is "liberalizing" flights a project?

Ghali v. Canada (Minister of Transport)

Between
Mr. François Ghali, Ms. Caroline Sauvé, Ms. Nathalie Duhamel, Mr. Luc Pharand, Mr. Lucien Pigeon, Ms. Pamela Morros, Mr. Louis J. Ottoni, Citoyens pour une qualité de vie/Citizens for a Quality of Life and C.É.S.A.M.M., applicants, and
Honourable David Anderson, in his capacity as Minister of Transport and Honourable Sergio Marchi, in his capacity as Minister of the Environment, respondents, and
Aéroports de Montréal, intervenor

Court File No. T-1153-96

Federal Court of Canada - Trial Division
Montreal, Quebec
Noël J.

Heard: October 21 - 24, 1996
Judgment: October 24, 1996
(20 pp.)

Pollution control — Environmental assessments or impact studies — Determination of whether study required, judicial review.

This was an application for an order in the nature of mandamus requiring the respondent Minister of Transport to conduct an environmental assessment as a result of transferring flights from Mirabel Airport to Dorval Airport. In 1986, the government decided to integrate Dorval and Mirabel within a centralized management structure. Under a transfer agreement signed on July 31, 1992, the federal government agreed to cease managing, operating and maintaining the Montreal international airport. The intervenor, ADM agreed to lease the airport and to manage, operate and maintain it for 60 years. On February 20, 1996, the intervenor publicly announced its proposal to liberalize, as of April 1997, the allocation of scheduled international flights with a view to letting the airline companies elect whether to direct international flights to Dorval or Mirabel. The practical effect of this project was to transfer all regularly scheduled international flights from Mirabel to Dorval. The Minister of Environment decided not to submit the ADM project to an environmental assessment on the basis that no significant adverse environmental effects were found as a result of transferring the flights. based on what assessment?

HELD: Application dismissed. Under section 5 of the Canadian Environmental Assessment Act, an environmental assessment of a project was required where a federal authority was the proponent of the project and did any act or thing that committed the federal authority to carrying out the project. This section did not apply to the case at bar as the federal authority was not the proponent of the relevant project. Therefore, the environmental review process that the applicants were attempting to set in motion could not take place.

Statutes, Regulations and Rules Cited:

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 2(1), 5(1)(a), 5(1)(b), 5(1)(c), 7(1), 7(2), 11(1), 11(2), 13, 14, 18, 20, 29, 37.
Federal Court Act, s. 18.1.

Counsel:

Sylvain Lussier, Jean F. Keable and Karine Brassard, for the applicants.
Yves Leboeuf and David Lucas, for the defendants.
Raynold Langlois and Michel Bellemare, for the intervenor.

¶ 1 **NOËL J.** (Reasons for Order):— This is an application for judicial review pursuant to section 18.1 of the Federal Court Act, by which the applicants are asking this Court to order the Honourable David Anderson, in his capacity as Minister of Transport, to proceed under sections 5, 11 and 14ff. of the Canadian Environmental Assessment Act [See Note 1 below] with an environmental assessment of the project by Aéroports de Montréal (hereinafter the "intervenor", or "ADM") of "liberalizing" the allocation of scheduled international flights. [See Note 2 below]

Note 1: S.C. 1992, c. 37, hereinafter the "CEAA" or the "Act".

Note 2: The practical effect of this project is to transfer all regularly scheduled international flights from Mirabel airport to Dorval, and to retain Mirabel as a specialized (vacation and all-freight) airport handling all chartered flights.

I. THE PARTIES

A. THE APPLICANTS

(i) Citizens for a quality of life

¶ 2 The applicant members of the not-for-profit corporation "Citizens for a quality of life" are all owners or occupants of properties situated in the municipalities of Pointe-Claire and Ville Saint-Laurent, the properties themselves being located within the air corridor used by planes taking off from and landing at Dorval airport.

¶ 3 "Citizens for a quality of life" is a not-for-profit corporation constituted under Part III of the Companies Act and composed of Canadian citizens who

(a) inhabit the municipalities in which Dorval airport is located: Dorval, Pointe-Claire and Ville Saint-Laurent, in the province of Quebec; or
(b) inhabit the municipalities that are not directly located on the edge of Dorval airport but who are nevertheless affected by the noise, pollution and risks of airplane crashes associated with proximity to Dorval airport.

(ii) C.É.S.A.M.M

¶ 4 The Coalition élargie pour le soutien de l'aéroport Montréal-Mirabel (hereinafter "C.É.S.A.M.M") is a not-for-profit corporation with the particular objective of defending and promoting environmental protection.

B. THE INTERVENOR

(i) ADM

¶ 5 ADM is the corporation responsible under the Airport Transfer (Miscellaneous Provisions) Act [See Note 3 below] for managing Montreal's international airports, which are located at Dorval and Mirabel.

Note 3: R.S.C. 1985, c. A-10.4. It should be noted that this Act is administered by the Minister of Transport.

¶ 6 Under the ADM's letters patents, which were issued on November 21, 1989 pursuant to Part II of the Canada Corporations Act, the objects of the ADM are, in particular:

[Translation]
a. to act as a public agency providing quality airport services that respond to the specific needs of the community, while pursuing efficiency and economic and commercial development, for example through developing the potential of the facilities for which it may be responsible;

b. ...
c. to ensure the operation of the facilities for which it may be responsible in the best interest of the public, on a sufficiently viable financial basis to raise the necessary funds for the optimal development of air transport;
d. to contribute to the economic development of the greater Montréal community while meeting the present and future needs of the national and international air transport systems and of the air transport and aeronautics industries;
e. to act as a stakeholder with the competent authorities in relation to any issue pertaining to the management or development of the facilities that may be the responsibility of the corporation or to the interests or needs in this regard of the community that is serviced by such facilities.

¶ 7 The members of the ADM's board of directors are appointed from among the members of the Société de promotion des aéroports de Montréal ("SOPRAM").

¶ 8 SOPRAM is a not-for-profit corporation created pursuant to Part III of the Quebec Companies Act on December 22, 1987 under the name Conseil de l'aéroport international de Montréal. The Conseil's letters patent were amended on November 21, 1989, the day on which the ADM was constituted, to adopt the new name, SOPRAM, and new objectives, which are now, inter alia:

[Translation]
(a) To bring together the representative economic and political authorities of the greater Montréal community which are concerned with all issues affecting air transport in the region serviced by the airport facilities used by this community;
...

(c) To promote the development and expansion of the airport facilities used by the greater Montréal community;
(d) To promote the interests and needs of the public served by the airport facilities used by the greater Montréal community;
(e) To appoint the members of Aéroports de Montréal, a not-for-profit corporation constituted under letters patent issued pursuant to Part II of the Canada Corporations Act.

C. THE RESPONDENTS

¶ 9 The Honourable David Anderson is the Minister of Transport and in this capacity is the individual who is the subject of this proceeding.

¶ 10 The Honourable Sergio Marchi is the Minister of the Environment. In their originating motion, the applicants sought a writ of mandamus enjoining the Minister of the Environment to examine the possibility of referring the proposed liberalization of the allocation of scheduled international flights to an environmental assessment panel. However, the Minister of the Environment subsequently decided to examine the possibility of subjecting the ADM project to an environmental assessment panel; as a result of this decision, this second cause of action became moot. As we will see, the results of this study were announced several days prior to the commencement of the hearing.

II. BACKGROUND AND FACTS

¶ 11 In 1946 the Canadian government designated Dorval airport as the point of entry for international flights, thereby making it the hub for North Atlantic and North American air transport. Parallel to the ongoing operation of Dorval airport by the Department of Transport, the Canadian government decided to begin building and to open in 1975 Mirabel airport, the original role of which was to be the point of entry for all international, transborder and domestic long haul commercial flights serving the Montreal area; since its opening, Mirabel airport has been the point of entry for international flights.

¶ 12 In December 1986, after public debates over the appropriateness of maintaining Montréal as a two-airport city, in accordance with the allocations established in 1975, the federal government announced its decision to maintain both airports in their respective roles and to integrate Dorval and Mirabel within a centralized management structure.

¶ 13 As early as 1987, the federal government envisaged the possibility of transferring the property and operation of the federal airports to interested agencies or groups such as, inter alia, the provincial governments, municipalities, local authorities or the private sector, for the purposes of implementing a new concept of airport management focused on the commercial orientation of the airports, their potential contribution to economic development and their sensitivity to local concerns and interests.

¶ 14 Within the context of this new federal government policy, it was understood that the federal government would continue to be in charge of safety and security issues, air navigation services, air traffic control and airport certification, and that the client successor agencies would operate the airports transferred by the federal government in compliance with the terms and conditions of their operating certificates and the safety and security regulations prescribed for the type of activities and aircraft at the respective airports.

¶ 15 Following the adoption of this new federal government policy in 1987, 36 supplementary basic principles were added in June 1989 to govern the creation and operation of the local airport authorities (LAAs). For example, it was understood and specifically stated therein that the federal government would initiate transfer negotiations in relation to the long-term leasing of the airports and that the LAAs, which were established to manage and operate a local airport system, were to be ostensibly financially independent companies whose boards would include representatives of the business community and community interests and be responsible for administering the companies according to a commercial orientation that would promote economic development while being sensitive to local concerns and interests.

¶ 16 On March 19, 1992 the Governor in Council issued an Order in Council authorizing the Minister of Transport to sign on behalf of Her Majesty in right of Canada a transfer agreement with the intervenor ADM transferring to the latter the management, operation and maintenance of the integrated system comprising the Dorval and Mirabel airports.

¶ 17 Under a transfer agreement signed on April 1, 1992 between Her Majesty in right of Canada and the intervenor, the federal Crown agreed to cease managing, operating and maintaining the Montreal international airport (Dorval and Mirabel) effective August 1, 1992. The intervenor agreed to lease the said airport and to take over its management, operation and maintenance. Through a ground lease signed on July 31, 1992, Her Majesty in right of Canada leased to the intervenor for a sixty (60) year period the integrated system of the Montreal international airport (Dorval and Mirabel).

¶ 18 On February 20, 1996 the intervenor publicly announced its proposal to "liberalize" as of April 1997 the allocation of scheduled international flights with a view to letting the airline companies elect, as of that date, whether to direct their scheduled international flights to Dorval or to Mirabel. Several days earlier, at a meeting of representatives of the intervenor and the Minister of Transport, the intervenor had informed the Minister of its intention to so liberalize the allocation of scheduled international flights.

¶ 19 This decision entails a change in the respective roles of the Dorval and Mirabel airports. In the first place, Dorval airport, as ADM states, will become a North American entry point for connections between the continent and Europe. Scheduled international flights may now leave from this airport and Mirabel will be the assigned destination and departure point for all freight and vacation charter flights.

¶ 20 Confronted with this proposal, and in the absence of an environmental assessment conducted in accordance with the Act, the applicants issued a formal notice to the Minister of Transport on May 2, 1996 calling on him to initiate the assessment process under the CEAA. Receiving no reply in the weeks that followed, they filed the present application on May 17, 1996.

¶ 21 Three days prior to the commencement of the hearing, on October 18, 1996, the Minister of the Environment released his decision not to submit the ADM project to an environmental assessment panel. At that time the Minister published a document entitled "[Translation] Environmental analysis of the proposed liberalization of scheduled international flight allocation between Dorval and Mirabel". The Minister's decision was explained as follows in a news release issued by the Canadian Environmental Assessment Agency:

No significant adverse environmental effects found for transfer of flights from Mirabel to Dorval

Ottawa - October 18, 1996 - The federal Minister of the Environment, Sergio Marchi, after consulting with other government departments, made public the study prepared by his Department which concludes that the planned transfer of scheduled international flights from Mirabel to Dorval would not have significant adverse environmental effects. The analysis by Environment Canada is based on a projected increase of eleven takeoffs per day.

As a consequence of this study which was completed September 16, 1996, the Canadian Environmental Assessment Agency has recommended, after considering other aspects of the Canadian Environmental Assessment Act (the Act), that the Minister not refer this issue to a review by an environmental assessment panel. The Minister has accepted this recommendation.

The Minister took into account the concerns raised by many people who have asked him to refer to a panel review the decision of les Aéroports de Montréal (ADM) to allow the transfer of the scheduled international flights to Dorval.

Projects on most Canadian airports were originally subject to federal environmental assessment. However with the proclamation of the Canadian Environmental Assessment Act and the transfer of airports to local airport authorities, the Act no longer applies to many projects on these leased lands.

To address this situation, the Minister has asked his officials, in consultation with the airport authorities and Transport Canada, to propose measures that would ensure that the appropriate environmental assessment of projects proposed by the airport authorities on these lands would occur under the Act. [See Note 4 below]

Note 4: Affidavit of Youssef Sabeh filed on October 20, 1996. [The text here is the official English version released by the Agency. - Tr.]

III. ISSUES

¶ 22 The applicants are of the opinion that the Minister of Transport has a duty to ensure that an environmental assessment is performed before the ADM project is implemented. More specifically, they argue that:

[Translation]
(a) through the benefits he will derive from the fees imposed or levied by ADM in the context of its decision of February 20, 1996, the Minister of Transport becomes the proponent, in part, of the project within the meaning of section 5(1)(a) CEAA; he is also, in part, the proponent as owner subject to a suspensive condition of the improvements that ADM will make to Dorval airport and through the control he retains as Lessor over ADM's operations;

(b) through his role in the payment of ADM's municipal taxes and the fact that ADM's rent is postponed, the Minister of Transport is financing, guaranteeing the financing or awarding some other financial assistance for the work performed by ADM in the context of its flight allocation liberalization project, within the meaning of section 5(1)(b) CEAA;

(c) through the terms of the lease, the Minister of Transport is authorizing the transfer of federal lands in the context of his flight allocation liberalization project, within the meaning of section 5(1)(c) CEAA.

¶ 23 ADM and the Minister of Transport submit in reply that the Minister is exercising none of the powers described in paragraphs 5(1)(a), (b) or (c) of the CEAA in relation to the project in question. They argue accordingly that the Minister is not bound to conduct an environmental assessment of the project.

¶ 24 ADM submits that the applicants' proceeding is in any event out-of-date since the Minister of the Environment concluded on October 18, 1996, as a result of the study he made of the project, that it "will not result in any significant adverse environmental effects".

IV. RELEVANT STATUTORY PROVISIONS

¶ 25 The CEAA was assented to on June 23, 1992, but did not come into force on that date. Sections 61 to 70, 73, 75 and 78 to 80 came into force on December 22, 1994, while sections 1 to 60, 71, 72, 74, 76 and 77 came into force on January 19, 1995. On this latter date, the Environmental Assessment and Review Process Guidelines Order, which since 1984 had governed the federal environmental assessment process, was repealed. [See Note 5 below]

Note 5: See Order Fixing December 22, 1994 as the Date of the Coming into Force of Certain Sections of that Act, SI/95-3; Order Fixing January 19, 1995 as the Date of the Coming into Force of Certain Sections of the Act, SI/95-11; Environmental Assessment and Review Process Guidelines Order, SOR/84-467; Environmental Assessment and Review Process Guidelines Order - Repeal, SOR/95-72.

¶ 26 The CEAA provisions relevant to this case all came into force on January 19, 1995.

Preamble
WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;
WHEREAS the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality;
AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;

2. (1) In this Act,

"federal authority" means

(a) a Minister of the Crown in right of Canada,

"responsible authority", in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted;
"environmental assessment" means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;
"screening" means an environmental assessment that is conducted pursuant to section 18 and that includes a consideration of the factors set out in subsection 16(1);
"comprehensive study list" means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(d);
"exclusion list" means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(c);
"project" means

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

"proponent", in respect of a project, means the person, body, federal authority or government that proposes the project;
Projects requiring environmental assessment

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;
(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;
(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or
(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Exclusions

7. (1) Notwithstanding section 5, an environmental assessment of a project is not required where

(a) the project is described in an exclusion list;
(b) the project is to be carried out in response to a national emergency for which special temporary measures are being taken under the Emergencies Act; or
(c) the project is to be carried out in response to an emergency and carrying out the project forthwith is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.

(2) For greater certainty, an environmental assessment is not required where a federal authority exercises a power or performs a duty or function referred to in paragraph 5(1)(b) in relation to a project and the essential details of the project are not specified before or at the time the power is exercised or the duty or function is performed.

...

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

(2) A responsible authority shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(a) or 37(1)(a).

...

13. Where a project is described in the comprehensive study list or is referred to a mediator or a review panel, notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made thereunder shall be exercised or performed that would permit the project to be carried out in whole or in part unless an environmental assessment of the project has been completed and a course of action has been taken in relation to the project in accordance with paragraph 37(1)(a).

14. The environmental assessment process includes, where applicable,

(a) a screening or comprehensive study and the preparation of a screening report or a comprehensive study report;
(b) a mediation or assessment by a review panel as provided in section 29 and the preparation of a report; and
(c) the design and implementation of a follow-up program.

...

18. (1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

(a) a screening of the project is conducted; and

(b) a screening report is prepared.

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.

...

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out and shall ensure that any mitigation measures that the responsible authority considers appropriate are implemented;
(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or
(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,
(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or
(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

...

29. (1) Subject to subsection (2), where a project is to be referred to a mediator or a review panel, the Minister shall

(a) refer the environmental assessment relating to the project to

(i) a mediator, or
(ii) a review panel; or

(b) refer part of the environmental assessment relating to the project to a mediator and part of that assessment to a review panel.

...

37. (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to paragraph 23(a), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

(i) the project is not likely to cause significant adverse environmental effects, or
(ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part and shall ensure that those mitigation measures are implemented; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

V. ANALYSIS AND DECISION

¶ 27 The only issue to be determined is whether the Minister of Transport is required to conduct an environmental assessment pursuant to paragraphs (a), (b) or (c) of subsection 5(1) of the CEAA. Insofar as the Minister has such an obligation, there will be a further issue as to the impact on that obligation of the very recent decision of the Minister of the Environment.

¶ 28 As a preliminary point, the applicants submit that the environmental assessments in relation to the expansions of the Vancouver and Pearson (Toronto) airports were conducted under the Order in Council that was replaced by the CEAA. [See Note 6 below] They add that it is hard to believe that the CEAA, in light of its preamble, is of lesser scope and more limited effect than the Order in Council.

Note 6: Environmental Assessment and Review Process Guidelines Order, SOR/84-467, read together with section 74 of the CEAA.

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1. PARAGRAPH 5(1)(a)

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

¶ 29 The applicants submit that the Minister of Transport is the proponent of the project in at least three capacities:

1. as a person who is sufficiently entitled under the lease and the agreement concerning the aeronautics services and facilities to prevent or authorize the project. In the circumstances, the applicants submit, the Minister's silence amounts to authorization;
2. as the owner subject to suspensive conditions of the improvements made by ADM in the context of carrying out the project; and
3. in terms of his economic interest and in particular in regard to the percentage of the fees imposed on passengers by ADM and the parking revenues he will receive as the lessor.

¶ 30 In regard to the first point, the applicants rely on a vast number of clauses in the lease and the Agreement concerning the aeronautics services and facilities which, they say, are indicative of a right of control. They add that since the Minister, through his silence, has approved the project, he is its proponent.

¶ 31 In regard to the second point, the applicants note that the Minister of Transport is the owner, subject to a suspensive condition, of all the improvements that may be made to the leased premises. [See Note 7 below] Although this right will be realized only at the termination of the lease, the applicants point out that under the relevant provisions of the Civil Code of Québec [See Note 8 below] the Minister of Transport will, as of that time, be deemed to have been the owner since July 31, 1992 of any facility that has been built by ADM. In this context, the applicants wonder how it can be claimed that the owner of property is not the proponent thereof while such property is being built. [See Note 9 below]

Note 7: See paragraph 3.08.01 of the lease.
Note 8: Articles 1506 and 1507.
Note 9: Applicants' Factum, paragraph 118.

¶ 32 In regard to the third point, the applicants note that the Minister of Transport will participate in the economic benefits associated with the ADM project in two respects, [See Note 10 below] and that he is thereby the proponent thereof.

Note 10: Under paragraph 4.03.02 of the lease, the Minister of Transport is entitled to a percentage of the revenue derived from the user fees levied on every passenger by ADM. The Minister of Transport will also, under paragraph 4.02.01 of the lease, receive a share of the increased income from the parking as a result of the planned addition of 3,100 parking spaces, and of the concessions income.

¶ 33 In reply to these submissions based on paragraph 5(1)(a), the respondent notes that the section in question requires that the federal authority be not only the proponent of the project but also the one who carries it out in whole or in part. He further argues that the applicants have failed to demonstrate how the Minister of Transport is to carry out the ADM project in whole or in part.

¶ 34 The intervenor and the respondent also note by way of preliminary submission that under the terms of the lease, ADM is to manage, operate and maintain the airport system solely on its own account and to the exclusion of anyone. [See Note 11 below] No agency or mandatary relationship is understood or implied. They further argue that all the rights enjoyed by the Minister of Transport under the lease are the normal prerogative of such an agreement, bearing in mind the fact that it was necessary for the Minister to ensure he had the necessary access to fulfil his obligations in the aeronautical field. [See Note 12 below] More specifically, the intervenor and the respondent argue that all the rights reserved by the Minister of Transport are intended either to protect his interests as ground lessor or to enable him to perform his obligations in the aeronautical field.

Note 11: Paragraph 8.02.01 of the lease.

Note 12: Navigation and air traffic control services, airport approval, and safety: paragraph 3.01.02 of the lease.

¶ 35 In addition, the respondent and the intervenor refer to the definition of the word "proponent" and point out that the Minister of Transport has denied having proposed the ADM project or being involved in any way whatsoever as proponent of this project within the meaning of the Act. [See Note 13 below] They add that a specific objective in the privatization of the Montreal airports, out of which ADM originated, was to turn the administration of these airports over to the private sector to the exclusion of the federal administration, including the Minister of Transport. This, they say, is the explanation for why the Department of Transport played no role in the development and establishment of the proposal circulated by ADM.

Note 13: Affidavit of Sam Henderson, Respondents' Record, page 4.

¶ 36 I note at this point that the applicants do not allege that there has been any subterfuge concerning the factual and legal relationship between ADM and the Minister of Transport. They acknowledge that this relationship is consistent with what is suggested by the contracts binding the parties. They further acknowledge that the perception ADM and the Minister have given us of their deeds and actions is consistent with the reality.

¶ 37 Bearing this in mind, the only way to make the Minister of Transport a proponent of the ADM project within the meaning of the Act is to argue that the Minister, through his silence on the ADM project, in fact proposed it. And that is what the applicants argue in paragraph 87 of their factum. If I clearly understand their position, the Minister of Transport, by virtue of the rights and powers he exercises under the lease and the associated agreement, could have blocked the project, and, since he did not do so, he becomes a proponent of it. Unfortunately, even on the assumption that the Minister of Transport had the discretion to block the project and that, to this extent, he can be accused of having authorized it, this does not make him a proponent of the project within the meaning of the definition. Similar reasoning applies to the fact that the Minister of Transport now has, through the prior lease, a financial interest in the project, to the fact that he can at the end of the day facilitate the financing of the project, and to the fact that he is likely to become the immediate or potential owner of the buildings that are to be constructed in the course of the project.

¶ 38 Although the usual meaning of "proponent" is very broad, [See Note 14 below] the meaning employed by Parliament in the CEAA is limited. Under the Act, a proponent of a project is the person that proposes it. In this regard, the record is unequivocal. The Minister of Transport neither directly nor indirectly proposed the project or any part thereof. It is ADM which, within the framework of the exclusive authority conferred on it by the lease and the 1992 agreement, [See Note 15 below] assumed the management of the airport system and, in the performance of that authority, decided to liberalize the flights and promote its project. [See Note 16 below] The only privilege to which the Minister of

Transport was entitled as such was to be informed of ADM's decision a few days before the public. This does not make him the author or co-author of ADM's proposal.

Note 14: The words "proponent" or "promoter" have several meanings. They include, in addition to the person who proposes or gives the initial impetus to a project, someone who finances or organizes it. (See Le Petit Robert, Nouvelle édition, 1992 update; The Concise Oxford Dictionary, Eighth Edition, 1992.) [Translator's note: The word "promoteur" in the French version of the CEAA is rendered as "proponent" in the English version.]

Note 15: In particular, paragraph 8.02.02 of the lease, and clause 30.01.01 of the agreement.

Note 16: I need not rule on the lawfulness of this decision, and shall carefully refrain from doing so, since the issue will be argued in the Superior Court within the next few days.

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2. PARAGRAPH 5(1)(b)

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

¶ 39 In regard to paragraph 5(1)(b), the applicants argue that both the right given to ADM to defer the payment of rent for a six-year period [See Note 17 below] and the payment by the Minister of Transport to the municipalities concerned of an amount equivalent to the municipal taxes otherwise payable constitute financial assistance within the meaning of this paragraph.

Note 17: Paragraph 4.05 of the lease.

¶ 40 The applicants concede, however, that such assistance cannot have been granted for the purpose of helping ADM to carry out its project since, in 1992, the project had yet to be conceived and thus no one had it in mind. [See Note 18 below] They do however argue that financial assistance, if any, was nonetheless granted "for the purpose" of helping ADM carry out its project, as required by paragraph

5(1)(b).

Note 18: As of July 28, 1995 ADM still planned to maintain the original assignments for Dorval and Mirabel. See "Plan directeur des installations aéroportuaires de Dorval et Mirabel", Applicants' Record, page 1785.

¶ 41 The applicants rely for this purpose on certain tax decisions [See Note 19 below] which, they argue, indicate that all that paragraph 5(1)(b) requires is that there be concomitance between the use of the financial assistance and the project in question. But the decisions on which the applicants rely in reaching this conclusion are to the diametrically opposite effect. The principle they establish is that a dollar is deductible even if it did not in fact produce any income, so long as it was spent for the purpose of producing income.

Note 19: Premium Iron Ores Limited v. The Minister of National Revenue, [1966] S.C.R. 685, in particular at 703; The Minister of National Revenue v. M.P. Drilling Limited, 76 DTC 6028; Royal Trust Company v. Minister of National Revenue, 57 DTC 1055 and Matabi Mines v. The Minister of Revenue (Ontario), [1988] 2 S.C.R. 175, at 187.

¶ 42 The words "for the purpose of", or "en vue de" in the French version, are unambiguous, as the cases cited by the applicants hold. For financial assistance to trigger the application of section 5, it must have been advanced or granted "for the purpose of" the project that one is seeking to subject to an environmental assessment. Since, in the case at bar, it is common ground that the financial assistance, if any, could not have been granted "for the purpose of" the project, paragraph 5(1)(b) cannot be applicable.

3. PARAGRAPH 5(1)(c)

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part;

¶ 43 In regard to paragraph 5(1)(c) of the Act, the applicants refer to the terms of paragraphs 3.01.03

and 3.01.04 of the lease, which read, in part, as follows:

> [Translation]
> 3.01.03
> The lessor expressly waives in favour of the lessor the benefit of its right of accession to any facility newly erected on any land capable of development... [See Note 20 below]

Note 20: Paragraph 4.02.01 of the lease defines the term "[Translation] land capable of development" as any part of the leased premises other than, inter alia, the air terminal and parking facilities.

> 3.01.04
>
> If the lessee so requests, the lessor shall also waive the benefit of the right of accession to any new facility that shall be erected on any other part of the leased premises. ...

¶ 44 The applicants explain that the lease is not emphyteutic in nature and that the Minister of Transport prima facie retains the ownership of the facilities that are to be erected. It is only through the waiver of this ownership, as provided in paragraphs 3.01.03 and 3.01.04, that ADM becomes owner of the new facilities, and that, the applicants argue, is a sale or lease within the meaning of paragraph 5(1)(c). Once again, I note that the transfer covered in paragraph 5(1)(c) must take place "for the purpose of enabling the project to be carried out".

¶ 45 It's an either-or proposition. Either the reconveyance of the buildings to be erected under the lease takes place at the time when the Minister of Transport waived his right of accession, i.e. when the lease was signed in 1992, or there is a reconveyance of the buildings at the time they are erected. [See Note 21 below] In the first case, the application of paragraph 5(1)(c) is ruled out, since, as we have seen, it is conceded that neither of the parties involved had the ADM project in mind when the lease was signed. In the second case, the application of paragraph 5(1)(c) is likewise ruled out, since, according to the evidence, there is not at present any building capable of reconveyance.

Note 21: In the case of paragraph 3.01.04 of the lease, at the time when the buildings are erected and ADM makes a request for reconveyance.

¶ 46 Beyond this, I will take the liberty of saying, in obiter, that the issue as to whether paragraph 5(1)(c) is likely to be triggered if and when some facilities are built must be answered in the negative. In my view, it was when the lease was signed that the Minister of Transport formally undertook to convey the ownership of any buildings that might be erected, and it is therefore at that date that he authorized the conveyance thereof within the meaning of paragraph 5(1)(c).

¶ 47 I conclude, therefore, that section 5 of the Act does not apply and that the environmental review process that the applicants are attempting to set in motion cannot therefore take place.

¶ 48 To those who will argue that this conclusion is consistent with the letter of the Act but ignores its spirit, I will say the following, over and above the fact that they have a remedy before the Court of Appeal. The spirit of the Act must be deciphered from the words used by Parliament to express it. In this instance, the Minister of the Environment indicated in his October 18 news release that he is disturbed that section 5 of the Act allows projects initiated by the privatized airport authorities to escape environmental review. [See Note 22 below] I agree, and as a citizen I am happy to note that the Minister has this concern. But it is not my job, as a judge, to decide what the policy of the Minister of the Environment should be in this regard, or to misconstrue the current Act by deciding myself what it should be.

Note 22: I will say in this regard that only paragraph 5(1)(a) appears to be defective, because of the limited meaning assigned to the word "proponent". The fact that paragraphs 5(1)(b) and (c) do not apply is attributable to temporal factors rather than the transfer of the airport authority to some local authorities.

¶ 49 The Act as it appears before me is clear and unequivocal. My only duty is to apply it. One can fault the judges for misconstruing laws, but they cannot be faulted for complying with the law and leaving the legislative task to our elected officials.

¶ 50 For these reasons, the motion in mandamus is dismissed.

ORDER

For the reasons accompanying this order, the motion in mandamus is dismissed.

Discussion of Ghali v Canada in relation to AECL concerns

Summary

- AECL has referred to the Ghali v Canada decision in discussion of proponent trigger
- Ghali case centered on claim that Minister of Transport should have conducted an EA under CEAA for the transfer of flights from Mirabel to Dorval
  - Motion was for an order of mandamus (to require the Minister to conduct an EA)
  - Claim that Minister had triggered under sections 5(1)(a), 5(1)(b), and 5(1)(c).
- The motion was dismissed

Argument that Minister of Transport was a proponent

- [Translation] "through the benefits he will derive from the fees imposed or levied by ADM (a company) in the context of its decision of February 20, 1996, the Minister of Transport becomes the proponent, in part, of the project within the meaning of section 5(1)(a) CEAA; he is also, in part, the proponent as owner subject to a suspensive condition of the improvements that ADM will make to Dorval airport and through the control he retains as Lessor over ADM's operations;

- This argues that the Minister is a proponent for at least the following reasons:

  1. as a person who is ***sufficiently entitled*** under the lease and the agreement concerning the aeronautics services and facilities ***to prevent or authorize the project***. In the circumstances, the applicants submit, the Minister's silence amounts to authorization;

  2. ***as the owner subject to suspensive conditions*** of the improvements made by ADM in the context of carrying out the project; and,

  3. ***in terms of his economic interest*** and in particular in regard to the percentage of the fees imposed on passengers by ADM and the parking revenues he will receive as the lessor.

Rationale for Decision

- Decision noted that while understanding of proponent is broad, it is specific under CEAA, and stressed the fact that the proponent must propose the project, although there is an allusion to the fact that the proposal may be direct or indirect (although no statement as to whether an indirect proposal would make one a proponent)

- Bearing this in mind, ***the only way to make the Minister of Transport a proponent*** of the ADM project within the meaning of the Act ***is to argue that the Minister, through his silence on the ADM project, in fact proposed it***. And that is what the applicants argue in paragraph 87 of their factum. If I clearly understand their position, the Minister of Transport, by virtue of the rights and powers he exercises under the lease and the associated agreement, could have blocked the project, and, since he did not do so, he becomes a proponent of it. Unfortunately, even on the assumption that the Minister of Transport had the discretion to block the project and that, to this extent, he can be accused of having authorized it, this does not make him a proponent of the project within the meaning of the definition. Similar reasoning applies to the fact that the Minister of Transport now has, through the prior lease, a financial interest in the project, to the fact that he can at the end of the day facilitate the financing of the project, and to the fact that he is likely to become the immediate or potential owner of the buildings that are to be constructed in the course of the project.

- "Although the usual meaning of "proponent" is very broad, [See Note 14 below] the meaning employed by Parliament in the CEAA is limited. Under the Act, a proponent of a project is the person that proposes it. In this regard, the record is unequivocal. ***The Minister of Transport neither directly nor indirectly proposed the project or any part thereof***. It is ADM which, within the framework of the exclusive authority conferred on it by the lease and the 1992 agreement, [See Note 15 below] assumed the management of the airport system and, in the performance of that authority, decided to liberalize the flights and promote its project. [See Note 16 below] The only privilege to which the Minister of Transport was entitled as such was to be informed of ADM's decision a few days before the public. This does not make him the author or co-author of ADM's proposal."

AECL/NRCan/CEAA Meeting
Friday, January 21, 200~~4~~5
CEAA Offices

Speaking Points

Agenda Item # 1: Introduction (Peter)

- NRCan, AECL, PCO and the Agency met in November to discuss AECL file
- Meeting was chaired by Tom Wallace of NRCan.
- Agency provided an update on the Crowns initiative; AECL offered comments on its forthcoming obligations under the Act.
- AECL concerns centred around the risk of potential litigation.
- Agency noted that a "legal clarity" regulation was not possible.
- Tom Wallace noted that the legislation had been passed, and that the Act would therefore apply to AECL.
- After some discussion, Tom Wallace identified three items to be dealt with in more depth at this working meeting.
- Those items are identified in the agenda, and are as follows:

    1. The "timing" issue: AECL's concern that when they are in a domestic vendor situation, an opponent might argue that AECL should be conducting a CEAA EA before the actual licensing application to CNSC is made.

s.21(1)(b)

- In the interim, Tom Balint and Greg Sayer have met to clarify some issues
- The Agency will speak to the first of these items, and AECL to the second and third.

Agenda Item # 2: Timing of assessments (James/Irene/Tom)

Background: Subsection 8(3) of the Act ensures that the federal department triggered, because of its role as a regulator, is fully responsible for an assessment and not the Crown corporation that is the project proponent. It reads:

> 8(3) If a Crown corporation is the proponent of a project and proposes to do any act or thing that commits it to carrying out the project in whole or in part and a federal authority other than the Crown corporation is required under paragraph 5(1)(*d*) to ensure the conduct of an environmental assessment of that project, the Crown corporation is not required to ensure that an environmental assessment of the project is conducted but, for greater certainty, it may accept a delegation from the federal authority under section 17.

AECL concern: When they are in a domestic vendor situation (i.e., AECL is not the proponent), an opponent might argue that AECL should be conducting (as a proponent) a CEAA EA before the actual licensing application to CNSC is made.

Agency response:

- Greg Sayer and Tom Balint explored this item further at their December 13 meeting.
- This concern is again predicated on an opponent arguing that AECL is a proponent when it is not, and there being a project as defined under the Act.
- If AECL were the proponent, ss. 8(3) would apply and AECL would have no responsibilities for conducting an environmental assessment—raise Chalk River example.
- If AECL were not the proponent, it seems unlikely that an opponent would initiate legal action to argue that AECL was the proponent only to have AECL conduct an EA of a project that would eventually require another EA by the CNSC.
- An opponent of AECL would likely prefer to see CNSC conduct the EA rather than AECL.
- AECL has raised the example of refurbishment work that would not require a license amendment—therefore the Act would not be triggered in association with that work. [The eventual re-start of the reactor would require a licence amendment.] A legal challenge would have to be predicated on there being a project as defined by the Act, and on AECL being the proponent.

Agenda Item # 3: Definitions of Key Terms in the Act (AECL)

[AECL will present its concerns regarding these definitions. These will likely have already appeared in correspondence with the Agency.]

Definition #1: "Proponent"

Background: "Proponent" is defined in s. 2 of the Act as:

> in respect of a project, means the person, body, federal authority or government that proposes the project.

AECL concern: Any time AECL bids on a project or contracts to carry out a project, whether domestic or overseas, opponents of such a project, or AECL's competitors, could argue that AECL was a "proponent" under the Act even though AECL is not the project owner and has no decision-making authority over the nature of the project itself. AECL's role in these cases would be that of a supplier or a contractor.

Definition #2: "Project"

Background: "Project" is defined in s. 2 of the Act as:

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

AECL concern: The lack of clarity of the definition of "project" leaves AECL open to arguments that activities undertaken before the bid stage of any project is reached (for example, participation in feasibility studies or technical/commercial evaluations; or business development or marketing activities) could amount to proponency, even though the project sponsor or owner would (and in AECL's view should) have responsibility for the environmental assessment process.

Definition #3: "Financial assistance"

Background: "Financial assistance" is not defined in s. 2 of the Act. Rather, it comprises the second of the section 5 triggers, namely:

> 5(1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority...
>
> > (*b*) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

AECL concern: It would be open to argument that the "definition" could encompass a broad range of financial arrangements that AECL might enter into with customers, thereby triggering the Act. This might even include AECL assisting a utility or customer in obtaining financing from third parties.

Agency supplemental work: Greg Sayer raised the following financial scenarios in his meeting with Tom Balint (Agency comments appear after each). AECL believes none of these comprise financial assistance, but could be argued as such.

1. **AECL makes a proposal to provide its services to an entity and agrees to take deferred payments with respect to the project.**

   Agency comment: Awaiting confirmation that AECL presently enters into such arrangements.

2. **AECL agrees to provide goods and services to an entity and agrees to take compensation in the form of actual or contingent equity in, or provide performance guarantees, incentives, refunds to the project if pre-established performance targets are missed, or otherwise.**

   Agency comment: AECL does not presently enter into equity relationships with an owner, as it is prohibited from doing so under the *Financial Administration Act*.

3. **AECL provides services to an entity and takes compensation only if there is a return on the investment.**

   Agency comment: AECL does not presently enter into this type of contract.

4. **AECL proposes to provide services to an entity and agrees to provide credit to further the completion of the project.**

   Agency comment: AECL does not presently enter into this type of contract, as it is prohibited from doing so under the *Financial Administration Act*.

5. **AECL arranges financing or offers assistance in arranging financing or possibly guarantees.**

   Agency comment: The financing body, not AECL, would potentially trigger the Act in these scenarios.

Agenda Item # 5: Next Steps (Peter)

- Based on what issues/concerns remain outstanding from this meeting, Peter to identify any further analysis/meetings required.

History of AECL "Exemption" Requests

"AECL needs a regulation that **exempts its commercial activities**, domestic and foreign, from the application of CEAA, in order that AECL can continue to fulfill its mandate."

-AECL written presentation to CEA Agency, October 14, 2003

"AECL proposes that a regulation be enacted to clarify the scope of CEAA's application to Crown corporations and to **exempt their commercial activities**."

- AECL written presentation to CEA Agency, January 23, 2004

"AECL proposes that a regulation be enacted to clarify the scope of CEAA's application to Crown corporations once they become federal authorities and to **exempt their commercial activities**."

-AECL letter to Bob Connelly, May 12, 2004

AECL requests "a modest exclusionary addition to the exclusion list regulations [sic] that would simply **exclude a project** in respect of which the only involvement of a Crown corporation is the making of a bid, a commercial proposal, or contracting for the provision of goods and services to a third party on commercial terms."

-AECL letter to Peter Sherhols, November 12, 2004

Canadian Nuclear Association Exemption Request

"The CNA strongly urges you to **exempt AECL's commercial business** from coverage under CEAA, both domestically and abroad."

-CNA letter to Minister Dion, November 4, 2004

"Timing" Item

Subsection 8(3) of the Act ensures that the federal department triggered, because of its role as a regulator, is fully responsible for an assessment and not the Crown corporation that is the project proponent. It reads:

> 8(3) If a Crown corporation is the proponent of a project and proposes to do any act or thing that commits it to carrying out the project in whole or in part and a federal authority other than the Crown corporation is required under paragraph 5(1)(*d*) to ensure the conduct of an environmental assessment of that project, the Crown corporation is not required to ensure that an environmental assessment of the project is conducted but, for greater certainty, it may accept a delegation from the federal authority under section 17.

AECL concern: When AECL is in a domestic vendor situation (i.e., they are not the proponent), an opponent might argue that AECL should be conducting (as a proponent) a CEAA EA before the actual licensing application to CNSC is made.

AECL's "Global" Concern

AECL's broad concern about becoming a federal authority under the CEA Act is as follows (in their own words):

> Legal challenges to AECL's commercial activities may be raised in an attempt to require AECL to conduct environmental assessments, where currently there would be no trigger for such assessments, and where AECL's competitors would not face such challenges.
>
> - from Appendix A to May 12, 2004 letter, AECL to R. Connelly

Latest AECL Concerns

The following are taken from the January 21, 2005 meeting. Except for items 4 and 5, none of these issues/arguments had been raised by AECL in past discussions or correspondence.

1. When AECL is in a domestic vendor situation, an opponent might argue that they should be conducting a CEAA EA before the actual licensing application to the Canadian Nuclear Safety Commission (CNSC) is made.

Argument:

Ss. 5(1) requires the FA to conduct an environmental assessment before exercising one of the powers or duties in ss. 5(1) (a) to (d). The language is emphasized below:

> 5. (1) An environmental assessment of a project is required **before** a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
>
> (a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

AECL then went on to focus on the verb tenses in ss. 8(3):

> 8 (3) If a Crown corporation **is** the proponent of a project and proposes to do any act or thing that commits it to carrying out the project in whole or in part and a federal authority other than the Crown corporation **is** required under paragraph 5(1)(*d*) to ensure the conduct of an environmental assessment of that project, the Crown corporation is not required to ensure that an environmental assessment of the project is conducted but, for greater certainty, it may accept a delegation from the federal authority under section 17.

The FA (in this case, AECL) is required under s. 5(1) to conduct an EA before "becoming" a proponent. However, ss. 8(3) cannot "release" a FA from the obligation to conduct an EA unless the FA "is" a proponent. AECL can be engaged in carrying out substantial portions of a project for years before submitting an application for a licence or licence amendment. Therefore, during the period before it "is" a proponent, AECL is open to legal challenge to conduct an EA.

AECL calls this a "gap," noting that "the Act says we shouldn't be doing the work, period, until we do the EA, even though another FA will be involved." To correct this "gap," suggested that 8(3) be amended via a regulation to read:

> 8 (3) If a Crown corporation **is** <u>or will be</u> the proponent of a project and proposes to do any act or thing that commits it to carrying out the project in whole or in part and a federal authority other than the Crown corporation **is** <u>or will be</u> required under paragraph 5(1)(*d*) to ensure the conduct of an environmental assessment of that project, the Crown corporation is not required to ensure that an environmental assessment of the project is

conducted but, for greater certainty, it may accept a delegation from the federal authority under section 17.

2. Where AECL is a proponent, yet is contracting with a third party (owner, operator). AECL would not be in control of when the third party applies for the licence, and thus argue that s. 8(3) does not remove AECL's obligations to do an EA.

3. Were AECL to make a bid in this situation, they would have to make it legally binding. By definition, therefore, they have made a commitment as a FA as per s. 5(1)(a), yet 5(1) requires that the EA be conducted before the commitment is made (language emphasized):

   > 5. (1) An environmental assessment of a project is required **before** a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
   >
   > (*a*) is the proponent of the project and **does any act or thing that commits the federal authority to carrying out the project in whole or in part;**

4. Definition of proponent

   Raised the Ghali case (1996), noting that the court had thrown out any consideration of ownership as being necessary to define "proponent." Raised as an example a request by the Government of Ontario for proposals on how to replace its coal-based electrical generating capacity. In such a case, were AECL to propose reactors, are they then the proponent?

s.23 [redacted]

5. Definition of financial assistance

6. AECL should not be required to conduct environmental assessments of projects that do not require CNSC approval (assuming AECL is the proponent)—if CNSC's "threshold" has not been met, the project is known not to have environmental impacts. Examples offered included maintenance and refurbishment. Some of these appear on the Exclusion List, but the list doesn't necessarily "mesh" with AECL's activities.

7. AECL doesn't want to trigger an EA on a service job when a competitor wouldn't. To solve this, the CNSC should add to the list of activities resulting in a Law List trigger.

last saved Jan 31/05.

October 2003 meeting

- "The concern for the impact of the application of CEAA on foreign sovereignty and confidentiality has been recognised by the government in the promulgation of the EDC environmental review regime, and the exemption of EDC from the application of CEAA. Regulations are required to achieve a similar result of [sic] AECL transactions for the same reasons."

- AECL offers the identical arguments for why its domestic activities should be exempted.

- Possible means to exclude all commercial activities from CEAA:
  - exclude AECL from POC and CEAA
  - amend Exclusion List to include a schedule for exclusion of domestic or foreign commercial activities of Crown corporations [not only AECL]
  - develop a new regulation to achieve the above

Boudria deck

- "No other country imposes its domestic regulations on international projects; EA guidance for such projects is done through export credit agencies."

Tsui,Kathy [CEAA]

From: McPherson, Lori [mcphersonl@aecl.ca]
Sent: January 31, 2005 2:56 PM
To: Mack,James [CEAA]
Cc: Guindon,Sylvana: NRCAN; Balint,Tom [CEAA]
Subject: RE: Meeting request

Hello Mr. Mack

The afternoon of February 15, 2005 will be good for our people. Please advise time and location.

Thank you
Lori

-----Original Message-----
From: Mack,James [CEAA] [mailto:James.Mack@ceaa-acee.gc.ca]
Sent: January 28, 2005 4:06 PM
To: McPherson, Lori
Cc: Guindon,Sylvana: NRCAN; Balint,Tom [CEAA]
Subject: RE: Meeting request

~~For the~~ week of the 14th ~~we have~~ the following the afternoon of either the 14th or the 15th. Let me know if these times are not convenient. Given that this meeting is an urgent priority we are willing to cancel other meetings to make this happen.

Thanks,

James Mack

Legislative and Regulatory Affairs | Affaires législatives et réglementaires

613-957-0603 | facsimile / télécopieur (613) 957-0897

james.mack@ceaa-acee.gc.ca

Canadian Environmental Assessment Agency

160 Elgin Street, 22nd floor, Ottawa ON K1A 0H3

Agence canadienne d'évaluation environnementale

160, rue Elgin, 22e étage, Ottawa (Ontario) K1A 0H3

Government of Canada | Gouvernement du Canada

-----Original Message-----
From: McPherson, Lori [mailto:mcphersonl@aecl.ca]

Sent: January 27, 2005 8:42 AM
To: Mack,James [CEAA]
Cc: Guindon,Sylvana: NRCAN; Balint,Tom [CEAA]
Subject: RE: Meeting request

Hello Mr. Mack

Unfortunately, we have conflicts with all the date/times you provided. Can you supply me with some dates/times for the week of February 14? Please advise.

Thank you
Lori

-----Original Message-----
From: Mack,James [CEAA] [mailto:James.Mack@ceaa-acee.gc.ca]
Sent: January 25, 2005 2:21 PM
To: McPherson, Lori
Cc: Guindon,Sylvana: NRCAN; Balint,Tom [CEAA]
Subject: Meeting request
Importance: High

Lori,

s.21(1)(b)

Would it be possible to arrange a meeting in Ottawa for **anytime on February 3rd**? If that date is not possible, things get more complicated. For back up, there are the following options:

- 2:00 - 4:30pm on February 4th;
- the afternoon of February 8th; or,
- the afternoon of February 9th.

Let me know if any of these times are suitable.

Thank you,

James Mack

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james.mack@ceaa-acee.gc.ca

Canadian Environmental Assessment Agency

160 Elgin Street, 22nd floor, Ottawa ON K1A 0H3

Agence canadienne d'évaluation environnementale

160, rue Elgin, 22e étage, Ottawa (Ontario) K1A 0H3

Government of Canada | Gouvernement du Canada

-----Original Message-----
From: McPherson, Lori [mailto:mcphersonl@aecl.ca]
Sent: January 13, 2005 1:38 PM
To: Mack,James [CEAA]
Subject: FW: January 21st meeting: application of CEA Act to AECL

-----Original Message-----
From: McPherson, Lori
Sent: January 13, 2005 1:37 PM
To: 'Mack,James [CEAA]'
Subject: RE: January 21st meeting: application of CEA Act to AECL

Hello Mr. Mack

Thank you for accommodating this change. Participating in this meeting from AECL will be the following:

Allan Hawryluk
Greg Sayer
Doug Christensen
Ahab Abdel-Aziz

Best regards,
Lori

-----Original Message-----
From: Mack,James [CEAA]
Sent: January 13, 2005 1:21 PM
To: Hawryluk,Allan: AECL; Guindon,Sylvana: NRCAN
Cc: Sherhols,Peter [CEAA]; Sayer,Gregory: AECL; Smith,John [CEAA]; Turmel,Natalie [CEAA]; Balint,Tom [CEAA]; Sayer,Gregory: AECL; McPherson,Lori: AECL; Gendron,Irene [CEAA]
Subject: January 21st meeting: application of CEA Act to AECL
Importance: High

This is to confirm our new meeting time for Friday, January 21 from 1:30 to 4:00 p.m. at the Agency's offices (Place Bell, 160 Elgin Street, 22nd floor - someone will meet you at reception). Please send me the names of all attendees in advance so that I can notify reception.

The need for this working meeting between the Agency, AECL and NRCan was identified at the broader November 15 meeting at NRCan's offices, which was also attended by PCO.

s.21(1)(b)

The proposed agenda for next week's meeting therefore is as follows:

1) Introduction

2) Discussion of section 8(3) of the CEA Act in relation to the timing of CNSC permits (Agency)

s.21(1)(b)

5) Next steps

Please contact me if you have any questions or suggestions about the agenda.

James Mack

Legislative and Regulatory Affairs | Affaires législatives et réglementaires

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james.mack@ceaa-acee.gc.ca

Canadian Environmental Assessment Agency

160 Elgin Street, 22nd floor, Ottawa ON K1A 0H3

Agence canadienne d'évaluation environnementale

160, rue Elgin, 22e étage, Ottawa (Ontario) K1A 0H3

Government of Canada | Gouvernement du Canada

Tsui,Kathy [CEAA]

From: Sayer, Gregory [sayerg@aecl.ca]
Sent: February 2, 2005 4:53 PM
To: Balint,Tom [CEAA]
Cc: Mack,James [CEAA]
Subject: RE: Meeting follow up

Thanks Tom

this looks fine but I will review it again tomorrow and confirm. **s.19(1)**

Regards,

Greg Sayer
Legal Counsel
Atomic Energy of Canada Limited
(905) 823-9060 ext 2715
(905) 823-6986 (fax)
(416) 708-3917 (cell)
sayerg@aecl.ca

-----Original Message-----
From: Balint,Tom [CEAA] [mailto:Tom.Balint@ceaa-acee.gc.ca]
Sent: January 28, 2005 4:32 PM
To: Sayer, Gregory
Cc: Mack,James [CEAA]
Subject: RE: Meeting follow up

Greg:

1. Here are the outstanding items that I've identified from our meeting last week. Please let me know if I've overlooked anything.

s.21(1)(b)

2. As requested, here is the Standing Committee transcript pertaining to the introduction of the ss. 8(3) amendment:

House of Commons Standing Committee on Environment and Sustainable Development
December 11, 2002

(1615)

Mr. Robert Connelly: To turn to G-4.1, the primary function of this section is to retain the ability to create future regulations, if need be, for wholly owned subsidiaries of crown corporations. Proposed subsection 8.2 [sic] is to address potential conflicting decision-making responsibilities. This ensures that the federal department is triggered, because of its role as a regulator, and is fully responsible for the assessment, rather than a crown corporation, if it is also a proponent for the same project. An example of that might be Atomic Energy of Canada Limited, which is regulated by the Canadian Nuclear Safety Commission. We would prefer that the process to be used would be that under the act with the regulatory body, rather than any process that would be used by the crown corporation here.

-----Original Message-----
From: Sayer, Gregory [mailto:sayerg@aecl.ca]
Sent: Thursday, January 27, 2005 6:06 AM
To: Balint,Tom [CEAA]
Subject: RE: Meeting follow up

s.21(1)(b)

OK thanks Tom. gs

Greg Sayer
Legal Counsel
Atomic Energy of Canada Limited
(905) 823-9060 ext 2715 (voice)
(905) 823-6986 (fax)
(416) 708-3917 (cell)
sayerg@aecl.ca

-----Original Message-----
From: Balint,Tom [CEAA] [mailto:Tom.Balint@ceaa-acee.gc.ca]
Sent: January 26, 2005 6:52 PM
To: Sayer, Gregory
Subject: Meeting follow up

Greg:

I'm out of the office tomorrow, but will get to you on Friday a list of action items for the Agency and AECL that resulted from our meeting on Friday. I understand as well that James has been in touch with Alan's office regarding a next meeting.

Tom

Tsui,Kathy [CEAA]

From: Mack,James [CEAA]
Sent: February 9, 2005 2:58 PM
To: Balint,Tom [CEAA]; Gendron,Irene [CEAA]; Turmel,Natalie [CEAA]
Subject: RE: Meeting follow up

Good to see that they are working on these but Tom I think we need to stress that if we are to analyze whether an arrangement is financial assistance we need to be able to review the documents - not just have them explained orally to us at a meeting. AECL did agree that they could provide us with copies for our review.

James Mack

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-----Original Message-----
From: Balint,Tom [CEAA]
Sent: February 9, 2005 2:55 PM
To: Gendron,Irene [CEAA]; Mack,James [CEAA]; Turmel,Natalie [CEAA]
Subject: FW: Meeting follow up

-----Original Message-----
From: Sayer, Gregory [mailto:sayerg@aecl.ca]
Sent: Wednesday, February 09, 2005 2:23 PM
To: Balint,Tom [CEAA]
Subject: RE: Meeting follow up

Tom, to confirm my note from last week, these items look fine.

With respect to the items left from our Dec 2004 discussion, we have some examples of deferred payment arrangements we can describe at our next

s.21(1)(b)

meeting, and the item relating to "goods" and "project" we could also disposition at that time, as we did not get to them at our last meeting.

Regards,

Greg Sayer
Legal Counsel
Atomic Energy of Canada Limited
(905) 823-9060 ext 2715
(905) 823-6986 (fax)
(416) 708-3917 (cell)
sayerg@aecl.ca

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From: Balint,Tom [CEAA] [mailto:Tom.Balint@ceaa-acee.gc.ca]
Sent: January 28, 2005 4:32 PM
To: Sayer, Gregory
Cc: Mack,James [CEAA]
Subject: RE: Meeting follow up

Greg:

1. Here are the outstanding items that I've identified from our meeting last week. Please let me know if I've overlooked anything.

s.21(1)(b)

- AECL to provide written suggestions for addressing concerns about the timing of environmental assessments and definitions.
- AECL to provide example contracts that illustrate their concerns about being subject to arguments that they are providing financial assistance.
- AECL to provide detailed examples of projects it engages in that do not require CNSC approval.

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House of Commons Standing Committee on Environment and Sustainable Development
December 11, 2002

(16-15)

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3. Remaining from our December 13 meeting:
    - Could you please confirm if AECL presently enters into deferred payment contracts (as described in AECL scenario #3).
    - Could you please confirm if "goods" (as described in various of your scenarios) has ever included or would ever include a "project" as defined under the *Canadian Environmental Assessment Act.*

-----Original Message-----
From: Sayer, Gregory [mailto:sayerg@aecl.ca]
Sent: Thursday, January 27, 2005 6:06 AM
To: Balint,Tom [CEAA]
Subject: RE: Meeting follow up

OK thanks Tom. gs

Greg Sayer
Legal Counsel
Atomic Energy of Canada Limited
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(905) 823-6986 (fax)
(416) 708-3917 (cell)
sayerg@aecl.ca

-----Original Message-----
From: Balint,Tom [CEAA] [mailto:Tom.Balint@ceaa-acee.gc.ca]
Sent: January 26, 2005 6:52 PM
To: Sayer, Gregory
Subject: Meeting follow up

Greg:

I'm out of the office tomorrow, but will get to you on Friday a list of action items for the Agency and AECL that resulted from our meeting on Friday. I understand as well that James has been in touch with Alan's office regarding a next meeting.

Tom

Tsui,Kathy [CEAA]

From: Mack,James [CEAA]
Sent: February 11, 2005 9:38 AM
To: Riverin,Guy:EXT; Balint,Tom [CEAA]
Subject: Monday February 14th from 1:30 to 2:30

from CNSC.

Guy,

Thanks for agreeing to meet with us from 1:30 to 2:30 on Monday at your office.

As you know we have been working with AECL to discuss what their obligations would be when they come under CEAA in June 2006. A lot of these discussions are focused on whether there could be a legal challenge that AECL is a proponent under CEAA when they are contracted to a private-sector proponent.

We would like to discuss with you how the CNSC permitting process works and whether it may provide some clarity for who would be the proponent for these projects. We did notice that on the CNSC EA page of your internet site that the description of projects for your EAs identify the proponent and we would also like to talk specifically about how that information is developed.

Thanks again for agreeing to meet with us, and we'll see you on Monday. I'll give you a call from reception.

James Mack
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Government of Canada | Gouvernement du Canada

Tsui,Kathy [CEAA]

From: Mack,James [CEAA]
Sent: February 14, 2005 5:56 PM
To: Sherhols,Peter [CEAA]
Cc: Smith,John [CEAA]; Balint,Tom [CEAA]; Turmel,Natalie [CEAA]
Subject: Research on financial assistance

Peter,

You had asked us to start looking at how the term financial assistance is understood by the Government of Canada, and potentially by international organizations. As discussed yesterday, we had looked at what types of financial arrangements federal departments are involved in, and which ones are deemed as financial assistance for the purposes of the CEA Act. However, to answer your question, we were to look at how the government understands all forms of financing and whether these forms constitute financial assistance understood broadly (i.e. not specifically financial assistance as defined in relation to the CEA Act).

I did speak again to some of my contacts who are, or have, worked at IC, TBS, Finance, and the Bank of Canada to determine whether there was a broad interpretation of what, out of all possible forms of financial arrangements, was viewed by the Government of Canada as constituting a form of financial assistance. I have two main observations:

1) the term financial assistance is understood differently depending on what it relates to - there does not appear to be a general understanding of what constitutes financial assistance at the highest level. For example, financial assistance for the purposes of the Income Tax Act has a different meaning than financial assistance for the purpose of an international trade agreements. Again, even among different sectors within or between trade agreements financial assistance may be understood in different ways.

2) for most international trade agreements, in particular the WTO, financial assistance is generally defined as an action that should not be taken by a government. Therefore, it is problematic to talk in that sense about a government program that constitutes financial assistance to a private industry.

Given that there are no obvious leads from my these discussions, the next step appears to me to review the Income Tax Act to see if there is a legal definition of what constitutes a form of income. This may allow us to make statements about whether a contracting arrangement (as described by AECL) is understood to be a benefit, or source of income, for a private company. I am not yet sure what that work may entail.

I do still have a few outstanding calls that have not yet been returned. If they provide any other information I will let you know.

James Mack
Legislative and Regulatory Affairs | Affaires législatives et réglementaires
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james.mack@ceaa-acee.gc.ca
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Atomic Energy of Canada Limited
Summary of Working Meeting

Meeting location:	Agency offices, Ottawa
Meeting date:	February 15, 2005, 1:30 p.m.
Present from Crown:	Gregory Sayer, Legal Counsel
	Alan Hawryluk, General Counsel
	David Tregunno, Director of External Relations
	Ahab Abdel-Aziz, Private Counsel
	Sylvana Guindon, NRCan
Present from CEAA:	Peter Sherhols
	James Mack
	Tom Balint
	Irene Gendron
	Natalie Turmel
Main message:	

Discussion note:

1. Introduction

Peter Sherhols noted that the purpose of this second meeting was to hear AECL's concerns about complying with their forthcoming obligations under the Act vis-à-vis international projects.

Ahab Abdel-Aziz (hereinafter AAA) reported that AECL is nearly finished assembling the deliverables from the January 21 meeting, and will be providing these to the Agency soon.

s.21(1)(b)
s.21(1)(c)

C-9) that Canadian federal authorities will conduct EAs for foreign projects, under the *Projects Outside Canada Regulations*.

In AAA's view, this is appropriate for most activities, but not for those in which AECL is engaged. CIDA, for example, confers benefits on a foreign government; AECL is more like a store, and the foreign government is free to shop elsewhere. Peter Sherhols summarized the cabinet process around the new Crown corporation obligations under the Act, and noted that AECL was discussed at that meeting. He reiterated that if AECL wishes to be exempted from their forthcoming obligations under the Act, for either domestic or international projects, they will have to make that request to cabinet.

The conversation moved to examining if AECL would trigger the Act for international projects, and what would result if they did.

AAA cited the Ghali case again (see summary note for meeting of January 21, 2005 for details), insisting that it says essentially that a contractor is a proponent. He also handed out copies of an affidavit by Lin Feng filed in the Sierra Club/CANDU case.

He noted that the principal issues for complying with the POC (assuming AECL is a proponent) pertains to ensuring that an EA is conducted of a project in a foreign country.

- AECL might have to obtain information from other companies involved in a joint project, for example (Bechtel, GE) to use in AECL's EA. This may not always be possible.
- May be impossible to obtain information from host country on cumulative effects of a project
- Have no leverage to ensure that mitigation measures are implemented
- Not in a position to comply with scoping language in ss. 15(3) **[N.B. scoping requirements of ss. 15(3) are "in the opinion of" the RA]**
- Not in a position to consider needs and alternatives under ss. 16(1)(e) **[N.B. the factors in this section are considered at the discretion of the RA]**

Referring to the affidavit, AAA noted that a Chinese EA does not finish until the end of the project; in using the Chinese EA to inform their own, AECL therefore would be unable to comply with s.11 [this gets back to the "timing issue" from the January 21 meeting].

Paragraph 14 of the affidavit also notes that "there is no mechanism under Chinese law to permit the application to a domestic project of ...mitigation or redesign requirements imposed by the environmental regulatory authorities of a foreign nation."

AAA raised the possibility that AECL might sign a contract with the Chinese government, which might come to a different EA decision for the project than AECL. In his view, AECL can do "lifecycle assessments" but they can't realistically be expected to include the site in the EA. In other words, they can EA the "product," but not the specifics of where it will be constructed.

Peter Sherhols asked AECL what they feel is the best they can do up until the irrevocable decision is taken. AAA suggested a class screening for each generation of reactor (pre-bid), with

s.21(1)(b)
s.21(1)(c)

Summary of AECL request—domestic and international (assuming they are a proponent)

Domestic

1. addition of "is or will be" to ss. 8(3) [see meeting note of January 21]
2. removal of non-CNSC-permitted activities from ambit of Act

s.21(1)(b)
s.21(1)(c)

Analysis and recommendation

Next steps and follow-up

AECL's deliverables from the January 21 remain outstanding. They are:

- AECL to provide concrete examples of the timing "gap."
- AECL to draft a regulation addressing their concerns about the timing of environmental assessments and submit it to the Agency for comment.
- AECL to provide example contracts that illustrate their concerns about being subject to arguments that they are providing financial assistance.
- AECL to provide detailed examples of projects it engages in that do not require CNSC approval.

Outstanding Action Items—AECL

s.21(1)(b)
s.21(1)(c)

From our January 21 meeting:

- AECL to provide written suggestions for addressing concerns about the timing of environmental assessments and definitions.
- AECL to provide example contracts that illustrate their concerns about being subject to arguments that they are providing financial assistance.
- AECL to provide detailed examples of projects it engages in that do not require CNSC approval.

In addition, the following items remain outstanding from our December 13 meeting:

- AECL to confirm if they presently enter into deferred payment contracts (as described in AECL scenario #3).
- AECL to confirm if "goods" (as described in various of their scenarios) has ever included or would ever include a "project" as defined under the *Canadian Environmental Assessment Act*.

Summary of the
Projects Outside Canada Regulations

Principal differences from the Act:

- No comprehensive studies
- Addition of advisory committee as third option for advanced assessment (along with panel review and mediation)
- Responsible Authority and Minister of Foreign Affairs frequently must be reported to and consulted, e.g., before referral to panel, mediation or advisory committee
- Screening, screening report, and follow up may be delegated to foreign government or body
- Mandatory public participation only in the event of a review panel, mediation, or advisory committee
- No guarantee of public hearings with advisory committee
- POC Regulations are not harmonized with the renewed CEA Act. Principal differences concern public participation in screenings (ss. 18(3)) and time for decisions (ss.20(4), 37(4))

Tsui,Kathy [CEAA]

From: Sayer, Gregory [sayerg@aecl.ca]
Sent: March 2, 2005 4:32 PM
To: Balint,Tom [CEAA]
Cc: Mack,James [CEAA]; Guindon,Sylvana: NRCAN
Subject: RE: AECL/CEAA Meeting followup

Thanks Tom. We are putting together a package to respond to these as well as the items discussed at our most recent meeting.

Regards, gs

Greg Sayer
Legal Counsel
Atomic Energy of Canada Limited
(905) 403-7515
(905) 823-6986 (fax)
(416) 708-3917 (cell)
sayerg@aecl.ca

-----Original Message-----
From: Balint,Tom [CEAA] [mailto:Tom.Balint@ceaa-acee.gc.ca]
Sent: March 1, 2005 10:13 AM
To: Sayer, Gregory
Cc: Mack,James [CEAA]; Guindon,Sylvana: NRCAN
Subject: AECL/CEAA Meeting followup

Greg:

A reminder that, as agreed at our meeting of February 15, 2005, AECL will provide the following deliverables originally identified at our meeting of January 21, 2005: **s.21(1)(b)** **s.21(1)(c)**

The following deliverables remain from our meeting of December 13, 2004:

s.21(1)(b)
s.21(1)(c)

ATOMIC ENERGY OF CANADA LIMITED AND THE *CANADIAN ENVIRONMENTAL ASSESSMENT ACT*

ISSUE

Atomic Energy Canada Ltd. (AECL) will be well represented at the Canadian Nuclear Association reception. Robert Van Adel, President and CEO of AECL, is presenting at the Nuclear Industry Seminar on March 10, 2005. It is possible that AECL's representatives may raise concerns regarding the Canadian Environmental Assessment Agency's (the Agency) initiative to develop a regulation to apply to AECL.

SUMMARY / KEY POINTS

- An amendment made to the *Canadian Environmental Assessment Act* (the Act) by Parliamentary Committee requires that all Crown corporations are to be subject to the Act or a regulation under the Act by June 11, 2006. The Agency has reached a consensus recommendation that thirty-seven out of forty-one affected Crown corporations will comply directly with the Act. The Agency has also initiated the drafting of a regulation for two corporations (Business Development Bank of Canada and Farm Credit Canada). Work is ongoing with AECL, and Canadian Commercial Corporation.

- Beginning in October 2003, the Agency conducted a detailed examination of AECL's past and current business lines, and wrote AECL in September 2004 to indicate that they would be minimally affected by complying with the Act for its domestic activities

  A new regulation varying the environmental assessment process for AECL thus was not thought to be necessary at that time.

s.21(1)(b)
s.21(1)(c)

- AECL remains concerned about potential legal uncertainties in applying the Act to its business. The Agency continues to meet regularly with AECL to explore these concerns and whether a regulation will be necessary. Natural Resources Canada is a regular participant in these meetings.

Date: March 8, 2005
Approved by: Peter Sherhols/A/Vice-President/Policy Development/957-0065
Filename: J:/Crowns/Crowns Library/AECL/Briefing Note for Nuclear Industry Seminar Mar 09

- need to be on record.
- polite letter from Peter;

refer to "in" from last mtg. helpful discussion; you still have issue; look fwd to meeting

- true crunch; summary;

- still "as mentioned"

Irene / Janes

=> are we having to do anything? ~~else~~

- provide or refer in letter

cc. WRC.

Tsui,Kathy [CEAA]

From: Vachon,Al [CEAA]
Sent: December 22, 2005 2:00 PM
To: Tsui,Kathy [CEAA]
Subject: FW: Recent AECL docs

A start

-----Original Message-----
From: Balint,Tom [CEAA]
Sent: March 17, 2005 3:43 PM
To: Vachon,Al [CEAA]
Subject: Recent AECL docs

Pros and Cons of a regulation.... | Letter to Michael Taylor respo... | Summary of /orking Meeting wit. | Summary of /orking Meeting wit.

Mr. Michael G. Taylor
Vice President
Corporate Affairs
Atomic Energy of Canada Limited
2251 Speakman Drive
Mississauga ON L5K 1B2

Dear Mr. Taylor:

Thank you for your letter and proposal of May 12, addressed to Mr. Robert Connelly. As I noted in my letter to you of June 2, Mr. Connelly, as the Acting President of the Canadian Environmental Assessment Agency, has referred this file to me.

Let me say at the outset that the government is committed to maintaining the commercial and competitive interests of Crown corporations in implementing their new obligations added by Parliament to the *Canadian Environmental Assessment Act* (the Act). The economic viability of Atomic Energy of Canada Limited (AECL), and indeed of all Crown corporations, is very much an important consideration in this initiative.

You have reiterated AECL's proposal for an exemption from the application of the Act for the domestic and international commercial activities of all Crown corporations. This is similar to what AECL put forward at the October 14, 2003 and January 23, 2004 meetings of our respective officials (the October proposal referenced AECL only, while the January proposal included all Crown corporations). Following each of those meetings, my officials indicated that while Parliament made provisions for varying the environmental assessment process for individual or classes of Crown corporations, it did not provide for the development of regulations that would exempt entire business lines of a Crown corporation from the application of the Act.

.../2

It is my understanding that your proposal for an exemption is based upon AECL's perception that recent correspondence from the former Minister of the Environment to the former Minister of Natural Resources indicated a "policy intent" of the government that AECL will not be required to conduct environmental assessments of its commercial activities (i.e., an explicit exemption would simply "clarify" this). In fact, the clarification provided by the Minister of the Environment was more limited than this and I would like to take this opportunity to review the contents and intent of that letter.

The letter confirms that under the circumstances of AECL's past CANDU sales (in which financing was provided by Export Development Canada, and AECL carried out commercial activities as a contractor, not a proponent), the Act would not apply to the offshore sale of a CANDU reactor. However, because the nature of AECL's potential future offshore and domestic commercial projects is unknown, the letter could not assure that all future AECL business would not trigger the Act. An exemption for such undefined projects would therefore be imprudent, and would also contravene the direction set by Parliament.

Having said this, we have spent considerable time and effort in reviewing your suggestion and have developed an alternative proposal that carefully considers the commercial nature of AECL's business while also reflecting the direction given by Parliament. We believe it will have a minimal impact on AECL's current activities. This letter puts forward that proposal, after further elaborating on the mandate given by Parliament and offering some analysis of the implications for AECL of complying with the Act.

The Agency's mandate regarding Crown corporations

As a result of changes made by Parliament to the Act via Bill C-9, forty-one parent Crown corporations will be subject to either the requirements of the Act or a modified environmental assessment process set in regulations, beginning June 12, 2006. These regulations could vary the environmental assessment requirements of the Act for Crown corporations to take into account their commercial and competitive circumstances.

As you know, during its review of Bill C-9, the Standing Committee on Environment and Sustainable Development (Standing Committee) initially voted to bring all Crown corporations under the ambit of the Act, immediately upon proclamation of the Bill. The amendment that was passed removed the explicit exclusion for Crown corporations that had always existed in the definition of "federal authority."

.../3

Later in the review process, the Standing Committee accepted government amendments to its original initiative. Those amendments included delaying the implementation of the new Crown corporation provisions for three years to provide time to develop regulations, where appropriate, and to ensure the necessary training occurs so that Crown corporations are able to fulfil their new obligations. The amendments also specifically exempted the Canada Pension Plan Investment Board, Export Development Canada, and wholly owned subsidiaries of Crown corporations. Finally, the amendments also added new regulatory authority to allow for the development, where appropriate, of a tailored process that takes into account the unique circumstances and competitive situations of specific corporations or classes of Crown corporations. This authority does not permit creating wide-ranging exemptions.

It is worth noting that included in the Committee's discussions were specific citations of a number of Crown corporations with commercial activities, including AECL, Business Development Bank of Canada, Canada Lands Company Limited, and Canada Mortgage and Housing Corporation. No suggestions to exempt the commercial activities of these Crown corporations were put forward at the Committee, House of Commons, or Senate stages of Bill C-9.

Our mandate, therefore, is to assess the implications (if any) of applying the Act to a Crown corporation's business, and where appropriate, to develop proposals that would vary or tailor the environmental assessment process for that Crown corporation. It is also important to note that the Standing Committee remains interested in this issue and has required that Agency officials update the Standing Committee every six months (until June 2006) on the implementation of the new Crown corporation provisions in the Act.

Analysis and proposed approach for AECL compliance with the Act

AECL's current domestic business lines

With regards to AECL's domestic projects, you note in Appendix B to your letter:

> "In Canada, to the extent that AECL is involved as a supplier, any projects of consequence will, as is usually the case currently, be licensed by the CNSC [Canadian Nuclear Safety Commission] and the owner will be required to engage CEAA during licensing."

.../4

Subsection 8(3) of the Act clearly indicates that AECL would not be responsible for conducting an environmental assessment under such conditions:

> *8(3) If a Crown corporation is the proponent of a project and proposes to do any act or thing that commits it to carrying out the project in whole or in part and a federal authority other than the Crown corporation is required under paragraph 5(1)(d) to ensure the conduct of an environmental assessment of that project,* ***the Crown corporation is not required to ensure that an environmental assessment of the project is conducted*** *but, for greater certainty, it may accept a delegation from the federal authority under section 17* [emphasis added].

In other words, beginning on June 12, 2006, and under its current business lines, AECL would only be responsible for projects at AECL's own facilities in Canada where no federal permits are required, which you note in your letter that "AECL has no objection to."

Given the above, there does not appear to be a reason for a regulation to vary the Act for AECL's domestic projects. AECL could comply directly with the Act without undue effect on its commercial activities. **s.21(1)(b) s.21(1)(c)**

.../5

Should AECL's future business lines (domestic and/or international) trigger the Act, and it is found that these obligations present problems, we would re-examine the need for regulations to vary the requirements of the environmental assessment process.

Summary of Proposal

AECL's current domestic business will not be impacted by its new obligations under the Act, and therefore a regulation does not appear necessary.

s.21(1)(b)
s.21(1)(c)

.../6

s.21(1)(b)
s.21(1)(c)

s.21(1)(b)
s.21(1)(c)

In closing, you note in your letter that when

As noted previously, I share this desire to protect AECL's commercial transactions. As you know, environmental assessment under the Act is a planning tool that informs decisions taken by federal authorities, who typically do not wish to proceed with projects that would result in significant adverse environmental effects. The foreknowledge of such effects, arrived through environmental assessments, can only help to modify projects in appropriate ways that protect the commercial, as well as the natural environment. Such approaches are rapidly becoming part of normal due diligence.

I thank you again for writing. I trust that the information I have provided will prove helpful, and that this proposal for how AECL might comply with its forthcoming obligations under the Act provides you with the clarity and certainty you require while reflecting the direction set by Parliament.

Yours sincerely,

Peter R. Sherhols
Acting Vice-President
Policy Development

c.c.: Mr. Howard Brown, Assistant Deputy Minister, Natural Resources Canada
Mr. Christopher Padfield, Analyst, Privy Council Office