

**SCOPING
A COMPARATIVE REVIEW OF LEGAL REQUIREMENTS & PUBLIC
EXPECTATIONS UNDER CANADIAN, ONTARIO AND U.S. ENVIRONMENTAL
ASSESSMENT REGIMES**

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Scoping and its Role in Environmental Assessments

This paper surveys recent Ontario, Canadian and U.S. approaches and case law regarding the role of scoping in environmental assessment practice.

We assume most environmental assessment practitioners accept that the purposes of an environmental assessment or EA (which for the purpose of this paper should be understood to be the equivalent of the environmental impact statement or EIS) as established by the pioneering U.S. *National Environmental Policy Act* of 1969, are to

- (a) serve as “an action-forcing device” to insure that environmental goals and policies are infused into programs and actions of government,
- (b) “provide full and fair discussion of significant environmental impacts”, and
- (c) inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.¹

Establishing the scope of a project and scope of assessment to be carried out are at the heart of

¹ National Environmental Policy Act of 1969, CEQ Regulation 1502, Sec. 1502.1

the EA process.²

The scope of a project refers to the elements that will be included in the assessment (for example, in relation to a pulp and paper mill expansion, should the responsible federal agency include the road to service the mill, the logging operation that will supply the mill, and/or the bridge needed for the road to reach the mill?).

The scope of the assessment deals with the elements that must be included in the EA, in particular, factors such as the need for the project and alternatives to the project.

For those interested in the ability of the EA process to contribute to more sustainable decision-making, and “greener” policy choices, ensuring that the proponent or responsible agency scopes the project and assessment appropriately is critical. “Appropriately” will mean, from this perspective, for most non-routine projects, that issues of need and alternatives must be considered. If they are not, the critique will likely be that an EA will do little more than recommend project mitigation measures.

From the public perspective, it will be argued that a narrowly-scoped EA will side-step the significant issues that communities must grapple with when making decisions about resource use, waste management, or energy supply, and is little assistance to decision-makers. The public would argue that the choices with a real chance to impact sustainability are made farther upstream, when decisions are made to proceed with a new incinerator instead of waste diversion, or new highway construction over public transit.

If the EA is allowed to focus on simply where to put the incinerator or road, i.e. if the particular project to be implemented is decided outside of the EA, the public will say the ability to generate “greener” decisions as part of the EA was lost and the purposes of EA as set out in the NEPA regulation avoided.

In Ontario, since 1975 when the *Environmental Assessment Act* was enacted, it has been accepted that purposes of EA, as generally found in the NEPA Regulation, would be addressed by requiring the proponent to address need, as well as both alternatives to and alternative methods of carrying out a proposed undertaking.

In a very recent case, *Sutcliffe*, the Ontario Environment Minister approved Terms of Reference for a landfill site expansion EA which did not require the proponent to examine the need for the proposed landfill expansion, nor alternatives to that expansion. Opponents of the landfill challenged the Terms of Reference, and the court quashed the Terms of Reference, finding them to be in violation of the Ontario EAA; the case is under appeal.

At the Canadian federal level, under the *Canadian Environmental Assessment Act*, federal government officials, called “responsible authorities”, have the discretion to consider or not to consider issues of need and alternatives to a project; only the “purpose” of the project is mandatory for comprehensive studies and panel reviews. Consequently, tensions more often surface at the federal level in relation to establishing the scope of the project.

² In Canadian practice, the term environmental assessment or EA is the equivalent of the detailed Environmental Impact Statement requirement of NEPA.

Subjecting a narrowly-scoped project to an examination of need and alternatives is far less onerous than a broadly-scoped project. Using our example of the pulp mill operation, if the federal authority has been asked to issue an approval for the bridge, limiting the project's scope to the construction of the bridge enables the EA to sidestep the more contentious issues of forest management, the supply for the mill, and construction of the road.

In the U.S., regulations under NEPA provide much more detailed guidance in relation to consideration of the purpose of a project and alternatives to a project. Nonetheless, familiar tensions surface in the caselaw in relation to how wide a range of alternatives a federal agency must canvass, and whether the reasonableness of alternatives is to be assessed from the perspective of the proponent, or the federal agency.

Ontario Caselaw on Scoping: the *Sutcliffe* Decision

On June 17, 2003, the Ontario Superior Court of Justice (Divisional Court) released its decision in the case of *Sutcliffe v. Ontario (Ministry of the Environment)*, Ont. Sup. Ct. (Div. Ct.), 65 O.R. (3rd) 357 ("*Sutcliffe*"). The decision considered the impact of changes made to Ontario's *Environmental Assessment Act* ("EAA") in 1997, and in particular, whether consideration of the need for a project and alternatives to the project were mandatory elements of an EA in Ontario.

Prior to the 1997 amendments, consideration of the need for a project and alternatives to a project had been considered mandatory in light of section 6.1 of the EAA. Section 6.1 required the EA to include a description of the purpose and rationale for the undertaking, and a rationale for alternatives to the undertaking.³ In 1997, the legislation was amended to require the

³ The amendments made to section 6.1 in 1997 are noted in bold below:

"s.6.1.(2) **Subject to subsection (3)**, the environmental assessment must consist of,

- (a) a description of the purpose of the undertaking;
- (b) a description of and statement of the rationale for,
 - (i) the undertaking,
 - (ii) the alternative methods of carrying out the undertaking, and
 - (iii) the alternatives to the undertaking;
- (c) a description of,
 - (i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
 - (ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and
 - (iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment

preparation of Terms of Reference, which would set out the proposed scope of the EA for consultation and the approval, where appropriate, of the Minister of the Environment (para.8). The Minister could approve the TOR where satisfied that they set out an EA process “consistent with the purpose of this Act and the public interest” (para. 9). Following approval of the TOR, the proponent would prepare the EA and submit it to the Minister for approval.

The goal of the TOR was to permit the Minister and interested parties to provide feedback to the proponent early in the process. It was hoped that requiring approval of the TOR would help to avert situations where an EA had to be rejected because a proponent had missed key considerations when completing an EA, at great expense and over a lengthy period of time. At the same time the requirement to seek approval for TORs was added, subsection 6.1(3) was added to the EAA, permitting the approved Terms of Reference to provide for an EA consisting of elements “other than” those set out in 6.1(2). In *Sutcliffe*, the central issue the court grappled with was whether or not the words “other than” meant “in addition to” the elements set out in 6.1, or “different from” those elements.

At issue in *Sutcliffe* was the proposed expansion of a landfill site near Napanee. The site was licensed to receive 125,000 tonnes of non-hazardous waste each year, which would have increased to 750,000 tonnes per year through the expansion. The proposal was resisted by the Sutcliffes, neighbours of the site, and by the nearby Mohawks of Quinte Bay.

Although Ontario’s EA legislation normally applied only to public sector proponents, since 1986 the Ontario Environment Ministry as a matter of policy has applied it to larger private sector waste disposal and waste management initiatives. In this instance the proponent, in developing Terms of Reference for its EA, opted not to address the question in the EA of whether the landfill expansion was necessary (other than from its perspective), whether an alternative to landfill would be more appropriate (diversion, recycling, etc.) or whether alternative sites should be considered. The Terms of Reference proposed to focus the examination of alternatives on alternative design and layout for the existing site. The Minister of Environment approved the narrowly-scoped EA.

In the court challenge, the issue was whether 1997 amendments to the EAA required need, alternatives to and alternative methods to be fully addressed, or whether the Environment Minister could allow “information other than that required” by the EAA to be provided. The

by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking;

(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and

(e) **a description of any consultation about the undertaking by the proponent and the results of the consultation.**

(3) The approved terms of reference may provide that the environmental assessment consist of information other than that required by subsection (2).

MOE argued that scoping of the EA was appropriate, in that it was argued the 1997 amendments were intended to streamline the EA process and curtail lengthy and expensive hearings. The MOE also argued that private sector proponents lacked the powers of expropriation (eminent domain) given to public sector proponents and, as such, ought not be required to present “alternatives methods” (e.g. alternative sites for) the proposed project.

The majority of the Divisional Court held that scoped terms of reference were not authorized, finding that the meaning of the term “other” was to be resolved having regard to the purpose of the EAA, its context, and legislative history.

The majority referred to the purpose of the EAA, being to protect, conserve and wisely manage the Ontario environment for the people of Ontario. The majority next considered the 1997 amendments in the context of the legislation as a whole. The Minister had, both before and after the 1997 amendments, the power to approve or reject an EA, or refer it to a tribunal for decision, and to substitute his or her decision for that of the tribunal where desired. The 1997 amendments increased public consultation obligations and, in the court’s view, “added the extra TOR step” to the EA process (para. 28). As such, the majority did not accept the MOE’s position that the amendments were designed to streamline or make the EA process less onerous for private sector proponents. The court also rejected the MOE’s argument that private sector proponents were hindered in the presentation of alternatives by a lack of power to expropriate; in this case, for example, the proponent company had successfully purchased seven landfill sites between 1996 and 2003.

The court also considered the statements of the Minister of the Environment at the time the amendments were made, and in particular, reassurances provided that the amended process would still provided for “full” environmental assessment, including the consideration of alternatives.⁴ Without evidence of legislative intent to the contrary, the court preferred the view that the 1997 amendments supplemented rather than supplanted the key elements of an EA, such that “other than” could only be taken to mean “in addition to” (para. 44).

The majority’s view was supported by two previous cases dealing with the scope of EA in Ontario, *Re Steetly Quarry Products Inc.* (1995) 16 C.E.L.R. (NS) 161 (Jt. Board) and *Re West Northumberland Landfill Site* (1996) 19 C.E.L.R. (NS) 181 (Jt. Board). Both cases considered whether or not proponents could scope an EA in response to the proponents’ own needs, rather than whether a broader need existed for the project, and both concluded that the issue of need was implicit in the requirement to set out the rationale for the project. To illustrate, the court cited the following quote from *Steetly Quarry*:

“Justification for an undertaking on the basis of need does not form an explicit requirement of the EA Act. It can, however, be successfully argued that implicit in the requirement for a rationale for the undertaking is an expectation that the proposed undertaking is needed. Also, since approval of an undertaking must rest comfortably on the purpose of providing for the betterment of the people of Ontario, one may conclude that if it does not enhance the community interest, it is not needed.

⁴ “All proponents will be subject to full environmental assessments. Of that my colleague opposite can be absolutely assured. Hansard, 88 (13 June 1996) at 3538 (Hon. Brenda Elliot, Environment Minister)” (para 36).

Further, although an undertaking under the EA Act may provide substantial private benefit to the proponent, it must also result in demonstrable social benefit. In any event, by convention, demonstration of need is accepted as an intrinsic part of an environmental assessment.” (para. 30)

Associate Chief Justice Cunningham, in dissent, held that the meaning of the term “other than” was not ambiguous on its face, and consequently there was no need to resort to statutory interpretation or legislative history. Logically speaking, Cunningham A.C.J. found that proponents could always include in an EA more information or elements than the statute required. As such, no amendment was required to permit the consideration of elements “in addition to” those set out at 6.1(2) (para. 13, dissent). Rather, the amendments were designed to recognize that “one size did not fit all” in the EA context, and that it was appropriate to allow private sector proponents flexibility in the contents of the proposed TOR and EA (para. 12).

The *Sutcliffe* decision has been appealed by the proponent to the Ontario Court of Appeal. At the outset of the appeal, the Environment Minister applied for leave to appeal as well. Subsequent to the 2003 Ontario election, the new Liberal Minister of the Environment filed a notice of abandonment. At the same time, however, the Attorney General filed a notice of intervention, to deal with issues such as the standard of review of Ministerial decisions, and the scope of Ministerial discretion. The appeal is scheduled to be argued June 28, 2004. Environmental assessment practitioners in Ontario will be following the outcome of the appeal closely.

Scoping under the *Canadian Environmental Assessment Act*

At the federal Canadian level, consideration of the need for a project and alternatives to the project are not mandatory EA requirements in the vast majority of cases, but rather are within the discretion of the relevant government agency, called the “responsible authority”, under section 16(1)(e) of the *Canadian Environmental Assessment Act*, (“CEAA”), or the Minister in the case of a panel review.

For certain kinds of larger projects, for which a comprehensive study is required, the purpose of a project must be considered under section 16(2)(a).⁵

⁵ Factors to be considered

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public that are received in accordance with this Act and the regulations;
- (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
- (e) **any other matter relevant** to the screening, comprehensive study, mediation or assessment by a review panel, **such as the need for the project and alternatives to the project**, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require

The responsible authority and Minister also have the discretion to determine the scope of the project that will be subject to assessment, under section 15.⁶ Section 15(3) does, however, require the responsible authority to carry out an assessment in relation to every construction, operation, modification, decommissioning, abandonment or other undertaking likely to be carried out in relation to a physical work.

A review of the caselaw in relation to the scope of the assessment reveals a great deal of judicial deference toward the statutory discretion accorded to the responsible authority under *CEAA* in relation to the scoping of an assessment. Generally speaking, provided the responsible authority has considered those elements required by the statute, the court will not review the degree or

to be considered.

Additional factors

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the **purpose** of the project;
- (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
- (c) the need for, and the requirements of, any follow-up program in respect of the project; and
- (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Determination of factors

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a), (b) and (d) and (2)(b), (c) and (d) shall be determined

- (a) by the responsible authority; or
- (b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

Factors not included

(4) An environmental assessment of a project is not required to include a consideration of the environmental effects that could result from carrying out the project in response to a national emergency for which special temporary measures are taken under the *Emergencies Act*.

1992, c. 37, s. 16; 1993, c. 34, s. 22(F).

⁶ 15. (1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

- (a) the responsible authority; or
- (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

Same assessment for related projects

(2) For the purposes of conducting an environmental assessment in respect of two or more projects,

- (a) the responsible authority, or
- (b) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

may determine that the projects are so closely related that they can be considered to form a single project.

All proposed undertakings to be considered

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

- (a) the responsible authority, or
- (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

1992, c. 37, s. 15; 1993, c. 34, s. 21(F).

extent of consideration undertaken.⁷ The decision of Pelletier J. in the case of *Inverhuron & District Rate Payer's Association v. Canada (Minister of the Environment)* [2000] F.C.J. No. 682 (Fed. T.D.) illustrates the trend:

“The extent to which certain factors are considered, and the weight given to various factors in the overall assessment of environmental effects, are matters for those who have the expertise to make such judgments, and not for the Court...” (para. 53).

Inverhuron dealt with the EA of a proposed dry storage facility for spent nuclear fuel at the Bruce Nuclear Power Plant. At the time the EA report was filed with the Minister of the Environment, Ontario Hydro had not yet settled upon a container design or the process for moving the fuel. Consequently, the report set out a reference case and assessed various alternatives by reference to deviations from the reference case. However, while among the alternatives noted in the EA report, the design that was approved was not the reference design. The applicants challenged the Minister's ability, in approving the EA, to rely upon an EA that had been done for what was argued to be a different project. The court considered the applicants' critique to be, in part, a challenge to the environmental science upon supporting the EA, and refused to become involved in a review of the evidence upon which the Minister relied. The other determining factor was the discretion accorded the responsible authority, as set out above.

Similarly the Federal Court in the case of *Sharpe v. Canada*, [1999] 4 F.C. 363 examined whether or not the Canadian Transportation Agency (CTA) had declined to exercise its jurisdiction by failing to assess the need for, and alternatives to, a railway line under s. 16(1)(e) of CEAA. The proponent in *Sharpe*, Union Carbide of Canada Inc. (“UCC”), had applied for approval from the CTA for construction of a short railway line to serve the UCC plant. The CTA had determined that it would consider the issues of need and alternatives to the project, but had relied on the conclusions of the proponent, UCC, as to the need for the project, rather than conducting its own analysis. The court held that while the CTA had relied heavily upon UCC's conclusions, it had expressed its own view on the issue of need (para. 24). The court held that business or commercial needs were a legitimate basis for rejecting alternatives, and that the responsible authority was within its discretion in relation to the scope of the assessment:

“Paragraph 16(1)(e) of the CEAA does not prescribe the degree of consideration required of the Agency on the question of need and alternatives. As the determination of whether to consider need and alternatives is discretionary, so is it within the discretion of the Agency to decide the nature and extent of its consideration of these factors.” (para. 27).

In obiter comments the court also noted that in cases where a project is environmentally acceptable, it might be unnecessary to consider need and alternatives, but in cases where a project would have severe environmental consequences, a more rigorous examination might be warranted (para. 28).

The Federal Court was similarly deferential in the case of *Alberta Wilderness Association v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (“*Express Pipelines*”). *Express Pipelines* dealt

⁷ See also the decision of the Federal Court of Appeal in *Sunpine*, *infra*, at para. 24-27.

with a judicial review application concerning a Joint Panel Review report on a proposed underground crude oil pipeline. The applicants challenged the sufficiency of the report in part on the grounds that the Joint Panel had an obligation to consider alternate border crossings, and to consider “all possible reasonable alternatives” (para. 12). The court held that where a Minister had set the scope of the project, including the termini of the oil pipeline, a Joint Panel is under no obligation to study alternative terminal points. As well, the matter of how many alternatives ought to be considered is a question of judgement, to be left to the responsible authority.

“While the Minister’s power to determine the scope of the project clearly cannot detract from the requirement for an assessment to consider the factors listed in section 16, it cannot fail to have some impact on those factors...

Also on the matter of alternative means of carrying out the project, it was suggested that the panel had not gone far enough and had not considered all possible reasonable alternatives. This once again is a question of judgement and we cannot see any grounds for interfering with the panel’s expression of satisfaction with the adequacy of the information provided to it on this point (para. 11-12).”

The true focal point for controversy in relation to scoping under CEAA has not been section 16, in relation to the scoping of an assessment, but rather in relation to section 15, which deals with the scoping of the project. As noted above, section 15(1) provides the responsible authority with the discretion to determine how the project will be scoped for EA purposes. Section 15(2) permits a responsible authority to determine that two projects are so closely linked as to warrant assessment as a single project. Some constraints are imposed upon the responsible authority’s discretion by section 15(3), which requires that the EA be conducted in respect of “every construction, operation, modification, decommissioning, abandonment or other undertaking” in relation to a physical work, that is proposed or likely to be carried out.

For example, in the case of *Citizens’ Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 273, the applicants challenged the decision of the responsible authority, the federal Department of Public Works, to separately assess a mine/mill project at Voisey’s Bay, and the smelter/refinery project that would process the ore at Argentia. The applicants argued that the two projects were so closely interrelated that they ought to be assessed as a single project under s. 15(3).

“It is urged, by the applicant, that ss. 15(3) restricts the discretion of the decision-maker, and in this case the mine, mill, smelter and refinery are integrally related undertakings, in terms of management, economics, production, scheduling, approval and environmental effects.” (para. 59)

The court considered the guidance material provided by the Canadian Environmental Assessment Agency, the Responsible Authorities Guide, in outlining the factors to be considered in determining the scope of a project. These factors included the inter-dependence of physical works or activities, any linkage that ensures that a decision to proceed with one makes the other inevitable, and the proximity of the physical works (para. 25). Applied to the case at bar, the court found that the responsible authority had validly exercised its authority when deciding to assess the mine/mill and smelter/refinery separately (para. 69). In particular, the projects were separated by a considerable physical distance, they were not interdependent in that the smelter would be a multi-client facility and the mine could have ore processed at other refineries, and the

decision to proceed with one project did not make the other inevitable (para. 68).

A similar situation was addressed by the court in the case of *Manitoba's Future Forest Alliance v. Canada (Minister of the Environment)*, [1999] F.C.J. No. 903. The applicants in *Manitoba* challenged a decision by the responsible authority, the Coast Guard, to assess only the bridge for which approval was sought, and not the related construction and expansion of a pulp mill, the construction of hundreds of kilometres of all-season and seasonal logging roads across 11 million hectares of land in Manitoba, and the forestry management plan that would feed the mill. The court held that the Coast Guard was within its discretion to scope the project as the construction of the bridge, and any related undertakings, and to exclude road construction and logging operations. The court quite explicitly disagreed with the trial court in *Friends of the West Country Association*, a decision which was overturned a year later by the Federal Court of Appeal.

In *Friends of the West Country Assn. V. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263 ("*Sunpine*"), the proponent sought the construction of a permanent road that could be used to transport logs to its mill. As the road crossed two creeks, approvals were required under the *Navigable Waters Protection Act* in order for construction to proceed (para. 3). The responsible authority, the Coast Guard, scoped the project as the construction of the two bridges alone, excluding the road and the forestry operation. The Friends of the West Country Association challenged the Coast Guard's scoping of the project, arguing that at a minimum the road ought to have been included, and perhaps the forestry operations, either through the operation of 15(3) or through the assessment of cumulative effects. The applicants were successful before the Motions Judge, who considered the guidance set out in the Responsible Authorities Guide and principles from U.S. caselaw, in particular the independent utility principle. However, the the decision was reversed on appeal (para. 13).

The Federal Court of Appeal first considered the meaning of the phrase "in relation to", in section 15(3): "in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to" the bridges (para. 13). The Federal Court rejected the assertion that elements that had been excluded through the scoping of the project could be brought back into the assessment through s. 15(3), so that if the responsible authority had excluded the road at s. 15(1), there was no obligation to consider the road pursuant to s. 15(3)) (para. 18, 23). As a result, the Federal Court of Appeal interpreted s. 15(3) in *Sunpine's* case to mean other undertakings in relation to the life cycle of the bridge itself, rather than other undertakings with some connection to the physical work:

"The words "in relation to" in context here do not contemplate any other construction, operation, modification, decommissioning, abandonment or other undertakings that has any conceivable connection to the project as scoped. Rather the words refer to construction, operation, modification, decommissioning, abandonment or other undertakings that pertain to the life cycle of the physical work itself or that are subsidiary or ancillary to the physical work that is the focus of the project as scoped." (para. 20)

The Federal Court of Appeal went on to reject the independent utility principle that the Motions Judge had relied upon in determining that the road and the bridges ought to be assessed together.

The independent utility principle counsels that where a project has no independent utility apart from other projects, the projects are inextricably intertwined, and must be assessed together (para. 21). In the *Sunpine* case, it was argued the bridge had no independent utility in isolation from the road, and thus the two projects ought to be assessed together. The Federal Court of Appeal, however, concluded that the independent utility principle had been imported from U.S. caselaw considering the *National Environmental Policy Act* (“NEPA”), and was of no assistance in interpreting s. 15(3) of CEAA (para. 22). Finally, the court went on to find that the responsible authority’s discretion extended to deciding which projects and activities ought to be included for the purposes of cumulative effects assessment (para. 27).

The *Sunpine* decision was later applied in *Lavoie v. Canada (Minister of the Environment)*, [2000] F.C.J. No. 1238, where the court held that failure to consider regulation of water levels in an EA of a proposed hydroelectric project did not violate s. 15(3), in light of the scoping decisions made by the responsible authority under s. 15(1).

A similar result was also reached by the Federal Court of Canada (Trial Division) in the case of *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1543 (“CPAWS”). CPAWS dealt with the construction of a winter road through a national park. The applicants argued that the EA ought to have considered the proponent’s “clearly stated intention” to convert the lower-impact winter road into an all-season, and higher impact, permanent road (para. 58). In particular, it was argued that the conversion of the winter road into an “all season” road was a “modification” under s. 15(3), and one that had originally been referenced in the project proposal. The court found, however, that the Minister of the Environment was within her jurisdiction in deciding to assess the two projects separately, and that s. 15(3) dealt with the life cycle of the winter road alone, rather than the winter road should it evolve in the future into a permanent road (para. 64).

Finally, in *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, the Federal Court of Appeal considered the scoping of a development project at Chateau Lake Louise, in Banff. The proponent, CP, had proposed a series of future developments at the Chateau, the first of which was a meeting facility. Future proposed developments included a swimming pool and spa restoration, staff housing construction and additional parking facilities. However, the responsible authority, the Minister of Canadian Heritage, had assessed only the proposed meeting facility and not the rest of the elements of the Long Range Plan for the Chateau. The court considered the guidance set out in the Responsible Authorities Guide, in relation to interdependence, linkage along with the principal project/accessory tests. Following *Sunpine*, *Manitoba*, and *Citizens’ Mining Council*, the court concluded that the responsible authority was within her discretion in assessing only the proposed meeting facility expansion.

As the review set out above makes clear, the Federal Court has been very reluctant to interfere with the determinations made under CEAA by responsible authorities in relation to both the scope of the project and the scope of the assessment. So long as the factors required to be addressed by s. 16(1) are included, the court will not second-guess the responsible authority’s analysis, nor the extent to which the factors were considered. Similarly, while provisions such as s. 15(3) and the assessment of cumulative effects under s. 16 have the potential to require quite a wide review of both a project’s life-cycle and to extend the range of the project at least for the

purpose of examination of cumulative effects, the Court has generally declined to interfere where an RA has dealt with these matters narrowly.

While it is logically attractive to hold that s. 15(3) cannot have the effect of re-opening a scope settled upon by a responsible authority at s. 15(1), the discretion in the act together with the deference of the courts to extremely narrow exercises in scoping are viewed by NGOs and public interest groups to undercut the purpose of EA, as generally reflected in the NEPA regulation referred to at the beginning of this paper. From that perspective, it can be argued that an EA must put complete cost-benefit information in front of decision-makers in relation to proposed projects, information that supplements economic and social analysis with environmental costs and benefits, and that the EA process is not designed to ensure an environmentally benign outcome, but rather to ensure that the any tradeoffs being made are clear both to the decision-maker and to the affected public.

Where a project involves the expansion of a forestry or mining operation, allowing responsible authorities to focus in on the construction of a bridge as the “project” arguably results in the loss of valuable input into the decision-making process. By definition, the environmental concerns related to the construction of a bridge will be very different than the analysis that would be necessary in relation to a forestry management plan, or a mine and mill project that would operate for decades, over a large geographical area.

Where projects are very narrowly scoped, the public would argue that the EA process turns into an exercise in generating mitigation measures for the project (ie. the bridge), rather than a planning exercise intended to enumerate and weigh potential solutions to a problem (for example, ensuring rational and sustainable resource use). In essence, the public would argue that very narrowly scoped EAs miss the “big picture” issues that EA was intended to highlight, and help address.

In part, the constraints that the courts have placed upon the scoping provisions of CEAA may stem from Canada’s predominant use of EA as a tool for the evaluation of projects alone. Other jurisdictions have for many years supplemented project-specific EA with strategic EAs, which can examine programs, policies, and regional development at a much more general scale. A strategic EA provides a much more sensible point of departure for debates that are presently, in Canada, undertaken at the project level. For example, projects involving resource or waste management, and transportation planning, engage concerns that often operate on a regional scale: What should our municipality or province be doing with its waste? How much emphasis should be placed on diversion and recycling vs. disposal? What are the region’s goals for growth and air quality, and how do these relate to our transportation choices (more highways vs. an expansion in public transit)? In the absence of strategic level EA, stakeholders are left to battle over competing values in the context of individual projects. In turn, where the scoping of that project is so narrow as to exclude the “big picture” issues, they simply fall off the table altogether.

U.S. Experience Under NEPA

While a comprehensive inventory of NEPA caselaw on scoping is beyond the purview of this

paper, a brief review the key principles related to consideration of alternatives will provide a useful counterpoint to the Canadian decisions discussed above.

NEPA requires that every EIS include consideration of “alternatives to the proposed action”, in particular where a proposal involves an “unresolved conflict concerning alternative uses of available resources”.⁸

More detailed guidance is set out in the Council on Environmental Quality’s Regulation 1501, which addresses both the exercise of scoping and the inclusion of reasonable alternatives. The term “scope” is defined to include three types of actions, three types of alternatives, and three types of impacts.⁹ The impacts to be considered include direct, indirect and cumulative impacts. The alternatives must include the “no action” (or “base case”) alternative, other reasonable courses of action, and mitigation measures not included in the proposed action. Actions must be assessed together where they are connected, cumulative, or similar so that common geography or timing makes a single assessment the best way to evaluate their impact. As alluded to above in the discussion of Canadian federal caselaw, the U.S. definition of connected actions also includes three elements:

“...Actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.

⁸ *National Environmental Policy Act of 1969*, as amended; see in particular Title 1, Section 102 [42 USC 4332], subsections (C)(iii) and (E).

⁹ “Scope consists of the range of actions, alternatives and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend upon its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

- (a) Actions (other than unconnected single actions) which may be:
 - 1. Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
 - (i) Automatically trigger other actions which may require environmental impact statements.
 - (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
 - (iii) Are interdependent parts of a larger action and depend upon the larger action for their justification.
 - 2. Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
 - 3. Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impact of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.
- (b) Alternatives, which include:
 - 1. No action alternative.
 - 2. Other reasonable courses of actions.
 - 3. Mitigation measures (not in the proposed action).
- (c) Impacts, which may be: (1) Direct, (2) indirect; (3) cumulative.”

- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend upon the larger action for their justification.”

The CEQ’s Regulation 1502 specifies that the EIS must briefly state both the purpose of the project and the “need to which the agency is responding in proposing the alternatives including the proposed action”. Section 1502.14 requires federal agencies to “rigorously explore and objectively evaluate” all reasonable alternatives, and where alternatives are eliminated from consideration, to provide brief reasons. Agencies are further required to devote enough attention to each alternative so that decision-makers can evaluate their comparative merits. Agencies must include reasonable alternatives that are outside of the lead agency’s jurisdiction, and must identify the preferred alternative.¹⁰

The court’s evaluation of the range of alternatives that will be considered acceptable within an EIS under NEPA depends, in part, upon whether the proposal is a discrete, site-specific proposal within the purview of a single agency, or a much broader inter-agency proposal.

For example, in the early case of *Natural Resources Defence Council v. Morton*, 458 F. 2d 827 (D.C. Cir. 1972) (“Morton”), the Secretary of the Interior proposed to sell oil and gas leases on the outer continental shelf, off the Louisiana coast, in response to a looming energy crisis. The court found that the EIS had failed to comply with NEPA, by not considering alternatives outside the jurisdiction of the lead agency – such as the deregulation of existing oil imports to increase supply, or the modification of natural gas prices. The Department of the Interior had argued that it ought only to consider alternatives within its ability to implement.

¹⁰ “This section is at the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sect. 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.”

The court held that while NEPA did not require a “crystal ball inquiry”, it did require consideration of feasible alternatives. As a result, the EIS should have included alternatives that, while outside the purview of the Department of the Interior, were within the purview of Congress or the President, the decision-makers that would ultimately receive the EIS:

“When the proposed action is an integral part of a coordinated plan to deal with a broad problem, the range of alternatives that must be evaluated is broadened. While the Department of Interior does not have the authority to eliminate or reduce oil import quotas, such action is within the purview of both the Congress and the President, to whom the impact statement goes. The impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and alternatives, for their consideration along with the various other elements of the public interest...”

Morton also established the principle that an alternative offering a partial solution should still be considered, in combination with other solutions, and that the need for legislative change should not necessarily disqualify an alternative from consideration.

In contrast, a more recent case from Washington, D.C. illustrates the narrower range of alternatives required in relation to discrete projects under the authority of a single lead agency. In the *City of Alexandria v. Slater*, [1999] CADC-QL 277 (“*Slater*”), the court reviewed an EIS dealing with a six-lane bridge, barely coping with traffic volumes twice the level it had been designed to accommodate. The EIS had examined eight alternative proposals, seven of which had twelve lanes, and one of which was a “no action” alternative. The EIS had discussed but eliminated narrower bridge alternatives, since these options did not meet traffic requirements. The EIS was challenged in *Slater* for failure to consider all reasonable alternatives. However, the court held that reasonableness must be defined by reference to a project’s objectives, and the project in this case was discrete and wholly within the lead agency’s jurisdiction. Unlike the situation in *Morton*, if the lead agency in *Slater* did not address the congestion problem by building a twelve-lane bridge, no other agency could be called upon to do so. Consequently, an incomplete (ten lane or less) solution was deemed not to be a “reasonable alternative”.

Alternatives need not be required under NEPA where they are speculative, remote, impractical or ineffective (see, for example, *Natural Resources Defence Council v. Donald P. Hodel*, [1988] CADC-QL 482 and *Colorado Environmental Coalition v. Dombeck*, No. 98-1379, [1999] CA10-QL 1029). For example, in *Akiak Native Community v. United States Postal Service*, [2000] CA9-QL 305, the postal service had undertaken an experimental system of delivery via hovercraft to remote Alaskan villages. The court held that it was unnecessary to evaluate alternatives such as fixed wing aircraft, truck or boats, in light of their inefficiencies, which had given rise to the program to begin with:

“The Postal Service seeks to improve the reliability and efficiency of mail delivery service to remote Alaskan villages. The Postal Service was not required to consider alternatives that would not serve this reasonable purpose... When the

purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved...”

Similarly, federal agencies are not required to consider alternatives which do not meet the agency’s objectives or are contrary to the agency’s statutory goals (*Central South Dakota Cooperative Grazing District v. Secretary of the US Department of Agriculture*, [2001] CA8-QL 1234. Nor are federal agencies required to evaluate alternatives that are unlikely to be implemented, such as a “no harvest” alternative in an EIS prepared by the U.S. Forest Service, which had a mandate to balance competing uses of the forest (*Seattle Audubon Society v. Moseley*, [1996] CA9-QI 1091).

NEPA caselaw dealing with the issue of reasonable alternatives makes clear, however, that the reasonableness of the alternatives chosen will be evaluated from the perspective of the federal agency assessing the project, *not* from the perspective of the proponent. The federal agency may not ignore the proponent’s objectives, but may similarly not blindly accept a proponent’s statement of purpose and need (*Colorado Environmental Coalition v. Dombeck*, [1999] CA10-QL1029). As a result, the federal agency’s definition of the objectives of a proposal is key yardstick against which the reasonableness of alternatives will be measured. The importance of clearly defining the proposal’s objectives is well illustrated by a ski-hill expansion case, *Methow Valley Citizens Council v. Regional Forester*, [1987] CA9-QL 2222 (“*Methow*”).

In *Methow*, a proponent applied to the Forest Service to develop an area known as Sandy Butte for use as a downhill ski area. The Forest Service’s stated purpose, in the EIS, was framed broadly – “to provide a winter sports opportunity” to the public – and *not* tied to a particular parcel of land. The EIS was challenged by opponents who suggested that other land, not owned by the proponent, was also available and had not been considered, and that the expansion of existing ski areas would have less environmental impact. The court found the EIS lacking in its consideration of reasonable alternatives, as it was then framed. However, the court went on to suggest that the Forest Service re-frame its EIS purpose to make clear that a particular market need was being addressed, which made the elimination of other alternatives reasonable, rather than revising the alternatives portion of the EIS.

“Thus the Forest Service should more clearly articulate its goal, specifically identifying the market and geographic pool of skiers targeted. This will provide a clear standard by which it can determine which alternatives are proposed for investigation and consideration in its EIS. In its present state, the EIS’s discussion of alternatives to the proposed action is inadequate as a matter of law”

There is considerable tension evident in the caselaw under NEPA between allowing a federal agency to define a project so narrowly that legitimate alternatives are excluded, and permitting agencies to establish criteria by which they can legitimately exclude options deemed to be impractical, remote, speculative, or ineffective. On the cautionary side with respect to project purpose is *Simmons v. United States Army Corps of Engineers*, [1997] CA7-AL 392. In *Simmons*, the City of Marion applied to the US Army Corp. of Engineers for permission to build a dam and reservoir, to supply both Marion and another district. The Corp. of Engineers assumed in its EIS that a single source should be used for both water users, without studying

whether the single-source solution was the best one, or even whether the single-source chosen was the best among the alternatives. The court observed that

“The “purpose” of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing “reasonable alternatives” out of consideration (and even out of existence). The federal courts cannot condone an agency’s frustration of Congressional will. If the agency constricts the definition of the project’s purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the Act.” (para 5)

In *California v. Block*, [1982] CA9-Q1 842, it was not the statement of purpose but rather the discarding of a viable option which rendered the EIS inadequate. In *California*, the Forest Service was devising a broad land-use planning system for the forests under its care. An assumption was made regarding in the EIS modelling process about resource use levels, which had the effect of limiting conservation in all alternatives to 33% or less of the land base. No justification or explanation for this ceiling was offered. The court found that an inquiry should have been made into whether increasing extraction in already-developed areas would have allowed for more conservation, and that the EIS should have had an alternative allocating somewhere between 34% and 100% of the land to wilderness, covering a reasonable range of alternatives.

Simmons and *California* notwithstanding, agencies are entitled to use criteria by which they will identify alternatives for serious consideration. In *Morongo Band of Mission Indians v. Federal Aviation Administration*, [1998] A9-QL 669, for example, the FAA was assessing proposals for new aircraft arrival routes at an airport, to cope with increasing volumes of airline traffic. The FAA’s criteria was the establishment of new air traffic sectors, that would balance equitably the east/west and north/south arrivals between runways and controllers. The Morongo Band objected to the route chosen, on the basis that it would cross their reserve, and that other alternatives existed that would not do so. The court found that the FAA had considered and legitimately rejected the alternatives by-passing the reservation as unsuitable for meeting the projects goals. The court observed that:

“The existence of a viable but unexamined alternative renders and environmental impact statement inadequate.’ *Resources Ltd. v. Roberston*, 35 F. 3d 1300, 1307 (9th Cir. 1994), quoting *Idaho Conservation League v Mumma* 956 F 2d 1508... An agency, however, is ‘entitled to establish some parameters and criteria – relatd to Plan standards – for generating alternatives to which it would devote serious consideration. Without such criteria, an agency could generate countless alternatives...The touchstone for our inquiry is whether an EIS’s selection and discussion of alternatives fosters informed decision-making and public

participation.” *City of Angoon v. Hodel*, 803 F.2d 1016, 1020 (9th Cir. 1986)” (para 40)

Similarly in *Citizens Against Burlington v. Busey*, 938 F.2d 190 (C.D. Cir. 1991), cert. Denied, 502 U.S. 994, 112 S. Ct. 616 (1992), the court upheld an EIS in relation to the addition of a cargo hub to an airport in Toledo. The EIS had only assessed two alternatives: approval of the expansion, and “no action”; the EIS had not explored alternative locations for the expansion. The majority held that it is for the federal agency to both select which alternatives to discuss in the EIS, and to determine the extent to which each alternative will be considered. The dissent, in contrast, felt that the federal agency had neglected to examine reasonable and feasible alternatives, evaluated in light of the federal agency’s objectives.

There are also cases under NEPA discussing when it is necessary to assess connected or related actions in a single EIS. These cases are very similar on the facts to the Canadian Federal Court decisions on the scope of a project, discussed above, although the U.S. cases benefit from more consistent court application of CEQ principles. But the outcome of the American cases is different.

For example, in *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), the court held that where proposed timber sales required the construction of a new logging road, the two actions were cumulative and connected, and had to be assessed together. The court found that the logging road would not be built absent the increased timber sales, and conversely, there would be no increased timber sales without access to the road.

Similarly in *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450 (D. Haw. 1991), consecutive phases of a geothermal power project in Hawaii were found to be linked to the initial phase and to require a single EIS, as it would have been unwise or irrational to undertake one phase without the other.

The opposite conclusion was reached, however, in *Save Barton Creek Association v. Federal Highway Administration*, 950 F.2d 1129 (5th Cir. 1992) (“*Barton*”), where the court held that it was acceptable to assess highway segments in separate EISs because none of the individual segments depended upon the other; each segment had independent utility.

Conclusions

The tension over the scoping of projects and assessments in Canada may well be a function of the project-focussed nature of our legislation. Unlike the U.S. system under NEPA, EA in Canada at the federal level is overwhelmingly project-focussed. In Ontario, while there is a requirement for EA to apply not only to public sector projects, but also to policies and programs, in practice this has been more honoured in the breach than in its observance.

Proponents, particularly those in the private sector, will in most cases appropriately seek to ensure that the scope of projects and scope of assessment is practical, and if possible limited, and that they not be required to address issues beyond their jurisdiction or mandate.

If strategic EA of policies, programs and plans were more common federally or within Ontario, it is much less likely that the battles currently fought project-by-project over scoping would continue. If, for example, a community's preferences were canvassed on a regional or programmatic level in relation to choices between waste diversion and new landfills, or public transit and new highway construction, and an adequate EA done on those larger issues allowing for reasoned choices to be made, then the public would be less likely (and have less of a legally valid opportunity) to challenge proponents at the time the project itself is to be assessed .

In the absence of effective strategic EA in Ontario or federally in Canada, the public will continue to insist that project level EAs must be scoped broadly enough to generate a meaningful assessment of the need for the project, and of reasonable alternatives to the project. They will argue that anything less demotes EA from a tool that can be used to foster more sustainable decision-making at the community level, to simply a process for generating mitigation measures. They will continue to argue that the purposes of EA, as reflected in NEPA, i.e., to insure that environmental goals and policies are infused into programs and actions of government, to provide full and fair discussion of significant environmental impacts, and to inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment, are not being achieved.

In the result, more use of plan and program EA, otherwise called SEA, could justify legal provisions which restrict project specific EAs from covering the same matters, such as need and alternatives to, which were covered by the SEA. This approach, together with specified requirements for meaningful and timely consultation between agencies, proponents and the public on scoping, could lead to less contentious project specific EA exercises.