: LexisNexis, 2008).

<sup>14</sup> *Oldman River*, *supra* note 1 at para 103.

<sup>15</sup> SOR/84-467 [*EARPGO*].

by the federal Court of Appeal in *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*:

... First, the responsible authority must decide whether the Act applies to the project and if it does, which type of environmental assessment applies. The next step is the conduct of the assessment itself. Following the assessment, the responsible authority makes a decision as to whether or not to allow the project to proceed. The final step is the post-decision activity which includes ensuring that mitigation measures are being implemented and giving public notice concerning the responsible authority's course of action.<sup>16</sup>

Pursuant to section 5, a federal EA of a “project”<sup>17</sup> is required when a “federal authority”<sup>18</sup> (FA) does one of the following for the purposes of enabling a project, whether in whole or in part:

- (a) is the proponent;
- (b) provides any form of financial assistance to the proponent, subject to certain exemptions;
- (c) sells, leases or otherwise disposes of federal lands or any interests in those lands, including a transfer of administrative responsibility to a province; or
- (d) under a provision prescribed by regulations made pursuant to section 59 issues a permit or licence, grants an approval or takes any other action listed there.<sup>19</sup>

The regulations referred to in paragraph 5(1)(d) are called the *Law List Regulations*<sup>20</sup> and reference specific sections of eighteen statutes, the application of which “triggers” a federal EA. For example, an approval for works that interfere with navigation pursuant to section 5 of the *Navigable Waters Protection Act*<sup>21</sup> is a “Law List trigger,” as are numerous provisions

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<sup>16</sup> [2001] 2 FC 461 at para 19.

<sup>17</sup> Project is a defined term pursuant to s 2:

“project” means (a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or (b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b).

<sup>18</sup> Federal authority is also a defined term pursuant to s 2. Generally, it means federal ministers, departments and agencies.

<sup>19</sup> This is a simplified summary of the actual wording; see s 5.

<sup>20</sup> SOR/94-636 [Law List].

<sup>21</sup> RS, 1985, c N-22 [NWP].

under the federal *Fisheries Act*,<sup>22</sup> including an authorization for works and undertakings that are likely to result in the harmful alteration, disruption or destruction of fish habitat.<sup>23</sup>

Should an EA be required, section 11(1) of *CEAA* states that the FA referred to in section 5 becomes a “responsible authority” (RA)<sup>24</sup> in relation to that project and must ensure that an EA is carried out.<sup>25</sup>

The *CEAA* contemplates four levels of assessment, each of increasing vigour: screenings, comprehensive studies, mediations and panel reviews.<sup>26</sup> Especially relevant to this article are the differences which existed between the screening and comprehensive study tracks prior to the recent passage of *JEGA*. The latter provided for:

- (1) Mandatory public consultation at the outset and throughout the environmental assessment process (sections 21-23);
- (2) A government funding program to facilitate public participation in the environmental assessment process (section 58(1.1));
- (3) Determination by the Minister as to whether the environmental assessment should be conducted as a comprehensive study by the RA or be referred to mediation or to a review panel (section 21.1);
- (4) Assessment of the purpose of the project and consideration of alternative means of carrying out the project and the environmental effects of the alternatives (section 16(2));
- (5) A mandatory follow-up program (section 16(2));

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<sup>22</sup> RS, 1985, c F-14 [*Fisheries Act*].

<sup>23</sup> *Ibid* s 35(2). Commonly referred to as a Harmful Alterations, Disruptions or Destruction (HADD) authorization, this is one of the most common triggers of the federal EA process.

<sup>24</sup> Responsible authority is also a defined term in s 2: “in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted.”

<sup>25</sup> Where there is more than one RA, as is often the case, s 12 provides that these shall together determine the manner in which to perform their duties and functions (to conduct an environmental assessment) under this Act and the regulations; see also *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181.

<sup>26</sup> In *Red Chris*, *supra* note 3 at para 14, Rothstein J suggested that “no assessment” is also a track. Readers should also note that there has never been a mediation under the *CEAA*.

(6) Consideration of the capacity of affected renewable resources to meet present and future needs (section 16(2)).<sup>27</sup>

Both screenings and comprehensive studies are examples of the “self-assessment” principle, wherein the department proposing to exercise a duty or function assesses the project themselves.<sup>28</sup> Panel reviews, on the other hand, are assessments carried out by independent expert bodies, often jointly with another jurisdiction. Most oil sands projects, for example, undergo joint panel review with members of Alberta’s Energy Resource Conservation Board (ERCB).

Pursuant to section 18, screenings are the presumptive EA track unless a project is either described on the *Comprehensive Study List Regulations* (CSL),<sup>29</sup> in which case a comprehensive study is required, or is excluded by the *Exclusion List Regulations* (ELR)<sup>30</sup>:

18(1) Where a *project* is not described in the Comprehensive Study List or the exclusion list made under paragraph 59(c), the [RA] shall ensure that (a) a screening of the project is conducted; and (b) a screening report is prepared.<sup>31</sup>

While each of the different EA tracks has its own specific requirements, most of an RA’s or panel’s duties with respect to an EA are outlined in sections 14 to 17. Section 14 sets out the elements of the EA process (an EA, a report and, where applicable, the implementation of follow-up programs). Section 15 gives RAs or, in the case of a panel review, the Minister of the Environment, the power to determine the “scope of the project” for the purposes of assessment. Section 16 gives those same persons the power to determine the “scope of factors” that shall be considered in the EA (usually referred to as the “scope of the assessment”), while section 17 authorizes the delegation of these tasks to third parties.

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<sup>27</sup> These differences were canvassed by Rothstein J in *Red Chris*, *supra* note 3 at para 18.

<sup>28</sup> This aspect of the *CEAA* has been criticized as tantamount to “allowing the fox to guard the hen house,” especially by those who consider federal departments vulnerable to industry capture; see Ted Schrecker, “The Canadian Environmental Assessment Act: Tremulous Step Forward, or Retreat into Smoke and Mirrors?” (1991) 5 CELR 192.

<sup>29</sup> SOR/94-638. This regulation-making power is reserved for projects which, in the Minister’s opinion, are likely to result in significant adverse environmental effects; *CEAA*, *supra* note 2 s 58(1).

<sup>30</sup> In order to be *intra vires* this regulation-making power, the Minister must have formed an opinion that these projects are unlikely to result in significant adverse effects; see *CEAA*, *supra* note 2 at s 59(c).

<sup>31</sup> *CEAA*, *ibid*, s 18.

Prior to *Red Chris* and *Vanadium*, the approach of federal RAs was that the “project” referred to in section 18 was not necessarily the entire development proposal submitted by a proponent (a mine, for example) but rather the “project as scoped” by RAs or the Minister pursuant to section 15.<sup>32</sup> Under this approach, many development proposals that would have otherwise required comprehensive studies did not, especially as federal departments increasingly – although not uniformly – embraced an approach known as “scoping to trigger.” This practice involved separating a development proposal into a list of components and then only “scoping-in” those which required federal regulatory approval or funding (for example, a dam and stream crossing for a mine access road that require *Fisheries Act* authorization, as opposed to an entire mine which, because it includes a dam and stream crossing, requires authorizations). As a result of this approach, scoping became one of the most contentious and litigated steps in the *CEAA* process.<sup>33</sup>

Once an EA is complete, a report must be prepared and a two-step “course of action” taken pursuant to either section 20 or section 37 (section 20 for screenings, section 37 for both comprehensive studies and panel reviews). The first step is a determination by RAs as to the project’s likelihood to cause “significant adverse environmental effects” (SAEEs) after taking into account any appropriate mitigation measures. If SAEEs are deemed not likely or likely but justified in the circumstances, the funding or authorization (or both) that triggered the *CEAA* can be issued. If the SAEEs cannot be justified then no authorization or approval can be issued, no funding will be forthcoming and the project – at least in its current form – will stall.<sup>34</sup>

Finally, where RAs rely on mitigation measures in making the SAEEs determination, the *CEAA* imposes an obligation to ensure or at least be

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<sup>32</sup> This approach was approved by the Federal Court of Appeal in *Friends of the West Country Ass’n v Canada (Minister of Fisheries and Oceans)* [2000] 2 FC 263 [Sunpine].

<sup>33</sup> Canada’s Commissioner of the Environmental and Sustainable Development (CESD) recently put it this way: “Responsible authorities have the discretion to establish a project’s scope according to their mandate or responsibilities. ... This discretion has been periodically challenged and appealed in court;” see *CESD*, 2009 Fall Report, Chapter 1 – Applying the Canadian Environmental Assessment Act, (1 November 2010) online: <[http://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200911\\_01\\_e\\_33196.html#hd5e](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200911_01_e_33196.html#hd5e)>.

<sup>34</sup> Under provincial regimes, the province essentially approves or disapproves of a project. Under the federal scheme, the government can merely refuse to issue certain approvals or provide funds. If the proponent can find a lawful way to carry out their project without the need for either federal funding or authorization, then it may proceed without these.



satisfied of their implementation.<sup>35</sup> Thus, where entire projects as proposed by proponents rather than as scoped by the RAs were assessed, the federal government had to consider a much broader set of mitigation measures. The practical implications of this distinction were obvious to all stakeholders and further raised the stakes in scoping.<sup>36</sup>

*B) Scoping: A Constitutional and/or Administrative Imperative?*

To the uninitiated, it might appear that Canadian courts have allowed what seems like a circumvention of the *CEAA*, and the *CSL* in particular, for over a decade. Behind this willingness, however, lay a general concern for some kind of proportionality, or nexus, between the triggering federal power and the federal government's consequent involvement in project EA and management, a preoccupation that finds some support in certain contradictory passages from *Oldman River*:

This preoccupation may have been first expressed in *Manitoba's Future Forest Alliance v Canada (Minister of the Environment)*<sup>37</sup> (*Tolko*), where the question was whether an EA triggered by an application for a section 5 *NWPA* approval for a bridge should also include within its scope the forestry operation that the bridge was intended to serve. Nadon J adopted the respondent forestry company's concerns:

What happens if a city within Canada, or a province for that matter, decides to build a bridge? When they seek approval under section 5 of the *NWPA*, does everything that city or province does become one big "project" which must be environmentally assessed under the *CEAA*? Surely not, but this might well be the result if the Applicants' arguments are accepted. Unless the environmental assessment is connected with the regulatory authority which triggers the *CEAA*, there is simply no

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<sup>35</sup> Through the combined operation of ss 20(1.1) and 20(2) (for screenings) and s 37(2)-37 (2.2) (for comprehensive panels and reviews), mitigation measures that are taken into account must fall into one of two categories: (a) those whose implementation the RA can ensure, in which case it is not limited to its duties or powers under any other Act of Parliament; and (b) those that it is satisfied will be implemented by another person or body. In addition, where projects have undergone comprehensive studies or panel reviews, RAs must design follow up programs, the purpose of which is to verify the effectiveness of mitigation measures or to implement adaptive management measures: see *CEAA*, *supra* note 2, s 38.

<sup>36</sup> See *Environmental Resource Centre v Canada (Minister of Environment)* 2001 FCT 1423, (2001), 214 FTR 94 at para 157, where the Federal Court precluded the federal government from relying on mitigation measures proposed by Alberta because they were measures over which the former had no control.

<sup>37</sup> [1999] FCJ No 903 (TD), (1999) 30 CELR (NS) 1 at para 86.

reasonable limit placed on what the responsible authority in any given case would have to consider.<sup>38</sup>

Thus, the notion of limits on the scope of the project for federal purposes appears to have initially been driven by administrative law concerns.

It was in *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans) (TrueNorth I)*<sup>39</sup> and *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*<sup>40</sup> (*TrueNorth II*) that such concerns took on a distinctively constitutional flavour. The development proposal at issue was the Fort Hills oil sands mine, the construction of which required the de-watering – in effect the destruction – of Fort Creek, a fish-bearing tributary of the Athabasca River. This latter aspect required *Fisheries Act* section 35(2) authorization, thus triggering the *CEAA*. The Prairie Acid Rain Coalition sought judicial review of the Department of Fisheries and Oceans' (DFO) decision to "scope" the project as the destruction of Fort Creek, leaving out the oil sands operation and in so doing avoiding a comprehensive study.<sup>41</sup>

It is in this case that *Oldman River*'s internal inconsistencies were put on full display, as each side claimed support for its position in some passage from that decision. The Coalition argued that the general tenor of the decision foreshadowed a more expansive approach to federal EA, which would be thwarted by narrow scoping.<sup>42</sup> The proponent and Canada, on the other hand, cited the case as supporting the proposition that "when Parliament's involvement is the result of its jurisdiction over fisheries, it must focus on the environmental effects relevant to a consideration of whether to authorize the destruction of fish habitat."<sup>43</sup>

At the Federal Court, Russell J ultimately agreed with the respondents:

There are other aspects of the judgment of La Forest J. in *Oldman River*, that suggest there must be some link between the exercise of legislative power and an appropriate head of power:

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<sup>38</sup> *Ibid.*

<sup>39</sup> 2004 FC 1265, (2004), 257 FTR 212 [*TrueNorth I*].

<sup>40</sup> 2006 FCA 31, [2006] 3 FCR 610 [*True North II*], leave to appeal to the SCC denied; see *Prairie Acid Rain Coalition, Pembina Institute for Appropriate Development, and Toxics Watch Society of Alberta v Minister of Fisheries and Oceans of Canada, TrueNorth Energy Corporation*, (SCC) 2006-07-20.

<sup>41</sup> *TrueNorth I*, *supra* note 39 at para 17.

<sup>42</sup> *Ibid* at para 67.

<sup>43</sup> *Ibid* at para 139.

It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, *the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another*.<sup>44</sup>

In *Oldman River*, La Forest J in *obiter* went on to consider several different heads of power, including railroads and fisheries. He classified the former as jurisdiction over an “activity,” the latter as with respect to a “resource,” and then went on to suggest that there is a static, inherent and high-level difference between the two insofar as environment issues are concerned.<sup>45</sup>

Rothstein JA picked up on these passages in *TrueNorth II*, suggesting that limiting the scope of the project for federal EA purposes was necessary in order to respect constitutional limits:

The purpose of the [CSL] 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... *In this case, the oil sands undertaking is subject to provincial jurisdiction*. The CSL 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 SCR 3, at 7172...

... the subject of the environment is not one within the exclusive legislative authority of the Parliament of Canada. *Constitutional limitations must be respected and that is what has occurred in this case*.<sup>46</sup>

Thus, Rothstein JA considered Parliament’s jurisdiction over fisheries as “narrow” and that this limited the scope of the permissible federal EA. Confronted with the argument that such a limited inquiry would render a potential justification exercise difficult if not impossible,<sup>47</sup> Rothstein JA essentially unravelled the CEAA’s two-step decision-making process by endorsing the consideration of extrinsic information,<sup>48</sup> which is to say, information gathered in provincial EA processes over which RAs have no control.

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<sup>44</sup> *Ibid* at para 232 [emphasis added].

<sup>45</sup> *Oldman River*, *supra* note 1 at para 98. In Part 4, we argue that, following *Red Chris* and *Vanadium*, the use of such categorizations has been, or at least should be, abandoned in favour of the more practical approach taken in the latter decision.

<sup>46</sup> *True North II*, *supra* note 41 at paras 24-26 [emphasis added].

<sup>47</sup> *Ibid* at para 35; see discussion surrounding sections 20 and 37 in text associated with notes 33 to 36, *supra*.

<sup>48</sup> *Ibid* at para 38.

While undermining the credibility of any federal justification for SAE, this reliance upon information from other EA processes is perhaps not too problematic; as noted above, the *CEAA* contains provisions for delegating many parts of the EA process, including the actual assessment of environmental effects. More troublesome is Rothstein JA's implicitly lop-sided view of the division of powers, wherein the federal government is permitted to consider the benefits of "provincially regulated" activities but not their negative environmental consequences, contrary to the paradigm of "sustainable economic development" endorsed by the Court in *Oldman River*, which calls for the integration of economic, social and environmental factors.<sup>49</sup> Finally, with respect to the categorization of projects as provincial, *Oldman River* is inapposite; such an approach was deemed to be neither helpful nor doctrinally correct.<sup>50</sup>

Notwithstanding these deficiencies, *TrueNorth II* would have likely been the final word on scoping were it not for amendments which came into effect only after the Fort Hills EA had been commenced. As will be seen, these amendments set the stage for the judicial review application in *Red Chris*.

A final note on context. Readers might be surprised to know that notwithstanding *TrueNorth II*, Canada has not uniformly engaged in "scoping to trigger." As noted in the preceding section, the *CEAA* provides, and Canada does occasionally opt for, joint review panels (JRPs) with either provincial agencies (as in the case of Alberta's ERCB for oil sands projects) or other federal agencies (as in the case of the National Energy Board for interprovincial pipelines). As these two examples suggest, JRPs are generally reserved for what can be considered major resource projects. Notwithstanding the fact that often Canada's only trigger is a section 35(2) authorization, not once in such instances, where the projects are assessed in their entirety, has the EA process been challenged on constitutional grounds. Most recently, the federal government appointed a panel to assess the proposed Prosperity Gold-Copper Mine Project in British Columbia, which required permits under the *NWPA*, the *Fisheries Act*<sup>51</sup> and the

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<sup>49</sup> See discussion of *Oldman River*, *infra* Part 4 A.

<sup>50</sup> *Oldman River*, *supra* note 1 at para 99:

What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation.

We return to this passage in Part 4.

<sup>51</sup> RSC 1985, c F-14.

*Explosives Act*.<sup>52</sup> Even though the province had already completed its own separate assessment, the federal panel reviewed the project in its entirety, ultimately concluding that it was likely to result in significant adverse environmental effects on several fronts. Subsequently, the mine was not granted the federal authorizations it required to proceed.<sup>53</sup>

### 3. *Red Chris and Vanadium*

#### A) *Summary of the Facts and Decisions Below*

*Red Chris* was the first *CEAA* case to come down from the Supreme Court of Canada that squarely addressed the EA process as its central issue.<sup>54</sup>

##### 1) *Red Chris*

In the fall of 2003, Red Chris Development Corporation (RCDC) submitted a project description to the British Columbia Environmental Assessment Office (BCEAO) for a copper-gold mine in the Tahltan traditional territory of north-western British Columbia.<sup>55</sup> The proposed mine and on-site mill were slated to employ 250 full time individuals and produce 27,500 tonnes of ore per day for some twenty-five years.<sup>56</sup> Along with the open pit mine, the \$230 million dollar RCDC proposal includes a tailings impoundment area (TIA), access roads and power supply infrastructure, and water supply associated works.<sup>57</sup>

The required provincial EA, under BC's *Environmental Assessment Act*,<sup>58</sup> was undertaken in accordance with terms of reference, and public

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<sup>52</sup> RSC 1885, c E-17.

<sup>53</sup> For a copy of the panel's report and the government's response, see the *CEAA* registry website: <<http://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=44811>>.

<sup>54</sup> Several cases which reached the Supreme Court of Canada addressed the relationship between the EA process and the Crown's duty to consult aboriginal peoples. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

<sup>55</sup> Imperial Metals Corporation, "Red Chris" (11 July 2010) online:<<http://www.imperialmetals.com/s/RedChris.aspx>>.

<sup>56</sup> TechnoMine, "Red Chris Mine" online: <<http://technology.infomine.com/articles/1/1915/legal.gold.canada/red.chris.mine.aspx>>.

<sup>57</sup> BC Environmental Assessment Office, "Public Comment Invited On The Application For The Red Chris Porphyry Copper-Gold Mine Project" (18 November 2004) online: <[http://a100.gov.bc.ca/appsdata/epic/documents/p238/110082408066\\_af749c9fd47c4621832ee01ee3ab7e63.pdf](http://a100.gov.bc.ca/appsdata/epic/documents/p238/110082408066_af749c9fd47c4621832ee01ee3ab7e63.pdf)>.

<sup>58</sup> SBC 2002, c 43.

comment on the project was requested and received.<sup>59</sup> By August of 2005, the province issued an assessment certificate having concluded that the project was “not likely to cause significant adverse environmental, heritage, social, economic or health effects.”<sup>60</sup>

In May of 2004, with the provincial EA process already underway, RCDC applied for *Fisheries Act* section 35(2) authorizations for dams required to create its TIA,<sup>61</sup> the operation of which also required an amendment to the *Metal Mining Effluent Regulations*.<sup>62</sup> Thus, the *CEAA* process was triggered pursuant to sections 5(1)(d) and 5(2) of the Act. In an initial “Notice of Commencement,” DFO described the project as including the open pit mine as well as associated infrastructure – including the TIA and water intake. Shortly thereafter, DFO and Natural Resources Canada (NRCan),<sup>63</sup> as joint RAs, informed the Canadian Environmental Assessment Agency (the Agency) that, because the proposed mine exceeded thresholds in the *CSL*, they would conduct a comprehensive study of the project.

In December of 2004, however, shortly after the Federal Court’s decision in *TrueNorth I* (which affirmed the “scoping to trigger” approach), DFO further advised the Agency that it was changing the scope of the project and confining it to the TIA, the water diversion systems, and those structures related to explosives. As a result, DFO concluded that only a screening of the project was necessary and not a comprehensive study. In May of 2006, the RAs concluded that the project (as re-scoped) was not likely to result in SAEs.

MiningWatch Canada filed an application for judicial review the following month, alleging that a comprehensive study and consequent consultation with the public regarding the scope of the project and assessment were both required. MiningWatch’s argument was rooted in the 2003 amendments<sup>64</sup> which changed the comprehensive study provisions as follows:

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<sup>59</sup> *Ibid.*

<sup>60</sup> For a copy of the certificate see online: <[http://a100.gov.bc.ca/appsdata/epic/documents/p238/1124988712862\\_7111ec0fb6c844f4b96ea79488c3fd2f.pdf](http://a100.gov.bc.ca/appsdata/epic/documents/p238/1124988712862_7111ec0fb6c844f4b96ea79488c3fd2f.pdf)>.

<sup>61</sup> Readers interested in DFO’s rationale for occasionally authorizing the use of natural, fish-frequented waters for tailings disposal are directed online to: <<http://www.dfo-mpo.gc.ca/habitat/role/141/1415/14156-eng.htm>>.

<sup>62</sup> SOR/2002-222 [*MMER*].

<sup>63</sup> NRCan was added as an RA in June of 2004 due to the required approval from that department under the *Explosives Act*, *supra* note 52.

<sup>64</sup> *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2007 FC 955, [2008] 3 FCR 84 at paras 189 and 190 [*Red Chris FC*]. See also MiningWatch’s

Pre Bill C-9	Post Bill C-9
21(1)Where a project is described in the comprehensive study list, the RA shall (a) ensure that a comprehensive study is conducted, and a comprehensive study report is prepared and provided to the Minister and the Agency:...	21(1) Where a project is described in the comprehensive study list, the [RA] shall ensure public consultation with respect to the <i>proposed scope of the project for the purposes of the environmental assessment...</i>

Essentially, MiningWatch argued that the use of the term “proposed scope,” added to section 21 by Bill C-9, meant that public consultation must take place prior to the actual scoping decision and that therefore the track determination must also precede the scoping decision. In reply, Canada and RCDC argued that it was well established that RAs have the power to scope projects for the purposes of the *CEAA*, and that nothing in the 2003 amendments was intended to change that.<sup>65</sup>

At the Federal Court, Martineau J agreed with MiningWatch and quashed the permits and approvals issued by DFO and NRCan.<sup>66</sup> In his opinion, a review of the applicable sections of *CEAA*, including the 2003 amendments, made it clear that once a comprehensive study has been triggered, Parliament intended for the mandatory provisions of section 21 to apply<sup>67</sup> and that in the case of the Red Chris mine a comprehensive study was properly triggered.

The Federal Court of Appeal allowed Canada’s appeal, holding that its previous decisions in *Sunpine* and *TrueNorth II* prevailed notwithstanding the 2003 *CEAA* amendments.<sup>68</sup> Desjardins JA observed that the introductory part of section 21(1) had not been altered by the 2003 amendments (“Where a project is described...”) and consequently there was no reason to assume that the prior courts’ analysis of those sections would have been any different.<sup>69</sup> It was therefore within the RAs’

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Factum before the Supreme Court of Canada, at para 62, cited online: <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/fac-mem-eng.aspx?cas=32797>> [SCC website].

<sup>65</sup> *Red Chris* FC, *ibid* at para 195. See also Canada’s Factum before the Supreme Court, *ibid* at paras 52-116.

<sup>66</sup> *Red Chris* FC, *ibid* at para 274; see in particular ss 2,5,13,14,15, 16,18 and the new s 21.

<sup>67</sup> *Ibid* at para 171.

<sup>68</sup> *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)* 2008 FCA 209, [2009] 2 FCR 21 [*Red Chris FCA*].

<sup>69</sup> *Ibid* at paras 52 and 53.

discretion to scope and consequently determine the level of assessment required at the Red Chris mine. Lending credence to constitutional concerns, Desjardins JA explained that such an approach ensured that “[t]he issues that are brought to the public’s attention in the consultation process [as required by section 21(1)] are consequently *those that come under federal jurisdiction*.”<sup>70</sup>

Bearing in mind this and similar passages in *TrueNorth I* and *II*, one might have expected the Supreme Court to certify a constitutional question when it granted MiningWatch leave to appeal, but neither party filed such a question.<sup>71</sup> The issue brought to the Supreme Court thus appeared to be strictly one of statutory interpretation: whether the requirements of section 21 and the scoping powers under section 15 were such that an RA could describe a project so as to avoid a comprehensive study trigger under the *Comprehensive Study List*.<sup>72</sup> In the words of Shaun Fluker, “... [W]hat comes first: scoping the project or tracking the category of environmental assessment?”<sup>73</sup>

## 2) Vanadium

In May 1999 and then again in 2003, then-proponent McKenzie Bay International Ltd forwarded to the Quebec Minister of the Environment a proposal for a vanadium mine at Lac Doré, Quebec, near the town of Chibougamou. The reserves at Lac Doré are estimated at 10 million tonnes. As the only such mine in North America, its targeted production would correspond to twelve percent of world consumption with a life span of more than forty years.<sup>74</sup>

Chibougamou, and Lac Doré, are situated on “Category III” lands as defined under the *JBNQA*. Consequently, the vanadium mine proposal was required to undergo assessment pursuant to section 22 of that Agreement. More specifically, as a project predominantly “provincial” in nature, it would undergo the provincial assessment process under the *JBNQA*.<sup>75</sup>

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<sup>70</sup> *Ibid* at para 54 [emphasis added].

<sup>71</sup> MiningWatch did seek to compel the federal government to file a notice of constitutional question if it was going to invoke constitutional limits to buttress its interpretation, but this motion was dismissed by the Federal Court of Appeal; see *Canada (Fisheries and Oceans) v MiningWatch Canada*, 2008 FCA 166, (2008), 379 NR 130.

<sup>72</sup> For case comments dealing exclusively with *Red Chris*, see Fluker, *supra* note 8; Doelle, *supra* note 8.

<sup>73</sup> Fluker, *ibid* at 157.

<sup>74</sup> *Moses c Canada (Procureur général)*, 2006 QCCS 1832 (Que Sup Ct) at para 7 [*Vanadium QSC*].

<sup>75</sup> All the parties seemed to agree that, at the very least, a provincial process under the *JBNQA* was required; see *Vanadium QSC*, *ibid* at para 148.



Because the project also required *Fisheries Act* section 35(2) authorization, however, Canada was of the view that a *CEAA* assessment was also required. The Northern Quebec Cree disagreed and suggested instead that in such instances both the federal and provincial processes under the *JBNQA* applied – notwithstanding the explicit “one assessment” principle espoused by that Agreement.<sup>76</sup>

The Cree then brought an application for judicial review before the Quebec Superior Court, arguing that the *CEAA* process conflicted with the process under section 22 of the *JBNQA* and was therefore not applicable. The Province of Quebec intervened in support of the Cree but with its own argument, which it only fully developed at the Quebec Court of Appeal. There, Quebec argued that although the *CEAA* replaced the *EARPGO* regime questioned in *Oldman River*, this did not negate the Supreme Court’s analysis in that case. More specifically, Quebec argued that the requirement under the *EARPGO* for an “affirmative regulatory duty” for the purposes of triggering the federal EA process was a constitutional – rather than merely administrative – imperative that had to be respected when applying the *CEAA*.<sup>77</sup> Recalling that section 35(2) of the *Fisheries Act* was found to not constitute such a duty in *Oldman River*, Quebec argued that this “*ad hoc* legislative power”<sup>78</sup> was similarly insufficient, from a constitutional perspective, to justify a comprehensive study of an entire mining project under the *CEAA*.

In reply, Canada argued that the need for an “affirmative regulatory duty” was a matter of statutory interpretation specific to the *EARPGO* regime that, under the *CEAA*, had been replaced by the Law List.<sup>79</sup> Relying on its approach pre-*Red Chris*,<sup>80</sup> Canada further argued that the *CEAA* scheme, including the discretion to scope projects on a case by case basis, ensured a sufficient link between the EA process and federal jurisdiction with respect to the environment.

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<sup>76</sup> Section 22.6.7 of the *JBNQA* provides that “a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada.”

<sup>77</sup> See *Vanadium QSC*, *supra* note 74 at para 64. The same argument was made before the Supreme Court of Canada; see Quebec’s Factum at paras 21 and 50-71, SCC website, *supra* note 64.

<sup>78</sup> *Oldman River*, *supra* note 1 at para 67.

<sup>79</sup> See *Vanadium QSC*, *supra* note 74 at paras 64-68; see also Canada’s Factum before the Supreme Court of Canada at para 67, SCC website, *supra* note 64.

<sup>80</sup> Although *Red Chris* was released before *Vanadium*, the latter was actually heard first by the Supreme Court, in June of 2009. The *Red Chris* hearing occurred in the fall of 2009.

Benard J of the Quebec Superior Court decided the matter on the basis that there existed a conflict between *CEAA* and the *JBNQA*, and that the latter prevailed.<sup>81</sup> After further analyzing the Agreement and *dicta* from the Federal Court of Appeal's decision in *Eastmain Band v Canada*,<sup>82</sup> she held that the nature of the *project*, as a matter of either provincial or federal jurisdiction, must have priority over the *effects* of the project in determining federal involvement.<sup>83</sup> Because this conclusion was sufficient to dispose of the case, Quebec's constitutional argument was not considered.

At the Quebec Court of Appeal,<sup>84</sup> Quebec re-oriented its argument to raise the constitutional applicability of the *CEAA* as the primary issue. Pelletier JA for a unanimous court, acknowledged at the outset that "[the] application of environmental assessment acts in the Canadian context poses both constitutional and administrative problems,"<sup>85</sup> but ultimately concluded that "a reading of the federal legislative and regulatory provisions leads the Court to conclude that there is a valid trigger that obliges the Federal Government to initiate an environmental assessment procedure."<sup>86</sup> He then held that although the *CEAA* was triggered, its procedures were to be substituted with the procedures of the federal assessment process under the *JBNQA*,<sup>87</sup> with the practical effect that the Vanadium mine would be subject to both the provincial and federal review procedure under the *JBNQA*. Such an approach "[took] into account the critical importance of the protection of the environment as a fundamental value in Canadian society."<sup>88</sup>

Quebec sought and was granted leave to appeal to the Supreme Court of Canada, and the following constitutional question was certified: "Are the *Canadian Environmental Assessment Act* and the Regulations made there under, constitutionally applicable to the project located on the territory contemplated by section 22 of the *James Bay and Northern Quebec Agreement*?"<sup>89</sup>

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<sup>81</sup> *Vanadium QSC*, *supra* note 74. As a result, the Vanadium mine did not fall under federal jurisdiction within the meaning of s 22.6.7 of the *JBNQA*. Only one EA was required.

<sup>82</sup> [1992] 1 FC 501 [*Eastmain*].

<sup>83</sup> *Vanadium QSC*, *supra* note 74 at para 169.

<sup>84</sup> *Moses c Canada (Procureur général)*, 2008 QCCA 741, (2008) 35 CELR (3d) 161 (QCA) [*Vanadium CA*].

<sup>85</sup> *Ibid* at para 5.

<sup>86</sup> *Ibid* at para 115.

<sup>87</sup> *Ibid* at para 201.

<sup>88</sup> *Ibid* at paras 200-202.

<sup>89</sup> SCC Order No. 32693 (December 12, 2008) available online: <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/dock-regi-eng.aspx?cas=32693>>.

*B) Red Chris and Vanadium at the Supreme Court of Canada**1) Red Chris*

As noted above, the fundamental issue considered by the Supreme Court in *Red Chris* was “whether the environmental assessment track is determined by the project as proposed by a proponent or by the discretionary scoping decision of the federal authority.”<sup>90</sup> After reviewing the facts and setting out the legislative scheme, Rothstein J (now sitting as a judge of the Supreme Court) set the stage for a curt analysis: “The duty of this Court is to interpret the Act based on its text and context.”<sup>91</sup>

Beginning with the definition of “project” in section 2,<sup>92</sup> and then moving on to the *CSL* itself,<sup>93</sup> Rothstein J concluded that where the *CEAA* refers to the term “project,” which it does over three hundred times,<sup>94</sup> it must be presumed to mean the “project as proposed by the proponent” and not the “project as scoped” by RAs.<sup>95</sup> Not only was this interpretation more consistent with the wording of the Act and associated regulations, it was also more in line with Parliament’s intent:

...The *CSL* includes classes of projects which the Minister has determined are likely to have significant adverse environmental effects (*CEAA*, s. 58(1)(i); *CSL*, Preamble). It would follow that by authorizing the Minister to make such regulations and thereby determine which projects require a comprehensive study, *Parliament intended the Minister to determine which projects did or did not require comprehensive study, not the RA*.<sup>96</sup>

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<sup>90</sup> *Red Chris*, *supra* note 3 at para 2.

<sup>91</sup> *Ibid* at para 27. This is a relatively short iteration of the “modern approach” to statutory interpretation espoused in *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at paras 21-22.

<sup>92</sup> *Red Chris*, *ibid* at para 28.

<sup>93</sup> *Ibid* at paras 30-31.

<sup>94</sup> *Ibid* at para 29.

<sup>95</sup> Interestingly, Rothstein J did not appear at all influenced by the wording of the 2003 amendments, and the new s 21 in particular.

<sup>96</sup> *Red Chris*, *supra* note 3 at para 33 [emphasis added]. In the commentary following *Red Chris*, some members of the private bar appeared to suggest that it is now the project as literally proposed, or submitted, by proponents that will determine the EA track and, consequently, the scope of the project for the purposes of section 15: “Project proponents now need to strategically consider how they submit project proposals to regulators on a go-forward basis. Proponents may attempt to limit the scope of proposals to the powers, duties or functions of each regulator;” see Shawn Denstedt, “‘Scoping to Triggers’ Approach Rejected by the Supreme Court of Canada,” online: (2010) Oslers <<http://www.osler.com/resources.aspx?id=19170>>. Such an interpretation, however, ignores one of the Court’s primary holdings – that Parliament has assigned the task of

Rothstein J then proceeded to discuss the issue of scoping. According to the Court, the project as proposed not only determines the EA track, but it also sets the minimum scope of the project for the purposes of section 15.<sup>97</sup> Thus, it is no longer open for federal departments to focus only on those components of a development proposal that required federal approval or funding. Although he agreed with Canada and RCDC that such an approach could lead to duplication,<sup>98</sup> Rothstein J noted that the *CEAA* had provisions for addressing this problem:

I should note that while, for federal environmental assessment purposes, a project will include the entire project as proposed, the RAs can, and should, minimize duplication by using the coordination mechanisms provided for in the Act. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments (subsections 58(1)(c) and (d)). Full use of this authority would serve to reduce unnecessary, costly and inefficient duplication. Cooperation and coordination are the procedures expressed in the *CEAA* (see section 12(4)).<sup>99</sup>

Having overruled two of his own previous decisions with barely a sentence and consequently squashing a decade-long understanding of the *CEAA*,<sup>100</sup> many in the environmental law bar expected Rothstein J to provide some guidance on the remaining steps in the process, or at the very least address some of the constitutional issues which so clearly influenced his prior decisions. Rothstein J did neither, leaving many to speculate that the answers would be provided in *Vanadium* where the constitutional issues were directly in play. Moreover, although agreeing to MiningWatch's request for a declaration on the correct interpretation of the *CEAA*, Rothstein J overturned Martineau J's order that a comprehensive study be completed and let the unlawful screening report stand.<sup>101</sup>

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determining the EA track to the Minister, not to RAs and therefore surely not to proponents. Indeed, and as acknowledged by those same commentators, most of the remainder of *Red Chris* instructs RAs on how to thwart proponent attempts at project-splitting.

<sup>97</sup> *Red Chris*, *supra* note 3 at para 39.

<sup>98</sup> *Ibid* at paras 23-24.

<sup>99</sup> *Ibid* at para 41.

<sup>100</sup> *Ibid* at para 26;

Red Chris and the government rely heavily on two prior Federal Court of Appeal decisions, *TrueNorth* and *Sunpine*. In reaching its conclusion, the Federal Court of Appeal also relied on these prior decisions. However, I am of the opinion that the approach of the Federal Court of Appeal and that advocated by Red Chris and the government cannot be sustained. *To the extent that the decisions relied on by Red Chris, the government and the Federal Court of Appeal are inconsistent with the analysis that follows, these reasons now govern* [emphasis added].

<sup>101</sup> *Ibid* at para 52.

## 2) Vanadium

In *Vanadium*, Binnie J for a narrow majority preceded his analysis of the CEAA-specific issues by first elaborating on the proposed mine's impacts on fish and fish habitat. The impact study "acknowledged a significant impact on fish habitat," including risks associated with the tailing ponds, and the fact that many water bodies would be lost as a result of the mine's development.<sup>102</sup> In its summary of the impact study, the proponent itself noted the following:

...The study area includes a walleye spawning ground in the Armitage River and several brook trout spawning grounds at the outfall of Audet Lake and in Wynne Creek. The Boisvert River has a habitat suitable for the reproduction of walleye. *Chibougamau Lake is of great importance to the region's residents and tourists, primarily for walleye fishing in the summer.*<sup>103</sup>

Binnie J also noted a general concern, on behalf of not only DFO but also other federal departments, about the sufficiency of the information provided by the proponent for the purposes of review.<sup>104</sup>

Having briefly set out this context, Binnie J began his analysis with a strong endorsement of the double aspects doctrine previously espoused by La Forest J in *Oldman River*. According to Binnie J:

There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under section 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the CEAA. *The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.*<sup>105</sup>

The Court then went on to explain the process that a proponent must undertake to obtain a *Fisheries Act* permit,<sup>106</sup> which in all cases will

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<sup>102</sup> *Vanadium*, *supra* note 4 at para 25.

<sup>103</sup> *Ibid* at para 25 [emphasis in original, citations omitted].

<sup>104</sup> *Ibid* at para 27.

<sup>105</sup> *Ibid* at para 36 [emphasis added].

<sup>106</sup> *Ibid* at para 49:

As stated, s 35(2) allows the Minister to set conditions upon which a person can engage in conduct otherwise prohibited by s 35(1)... In other words, s 35(2) allows the Minister to issue a permit to a person, like the proponent of the vanadium mine, to engage in conduct harmful to fish habitat that would otherwise contravene s 35(1) and expose the mine operator to serious consequences.

require compliance with the *CEAA*. Because the proposed vanadium mine would have an ore production capacity greater than 3,000 tons per day, it was covered by section 3 of the *CSL*, and section 16(a) of the Schedule. As such, “the assessment under the *CEAA* must comply with the ‘comprehensive study’ provisions, meaning that it requires public consultation and participation, among other procedures set out in the *CEAA* itself [citing *Red Chris*].”<sup>107</sup>

So ended the Court’s discussion of the *CEAA*. Those waiting since *Red Chris* for some further clarity, on either the administrative or constitutional front, were seemingly left waiting.

#### 4. Commentary

##### A) What Happened to the Contextual Approach?

For Canadian environmental lawyers and academics, one of the most striking features of the *Red Chris* and *Vanadium* decisions is not so much what they say, but what they fail to say. Until now, the Court has typically approached environmental law cases with what one author has described as an “enlightened contextual analysis,” an approach that “regularly [went] beyond the narrow legal question as raised by the parties and lower courts to a discussion of the important environmental law and policy context that inevitably affects the interpretation of the legal issues.”<sup>108</sup>

It was *Oldman River*, after all, which entrenched EA as an integral and necessary part of federal government decision-making.<sup>109</sup> Acknowledging at the outset the protection of the environment as “one of the major challenges of our time,”<sup>110</sup> La Forest J went on to lay the ground work for future constitutional relations on the environment, labeling it *sui generis* – “touching several of the heads of power assigned to the respective levels of government.”<sup>111</sup> While “constitutionally abstruse” and prone to overlap as well as uncertainty, La Forest J was rather prophetic in stating that “both levels of government may affect the environment, either by acting or not acting.”<sup>112</sup> With regard to the meaning of “environment,” La Forest J did

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<sup>107</sup> *Ibid* at para 40.

<sup>108</sup> Jerry V DeMarco, “Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law” (2004) 15 J Envtl L & Prac 1 at 7-8.

<sup>109</sup> Marie-Ann Bowden, “*Friends of the Oldman River Society v Canada et al*: Two Steps Forward, One Step Back” (1992) 56 Sask L Rev 209.

<sup>110</sup> *Oldman River*, *supra* note 1 at para 1.

<sup>111</sup> *Ibid* at para 93.

<sup>112</sup> *Ibid* at para 95

not “accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the ‘environment’ is a diffuse subject matter.”<sup>113</sup> He invoked the then groundbreaking work that followed the release of the “*Brundtland Report*” of the World Commission on Environment and Development<sup>114</sup> to expand the breadth of environmental assessment (and environmental law) to justify consideration of the impacts on social, economic, and cultural environments as well as highlighting their interconnectedness and (what was then referred to as) sustainable economic development.

In *Ontario v Canadian Pacific Ltd.*<sup>115</sup> the Court once again stepped back from the tenets of strict statutory interpretation and affirmed the unique nature of legislation aimed at environmental protection in the context of a review for vagueness under section 7 of the *Charter of Rights and Freedoms*.<sup>116</sup> After canvassing similar legislation in all of the provinces,<sup>117</sup> Gonthier J recognized that environmental problems do not lend themselves to precise codification.<sup>118</sup> Bearing in mind the “obvious” social importance of environmental protection, and because of the necessity to accommodate a wide range of environmentally harmful activities, the Court held that “a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime.”<sup>119</sup> Consequently, in protecting and pursuing environmental protection it is necessary that courts “take a more deferential approach” to *Charter* review when environmental health and property damage are at risk.<sup>120</sup>

The next, albeit controversial, development occurred in *Attorney General of Canada v Hydro-Quebec*<sup>121</sup> where, in an apparent bid to ensure that both federal and provincial governments have sufficient room to “affect the environment,”<sup>122</sup> the Court surprised, if not perplexed, most

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<sup>113</sup> *Ibid* at para 47.

<sup>114</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) [*Brundtland Report*].

<sup>115</sup> [1995] 2 SCR 1031 [*Canadian Pacific*].

<sup>116</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. In *Canadian Pacific*, CP argued that the prohibition under s 13(1)(a) of the *Ontario Environmental Protection Act*, RSO 1990, c E 19, was unconstitutionally vague.

<sup>117</sup> *Canadian Pacific*, *ibid* at para 42.

<sup>118</sup> *Ibid* at para 43.

<sup>119</sup> *Ibid* at para 52.

<sup>120</sup> *Ibid* at para 58.

<sup>121</sup> [1997] 3 SCR 213 [*Hydro-Quebec*].

<sup>122</sup> *Oldman River*, *supra* note 1 at para 95.

observers by upholding the *Canadian Environmental Protection Act*<sup>123</sup> on the basis of Parliament's criminal law power and not pursuant to its residual but also exclusive power to act in the interest of "peace, order and good government."<sup>124</sup> La Forest J seemed to place the constitutional cart behind the environmental horse when he stated "the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated" – in this case toxic substances.<sup>125</sup>

Heading into the new millennium, the Court directly addressed – and expressly adopted – a number of environmental and resource management principles to aid in the interpretation of legislation that was the subject of challenge<sup>126</sup> in both *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*<sup>127</sup> and *Imperial Oil Ltd. v Quebec (Minister of the Environment)*.<sup>128</sup>

In *Spraytech*, l'Heureux-Dube J noted that regulation of pesticide use by the Town of Hudson was consistent with international environmental law principles and policies and that as such could "help inform the contextual approach to statutory interpretation and judicial review."<sup>129</sup> Thus, the judgment incorporated the precautionary principle,<sup>130</sup> the value

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<sup>123</sup> SC 1999, c 33 [CEPA].

<sup>124</sup> The Court was unanimous in its support of the environment as a legitimate criminal public purpose within the rubric of s 91(27) of the *Constitution Act, 1867*; see *Hydro-Quebec*, *supra* note 121 at paras 127-30. See also Iacobucci J speaking for the minority (at para 43) who agreed regarding the legitimacy of purpose but not with regard to the requisite "prohibition backed by penalty" requirement of the criminal law necessary to uphold the impugned provisions of the CEPA. For a strongly worded criticism of the majority's approach, see David Beatty, "Canadian Constitutional Law in a Nutshell" (1998) *Alta L Rev* 605.

<sup>125</sup> *Hydro-Quebec*, *supra* note 121 at para 86.

<sup>126</sup> For an excellent description and discussion of these principles see Jerry DeMarco, "Building a Strong Foundation for Action: A Review of Twelve Fundamental Principles of Environmental and Resources Management Legislation" (2009) 19 *J Envtl L & Prac* 59, and Jerry DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law" (2007) 17 *J Envtl L & Prac* 159 [DeMarco, "What Could be Next"].

<sup>127</sup> 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*].

<sup>128</sup> 2003 SCC 58, [2003] 2 SCR 624 [*Imperial Oil*].

<sup>129</sup> *Spraytech*, *supra* note 127 at para 30, L'Heureux-Dubé J quoting her own judgment in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 70.

<sup>130</sup> *Spraytech*, *ibid* at paras 31-32, citing the expansive definition of the precautionary principle in the *Bergen Ministerial Declaration on Sustainable Development* (1990).



of sustainable development, and an indirect acceptance of the sustainability mantra to “think globally, act locally” through reference to the doctrine of subsidiarity.<sup>131</sup> Further, in the context of the precautionary principle’s tenets, the underlying objectives to limit pesticide use based upon alleged health risks associated with their non-essential use fit well under the principle of preventive action.<sup>132</sup>

In *Imperial Oil*, LeBel J opened his judgment with the statement that the case “arises out of the application of the polluter-pay statutory principle,”<sup>133</sup> a principle which he later acknowledged as “firmly entrenched in environmental law in Canada.”<sup>134</sup> The environmental objectives of Quebec’s *Environment Quality Act*<sup>135</sup> were included in the decision to assist the Court in its review of the Minister’s order and to assess the procedural fairness that applied to the Minister’s decision in the case. In the result, environmental priorities informed the exercise of the Minister’s discretion.<sup>136</sup>

Arguably, the high-water mark of Supreme Court environmental law decisions after *Oldman River* is *British Columbia v Canadian Forest Products Ltd*,<sup>137</sup> a case involving damages for a forest fire negligently caused by the forest company. Like the dissenting judgment of La Forest J in *R v Crown Zellerbach*,<sup>138</sup> Binnie J’s majority opinion is as significant as a blueprint for future litigation as it is for its appreciation of the relevant environmental concerns at issue. In the judgment, Binnie J restored the decision of the trial judge and limited the plaintiff’s entitlement to compensation based on the statement of claim. However, after reiterating the superordinate importance of environmental protection as a fundamental value along with the challenges of stewardship associated with ensuring a healthy and sustainable environment,<sup>139</sup> the Court acknowledged that “[t]he environment includes more than timber”<sup>140</sup> and considered several kinds of “environmental value” which may, in the proper circumstances, be compensable.<sup>141</sup> The Court then “opened the door” for the Crown to potentially seek damages for environmental loss in

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<sup>131</sup> *Ibid per* LeBel J at paras 53-54 and L’Heureux-Dubé J at paras 3-4.

<sup>132</sup> *Ibid* at para 31.

<sup>133</sup> *Imperial Oil*, *supra* note 128 at para 1.

<sup>134</sup> *Ibid* at para 23.

<sup>135</sup> RSQ, c Q2.

<sup>136</sup> *Imperial Oil*, *supra* note 128 at para 31.

<sup>137</sup> 2004 SCC 38, [2004] 2 SCR 74 [*Canfor*].

<sup>138</sup> [1988] 1 SCR 401 [*Crown Zellerbach*].

<sup>139</sup> *Canfor*, *supra* note 137 at para 7.

<sup>140</sup> *Ibid* at para 12.

<sup>141</sup> *Ibid* at paras 138-41.

its capacity as *parens patriae* in the future.<sup>142</sup> The valuation of those damages, again tagged as an issue “for decision in a future appeal,”<sup>143</sup> might well go beyond diminution of the commercial value of the timber contemplated within the contractual relationship to include losses associated with the environmental dimensions of the harm, such as the loss of important ecosystem services.<sup>144</sup> As Binnie J succinctly concluded, “[T]here is [nothing] so peculiar about ‘environmental damages’ as to disqualify them from consideration by the Court”<sup>145</sup> provided “a coherent theory of damages, a methodology for their assessment, and supporting evidence”<sup>146</sup> were put forward upon which to base such a claim.

In each of the above-noted cases, the Court’s approach consisted of more than mere platitudes about the importance of environmental protection; rather, the Court demonstrated an ability to place the outstanding legal issues within that environmental rubric and, as one writer stated, to “see the entire ‘forest’ and not just the ‘trees.’”<sup>147</sup>

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<sup>142</sup> The initial pleadings in this case did not raise these issues and thus a decision was on their applicability was not appropriate. For discussion of the public trust doctrine in Canada see John C Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized” (1997) 7 J Evtl L & Prac 1; Scott Kidd, “Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada” (2006) 16 J Evtl L & Prac 187; Andrew Gage, “Highways, Parks & the Public Trust Doctrine” (2008) 18 J Evtl L & Prac 1.

<sup>143</sup> *Canfor*, *supra* note 137 at para 119. Although damages for environmental harm were not available in *Canfor*, Binnie J noted that statutory and common law remedies for environmental damage may be available to protect the public interest provided three prerequisites are established: first, the claim is based on a coherent theory of damages; second, the methodology of assessment is sound and; third, the evidence to establish the loss is established by the plaintiff.

<sup>144</sup> These damages if properly established through accepted valuation techniques could include possible use value, existence value (passive use), and inherent value. In this regard the Court in *Canfor*, *ibid*, repeatedly cited the Ontario Law Reform Commission’s *Report on Damages for Environmental Harm* (1990). For a discussion of evaluation of harm, public nuisance and public trust specific to *Canfor* see Jerry de Marco, Marcia Valiante and Marie-Ann Bowden, “Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v Canadian Forest Products Ltd.*” (2005) 15 J Evtl L & Prac 233.

<sup>145</sup> *Canfor*, *ibid* at para 155.

<sup>146</sup> *Ibid* at para 12.

<sup>147</sup> De Marco, “What Could be Next,” *supra* note 126 at 204. For a contrary view of the significance of more recent Supreme Court decisions, see Shaun Fluker, “The Nothing That Is: The Leading Environmental Law Case of the Past Decade” ABlawg.ca University of Calgary, Faculty of Law Blog on Developments in Alberta Law online: (2010) <<http://ablawg.ca/2010/01/18/the-nothing-that-is-the-leading-environmental-law-case-of-the-past-decade/>>.

Nowhere in the *Red Chris* or *Vanadium* decisions does the Court seize the opportunity to stand on the shoulders of this earlier environmental jurisprudence.<sup>148</sup> In *Red Chris*, the closest one gets to a contextual analysis is Rothstein J's statement that the *CEAA* must be interpreted based on its text "and context."<sup>149</sup> The situation is only slightly better in *Vanadium*; Binnie J at least considered it "appropriate" to consider the factual context giving rise to the legal dispute<sup>150</sup> but, as noted by Jerry DeMarco, failed to "take the opportunity to underline the importance of properly functioning environmental assessment processes in effective environmental decision-making."<sup>151</sup>

The fundamental question is whether such a change in approach had any discernable impact on the outcome in either decision. Arguably, Binnie J's consideration of the project's environmental effects at least brought to light concerns about the apparent insufficiency of information provided by the proponent under the *JBNQA* process and motivated an outcome whereby the federal Fisheries Minister could insist on his own, more rigorous review under the *CEAA*.<sup>152</sup> In contrast, Rothstein J did not once acknowledge the *Red Chris* mine's potential environmental effects<sup>153</sup> or the alleged deficiencies associated with BC's EA process.<sup>154</sup> Viewed this

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<sup>148</sup> As noted by Meinhard Doelle, the Court has not granted leave in environmental cases very often generally; see Doelle, *supra* note 8 at 1. Indeed, leave to appeal *TrueNorth II* was denied without reasons on July 20, 2006; see [2006] SCCA No 197 (QL).

<sup>149</sup> *Red Chris*, *supra* note 3 at para 27.

<sup>150</sup> *Vanadium*, *supra* note 4 at para 20; see also paras 25-30.

<sup>151</sup> Jerry V DeMarco, "Developments in Environmental Law: The 2009-2010 Term – Two Decisions on Environmental Assessment" (2010) 52 SCLR. (2d) 247 at 264. Somewhat in contrast to this paper, DeMarco further suggests that the narrow decisions by the Court in these two cases will not play a central role in the on-going policy debate surrounding federal EA.

<sup>152</sup> *Red Chris*, *supra* note 3 at para 33: "Thus, all parties involved in the present matter acknowledged the harmful impact of the mining project on fish and fish habitat, and both the Review Committee and the governmental authorities at the federal as well as the provincial level identified a serious lack of pertinent information."

<sup>153</sup> The one exception may be where he described the practice of using natural water bodies as TIAs as "an area in a small valley to be used for the permanent storage of mining effluent;" see *Red Chris*, *ibid* at para 5.

<sup>154</sup> See MiningWatch's Factum, *supra* note 64 at para 160: "For example, in BC, the provincial assessment process does not require any public consultation on the terms of reference." Indeed, the apparent difference in terms of quality and rigour between a *CEAA* EA and those completed under various provincial regimes was perhaps the elephant in the room in both *Red Chris* and *Vanadium*. In particular, see Mark Haddock, "Current Issues in Environmental Assessment in British Columbia" (2010) J Env'tl L & Prac 221.

way, his decision to overturn the lower court's order (quashing the federal permits) and let the unlawful screening EA stand takes on an air of reasonableness if not outright inevitability.

Meinhard Doelle has also suggested that *Red Chris* represents a missed opportunity to deal with a number of broader EA and environmental law issues in the way that previous Supreme Court decisions have:

Most surprising in this regard is the absence of any meaningful discussion of the critical role the public plays in the EA process. There is no mention of international law principles on public participation. There is no discussion of the mutual learning opportunity EA provides through the active engagement of proponents, members of the public, and government decision makers. The absence of this broader discussion is particularly surprising given that intervenors were granted standing to comment on these issues. The central role of the RA's failure to consult with the public prior to the scoping decision makes this omission even more perplexing.<sup>155</sup>

Although it is obviously not possible to prove cause and effect, the foregoing complaints do seem to have sufficient merit to justify concerns for the development of a robust Canadian environmental law going forward. This is not to say, however, that *Red Chris* and *Vanadium* are devoid of any important developments, as the next section sets out.

### *B) New Puzzle Pieces*

The clearest positive result for persons promoting better EA emerging from *Red Chris* and *Vanadium* is the Court's rejection of the *TrueNorth* approach to the *CEAA*. In our view, however, the decisions go further and actually resolve some of the lingering difficulties from *Oldman River* with respect to the breadth and purpose of federal EA.

#### *1) Confining the "Affirmative Regulatory Duty" to the History Books*

As noted by Quebec in its argument in *Vanadium*, the Court in *Oldman River* held that the *EARPGO* was not triggered by *all* federal departments that had decision-making responsibilities with respect to a development proposal, but only by those whose decision making authority was part of an "affirmative regulatory duty."<sup>156</sup> Applying this interpretation, La Forest

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<sup>155</sup> Doelle, *supra* note 8 at 171.

<sup>156</sup> *Oldman River*, *supra* note 1 at paras 64-67:

That is not to say that the *Guidelines Order* is engaged every time a project may have an environmental effect on an area of federal jurisdiction. There must first be a "proposal" which requires an "initiative, undertaking or activity for which the

J concluded that the Oldman River Dam project qualified as a proposal for which the Minister of Transport alone was responsible, because the *NWPA* placed an “affirmative regulatory duty” on the Minister of Transport.<sup>157</sup> There was no equivalent regulatory scheme under the *Fisheries Act* applicable to this project, and therefore the federal Fisheries Minister was not so bound.<sup>158</sup>

In *Vanadium*, Quebec’s argument was that “what is sauce for the goose, is sauce for the gander,” ironically finding support for its position in some of the commentary that followed *Oldman River*:

Obviously this test is specific to the present wording of the Guidelines Order. But even if any new scheme were to depart from the requirement of “federal responsibility,” La Forest J’s test still holds some relevance. It is grounded in the realization that EARP cannot be invoked every time there is some environmental effect on a matter of federal jurisdiction. Rather, the federal government is responsible only for the environmental effects of what it does.<sup>159</sup>

In our view, Binnie J’s refusal to even acknowledge Quebec’s argument means that the “affirmative regulatory duty” concept is simply no longer relevant. The same can be inferred from Rothstein J’s categorization of the *CEAA* in *Red Chris* not as a process for merely identifying the environmental effects of federal action, but rather as “a detailed set of procedures that federal authorities must follow before *projects* that may adversely affect the environment are permitted to proceed.”<sup>160</sup>

This is a positive development. The “affirmative regulatory duty” concept was vague in the extreme, a vagueness compounded by its dubious application in *Oldman River* itself. As alluded to by Canada in its factum in *Vanadium*,<sup>161</sup> there is no meaningful distinction between the regulatory scheme set up by section 5 of the *NWPA* on the one hand, and section 35 of the *Fisheries Act* on the other; both impose a prohibition followed by an

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Government of Canada has a *decision making responsibility*.” In my view the proper construction to be placed on the term “responsibility” is that the federal government, having entered the field in a subject matter assigned to it under s 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. It cannot have been intended that the *Guidelines Order* would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction [emphasis added].

<sup>157</sup> *Ibid* at para 65.

<sup>158</sup> *Ibid* at para 66

<sup>159</sup> Warkentin, *supra* note 7 at 320-21.

<sup>160</sup> *Red Chris*, *supra* note 3 at para 1.

<sup>161</sup> Factum of the Attorney General for Canada, *supra* note 79 at para 75.

exemption, and both provide their respective Ministers with the ability to impose terms and conditions on an associated physical work as part of the approval process.<sup>162</sup>

Moreover, even if the goal of finding such a duty was to ensure sufficient federal jurisdiction over the physical work as a whole – that a federal Minister was sufficiently “clothed” with regulatory authority to justify a complete examination of its potential effects<sup>163</sup> – the concept was not only vague but also flawed. It is difficult to conceive of a physical work, short of a fishing boat, over which DFO could have *more* regulatory authority than a dam. Under the *Fisheries Act*, section 35 is only one of several potentially applicable provisions, including the power to order the construction of fish ways (section 20), the power to order the release of water necessary for fish (section 22), and a prohibition against the destruction of fish unless otherwise authorized by the Minister (section 32).<sup>164</sup>

## 2) Refocusing the Inquiry

In a related argument, Quebec relied on Rothstein J’s *dicta* in *TrueNorth II* to the effect that the fisheries power was too narrow to sustain a comprehensive study of the proposed vanadium mine: “Nor are the [CSL] Regulations engaged because of some *narrow* ground of federal jurisdiction, in this case, subsection 35(2) of the *Fisheries Act*.”<sup>165</sup>

This reference to a “narrow ground of federal jurisdiction” comes from one of *Oldman River*’s most (in)famous passages:

...I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the [EARPGO] as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of

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<sup>162</sup> In addition to these legislative provisions, an application for a subsection 35(2) authorization must be in the form of Schedule VI of the *Fishery (General) Regulations* SOR/93-53 (see s 58(1)) [F(G)R]. Although the F(G)R were promulgated in 1993, after *Oldman River*, they were actually a consolidation of several regional regulations which also included such a provision.

<sup>163</sup> *Oldman River*, *supra* note 1 at para 64 referring to EARPGO provisions related to mitigation as evidence of “the regulatory authority with which the Government of Canada must have *clothed* itself under an Act of Parliament before it will have the requisite decision-making responsibility.”

<sup>164</sup> The extent to which these other provisions will be engaged in any given case will depend on a full understanding of a project’s likely impacts, a difficult task where project scoping limits the federal assessment to the first regulatory trigger in play, such as a s 35(2) authorization.

<sup>165</sup> Factum of the Attorney General for Quebec, *supra* note 77 at para 84.

federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction.<sup>166</sup>

Nowhere in *Vanadium* (nor *Red Chris*) does the Court engage in this or any other kind of categorizing, as it did in *Oldman River* and several years later in *Hydro-Quebec*.<sup>167</sup> Rather, Binnie J at the outset focused the inquiry on the specific legislative context at issue:

The question raised by this appeal is whether a mining project within the territory covered by the [JBNQA] that “results in the harmful alteration, disruption or destruction of fish habitat” ... is nevertheless exempted by virtue of the [JBNQA] from any independent scrutiny by the federal Fisheries Minister before issuing the federal fisheries permit...

The Attorney General of Quebec... contends that despite the anticipated impact of the mine’s tailing ponds and other pollutants on fish and fish habitat, and despite fisheries being a matter within exclusive federal jurisdiction... the [JBNQA] should be interpreted to exclude what would elsewhere be a compulsory assessment of the project’s impact under the [CEAA], and/or under federal fisheries policy.<sup>168</sup>

In reply, Binnie J held that the JBNQA did not support “such an anomalous result,”<sup>169</sup> and that there was nothing unconstitutional about the Minister carrying out a comprehensive study of the Vanadium mine pursuant to the CEAA.<sup>170</sup>

From both a practical and constitutional perspective, this conclusion makes sense. Practically, it makes sense because to hold otherwise would mean that the Minister would be precluded from assessing the extent of the harm which he or she is being asked to authorize. It would also mean that

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<sup>166</sup> *Oldman River*, *supra* note 1 at para 104.

<sup>167</sup> *Hydro-Quebec*, *supra* note 121 at para 114:

In examining the validity of legislation in this way, it must be underlined that the nature of the relevant legislative powers must be examined. Different types of legislative powers may support different types of environmental provisions. The manner in which such provisions must be related to a legislative scheme was, by way of example, discussed in *Oldman River* in respect of railways, navigable waters and fisheries. An environmental provision may be validly aimed at curbing environmental damage, but in some cases the environmental damage may be directly related to the power itself. There is a considerable difference between regulating works and activities, like railways, and a resource like fisheries, and consequently the environmental provisions relating to each of these. Environmental provisions must be tied to the appropriate constitutional source.

<sup>168</sup> *Vanadium*, *supra* note 4 at paras 1-2.

<sup>169</sup> *Ibid* at para 3.

<sup>170</sup> *Ibid* at para 13.

the Minister, in deciding whether the fisheries interest in protecting and conserving fish habitat is outweighed by some other non-fishery interest (or perhaps more accurately that it is in the public interest to allow harm in pursuit of some other benefit<sup>171</sup>) cannot consider that interest.

Constitutionally, it makes sense because such a mine is not a matter of exclusive provincial jurisdiction. There is no “general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation,” and there is therefore nothing unconstitutional, or colorable, or Trojan horse-like, about the Minister assessing the environmental effects of the mine in the course of his or her decision-making under the *Fisheries Act*.<sup>172</sup> On the contrary, Quebec’s position would amount to an abdication of constitutional responsibilities by the federal government. As stated by Binnie J, the “mining of non-renewable mineral resources aspect” of the mine falls within provincial jurisdiction, the “fisheries aspect is federal.”<sup>173</sup>

In our view, this approach is far superior to one that casts the various heads of power as either narrow or broad, comprehensive or restrictive,<sup>174</sup> or in relation to activities as opposed to resources,<sup>175</sup> and then infers static constitutional limits without regard to the actual legislative provisions in play.<sup>176</sup> Provided that such provisions are in “pith and substance” valid federal legislation,<sup>177</sup> the relevant inquiry is not whether section 5 of the

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<sup>171</sup> See *infra* note 180 and corresponding text.

<sup>172</sup> See *Oldman River*, *supra* note 1 at para 100. In *Vanadium*, *supra* note 4, Binnie J put it thus at para 13:

My colleagues refer to the Treaty as a manifestation of cooperative federalism, but with respect, as they interpret it, the Treaty turns out to be a vehicle for provincial paramountcy. My view, on the contrary, is that a refusal by the federal Fisheries Minister to issue the necessary fisheries permit...without compliance with the *CEAA* would neither be in breach of the Treaty nor be unconstitutional...The federal laws, the provincial laws and the James Bay Treaty fit comfortably together, and each should be allowed to operate within its assigned field of jurisdiction.

<sup>173</sup> *Vanadium*, *supra* note 4 at para 36.

<sup>174</sup> See Steven A Kennett, “Federal Environmental Jurisdiction After *Oldman*” (1992-1993)38 McGill LJ 180.

<sup>175</sup> As the Court did in *Oldman River*, *supra* note 1.

<sup>176</sup> Such categorizations were no doubt useful when environmental law was in its infancy and concerns about a radical reconfiguration of the division of powers loomed large. In hindsight, however, it may be that such concerns were overstated and that established constitutional doctrines, such as double aspects and cooperative federalism, have proven up to the task of preserving a balance of power with respect to jurisdiction over the environment.

<sup>177</sup> *Hydro-Quebec*, *supra* note 121 at para 23:

The manner of analysing matters involving division of powers is well established [citing Hogg]. The law in question must first be characterized in relation to its “pith



*NWPA* (in the context of *Oldman River*) or section 35(2) of the *Fisheries Act* (in the context of *Red Chris* and *Vanadium*) are narrow or broad, but simply what they say.

This is precisely the approach taken by Iacobucci J, writing in 1994 for the majority of the Supreme Court, in *Quebec (Attorney General) v Canada (National Energy Board)*:

As noted earlier, the *vires* of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid...<sup>178</sup>

In the context of section 35(2) of *Fisheries Act*, Parliament assigned to the federal Fisheries Minister the important responsibility of deciding whether and under what conditions to authorize the destruction of fish habitat, a power undoubtedly *intra vires* the fisheries power.<sup>179</sup> In other cases, the Court has made it clear that this power must be exercised in a manner consistent with the Minister's "duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest."<sup>180</sup> In order to do so,

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and substance." that is, its dominant or most important characteristic. One must then see if the law, seen in this light, can be successfully assigned to one of the government's heads of legislative power.

<sup>178</sup> [1994] 1 SCR 159 at para 66 [*National Energy Board*]. This reference to the coordinating provisions of the *EARPGO* mirrors Rothstein J's reasoning in *Red Chris*, supra note 3 at paras 24-25:

...Where projects are subject to environmental assessment by both provincial and federal authorities, it is not unreasonable to think that such projects should not be subject to two, duplicative, environmental assessments...

However, s 12(4) of the CEAA provides that in such cases, a federal RA may cooperate with the province in respect of the environmental assessment. Detailed provisions for coordination are set out in the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, the *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (2004), and similar provincial-federal harmonization agreements across the country. Thus, *Red Chris* and the government's policy arguments regarding duplication and coordination have been recognized in the CEAA and its regulations.

<sup>179</sup> *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292.

<sup>180</sup> *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 37.

it seems plain that the Minister must be able to assess not only the impacts he or she is contemplating to authorize but also the reason that he or she might choose to do so. To borrow from *Oldman River* the analysis of the Minister of Transport's discretion regarding interference with navigation pursuant to section 5 of the *NWPA*, "If...the impact on [fish habitat] were the sole criterion, it is difficult to conceive of a [mine] of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if [an impact to fish habitat] is warranted in the circumstances."<sup>181</sup>

To suggest that such a power is narrow not only distracts from the relevant inquiry but is also misleading. Leaving aside Supreme Court cases to the opposite effect,<sup>182</sup> it suggests a static, or frozen, character to federal powers contrary to "one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life," an approach that applies to the construction of the powers enumerated in sections 91 and 92 of the *Constitution Act, 1867*.<sup>183</sup>

Nor does it make much sense to speak of such power as being restrictive, as opposed to comprehensive, which implies that the federal government has plenary power to regulate the use of a resource – by fishing, for example – but not its outright destruction.<sup>184</sup> Rather than

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<sup>181</sup> *Oldman River*, *supra* note 1 at para 51.

<sup>182</sup> See *Ward v Canada (Attorney General)* 2002 SCC 17, [2002] 1 SCR 569 at paras 41-42, where the Court described the fisheries power as broad, albeit not unlimited: These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control. They recognize that "fisheries" under s. 91(12) of the *Constitution Act, 1867* refers to the fisheries as a resource; "a source of national or provincial wealth" (*Robertson*, *infra* note 191 at 121); "a common property resource" to be managed for the good of all Canadians (*Comeau's Sea Foods*, *supra* note 178 at para 37). The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.

<sup>183</sup> *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 at para 22. See also *Hydro-Quebec*, *supra* note 121 at para 86: "The Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated." In the context of the fisheries power, this would arguably include an increased understanding of the ecosystem goods and services associated with fish habitat, such as those discussed in *Canfor*, *supra* note 137.

<sup>184</sup> *Kennett*, *supra* note 174. Kennett suggests that all environmental regulation could be conceived of as regulation of an environmental activity, as opposed to regulation of some aspect of the environment such as air or water. In the case of the fisheries power, he suggests that Parliament's jurisdiction over the activity of fishing is comprehensive,

engaging in such categorizations, the better approach is to start with the legislative provisions that put the federal decision-maker in play and then determine what they must decide and what factors may be relevant to that inquiry. In the case of section 35(2), the Minister must determine whether the destruction of fish habitat, which the CESD has recently described as a “national asset” that provides food and shelter for aquatic wildlife as well as water for human consumption and contributes billions of dollars to Canada’s economy,<sup>185</sup> is in the public interest, a determination that invariably will require an appreciation of the work or undertaking causing such harm.

In *Oldman River*, however, La Forest J went on to limit the Minister of Transport’s consideration of environmental effects of the dam to those on areas of federal jurisdiction.<sup>186</sup> *National Energy Board* raised no such limitation, nor was it mentioned in *Red Chris* or *Vanadium* – even *Oldman River* is contradictory on this point.<sup>187</sup> Most importantly, the *CEAA* makes no mention of any such limitation. In our view and for the reasons set out in the next section, it should also be considered abandoned.

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and therefore allows a full consideration of environmental issues, but that over such activities as dams, it is restrictive, because the latter has only an indirect effect on fisheries.

<sup>185</sup> Minister of Transport, Press Release online: <[http://www.oag-bvg.gc.ca/internet/English/mr\\_20090512\\_e\\_32558.html](http://www.oag-bvg.gc.ca/internet/English/mr_20090512_e_32558.html)> [emphasis added]. See also the CESD, Spring 2009 Report, “Chapter 1—Protecting Fish Habitat” online: <[http://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200905\\_01\\_e\\_32511.html#hd5a](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200905_01_e_32511.html#hd5a)>: “Fish are an important renewable marine and freshwater resource for Canada... In 2005...more than 3.2 million adult anglers participated in recreational fishing, which contributed \$7.5 billion to the Canadian economy.”

<sup>186</sup> *Oldman River*, *supra* note 1 at para 106: “Here, the Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, is directed to consider the environmental impact of the dam on such areas of federal responsibility as navigable waters, fisheries, Indians and Indian lands, to name those most obviously relevant in the circumstances here.”

<sup>187</sup> In *Oldman River*, La Forest J cited with approval the Australian case, *Murphyores Incorporated Pty Ltd v Commonwealth of Australia* (1976), 136 CLR 1 (HCA) 9 ALR 199 at 12 CLR, where the Court held that “considerations in the light of which the decision is made may not themselves relate to matters of [a head of power] but that will not deprive the decision which they induce of its inherent constitutionality for the decision will be directly on the subject matter [of that head of power] and the considerations actuating that decision will not detract from the character which its subject matter confers upon it.” Mark Warkentin also considered it “surprising” that La Forest J imposed such a limitation, noting that the proposition – that considering matters exclusively within provincial jurisdiction would be colorable – is not easily reconciled with the characterization of EA as a decision-making process; see Warkentin, *supra* note 7 at 326-27.

### 3) *The CEAA as Process and Disclosure Mechanism*

As a starting point, La Forest J's use of the word "consider" in *Oldman River* ("the Minister of Transport...is directed to *consider* the environmental impact...on such areas of federal responsibility...") in the context of a process that breaks decision-making into an information-gathering stage and a decision-making stage is imprecise at best. If this limitation was meant to apply to the information-gathering stage, it would seem unworkable. As a simple example, a project may require the removal of trees, a seemingly provincial matter. Such removal, however, tends to reduce the ground's potential to absorb rainfall, causing increased runoff and sedimentation in adjacent streams, to the detriment of fish and fish habitat, a federal matter. Simply put, projects need to be assessed holistically if they are to be assessed at all.

This brings us to the decision-making stage. Provided that effects can be compartmentalized this way (a difficult task for the same reason provided above, but one which joint review panels appear to have managed<sup>188</sup>), the provinces could be expected to argue that the federal government should be precluded from weighing environmental effects which are seemingly local in scope. For its part, MiningWatch argued in *Red Chris* that "it makes no more sense to consider only part of the impacts, than it would to ignore half of the benefits."<sup>189</sup>

Bearing in mind the plain wording of the *CEAA*, we are inclined to agree with MiningWatch. However, we suggest that such a result should not be expected to change the existing, *quasi*-constitutional pattern of deference to provincial preferences in the context of natural resource management, at least not in and of itself.<sup>190</sup> This is because the *CEAA*'s

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<sup>188</sup> In this context, panels first make a determination about the desirability of the project (under most provincial regimes this means a determination as to whether the project is in the "public interest," whereas under the *CEAA* the test is no likelihood of SAEs or SAEs that are justified in the circumstances) and then generally proceed to make recommendations regarding mitigation measures, directing these at the various provincial and federal (and sometimes territorial) agencies involved, seemingly based on their respective mandates. Probably the best example of such an effort is the recent Mackenzie Gas Project Joint Review Panel Report, online: <<http://www.ngps.nt.ca/report.html>>.

<sup>189</sup> Miningwatch Factum, *supra* note 64 at para 39.

<sup>190</sup> See Roderick A. Macdonald, "F.R. Scott's Constitution" (1997) 42 McGill LJ 11 at 21:

It follows that a final element of the implicit constitution is, inevitably, political practice. What are the patterns by which the institutions of government actually work? Sometimes, when they become stabilized institutional practices, these patterns are referred to as conventions... The practice of designating a Quebec

primary objective is not to impose some minimum federal standard of environmental protection, but rather to implement a process for decision-making through which previously unknown or ignored environmental effects are identified and either mitigated or at least acknowledged in a transparent process.<sup>191</sup>

In this way, the *CEAA* is much like the progenitor of all EA laws, the US *National Environmental Policy Act (NEPA)*.<sup>192</sup> In what is still considered the authoritative decision on the matter, the US Supreme Court held that the *NEPA*:

...require[s] that agencies take a “hard look” at environmental consequences and ... provide[s] for broad dissemination of environmental information. Although these procedures are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. ... Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed — rather than unwise — agency action.<sup>193</sup>

As noted by Ted Schrecker back in 1991, this perspective is shared by the *CEAA* in its stated purpose “to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them.”<sup>194</sup> Although the structure and wording of the

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lieutenant whenever an English-speaking Prime Minister from outside Quebec is in office is part of the living constitution. *So are different patterns of deference to provincial interests whenever matters of language, natural resources, fisheries, forestry or manufacturing are in issue.* Some constitutional theorists suggest that these practices have no normative force, and that they may be departed from freely. Yet the point is that they are not frequently departed from, and are always subject to notice when they are [emphasis added].

<sup>191</sup> Gibson, *supra* note 12 at 192:

The basic objective of environmental assessment law has been to force and guide careful attention to environmental considerations in the development, approval and implementation of undertakings that may have important effects. While most attention has been focused on approvals implications, [EA] is not meant to be a regulatory exercise.

<sup>192</sup> 42 USC 4321 [*NEPA*].

<sup>193</sup> *Robertson v Methow Valley Citizens Council*, 490 US 332 (1989).

<sup>194</sup> *CEAA*, *supra* note 2, s 4(1). See Schecker, *supra* note 28. Admittedly, subsection 4(1) goes on to state that the purpose of assessments is “to ensure that such projects do not cause significant adverse environmental effects,” but when considered alongside the explicit power to authorize such projects, the most reasonable interpretation is that projects should not result in significant effects unknowingly.

*CEAA* may suggest more of a bias against “unwise action” than found in *NEPA*, it specifically allows the federal government to conclude that SAEs may be justified in some circumstances (as discussed in Part 2), a reality that may not sit well with some, but which

is fully compatible with agreement on the point that it is inexcusable for governments to make such decisions (as, in Canada, they very often do) without full consideration, and full public disclosure, of their environmental consequences and of the tradeoffs being made. By doing so, governments destroy the very basis for the public accountability which they invoke as justification for their decisions.<sup>195</sup>

The *CEAA* is primarily about process and disclosure, not outcomes.<sup>196</sup> Consequently, where the federal government wishes to enable a project (through funding or approvals) that is likely to result in SAEs that are not capable of mitigation or where mitigation is possible but deemed cost-prohibitive by the proponent, it remains open for it to try to justify such a decision on the basis of deference to provincial preferences over matters that it considers provincial in scope.

What such a justification might look like and how the courts might approach it upon review was recently foreshadowed in *Pembina Institute for Appropriate Development v Canada (Attorney General)* (known as *Kearl*),<sup>197</sup> a case involving an oil sands mine expected to emit annual quantities of greenhouse gases equivalent to the emissions of 800,000 cars.<sup>198</sup> Tremblay-Lamer J stressed the “science and fact-based” nature of the assessment exercise, as distinguished from the “political determinations made by final decision-makers”:

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<sup>195</sup> Schrecker, *ibid* at 204.

<sup>196</sup> As noted by La Forest J in *Oldman River* (see *supra* note 14 and associated quotation), and affirmed by Rothstein J in *Red Chris*, *supra* note 3 at paras 1 and 14. Although these passages do not explicitly refer to disclosure, in our view it is a corollary to legislation that prescribes a decision-making process. Moreover, the *CEEA*’s fourth preambular statement (which expresses Canada’s commitment to facilitating public participation and providing access to the information upon which assessments are based), coupled with the detailed provisions with respect to the creation and maintenance of a public registry (the CEA Registry, see s 55), reflects the ethos of Canada’s access to information legislation, whose purpose is to “facilitate democracy” by ensuring “first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry;” see *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 61. See also text, *infra*, associated with note 200, on the importance of accountability in the environmental arena.

<sup>197</sup> 2008 FC 302 [*Kearl*].

<sup>198</sup> *Ibid* at para 70.

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...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.<sup>199</sup>

Like the abandonment of *Oldman River*'s "affirmative regulatory duty," reaffirmation of the *CEAA* as both decision-making process and disclosure mechanism would also be a positive outcome for EA, for at least two reasons. The first has to do with the important role of political openness and accountability in the environmental arena. As noted by Mark Walters almost twenty years ago following the release of the *Bruntland Report*,

Strong arguments can be made that the Constitution, instead of instilling a sense of rule of law into environment and resource management, suffocates the ideal with a fog of jurisdictional ambiguity, thereby frustrating the goals of openness and accountability. Public participation and interest group access to those who formulate policy requires a clear understanding by both those in power and those attempting to sway those in power of just who is responsible for what. In the area of environmental management, however, confusion prevails on the part of both officials and the public in this regard.<sup>200</sup>

By requiring full public disclosure of projects' environmental consequences and of the tradeoffs being made in the decision-making process, the *CEAA* enables political accountability for specific environmental decisions by identifying the relevant players and preferences. It is in this indirect way that the *CEAA* can lead to substantively better outcomes for the environment, particularly if the "fundamental value" described by Gonthier J becomes a principle

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<sup>199</sup> *Ibid* at paras 72-74.

<sup>200</sup> Mark Walters, "Ecological Unity and Political Fragmentation: The Implications of the Bruntland Report for the Canadian Constitutional Order" (1991) 29 *Alta L Rev* 420 at 430. Professor Walters acknowledged that there are two sides to this debate, and that some "find a glimmer of benefit with the constitutional fog; it is said that as long as neither level of government knows precisely what it is responsible for neither will act unilaterally and, hence, an air of co-operation and a necessity for inter-governmental negotiation is fostered."

embraced by politicians and manifested in the decision-making process or, failing that, by the electorate at the ballot box.<sup>201</sup>

For constitutional and environmental scholars, another positive outcome might be the opportunity, following some future litigation, to consider the limits of federal environmental jurisdiction in the context of a concrete factual matrix. It is one thing to say that the federal government *may* defer to provincial preferences, disclosure of which is sufficient to ensure some accountability. Whether the Constitution *requires* such deference is another matter. While a detailed discussion of that question is beyond the scope of this article, there seems to be little room for doubt that the federal government weighs what can be considered conventional economic benefits of resource projects in its decision-making – even seemingly local ones.<sup>202</sup> If this is the case, the only change brought about by the *CEAA* is to broaden the federal government's previously narrow metric for measuring benefits – by reference to jobs and revenue, for example – with the concept of sustainable development, which necessitates the incorporation of environmental costs and benefits into the equation. To suggest that the former is constitutional but the latter is not is to suggest that the Constitution is inherently and permanently biased towards an out-dated and discredited model for economic growth – a seemingly untenable position.

### 5. Conclusion

Although there appears to be a justifiable concern among environmentalists with the Supreme Court's failure to explicitly reiterate (and possibly advance) the broader objectives associated with environmental protection in either *Red Chris* or *Vanadium*, it is premature to attribute to the Court any retreat from commitment to that ethos. Perhaps the judgments reflect

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<sup>201</sup> *Canadian Pacific*, *supra* note 115 para 55. Although EAs do not often end in a finding of SAEE, it is worth noting that in those instances that they have, the federal government has generally not proceeded to issue permits and/or authorizations.

<sup>202</sup> For example, DFO's 1986 *Policy for the Management of Fish Habitat*, which was presented before Parliament and continues to guide the department's activities, expressly "recognizes that natural resource interests such as the forest, fishing, mining, energy, and agricultural sectors make legitimate demands on water resources, and that ways must be found to reconcile differences of opinion on the best use of those resources." DFO (1986) online: <<http://www.dfo-mpo.gc.ca/habitat/role/141/1415/14155/fhm-policy/page04-eng.asp#c3.2>>. A more recent example is DFO and Environment Canada's policy with respect to the use of natural, fish-bearing waters as TIAs, which recognizes that "Mining is an important part of the Canadian economy, generating billions of dollars and hundreds of thousands of jobs..." See DFO, *Metal Mining Effluent Regulations (Fact Sheet)*, online: <<http://www.dfo-mpo.gc.ca/habitat/role/141/1415/14156-eng.htm>>.



a new reality wherein environmental protection as a fundamental value is a given – already entrenched in the minds of the Court to a degree that it is not necessary to belabour the jurisprudence and simply the rubric within which to craft the response in any given case. After all, both *Red Chris* and *Vanadium* reinforce federal EA as an effective tool for ensuring that the environmental impacts of projects are catalogued and considered in their entirety prior to decision-making.

In rejecting the “scoping to triggers” approach, the Court has avoided “the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions.” In this passage from *Oldman River*, La Forest J continued: “Quite simply, the environment is composed of all that is around us and as such must be a part of what actuates many decisions of any moment.”<sup>203</sup> The Court’s interpretation of the *CEAA* promotes this sentiment by ensuring that consideration of environmental effects will not be confined to artificially split projects under the pretext of some static characterization of the federal power at play. Consequently, federal decision-makers and all other stakeholders will be fully informed of all of the relevant impacts of proposed projects in their entirety. The decisions which follow may not necessarily satisfy everyone, but the Supreme Court has fortified the legitimacy of the process, something which should result in improved environmental outcomes.

That being said, there remains merit in the contextual approach to environmental cases and it should not be abandoned by the Supreme Court. While it may seem trite to restate environmental protection as a fundamental value, there is nothing trite in recognizing existing and emerging principles of environmental policy and management. Not only are such specialized principles routinely – and appropriately – invoked to resolve legal disputes in other contexts, such as commercial and tax law (to name but two), their contextualization, re-iteration and application assists lower courts in their own work and occasionally nudges governments toward a more genuine commitment to sustainability. Nor is there anything trite about recognizing the often significant environmental impacts of both public and private decisions when adjudicating disputes in this context. In *Vanadium*, consideration of such impacts led the Court to recognize that not all EA regimes are created equal – a fact that has recently garnered

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<sup>203</sup> *Oldman River*, *supra* note 1 at para 102.

public attention in the context of another mining project proposed in BC with important implications for upcoming *CEAA* review.<sup>204</sup>

Granted, there may be some duplication in the information required by federal and provincial decision-makers. As Rothstein J and numerous judges before him have pointed out,<sup>205</sup> however, there are provisions within the *CEAA* for cooperative process.<sup>206</sup> Moving forward, the seven-year review of the Act represents an opportunity to examine those legislative provisions in light of the reality on the ground: that while some progress has been made,<sup>207</sup> effective integration and cooperation has thus far remained largely elusive – the Red Chris EA being a case in point.<sup>208</sup> All stakeholders should be considering the opportunities and challenges for streamlining common areas of information-gathering responsibility and proposing new solutions. Associated with promotion of EA as a government process, the seven-year review should also consider an expansion of the provisions within the *CEAA* to realize strategic environmental assessment (SEA) at the federal level.<sup>209</sup> The existing skeletal efforts could be re-enforced to facilitate earlier information

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<sup>204</sup> Mark Hume, “Flawed logic justifies the destruction of Fish Lake,” *The Globe and Mail*, online: <<http://www.theglobeandmail.com/news/opinions/columnists/mark-hume/flawed-logic-justifies-the-destruction-of-fish-lake/article1780091/>>.

<sup>205</sup> See discussion at note 180.

<sup>206</sup> *Red Chris*, *supra* note 3 at para 41.

<sup>207</sup> Canadian Council of Ministers of the Environment, “A Canada-Wide Accord on Environmental Harmonization,” online: <[http://www.ccme.ca/assets/pdf/accord\\_harmonization\\_e.pdf](http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf)>. See also the specific accords signed by Alberta, British Columbia, Manitoba, Newfoundland and Labrador (draft agreement), Ontario, Quebec, Saskatchewan and Yukon. See also Kirsten Douglas and Sam NK Banks, “A Guide To Federal Assessments,” online: <<http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb0859-e.htm#a11>>.

<sup>208</sup> As noted by Martineau J, the Red Chris EA was initiated as a cooperative EA with BC, but “the steps described in the draft work plan to complete, within the provincial 180-day time limit, a joint co-operative EA, leading to the production of a comprehensive study, were not followed or respected by the RAs”: *MiningWatch v Canada*, *supra* note 64 at para 107.

<sup>209</sup> For a discussion of SEA possibilities see Robert Gibson, Hugh Benevides, Meinhard Doelle and Denis Kirchhoff, “Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options” (2010) 20 J Envtl L & Prac 175. See also Privy Council Office/Canadian Environmental Assessment Agency, “Strategic Environmental Assessment: The Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals,” online: <[http://www.ceaa.gc.ca/Content/B/3/1/B3186435-E3D0-4671-8F23-2042A82D3F8F/Cabinet\\_Directive\\_on\\_Environmental\\_Assessment\\_of\\_Policy\\_Plan\\_and\\_Program\\_Proposals.pdf](http://www.ceaa.gc.ca/Content/B/3/1/B3186435-E3D0-4671-8F23-2042A82D3F8F/Cabinet_Directive_on_Environmental_Assessment_of_Policy_Plan_and_Program_Proposals.pdf)>.

gathering and decision-making at a regional and/or strategic level in order to minimize the vesting of interests, such as those that weighed on Rothstein J in *Red Chris*,<sup>210</sup> that may not be sustainable.

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<sup>210</sup> *Red Chris*, *supra* note 3 at para 47, where Rothstein J expressed a concern that RCDC “will be prejudiced by incurring further delay and costs” should Martineau J’s court order (for the completion of a comprehensive study) stand.