

The Implications of the SCC Red Chris Decision for EA in Canada

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1. INTRODUCTION

The SCC has not granted leave in environmental cases very often. There have only been a handful of decisions in the past 20 years with a clear focus on environmental law. Each of these decisions, however, has been critical to the development of Canadian environmental law. *R. v. Crown Zellerbach*³⁸, and *R. v. Hydro Quebec*³⁹ combined to firmly establish the federal role in environmental protection. In the *Friends of the Oldman River Dam Society v. Canada [Oldman River Dam]*⁴⁰ and *R. v. Hydro Quebec* the SCC sent important signals to all levels of government about their responsibility to deal with the protection of the environment, an issue the SCC has repeatedly referred to as one of the major challenges of our time.⁴¹ This trend has continued in more recent cases such as *Spraytech v. Town of Hudson*,⁴² and *BC v. Canadian Forest Products [Canfor]*.⁴³ Collectively, these cases signalled a progressive approach to the interpretation and development of environmental law with the clear underlying intent to ensure governmental and non-governmental actors have the necessary legal tools at their disposal to deal effectively with the challenges involved.⁴⁴

The January 2010 decision in the case of *MiningWatch Canada v. Canada [Red Chris]*⁴⁵ is the latest in this string of environmental SCC decisions. As such, the case provided an opportunity for the SCC to further elaborate on some of the themes developed in previous cases. Areas for possible elaboration ranged from the expanding roles and responsibilities of all levels of governments in environmental

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38 [1988] 1 S.C.R. 401

39 [1997] 3 S.C.R. 213.

40 [1992] 1 S.C.R. 3.

41 *Ibid.* at para. 1.

42 [2001] 2 S.C.R. 241.

43 [2004] 2 S.C.R. 74.

44 See also *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392, and *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624. For a detailed discussion of the role of the SCC in the development of environmental law, see Jerry V. DeMarco, Marcia Valiante & 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.E.L.P. 233.

45 2010 SCC 2.

law,⁴⁶ to the role of international law principles such as precaution and public participation in domestic environmental law.⁴⁷ In this respect, *Red Chris* is a clear disappointment. More narrowly and immediately, of course, the *Red Chris* case deals with the interpretation of the *Canadian Environmental Assessment Act*⁴⁸ (CEAA) and the application of CEAA assessment process. As such, it represents a follow-up to the 1992 decision of the SCC in the *Oldman River Dam* case, in which the SCC was asked to rule on the application of the EARP Guidelines Order, the EA process which preceded CEAA.⁴⁹ *Red Chris* is the first SCC decision dealing directly with the substance of CEAA, and in this respect makes an important and constructive contribution to environmental law in Canada.⁵⁰

2. THE LEGAL CONTEXT

There has been a rich body of case law interpreting key provisions of CEAA since its enactment in 1995.⁵¹ Most of these cases were decided or commenced before significant changes to CEAA were passed by Parliament in 2003. The *Red Chris* case represents one of the first reported cases to deal with the amended CEAA. As such *Red Chris* provided an opportunity to comment on the direction of lower court decisions on CEAA and on the implications of the 2003 amendments.

The *Oldman River Dam* case represents the only prior SCC decision to focus on the federal EA process. In it, the court affirmed federal jurisdiction and responsibility to engage in an integrated and comprehensive information gathering process to understand the environmental and socio-economic implications before federal regulatory decisions are made.⁵² Since the enactment of CEAA, this responsibility has gradually been eroded through an interpretation of CEAA by some responsible authorities (RAs). This approach has been endorsed by both the Federal Court and Federal Court of Appeal through a series of decisions, which served to turn the CEAA assessment process into a discretionary process and in some cases a paper exercise rather than a process of informing decision makers of the implications of the decisions they were being asked to make. The focus of many

⁴⁶ Including federal, provincial, aboriginal and municipal governments.

⁴⁷ *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 (Factum of the Appellant at paras. 142–57), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/factums-memoires/32797/FM010_Appellant_Miningwatch-Canada.pdf>. See also Factum of the Interveners, the Canadian Environmental Law Association, the West Coast Environmental Law Association, the Sierra Club of Canada, the Quebec Environmental Law Centre, Friends of the Earth Canada and the Interamerican Association for Environmental Defense at paras. 25–53.

⁴⁸ *Canadian Environmental Assessment Act* (1992, c. 37).

⁴⁹ See M. Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, Ont.: LexisNexis Butterworths, 2008) at 62 for a discussion of the *Oldman* case and its significance for EA in Canada.

⁵⁰ *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522. The case went to the SCC on a procedural dispute that arose out of judicial review proceedings regarding CEAA but the Court did not give any substantive consideration to CEAA.

⁵¹ *Supra*, note 12 at 121.

⁵² *Ibid.* at 69.

of these CEAA cases was on the scope of the project to be assessed under CEAA and the scope of the assessment to be carried out, both critical steps in ensuring an effective EA process.⁵³ Key among these cases was the *Sunpine and True North* decisions of the Federal Court of Appeal.⁵⁴

Substantial amendments to CEAA came into effect in October 2003, just before the EA process for the Red Chris mine was initiated. The amendments deal with a range of issues, from changes to the purpose section and the introduction of a new electronic registry to enhancement of tools for coordination among RAs and jurisdictions. Most directly relevant to the *Red Chris* decision, the 2003 amendments introduced two key changes to the comprehensive study process. One change is the requirement for public participation at all key stages of the comprehensive study process including the scope determination. A second change to the comprehensive study process involved a final track determination at the start of the EA process on whether to proceed with the comprehensive study or refer the project to a review by a panel or by mediation.⁵⁵

3. FACTS OF THE CASE¹⁹

The case centers on an open pit copper and gold mine and milling operation proposed by the Red Chris Development Company Ltd. in north-western British Columbia. The project is proposed in a sparsely populated part of BC within the traditional territory of the Tahltan Nation. Mill production is expected at a rate of 30,000 tonnes per day over a 25 year period. The project involves capital expenditures in the range of \$230 million and 250 direct full time jobs.

The project includes the construction of three dams which would have the effect of turning existing watercourses in the valley of the mine into tailing ponds for mill effluent. The end result would be a large tailings storage area using and affecting a number of watercourses in the valley and beyond. From a federal EA trigger perspective, the project would involve the deposit of a deleterious substance into

⁵³ The term “scope of assessment” is used here to refer to the factors included under s. 16(1) and (2) and the scope of those factors under s. 16(3). The term scope of assessment is also sometimes used to refer to scoping under ss. 15 and 16 of the CEAA collectively.

⁵⁴ *Friends of the West Country Assn. v. Canada (Minister of Fisheries)* (1999), 31 C.E.L.R. (N.S.) 239 (F.C.A.) [*Sunpine*] and *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 [*True North*].

⁵⁵ For a more detailed discussion of these changes, see Hugh J. Benevides, “Real Reform Deferred: Analysis of Recent Amendments to the *Canadian Environmental Assessment Act*” (2004) 13 J.E.L.P. 195. For Agency guidance on the CEAA amendments, refer to Canadian Environmental Assessment Agency, *Canadian Environmental Assessment Act: An Overview*, (December 2003) and Canadian Environmental Assessment Agency, *Explanation of the Amendments to the Canadian Environmental Assessment Act*, (October 2003), online: Canadian Environmental Assessment Agency: Policy & Guidance <<http://www.ceaa.gc.ca/default.asp?lang=En&n=DACB19EE-1>>. See also generally *supra* note 11.

watercourses frequented by fish,⁵⁶ the destruction and alteration of fish habitat,⁵⁷ and the use of explosives.⁵⁸ The project also has potential impacts on federal public lands and Indian reserves, endangered species and greenhouse gas emissions.⁵⁹ In short, the project would impact on a number of areas of undisputed federal jurisdiction and some other areas of potential federal jurisdiction. The project was also within provincial powers based on jurisdiction over natural resources and property and civil rights.⁶⁰ The jurisdiction of both the federal and provincial levels of government to require an environmental assessment of the project was not in dispute in the case. Both levels of government initiated their own EA process, but initially coordinated their efforts under a federal provincial EA agreement.⁶¹

The provincial EA process identified the proposed mine as a reviewable project because it was a new mine with production capacity greater than 75,000 tonnes per year. As such, it required a provincial environmental assessment certificate before it could proceed. The proponent submitted a project description to provincial officials in October 2003 to commence the provincial EA process. The process involved further submissions from the proponent, such as the EA application and the Application Supplement. Written public comments were received, and open houses were held by the proponent.⁶²

The project assessed under the provincial EA was essentially the project as proposed by the proponent, including the open pit mine, the mill, a tailings management facility, a waste rock storage facility, a low grade ore stockpile, a mine camp, roads and other infrastructure, water supply, power supply, and explosives facilities. In July 2005, the provincial EA office concluded that the project “is not likely to cause significant adverse environmental, heritage, social, economic or health effects”. In August 2005, the province issued its environmental assessment certificate.⁶³

The CEAA assessment process did not proceed as smoothly. While the RAs did not contest the application of CEAA to the project, the appropriate level of assessment and the scoping decision soon became sources of controversy. In May 2004, sometime after the provincial EA, the CEAA assessment process was initiated as a comprehensive study. By December 2004, the assessment was down-

⁵⁶ Regulated under s. 36 of the *Fisheries Act*, R.S.C. 1985, c. F-14 and in this case addressed through a request for an amendment by the Governor in Council of Schedule 2 of the *Metal Mining Effluent Regulations*, SOR/2002-222 as amended, under the authority of s. 36(5), to include the watercourse in question as a tailings impoundment area.

⁵⁷ Regulated under s. 35 of the *Fisheries Act*.

⁵⁸ Regulated under s. 7(1) (a) of the *Explosives Act*, R.S.C. 1985, c. E-17.

⁵⁹ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 91(1A) and 91(24), reprinted in R.S.C. 1985, App. II, No. 5.

⁶⁰ *MiningWatch Canada v. Minister of Fisheries and Oceans*, [2008] 3 F.C.R. 84, ¶20 (T.D.).

⁶¹ It would appear that once the decision was made to move from a comprehensive study to a screening, the terms of the agreement were not followed. *Ibid.* at paras. 102–11.

⁶² *Supra* note 24 at paras. 60–91, and *supra* note 8 at para. 4.

⁶³ *Ibid.*

graded to a screening. By April 2006, the screening report was released. It relied substantially on the provincial EA process. In May 2006, the responsible authorities announced its decision to allow the project to proceed based on the conclusion that it was “not likely to cause significant adverse environmental effects.”

Central to the controversy was the change in the EA track part way through the process. The change in track from a comprehensive study to a screening was accompanied by a change in the scope of the project. The notice of commencement of CEAA assessment had still included most of the same elements of the project as the provincial assessment i.e. the notice described the project essentially as proposed by the proponent. It indicated that the EA would proceed by way of comprehensive study. The decision to proceed with a comprehensive study was based on the ore production capacity, which clearly exceeded the threshold set out in the *Comprehensive Study List Regulations*.⁶⁴ The Department of Fisheries and Oceans (DFO) and Natural Resources Canada (NRCan) were identified as responsible authorities (RAs) under CEAA, with DFO taking a lead role.

In December 2004, following the release of the *True North* decision by the Federal Court,⁶⁵ DFO announced its decision to proceed by way of a screening instead of a comprehensive study. This announcement was followed in March 2005 with a decision to re-scope the project for purposes of CEAA assessment to facilities related to the tailings ponds and the explosives facilities only. The CEAA assessment proceeded in the form of a screening without public consultations.⁶⁶ The screening report was made available to the public on the electronic registry in May 2006, around the same time as the announcement of the decision that the project was “not likely to cause significant adverse environmental effects.”

4. THE JOURNEY OF THE CASE TO THE SCC

On June 9, 2006, MiningWatch filed a Notice of Application in the Federal Court alleging a violation of s. 21 of CEAA. The Application sought a declaration that the Red Chris Mine is a project described in the Comprehensive Study List (CSL) as it exceeds the production capacity thresholds in s. 16(a) and/or 16(c) of the *Comprehensive Study List Regulations*. On September 25, 2007, the Federal Court allowed the application for judicial review. Justice Martineau quashed the screening decision, and prohibited the RAs and the Governor in Council from issuing approvals in relation to the Red Chris mine project until the public had been consulted on the scope of the project and a comprehensive study was carried out in accordance with s. 21.

The decision of Justice Martineau was appealed to the Federal Court of Appeal by both the federal government and the proponent. On June 13, 2008, the Federal Court of Appeal (Desjardins, Sexton and Evans J.J.A.) unanimously allowed the appeal, set aside the decision of Justice Martineau and dismissed the application for judicial review. In reaching its conclusion, the Court of Appeal followed two of

⁶⁴ SOR/94-638, ss. 16(a), (c).

⁶⁵ *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* (2004), 10 C.E.L.R. (3d) 55 (F.C.T.D.).

⁶⁶ *Supra* note 8 at paras. 5–7. There was some consultation with the Tahltan band council and the Iskut First Nation, see *supra* note 24 at para. 124.

its previous decisions.⁶⁷ In *Sunpine*, the Court had held that the term project in s. 15(3) meant “project-as-scoped.”⁶⁸ In the *True North* case, the Court had similarly concluded that project in s. 5(1)(d) meant “project-as-scoped”, and that RAs have broad discretion to scope projects narrowly under s. 15(1).⁶⁹

On December 18, 2008, the SCC granted MiningWatch Canada leave to appeal the decision of the Federal Court of Appeal. The appeal focused on the statutory interpretation of the CEAA, specifically the requirements of s. 21 of CEAA and the limits of the power to scope a project under s. 15 of the Act. The following issues were identified in the appellant’s factum:

1. Can an RA avoid the requirement to conduct a comprehensive study for major projects described on the Comprehensive Study List by redefining the project, and thereby downgrade to a screening level assessment?
2. Can an RA avoid the requirement of public consultation under s. 21(1) of CEAA, for major projects described on the Comprehensive Study List, by redefining the project?⁷⁰

An additional underlying issue in the case before the SCC was whether the previous Federal Court of Appeal cases of *Sunpine* and *True North*, were correctly decided. This was not an issue until the case came before the SCC, because the lower courts were bound to follow these Federal Court of Appeal decisions.

5. THE SCC DECISION

In its January 21, 2010 decision, the SCC defined the single issue before it as follows: “whether DFO and NRCan as responsible authorities under the CEAA have been conferred discretion to determine whether an environmental assessment proceeds by way of a screening or comprehensive study.”⁷¹ Rothstein J., writing for a unanimous court, concluded that RAs do not have discretion to choose between a screening and a comprehensive study. The RAs should have used the “project as proposed” by Red Chris to determine whether CEAA was triggered, and

⁶⁷ *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 209, [2009] 2 F.C.R. 21.

⁶⁸ *Sunpine*, *supra* note 17 at paras. 16–18. *Sunpine* involved two bridges for a proposed forestry road that was itself related to a larger forestry project. The project was scoped narrowly to be limited to the two bridges.

⁶⁹ *True North*, *supra* note 17 at paras. 19–20. *True North* was very similar to *Red Chris* on the facts. It involved an oil sands mine being assessed under CEAA as only as a “creek destruction project” at a screening level rather than at the comprehensive study level required for “oil sands projects” of that size.

⁷⁰ The appellant’s factum is available on the SCC website at <<http://www.scc-csc.gc.ca/case-dossier/cms-sgd/search-recherche-eng.aspx>> under docket # 32797. Respondents’ factums are also available, as is a webcast of oral arguments.

⁷¹ *Supra* note 8 at para. 12. Throughout this case comment, reference is made to the RA’s discretion and obligations under ss. 15 and 16. Of course, in case of a panel review or mediation, the responsibility under ss. 15 and 16 shift to the Minister of the Environment.

whether the assessment was to proceed by way of a screening or comprehensive study.⁷²

In reaching this conclusion, Rothstein J. made a couple of other key findings. First, he determined that the track determination under the CEAA precedes scoping, except where the proponent engages in project splitting.⁷³ Related to this, the court confirmed that it is the Minister of the Environment (the Minister), not the RA, who determines, through the power to enact the *Comprehensive Study List Regulations*, whether project requires merely a screening or a comprehensive study.⁷⁴ Finally, Rothstein J. concluded that the discretion to scope under s. 15 is not to be used to narrow the scope to something less than the project as proposed.⁷⁵ Brief elaborations on these points are found in paras. 26 to 42 of the decision. Given the importance of the track determination and scoping process to the operation of CEAA, a close paragraph by paragraph analysis is warranted to determine the precise implications of the *Red Chris* decision for CEAA scoping and track determination.

Rothstein J. commenced his analysis by pointing out in para. 26 that “the approach of the Federal Court of Appeal and that advocated by Red Chris and the government cannot be sustained.” There is no doubt that the reference to the Federal Court of Appeal is a reference to its decisions in *Sunpine* and *True North*. This is remarkable, given that Rothstein J. was a long time member of the Federal Court of Appeal, and in fact wrote for the majority in these cases. As discussed below, the SCC directly overturned key aspects of these two decisions on the definition and scope of project, and put into question the overall approach to CEAA by the Federal Court of Appeal.

Rothstein J. started the substantive analysis in para. 28 with a close look at the definition of project. His conclusion is that project as defined in s. 2 means the project as proposed by the proponent. This has interesting implications for part (a) of the s. 2 definition of project dealing with undertakings in relation to physical works. This part of the definition of project had previously been conceived of as “any one undertaking” in relation to a physical work proposed by a proponent. Section 15(3) was then thought of as the provision that broadened the project from the one undertaking that triggered a s. 5 decision to all undertakings likely to be carried out. Under Rothstein J.’s interpretation, all undertakings and the full physical work proposed are now included under the definition of project from the start. The notion of “any undertaking” in the definition of project is therefore now better understood as “any and all undertakings.”

By illustration, the construction of a bridge might be the “one undertaking” and therefore the project that triggers the assessment. Under the approach adopted by the Federal Court of Appeal in *Sunpine* and *True North*, ss. 15(3) would then add the operation and decommissioning of the bridge to the scope of project. In light of the *Red Chris* decision, the process of including all undertakings in relation to the proposed physical work is now done at the front end, under the definition of

⁷² *Ibid.* at para. 53.

⁷³ *Ibid.* at paras. 29-30, 35.

⁷⁴ *Ibid.* at paras. 32-34.

⁷⁵ *Ibid.* at paras. 39-40.

project. Section 15(3) would seem to be reserved for undertakings not proposed by the proponent, but nevertheless likely to be carried out. An example might be specific uses of the bridge, such as the use of the bridge, by someone other than the proponent, to transport resources to market. As pointed out in paragraph 40, ss. 15(3) also serves as an important tool to prevent project splitting by proponents.

A key question this poses is how the determination is made on what project the proponent is “proposing?” One approach would be to simply consider the project as described by the proponent in the project description. This approach, of course, carries with it the risk of project splitting by the proponent. An alternative would be to require a broader consideration at this stage of what the proponent is actually proposing to do. This approach would rely on any related regulatory applications to all levels of government to identify the project as proposed by the proponent. This issue is not addressed in the decision; however, the court does return to the issue of project splitting in paras. 39 and 40.⁷⁶

Having determined that the definition of project refers to the project as proposed by the proponent, Rothstein J. concluded in para. 29 that the definition of project as the proposed project applies wherever the term is used throughout the Act, unless there are expressed words to the contrary or the context necessarily implies that a different definition of project is required. Applying this approach, the court concluded that the general definition as outlined above applies to ss. 18 and 21 of CEAA, i.e. the initial track determination.

Support for the court’s first key conclusion, that the basis for the track determination is the project as proposed, is offered in paras. 30 to 34 of Rothstein J.’s reasons. The wording of s. 16 of the Schedule to the Comprehensive Study List is relied on for support, as is the regulation making power for that list under s. 58 of the Act. Here the court discussed the role of the regulation making power in allocating the power to decide which projects have to undergo a comprehensive study to the Minister rather than the RA. Based on this analysis, the court found in para. 34 that “project” in ss. 18 and 21 means the project as proposed, not the project as scoped. This meaning of project in ss. 18 and 21 is subject only to the right of the RA to broaden the scope of project under ss. 15(2) and (3).

In para. 35 the court confirmed that tracking and scoping are distinct steps in the CEAA process. The RA first identifies the requisite track based on the project as proposed and the direction from the Minister in the form of the CSL. Only then does the RA proceed to scoping under s. 15. If the scoping process results in a broader scope of project, the track determination may have to be reconsidered. In turning to the key issue of scoping under s. 15, the court started with the general statement that once the track is determined, the RA has “the discretion to determine the scope of the project for the purposes of assessment.”⁷⁷ The next three paragraphs of the decision provide a basic description of the steps involved in making the scope determination under the various tracks under CEAA, without adding much to the analysis.

⁷⁶ For a case that dealt with the issue of project splitting, see *Bennett Environmental Inc. v. Canada (Minister of the Environment)*, 2005 FCA 261, 16 C.E.L.R. (3d) 1.

⁷⁷ *Supra* note 8 at para. 35.

This now takes us to the critical four paragraphs in Rothstein J.'s reasons.⁷⁸ They are included under a separate heading: "Limits on the Discretion to Scope a Project". On the surface there is some apparent ambiguity on whether these paragraphs are still in the context of the track determination. However, on balance it seems clear that the court is discussing limits on scoping discretion generally. Paragraph 39 provides some key conclusions on scoping. It confirms that s. 15 as a whole can only add to the scope, not take away from it, and that it offers a combination of direction and discretion to add to the project as proposed. It then offers some commentary on the role of individual subsections.

The scope of the project can be expanded on a discretionary basis under ss. 15(1) and (2). The court did not specifically address whether there are circumstances where an RA may have to combine projects under ss. 15(2) in response to project splitting by a proponent. The reference to enlarging "the scope when required by the facts" appears to relate to ss. 15(3) and its requirement to include every undertaking the RA determines is likely to be carried out in relation to the proposed physical work. The implication would appear to be that the RA has an obligation to enlarge the project under ss. 15(3) in situations where the proponent has engaged in project splitting. The overall message is that the scope can be expanded and may have to be expanded, but it cannot be narrowed to something less than "the project as proposed."

In para. 40, Rothstein J. re-confirmed the general proposition that the level of assessment is based on project as proposed by the proponent. This paragraph would therefore appear to be a continuation of the analysis in the previous paragraph. The court then commented specifically on the risk of project splitting by proponents. The court pointed out that CEAA assumes that the proponent will represent the entire project, but the court's reasoning lacks clarity on the respective roles of the proponent, RAs and the courts in preventing project splitting.

After acknowledging the risk that some proponents may respond to this decision by engaging in project splitting, Rothstein J. could have been much clearer on a proposed solution. The court could have confirmed a duty on proponents to include the entire project proposed in their project descriptions. Arguably, it is implicit in Rothstein J.'s comment in para. 40 that the Act assumes the proponent will file the entire proposed project, but the decision is not clear on this point. The court could have confirmed a duty on the RA to exercise its responsibilities under s. 15 to undo project splitting. Again, this duty is implicit in the discussion on the role of s. 15 in para. 39, but the court did not explicitly confirm this duty here. It could have confirmed that the concept of "project as proposed", introduced in para. 28, overrides any effort by the proponent to split the project. In other words, the court could have confirmed that the project as proposed is still the whole project, determined objectively on the evidence, even if the proponent decides to try to submit only part of the project for CEAA purposes. In this last respect, para. 40 takes us all the way back to para. 28 where the court failed to clarify how the project as proposed is to be identified. This remains a critical shortcoming of the decision.

Paragraph 41 does offer a bit more clarity on this point by stepping back from the detail to the bigger picture. It confirmed that project splitting has to be ad-

⁷⁸ *Ibid.* at paras. 39–42.

dressed and that there is no longer any discretion to limit the scope to something less than the entire project as proposed. In the end, the message on the outcome is that projects have to be scoped broadly, and that efficiency cannot be used as a justification for narrow scoping. Rather, efficiency is to be achieved through coordination and cooperation among the levels of government with EA responsibilities for a given project. The court is clear; CEAA offers ample tools to avoid duplication and inefficiency. The underlying message is that the Act will not permit efficiency to trump an effective and sufficiently broad scoping. If there is an efficiency problem, it rests with implementing governments, not with.

The basic idea is that all governments interested in a project EA need to get together and jointly initiate an integrated EA process so that decision makers at all levels of governments have a full appreciation of the decisions they are asked to make. Beyond the efficiency point made by the SCC, such active engagement and cooperation is critical for at least two reasons. First, without the active engagement of the various levels of government, it is unlikely that the process will do justice to the full range of issues that need to be considered in deciding whether and how a project should proceed. Second, without their active engagement, the final decision makers will be disconnected from the EA process and not be in a position to make sound decisions based on the information gathered. The SCC was clear that “delegation” is not the answer. Lack of active cooperation means unnecessary duplication, extra time and cost to everyone involved and reduced effectiveness. On the other hand, active, early and meaningful cooperation and coordination along the lines suggested provides an opportunity to finally realize the hope for EA as an effective and efficient tool for sustainable development.⁷⁹

As noted above, an intriguing aspect of the decision is the fact that it essentially overturns the Federal Court of Appeal rulings in *Sunpine* and *True North* written for the majority by Rothstein J. In both cases the court accepted the idea that “project” in CEAA generally meant project as scoped. Further, the court gave broad discretion to federal decision makers to determine the scope of the project for CEAA assessment purposes.

In *Red Chris* Rothstein J. provided no clear explanation for the rethinking of his two Federal Court of Appeal rulings. He could have justified the change based on the 2003 amendments to the comprehensive study process, but it is evident from the decision that these amendments were not an important factor. He could have justified the change based on the addition of the precautionary principle to the purpose section, but the judgment does not even mention this change to CEAA.

It seems that Rothstein J. came to the conclusion that his previous approach to CEAA was inconsistent with the wording of the Act and the context within which it has been operating. It is certainly possible that the facts of the *Red Chris* case convinced Rothstein J. of the mismatch between his interpretation of s. 15 and the overall functioning of the Act. While Rothstein J.’s change in his position on this issue is commendable, it remains to be seen whether it will ensure a true change in the Federal Court of Appeal’s views on CEAA.

⁷⁹ Arlene Kwasniak, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency and Substitution: Interpretation, Misinterpretation, and a Path Forward” (2009) 20 J.E.L.P. 1.

In the end, it is clear the SCC as a whole has a different view of the operation of CEAA than that represented by the two key FCA rulings. This, of course, raises questions about other aspects of these two FCA decision. It is unfortunate that the Supreme Court does not offer much guidance here, making a further court challenged necessary to resolve the questions raised by the *Red Chris* decision.⁸⁰ *Sun-pine* and *True North*, of course, continue to be good law on issues unrelated to those before the court in *Red Chris*, such as standard of review for CEAA. However, its approach to the definition and scope of project has clearly been overturned. More fundamentally, the FCA's overall approach to the scope of assessment in CEAA has been called into question. It is unclear whether the FCA's approach to s. 16, for example, is still supportable in light of the close connection to the definition and scope of project.

6. FINAL THOUGHTS

The legacy of the *Red Chris* decision is likely to be mixed. On the positive side, while short on detail, the decision nevertheless serves as a reminder to lower courts that the SCC takes environmental issues seriously, and that it takes a progressive approach to interpreting environmental legislation, with an eye to encouraging all levels of government to make effective use of the legal tools at their disposal. It challenges the Federal Court of Appeal, in particular, to rethink its very deferential approach to CEAA judicial review applications on scoping.

At the same time, *Red Chris* is a missed opportunity to deal with a number of broader EA and environmental law issues raised in the way previous SCC 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 or 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.⁸¹ The central role of the RA'S failure to consult with the public prior to the scoping decision makes this omission even more perplexing.

Red Chris will inevitably lead to further litigation on CEAA, as there are still a number of issues unresolved, most notably perhaps the appropriate response to project splitting. Among other unresolved CEAA issues that will likely be the subject of further litigation are the factors and scope of factors under s. 16 of CEAA. Specifically, the constitutional question on the ability of a federal assessment to gather information, and to consider and base decisions on a full range of social, economic and environmental considerations, including those under provincial jurisdiction was

⁸⁰ There is a factual error in para. 17 of the decision. In it, the court suggested that only comprehensive studies can lead to panel reviews and mediation. Of course, under ss. 20, 25 and 28 of the Act, any project subject to a screening can be referred to a panel review or mediation.

⁸¹ See *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2008] S.C.C.A. No. 393 for the full text of the rulings regarding the application for leave to appeal and the motions for leave to intervene.

never before the court in *Red Chris*. The *Oldman River Dam* case does not provide a complete answer, though it strongly hints that the federal government has the ability to carry out a comprehensive information gathering process to inform the valid exercise of federal jurisdiction. Of course, litigation of this issue could be avoided if jurisdictions across Canada take the *Red Chris* message on cooperative EA seriously. In the meantime, the SCC will have the opportunity to consider some of the outstanding CEAA issues shortly, when it renders its decision on the appeal from the Quebec Court of Appeal in *Moses*.⁸² The case will certainly provide an opportunity for the SCC to clarify the relationship between multiple EA processes in the context of a specific project and the role of CEAA assessment process.

The prospect of further litigation on CEAA is likely to be unwelcome news to governments, proponents and intervenors alike. However, the good news is that CEAA litigation is finally starting to reach a level of maturity that allows for a common understanding of the Act, and how it should be implemented. The message from the SCC on the avoidance of duplication and the need for cooperation and coordination is critical in this regard.⁸³ It can only be hoped that all levels of government take this message to heart, as it is the only way to improve the efficiency of EA in Canada without significantly undermining its effectiveness. All levels of government, and all key decision makers, must be sufficiently involved in the design and implementation of an EA process in order to make good decisions based on its outcome. *Red Chris* sends the clearest signal yet that this is the future of EA.

One aspect of the decision, the remedy granted by the SCC, has not been addressed in this case comment. The SCC took the unusual step of agreeing with the trial judge on the substantive issues, but overturning his proposed remedy of requiring a comprehensive study to be carried out. The SCC limited the remedy to a declaration that the RA's acted unlawfully, citing the nature of the case as a "test case," the RA's reliance on the *True North* ruling, and the failure of the applicants to identify specific shortcomings in the provincial EA process as reasons for this reversal. This aspect of the decision has important broader implications, but the implications are not specific to CEAA and are not directly related to the operation of CEAA, so they are not addressed in this case comment.

As a final thought, the decision provides important context for the legislated seven year review scheduled for 2010. It provides clarity on key aspects of CEAA that otherwise might have required legislative change. Where radical reform may have been warranted to make CEAA an effective tool, more modest changes may now be sufficient to put EA in Canada on a constructive path. The basic message about the importance of cooperation and coordination as a way of ensuring an effective and efficient EA processes, especially between the federal and provincial levels of government, is critical to the success of the seven year review and must be taken seriously. One coordinated process with active involvement of all levels of government, as well as meaningful public engagement, has the best hope of improving decision making for sustainability in Canada.

⁸² *Moses c. Canada (Procureur général)* (2008), 35 C.E.L.R. (3d) 161 (Qc. C.A.); leave to appeal to S.C.C. granted [2008] S.C.C.A. No. 281.

⁸³ Kwasniak, *supra* note 43.