Mackenzie Valley Environmental Impact Review Board

Jan. 26, 2006

To: Distribution List

Dear Sirs/Ma'ams,

Re: MVRMA Key Terminology

The Mackenzie Valley Environmental Impact Review Board has prepared the attached draft reference bulletin to describe how it has operationally interpreted selected key terms in the *Mackenzie Valley Resource Management Act* (MVRMA). This has been done to improve clarity for the benefit of all parties involved in the Review Board's assessments.

Please read the attached document, and forward any comments in writing by Feb. 21, 2006.

Thank you,

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Mackenzie Valley
Environmental Impact Review Board

Reference Bulletin: Operational Interpretation of Key Terminology in Part Five of the Mackenzie Valley Environmental Management Act

Mackenzie Valley Environmental Impact Review Board
December 12, 2005

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1 Introduction

Certain key terms in Part Five of the MVRMA have proven problematic to practitioners and parties involved in the environmental impact assessment process. This reference bulletin is intended to clarify to others how the Review Board interprets some of these terms. These interpretations do not indicate any change in the Review Board's approach to environmental assessment. The Review Board is producing this document because it recognizes that clear guidance on terms that are central to its processes can only help improve people's understanding. The Board's interpretation is based on accepted standards of good EIA practice, its growing number of direct experiences conducting environmental assessments, the *EIA Guidelines*, and the legal interpretations of relevant case law.

These terms are used in some of the most important determinations under Part Five. In Preliminary Screening, this question is "**Might** the development have a **significant adverse** environmental impact or be a cause of **public concern**?". In an Environmental Assessment, the question is "Is the development **likely** to have **significant adverse** environmental impacts or be a cause of **public concern**?". It is to help understand these central questions that this reference bulletin deconstructs their terminology.

This reference bulletin will address the following terms:

1. Might;
2. Likely;
3. Adverse;
4. Significant; and,
5. Public Concern.

Each of these terms is important to the MVRMA, and each has been the subject of difficulties of interpretation in the past.

For each term, this document will describe the its use in the MVRMA, provide the Review Board's interpretation of the term, and discuss certain considerations about how the term is practically applied in the assessment process of the MVRMA. Further reading on Canadian law applying to the term may be found in the appendicies of this document.

2 Might

The term "might" is used in Preliminary Screenings, the first level of environmental impact assessment under the MVRMA. This section will elaborate on the meaning of "might". It will also describe the Review Board's expectations about how the term is to be applied under the MVRMA, because the way it is to be applied helps to further clarify its interpretation.

The Review Board recognizes that the term "might" means "possible". However, to rationally apply the term might in the EIA process of the MVRMA, it must be practically interpreted to mean "reasonably possible". The primary objective of Preliminary Screening (outside of local government boundaries[1]) is, in accordance with *s.125* of the MVRMA, to determine if a development proposal:

- ***might*** have a ***significant adverse impact on the environment***, or
- ***might*** be a cause of ***public concern***.

Where a Preliminary Screener determines that one or both of these tests (the ***might*** tests) are met, then the development must be referred to the Review Board for an Environmental Assessment.

Preliminary Screeners are not required to determine if there **will** be a significant impact, but only if there **might** be one. Preliminary Screener's analyses should go no further than needed to determine that this test has been met, considering factors in *s.114* and *s.115* of the MVRMA.

Preliminary Screeners correctly point out that "might" means possible, and that any development "might" have environmental effects. Practically, however, it is clear that not every application should be referred to the Review Board for an environmental assessment. This interpretation would defeat the purpose of Preliminary Screening, because it would not allow the EA process to focus decision making on the development applications where it is most needed.

The other terms in s.125 help provide a context for interpreting what "might" means. The rest of the might test talks about "significant adverse effects". (The Board's interpretation of the terms "significant" and "adverse" will be discussed below). This makes it clear that in order to apply the "might" test meaningfully, the professional judgment of the Preliminary Screener must play an important role. Is there a **reasonable possibility** of significant adverse impacts? To decide this, the Preliminary Screener must consider, at a preliminary level[2], the significance of a development's potential effects

[1] Inside of local government boundaries, the test becomes whether the project is ***likely*** (as opposed to simply "might").
[2] As opposed to in the depth at which it is considered during an Environmental Assessment.

(e.g. their magnitude, duration, geographic extent and likelihood). Throughout the Preliminary Screening, the preliminary screener should bear in mind the sensitivity of the test, asking themselves "Should this development go to an Environmental Assessment?".

The term "might" is very broad and does not require the same level of certainty as the word "likely" would (see below). Thus, the MVRMA has a more sensitive trigger for further assessment than many other EIA processes. Preliminary Screeners have sometimes been unclear on how to best apply this test. The wording of the Act has not helped to clarify this.

One reasonable approach to this is to ask the following key question: "**Are there relevant unanswered questions about this development?**". This applies both to environmental impacts and public concern. If there are relevant unanswered questions, then an Environmental Assessment should be considered. It is the Preliminary Screener's decision to refer, and it is the Review Board's responsibility to conduct the Environmental Assessment. The purpose of Preliminary Screening is to identify whether or not there are questions that should be assessed further, and *not* to determine answers to those questions.[3]

Preliminary Screeners should refer a development to an Environmental Assessment if:

- the professional judgement of the Preliminary Screener enables them to recognise that the "might" test has been met;
- it cannot be determined that the "might" test has been met without further substantial analysis (or without new information, beyond that of the Preliminary Screening); or,
- there are uncertainties about the potential impacts or the effectiveness of proposed mitigation measures that require analysis to be resolved.

When determining if there **might** be significant adverse environmental impacts, Preliminary Screeners should consider the factors that contribute to significance (see below). The threshold for making such a determination is low, due to the sensitivity of the "might" test. If there are doubts, the development should be referred to the Review Board for Environmental Assessment.

The following are some examples where, in the Review Board's experience, there **might** be significant adverse environmental impacts:

- **Development scale:** Larger developments often have more potential to cause significant adverse impacts.

[3] The sensitivity of the "might" test makes more sense when considered as a part of the overall EIA process. As a whole, the several steps of the EIA process in Part 5 can deal with any potential significant adverse environmental impacts or public concern associated with a development proposal. Recall that each step in the EIA process builds upon the previous step, using the information provided and gathering more information as required to complete a more thorough assessment and analysis.

- **Development location:** Development projects in, near or upstream of protected or potential protected areas, areas used for hunting, fishing, and trapping, or areas of known ecological sensitivity might cause significant adverse environmental impacts;
- **Nature of the activity:** Some activities typically involve more environmental risk than others, due to factors such as (but not limited to):
  - the degree of disturbance;
  - involvement of hazardous chemicals or effluents;
  - major infrastructure requirements;
  - changes to access;
  - use of a new technology, or known technology in an unfamiliar setting;
  - social changes to community structure (e.g. influx of migrant workers to a community); or,
  - changes to stress on existing social services.

3 Likely

The word "likely" has an important role in the MVRMA. In s. 117 the term is used in the context of the MVEIRB determining the scope of a development and whether a cumulative impact is "likely" to result from a development when combined with other developments. Section 117(2) sets out the factors that must be considered in both an environmental assessment and an environmental impact review:

> 117(2) Every environmental assessment and environmental impact review of a proposal for a development shall include a consideration of
>
> (*a*) the impact of the development on the environment, including the impact of malfunctions or accidents that may occur in connection with the development and any cumulative impact that is **likely** to result from the development in combination with other developments;

The term "likely" is also used in s. 117(2)(d) in the context the Board's consideration of whether a development is "likely" to have a significant adverse impact on the environment:

> (*d*) where the development is **likely** to have a significant adverse impact on the environment, the imposition of mitigative or remedial measures;

In s. 117(3) the additional factors that the MVEIRB shall consider in an environmental impact review are listed and include:

> (*d*) the capacity of any renewable resources that are **likely** to be significantly affected by the development to meet existing and future needs.

Section 125(2)(a) outlines the test to be used by preliminary screeners when deciding whether or not to refer a proposal, that is wholly within local government territory, to the MVEIRB for the EA stage in the Part 5 process.

> 125(2) Where a proposed development is wholly within the boundaries of a local government, a body that conducts a preliminary screening of the proposal shall
>
> > (*a*) determine and report to the Review Board whether, in its opinion, the development is **likely** to have a significant adverse impact on air, water or renewable resources or might be a cause of public concern;

The term is also used in s. 128(1)(a):

> 128. (1) On completing an environmental assessment of a proposal for a development, the Review Board shall,
>
> > (*a*) where the development is not **likely** in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern, determine that an environmental impact review of the proposal need not be conducted;

The term is again used in the context of the MVEIRB determining whether it likely (or not) that the development will have a significant adverse impact or cause significant public concern. If not, no EIR needs to be done after the EA. However, if it is "likely" to have a significant adverse effect on the environment then, under s. 128(1)(b) the Board has a couple of options. If it is "likely" to be the cause of significant public concern then under s. 128(1)(c) the Board may order that an EIR be undertaken. If it is "likely" to cause an environmental impact that is so significant that it cannot be justified then the Board can reject the development without an EIR under s. 128(1)(d).

The final uses of the term "likely" in Part 5 are in sections 128(4), 130(2), 131(3) and 140(2). In the first three sections it is used in relation to the Board's identification in a report of EA or EIR of areas where a development is "likely" to have a significant adverse effect or to be a cause of significant public concern. In s. 140(2) it is used in the context of the Board deciding under s. 128(4), 130(2) or 131(3) that the proposal is likely to have a significant adverse effect or cause significant public concern outside the Mackenzie Valley. If so, the Board can enter into an agreement with another authority that is responsible for looking into environmental effects in that region.

The Review Board interprets the term "likely" to mean "probable". That is, if an outcome is more probable than not, it is a likely outcome. The Review Board decides this based on the evidence before it. If there is a greater than 50% chance of an event, it is more likely than not to occur. For something to be "likely", it must be more than just "reasonably possible". The Review Board therefore operationally interprets the term "likely" to indicate a higher test than the term "might".

When the Review Board uses the term "likely" in reference to a measure in a Report of Environmental Assessment, it uses its subjective informed opinion, based on the evidence before it, to reach this conclusion of whether or not an significant adverse environmental impact is "likely".

4 Adverse

The adjective "adverse", in relation to "impact" is used many times in Part 5 of the MVRMA. The term "adverse impact" is often modified by the adjective "significant". For example the term is used in s. 125(1)(a) as follows:

> (1) Except as provided by subsection (2), a body that conducts a preliminary screening of a proposal shall:
>
> (a) determine and report to the Review Board whether, in its opinion, the development might have a significant *adverse* impact on the environment or might be a cause of public concern

The Review Board operationally interprets the term "adverse" to mean "undesirable, hurtful, or injurious". Developments have some impacts that are beneficial, and others that are undesirable. The latter are referred to as "adverse impacts". The Board will use its informed judgement to determine whether an impact is adverse.

Typically, environmental assessments focus on adverse impacts, rather than on beneficial impacts. This is because adverse impacts are usually unintentional, while beneficial impacts are usually planned (and often a motivation of the development). This means that there is a greater risk of adverse impacts being under-considered in the planning process. EIA is a way to rectify this, by ensuring that adverse impacts are duly considered in important decisions about proposed developments.

5 Significant

The term "significant" is used in Part 5 of the MVRMA in many sections. It is generally used as a qualifying term in front of other terms such as "adverse impact" in the context of an impact on the environment including its use in s. 125(1)(a) and s. 125(2)(a). It is also used to qualify the term "public concern" in other sections.

The concept of significance is a fundamental one in EIA. The world is made of complex systems with inter-related parts. Any development will cause many effects. During an environmental assessment, the Board is required to decide which of those impacts matter

enough to require the Board's intervention (in the form of a prescribed measure or a decision under s. 128). The Board makes this distinction by considering the **significance** of the development's potential impacts. **The term "significant" means an impact that is, in the view of the Board, important to its decision.**

This is determined by the Board using its subjective informed opinion, in consideration of the evidence before it. In determining an impact's significance, the Board will consider the characteristics of the impact. It will particularly consider the following:

- The **magnitude**, or degree of change, of the impacts that might be caused;
- The **likelihood** and certainty[4] of the impact occurring;
- The **geographical area** that the impact might affect;
- The **duration** that the impact might have- i.e. how long the effect will last;
- The **reversibility** of the impact that might occur; and,
- The **nature** of the impact- i.e. how valued is the affected component?

Determining significance requires more than a straightforward equation. To determine significance, the Board will use its own principles and values to weigh all of these factors, with regard to the goals described in s. 114 and s. 115, and come to a conclusion based on a broad consideration of the evidence.

For example, consider a development that includes a proposed dyke with a one in ten chance of failure, with catastrophic consequences. In that case, the fact that the likelihood of the impact is only ten percent may be outweighed by the other characteristics of the impact, and the impact may be considered significant.

Another example is a development that will cause the certain death of fifty mosquitos compared to fifty grizzly bears. Even if the magnitude, duration, reversibility, and geographical area of the impacts were the same, the nature of one impact (killing fifty mosquitos) is very different form the other (killing fifty grizzly bears). The Board's findings of significance would not be the same for these two cases.

6 Public Concern

The term "public concern" is used extensively in Part 5 of the MVRMA. It is generally used in the context of either the preliminary screening body (s. 125) or the MVEIRB having to decide if there "might" be public concern or will "likely" be public concern or

[4] In this sense, likelihood is based on the probability of an event occurring, while certainty refers to the limits of our theoretical accuracy in predicting.

significant public concern. (The meaning of "significant" is discussed later in this Reference Bulletin.)

The Review Board operationally interprets the term "public concern" to mean "widespread anxiety or worry". During an environmental assessment, when the Review Board determines whether or not there is public concern about a development it undertakes the challenging tasks of considering how widespread the concern is, and how great is the degree of anxiety or worry. Some of the Board's considerations in these matters are described below.

One of the Preliminary Screening tests for referral to Environmental Assessment is the question "Might the development be a cause of public concern?"[5] This has proven problematic for Preliminary Screeners to apply, partly due to the subjective nature of the test. As with the rest of the "might" test, the professional judgment of the Preliminary Screener plays a vital role. The question of evaluating public concern has also arisen during several environmental assessments.

Although there is no clear formula for determining public concern, the following are some examples where, in the Review Board's experience, public concern could be an issue. Note that this list is similar to that of the factors that might cause significant adverse environmental impacts. The two are sometimes, but not always, related.

1. **Development scale**: Larger developments often affect more people, and their proposal may generate public concern.
2. **Proximity to communities**: People are often concerned with developments in their vicinity, so the closer a development is to a community, the more concern may be caused.
3. **New technology**: Where a proposed development uses a new type of technology or one that has never been used in the North before, people's unfamiliarity with the type of development could generate concern.
4. **Severity of Worst Case Scenarios**: Typically, there will be more concern over a development the more severe its worst case malfunction scenario is.
5. **Proximity to protected or sensitive areas:** There is typically more potential for public concern for developments in, around or upstream of protected areas (such as parks, or reserves), or ecologically sensitive areas (such as calving or spawning grounds).
6. **Areas known for harvesting**: The closer a development is to a good hunting, fishing or trapping area, the more there may be public concern associated with it.

The number of concerns voiced may be a factor to the screener in gauging whether there might be public concern, but is not necessarily the only factor. Although a large number of voiced concerns could lead to a referral to environmental assessment, for example,

[5] MVRMA, Sec. 125 (1).

even a small number of voiced concerns may do so, depending on the reasons for the concern. If a single concern is well justified by relevant reasons, this could be more important than many unsupported letters.

When identifying public concern, it may be valuable to consider whether the proposed development is being discussed in the media (radio, TV, newspapers, etc), whether letters of concern have been submitted, whether there is a history of concerns about the area, whether the proposed type of development has caused controversy in the past, and so on.

The location of the person or group voicing concern may also be relevant to the might test. The MVRMA specifies that it must ensure that the concerns of aboriginal people and the general public are taken into account[6], and that it is to protect the well-being of residents and communities in the Mackenzie Valley[7] and other Canadians[8]. However, some sites in the Mackenzie Valley have specific territorial, national or international designations implying a broader duty of care when considering comments. For example, it is reasonable to consider concerns from across Canada when they relate to potential impacts on a National Park, because it is designated as such for the people of Canada. Similarly, consideration of Canada's international environmental commitments may lead to a referral.

7 Conclusion

It is hoped that above material will help to clarify how the review Board operationally interprets terminology that is key to the environmental impact assessment process. In so doing, it is hoped that the reader has a better understanding of the questions "Might the development have a significant adverse environmental impact or be a cause of public concern?", and "Is the development likely to have significant adverse environmental impacts or be a cause of public concern?". These are the questions that lie at the heart of Preliminary Screening and Environmental Assessment in the Mackenzie Valley.

[6] MVRMA Sec. 114(c).
[7] MVRMA sec. 115 (b).
[8] MVRMA sec. 9.1

Appendix A: The Term "Might" in Law

The legal definition of the word "might" does not explain what "might" means in the context of evaluating whether a proposal "might" have a significant adverse effect or "might" be a cause of public concern. The definition from Black's Law Dictionary, 6th Edition is:

> "Might": past tense of word "may". Equivalent to "had power" or "was possible" or "have the physical or moral opportunity to be contingently possible". (In re Weidberg's Estate, 172 Misc. 524, 15 N.Y. s. 2d 252, 257.)

This definition provides no clear way to evaluate the chance that a significant adverse effect "might" be caused by a proposal or that a proposal "might" be a cause of public concern. The definition merely alludes to the meaning of "might" as a possibility, without providing guidance as to how to determine such a possibility.

Canadian courts have addressed the meaning of the word "might" but have not provided a test for it. Cannon, J. of the Supreme Court of Canada addressed the meaning of "might" in *Canadian National Steamships Co. v. Watson*, [1939] S.C.R. 11 when referring to the findings of the jury members:

> They simply say that the accident *might* have been avoided. Is this a verdict sufficient to give us the certainty required to connect the injuries suffered by the respondent with the alleged negligence or omission? *The verdict seems to be based not on a fact of which the jurymen were convinced but on a probability or a possibility.* [Emphasis added.]

As discussed above in the context of the legal definition, the meaning of "might" refers to a possibility (or a probability).

In a case from the same year as the preceding case, the Quebec Court of King's Bench addressed the meaning of "might". In *Lieberman* v. *Vincent* (1939), 68 Que. K.B. 14 at 29 Hall, J. wrote:

> The jurors, who declared that [the driver of a car] "might have seen that car approaching at a close enough distance for him to avoid the accident", were speculating, conjecturing or formulating an opinion. Their finding was not one of fact. The jurors declared that [the driver] might have seen the approaching car and have avoided the accident. They did not declare what could have been done; how it could have been accomplished under the circumstances...*the connection that linked [the driver] with responsibility was a mere possibility*. [Emphasis added.]

Hall, J. found that whether something "might" occur, is based not on fact but rather on possibility.

A more recent reference was made to "might" at the Federal level, in the context of the Canadian Competition Tribunal in *Canada (Director of Investigation & Research)* v. *Nutrasweet Co.*[9] Reed, J. wrote:

> "Might" is used in Rule 14 (1) [of the *Competition Tribunal Rules,* SOR/87-373] in the sense of "might perhaps be used in evidence" rather than in the sense which would require either a *definite intention* to use the document in evidence or a determination, at that stage, of its admissibility... [Emphasis added.]

This is further example of the definition of "might" as indicating a possibility rather than indicating something definite.

[9](1989) 28 C.P.R. (3d) 316 at 319 (Can. Competition Trib.)

Appendix B: The Term "Likely" in Law

The meaning of the term "likely" has been addressed in Canadian case law. In the insurance law context, the British Columbia Court of Appeal had the following to say about its meaning:

> The only additional point of clarification that arose in the course of argument was that counsel for the appellant did not agree that the word "likely"...means "at lease more probable than not." He thought it might mean some lesser probability than more probable than not. But...the word "likely" has a clear meaning of "at least more probable than not."[10]

To apply this to Part 5, the test for "likely" would be whether the significant impact or the significant public concern was "at lease more probable than not." This is a test that requires more evidence than the "might" test in which only some evidence would have to be shown to prove that the impact or concern "might" occur.

In the health law context the term "likely" has also been interpreted. In a Manitoba Court of Queen's Bench decision from 1987 the court wrote:

> In my view, "likely" in the context of s. 16 [of the *Mental Health Act*, R.S.M. 1987, as am.] is a synonym for "probable".[11]

Again, to apply this test to show that the significant impact or significant public concern was probable, would require more evidence than the "might" test.

The term was also interpreted in the trade and commerce context as it was used in the 1952 *Combines Investigation Act*. The New Brunswick Court of Appeal stated the following:

> The trial Judge clearly erred in his interpretation of "likelihood". The difference is co-extensive with the words "probability" and "possibility". The trial Judge according to his finding of facts interpreted "likelihood" as the "possibility". The word "likely" as used in s. 2 of the *Combines Investigation Act*, [R.S.C. 1952, c. 314] means "will probably" not "may possibly".[12]

In this context the term was also interpreted as meaning "probably" rather than "possibly" or "might".

In the corporations context, the Ontario Court of Appeal looked at the meaning of "likely" in relation to the chance that names of corporations could be mistaken for one another. The Court wrote:

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[10] *Sayle* v. *Jevco Insurance Co.* (1985), 16 C.C.L.I. 309 at 310 (B.C.C.A.) the court per Lambert J.A.
[11] *Bobbie* v. *Health Sciences Centre* (1988), 49 C.R.R. 376 at 383 (Man. Q.B.) Scott A.C.J.Q.B.M.
[12] *R.* v. *K.C. Irving Ltd.* (1975), 20 C.P.R. (2d) 193 at 210, 11 N.B.R. (2d) 181, 23 C.C.C. (2d) 479, 62 D.L.R. (3d) 157 (C.A.) the court per Limerick J.A.

> In dealing with the question the Court had to decide, the substitution of the word "likely" in ss. (1)(a) for the word "calculated" earlier used (Companies Act, R.S.O. 1950, c. 59, s. 39), makes it unnecessary now to demonstrate any intention to deceive on the part of the proponent. "Likely" as an adjective is defined by the Oxford English Dictionary as "probable" -- "that looks as if it would happen". Accordingly, the question becomes, "Did the Provincial Secretary give to the proponent a name so similar to that of the objector that 'it looked as if deception would occur'."
>
> Before setting out what evidence the Provincial Secretary properly should consider in framing his answer to the question which presents itself to him, there are some further considerations relevant to the decision he must make. The Provincial Secretary should not approach the determination of the probable deceptive qualities of the name proposed with a view to applying a standard so rigid that the test becomes not "probability of deception" but "possibility of deception": he should relate his judgment to the normal consequences of the use of the proposed name in a legitimate manner assuming that the new company intends to conduct its business fairly and not in a manner calculated deliberately to pass off its business as that of another. [13]

The Court was therefore stating that "likely" in that context meant there was a "probability" that people could be deceived, not just a possibility.

It should be noted that the term "likely" in s. 125(2)(a) is related to whether there is likely to be a significant adverse effect on air, water or renewable resources (rather than on the "environment" as set out in s. 125(1)(a).) However, the term "might" is still used in relation to whether the proposal might be a cause of public concern as it is in s. 125(1)(a). Therefore, the test for a significant adverse effect within local government territory is more stringent than in other areas. This may be because within local government areas there may be other controls on development such as like zoning bylaws. It seems clear, however, that municipal areas do not get same level of protection as areas outside local government areas.

[13] RE CC CHEMICALS LTD,]1967] 2 O.R. 248 (1967) 63 D.L.R. (2d) 203, 52 C.P.R. 97 at pages 107-108.

Appendix C: The Term "Adverse" in Law

The Concise Oxford Dictionary of Current English[14], defines "adverse" as: "1. contrary, hostile" and "2. hurtful, injurious." There is Canadian case law that has looked at the meaning of "adverse". Its meaning in the phrase "adverse impact" was discussed in the municipal law context. However, the discussion was not helpful since a municipal board was looking at whether an event (the loss of affordable rental housing) would have an adverse effect.[15]

The courts have interpreted the term "adverse", as it is used in evidence law in the context of a witness. In that sense, "adverse" means "hostile". Another court found that it meant at least "opposed in interest, or unfavourable in the sense of opposite in position, and is not limited to "hostile."[16] So, the term has a negative connotation.
In looking at the phrase "adverse impact discrimination" in the context of human rights law, the term "adverse" refers to a negative effect on a person based on an action that violated a person's human rights.[17]

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[14] Concise Oxford Dictionary of Current English, 8th Edition, Ed. R.E. Allen (Oxford: Clarendon Press, 1990, p. 18.
[15] *Niagara (Regional Municipality)* v. *Mraz Investments Ltd.* (1991), 25 O.M.B.R. 355 at 364 Johnson (Member)
[16] *R.* v. *Gushue (No. 4)* (1975), 30 C.R.N.S. 178 at 182 (Ont. Co. Ct.), Graham Co. Ct. J.
[17] *Corlis* v. *Canada (Employment & Immigration Commission)* (1987), 8 C.H.R.R. D/4146 at D/4151, 87 C.L.L.C. 17,020 (Cdn. Human Rights Trib.) Semotiuk

Appendix D: The Term "Public Concern" in Law

Several cases have addressed the meaning of "public concern" in the context of environmental assessment. In the case of *Cantwell* v. *Canada (Minister of the Environment)*[18] the Federal Court Trial Division addressed an application for an order quashing a decision to allow the Point Aconi project, a coal-fired generating station on Boularderie Island in Cape Breton, Nova Scotia, to proceed.

The Environmental Assessment and Review Process Guidelines Order[19] applied to the Point Aconi project. Section 4(1)(b) of the Guidelines Order states that the department shall include in its consideration of a proposal "the concerns of the public regarding the proposal and its potential environmental effects." Section 13 states that notwithstanding the decision made under section 12 "if the public concern about the proposal is such that a public review is desirable" the department must refer the proposal to the Minister so that a public review may be conducted.

Prior to the approval of the project environmental studies had been carried out by Nova Scotia Power. During that process, public meetings had been held with municipal representatives, members of the public and with fishermen from the area. A package of documents was submitted to the Minister of Fisheries and Oceans along with a covering memorandum from the Deputy Minister of the Department.

The Minister approved the recommendations of the deputy and signed the recommendations to show his concurrence. The recommendations stated that the project would not be referred to a panel for a public review. This recommendation was made because, according to the Department's initial assessment, "with additional conditions, environmental effects from the project are expected to be insignificant or mitigable with known technology."[20]

The application to the Court was made for a review of the Minister's decision and for the approval of the project to be quashed. The Court stressed that it was not its function in such a review to decide whether the Minister's decision in issuing failing to refer the project to a public panel for review was correct but rather whether the Minister had acted in accordance with the law.

The issue in the case in relation to public concern was whether the Minister of Fisheries and Oceans had erred in failing to refer the project to the Minister of the Environment for

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[18][1991] 41 F.T.R. 18, 6 C.E.L.R. (N.S.) 16 [hereinafter the Point Aconi case.]

[19]S.O.R./84-467 ("the Guidelines Order" or "EARPGO")

[20]*Point Aconi* p. 5 (Q.L.)

public review by a panel. The applicants submitted that the "public concern was such that a public review was desirable and... that the Minister's decision to the contrary was made in light of considerations that were irrelevant."[21] The Court found that there was " no doubt of widespread public concern about this project and interest in a public review by a panel".[22] The Court found that the initial assessment itself referred to this.

The Court agreed that the discretion of the Minister under section 13 was not absolute, that it must be "exercised reasonably and in good faith taking into account relevant considerations, having regard to the purposes of the Guidelines Order."[23] However, the Court rejected the applicants' argument that if there is sufficient public concern about a project that a public review should be held. The Court stated that this is not what section 13 says. MacKay, J. found that the "level and extent of public concern ought to be an important factor considered by the Minister in his deliberations under section 13 to determine whether a public review by a panel "is desirable"."[24] MacKay, J. found that this had been an identified consideration in the assessment, in the covering memo and in other documents before the Minister when he made his decision.

The applicants' main argument was that the Minister appeared to have included considerations which were irrelevant to the purposes of the Guidelines Order and which were therefore irrelevant to his decision. The applicants stated that a list of factors against referring the project to a public review panel were " considerations of expediency or practicality or political factors which are irrelevant to a decision whether "public concern about the proposal is such that a public review is desirable"."[25] The list of alleged irrelevant considerations included:

> ...that construction has begun; that a Panel could not be precluded from examining the entire project as if construction had not begun and the public review would generate pressure to halt the project until the review is completed; that there appeared to be no federal legislative authority to halt the project and if efforts were made to do so the federal government would be open to action in damages for any delay in construction; that the provincial government, having concluded its own assessment, would be unlikely to agree to participate in a public review; that a Panel might recommend no meaningful change which would cause frustration to some, and to others exasperation at expenditure of taxpayers' money; that the Panel might recommend measures that lie beyond federal

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[21]Point Aconi p. 8 (Q.L.)

[22]*Ibid.* p. 15 (Q.L.)

[23]*Ibid.* p. 15 (Q.L.)

[24]*Ibid.* p. 15 (Q.L.)

[25]*Ibid.* p. 16 (Q.L.)

> legislative competence; that not having a public review would be seen as collaboration with the province whose process for public involvement was criticized by many.[26]

The Court agreed that many of the factors suggested for the Minister's consideration were irrelevant. However, MacKay, J. also found that there were other considerations before the Minister that were relevant factors. These included:

> ...the general conclusion of the Assessment which expressly referred to public concern and the necessity for a decision under section 13; the widespread public concern about the project and the evident interest of many in a public review, evident from the Assessment and other documents, including the memorandum from the Deputy Minister recommending that the Assessment's conclusion be accepted and that the matter not be referred for a public review by a Panel.[27]

MacKay, J. also found some other factors in the memoranda to the Minister that could also be considered as relevant: "that referral to a public review would be seen by many in the public as a positive response to public concern; that a public review would at least provide opportunity for people to gain a better understanding of anticipated environmental effects and to alleviate suspicion of government."[28]

There were no reasons given by the Minister for his decision. The Court therefore found that it could only review the considerations in front of the Minister at the time of his decision. MacKay, J. therefore found that he could not conclude that the Minister's decision not to refer the project to public review had been *entirely* based on irrelevant considerations. Nor could the Court conclude that the Minister had *clearly* relied on irrelevant considerations since there were other relevant considerations before him as well. Therefore, the Court found that the Minister had acted within his discretion in deciding not to refer the matter to public review.

After the Point Aconi case another case dealt with the measurement of public concern in the environmental assessment context, *Pippy Park Conservation Society, Inc.* v. *Canada (Minister of Environment).*[29] The Trans-Canada Highway in Newfoundland was to be improved and in 1987 an Environmental Impact Statement (EIS) was completed in accordance with provincial legislation. In May 1992 an Initial Environmental Evaluation (IEE), commissioned by Transport Canada, was completed. In August, 1992 the Minister approved the initial IEE. The Government of Newfoundland had reviewed its 1988 EIS to see if there had been any changes since then and public hearings were held by the

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[26] *Ibid.* p. 16 (Q.L.)

[27] *Ibid.* p. 16 (Q.L.)

[28] *Ibid.* p. 16 (Q.L.)

[29] [1994] F.C.J. No. 1662, (1994) 86 F.T.R. 255, 15 C.E.L.R. (N.S.) 306

Goodyear Commission which also evaluated the 1988 EIS. The Commission found that there had not been enough changes to require another EIS. In August 1993 a news conference was held and the IEE, the Commission's report and other information were made available to the public.

Pursuant to section 15 of the EARPGO Transport Canada made public the documentation on which its approval of the IEE was based and stated that it would receive public comment until November 19, 1993. This fact was communicated to the applicant's president on October 13, 1993. Transport Canada received limited public comment: two written submissions, one by the applicant. The Court found that neither of the comments appeared to provide any information not previously available to Transport Canada. Based on the public response Transport Canada decided not to refer the proposal to the Minister of the Environment for public review by a Panel.
The Court found Transport Canada's decision to not refer the project to a panel was based on relevant considerations, even though the applicant's views were not accepted and that there was no evidence that the decision was made on the basis of irrelevant or improper considerations.

In the 1997 environmental assessment case of *Community Before Cars Coalition* v. *National Capital Commission*[30] the Federal Court cited MacKay, J. in the Point Aconi case in which he listed the relevant factors for consideration that were before the Minister. The Court in the *CBCC* case cited the public concern analysis which the National Capital Commission (NCC) staff had prepared in relation to the bridge which was the subject of that case.

The lengthy analysis recommended that the NCC Commissioners not refer the project to a public review panel, a recommendation which they adopted. The Court found the analysis very thorough since it included a summary of every comment from the PAC meetings and all correspondence either for or against the three lane bridge. The Court found that, based on all of the public response on the proposal that the NCC received, it had made its recommendation without ignoring or discounting any concerns.

The Court cited the statement from NCC's analysis that: "NCC staff is confident that sufficient information has been considered to assess the environmental implications of the Proposal and that the concerns raised related to the project can be addressed through design and proposed mitigation which would be implemented should the Proposal proceed."[31] The staff felt that the issues addressed throughout the process continued to be the same, that no new ones had been raised and it felt that no new ones would be raised should a public review be held. The NCC therefore recommended that no review

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[30][1997] F.C.J. No. 1060, (1997) 135 F.T.R. 1 [Hereinafter *CBCC*]

[31]*Ibid.* para 130 (Q.L.)

panel assessment was required. The Court found that there was no basis on which to conclude that the Commissioners had relied on irrelevant considerations.

The Court in *CBCC* stated that just because there is a "steadfast opposition" to a proposal does not mean that a public review panel would be the inevitable result.[32] The Court stated that there will, realistically, always be opposition to some proposals. However, since the Court found that the NCC staff had decided that no new concerns would be raised that the NCC's conclusion had to be a relevant factor. The Court also found that the public had had adequate opportunity to express its concerns during the environmental assessment process.[33]

The issue of how to measure public concern was addressed by the Saskatchewan Court of Appeal in *Irving* v. *Kelvington Super Swine Inc.*[34] The Court had to determine whether the livestock operation was a "development" under section 2(d) of *The Environmental Assessment Act*[35] and whether it therefore was subject to an environmental assessment. The Environmental Assessment Branch of the Department of the Environment had already determined that the project was not a development under s. 2(d).

One of the areas the Court looked at to see if the project was a development was whether there was widespread public concern because of potential changes to the environment under s. 2(d)(iv). There was evidence on the number of public meetings which were held and the number of petitions which were circulated and signed by people in the project area. The Court found that there was an indication of public concern, however, that it was local concern and was not widespread.[36] The Court found that it was doubtful that the number of people expressing concern represented a majority of the residents in the area of the project. The Court held that the proposed development was not a development under the statute.

The *Super Swine* case may not be applicable to the MVEIRB context since Saskatchewan's environmental statute sets up widespread public concern as one of the criteria for determining if the project is a development. The *MVRMA* does not define whether something is a development or not partially based on whether there is widespread public concern, however, this case is cited to give an example of what a large amount of public concern might be. Also, Part 5 often refers to significant public concern which might be similar to widespread public concern.

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[32] *Ibid.* para 131 (Q.L.)
[33] *Ibid.* para 131 (Q.L.)

[34][1997] S.J. No. 739 [Hereinafter *Super Swine.*]

[35]S.S. 1979-80, c. E-10.1.

[36] *Super Swine* para 15 (Q.L.)

Appendix E: The Term "Significant" in Law

The word "significantly" was described in *R.* v. *Dupuis*[37] by Justice Dawson of the Saskatchewan Court of Queen's Bench. He stated: "Something that is significant is consequential, notable, considerable, eventful, important, material, meaningful, profound or substantial." (The context that the word was used in was the manufacture of illegal drugs in someone's home and whether the property had been *significantly* modified to facilitate the commission of a designated substance offence.)

In relation to another context using "significant" Justice Dawson wrote: "In a number of employment law decisions interpreting the term "significant contributing factor", pursuant to Ontario's Workers' Compensation Act, R.S.O. 1980, c. 539, the term was defined as follows: A "significant contributing factor" is a factor of *considerable effect or importance* or one which *added to* the worker's pre-existing condition *in a material way...*"[38] [Emphasis added.] This quote could be modified to fit an environmental context to read: A "significant" adverse environmental impact is factor of considerable effect or importance or one which added to or detract from the environment's condition in a material way.

The term "significance" in the environmental context has been considered by the courts in the past. A useful case for interpreting the meaning of "significant adverse effect on the environment" is *Friends of the Island Inc.* v. *Canada (Minister of Public Works).*[39] The case involved an application for judicial review of a decision to build a bridge linking Prince Edward Island and New Brunswick. Strait Crossing Inc. put together a specific environmental evaluation (SEE) in relation to a self-assessment done under the Environmental Assessment and Review Process Guidelines Order[40].

In its memorandum SCI stated: "Both case law and the FEARO manual indicate environmental impact predictions and determinations of significance are essentially value judgments and may be based not just on studies but on professional judgment, experience, even speculation."[41]

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[37](1998), 130 C.C.C. (3d) 426 at 437.

[38]*Supra* note 2 at para 17.

[39][1993] F.C.J. No. 781 [Hereinafter *Friends of the Island.*]

[40]S.O.R./84-467 ("the Guidelines Order" or "EARPGO")

[41]SCI memo page 45, para 122.

The Court stated that the Guidelines Order clearly shows that the potential impacts of a project may be classified as either significant or insignificant but only to the extent that they are known and if they are unknown, they cannot be classified as insignificant but instead require further study or referral to a panel.[42] The Court found that the authors of the SEE identified time and space boundaries against which to determine significance or insignificance.[43]

As well, SCI formulated assessment criteria to judge significance based on: professional judgment, the expertise of the study teams and the criteria ordinarily used by other environmental consultants.[44] The Court found that the assessment criteria for "significance" of the effects were developed by SCI in a manner consistent with the FEARO[45] guide. Public Works Canada also used the FEARO guide to make up its manual. One of the crucial elements to the applicant's case was establishing that an error of law had been committed respecting the significance criteria. The Court found that the applicant had failed to establish that such an error of law had been committed.

One of the most helpful things in the case, in relation to defining significance, was an excerpt in the case from Public Works Canada's Manual:

> The significance of an impact is ultimately determined by a value judgment based on both quantitative and qualitative observed and scientifically derived data. It will take into account the potential for concern and controversy that a project might create in both the public and professional communities. Concern and controversy is related to significance and reflects such things as the public's perception of impact, magnitude and importance as described below.[46]

The Court stated that the PWC manual then set out the same 6 criteria as are found in the FEARO guide for evaluating the significance of an environmental effect: *magnitude, importance, prevalence, remoteness, duration* and *risks.*

The Court found that the framers of the SEE had applied the significance criteria to all possible environmental effects of the project to determine whether they were significant or insignificant.[47] In the end SCI had found that there were two significant effects but

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[42] *Friends* para 13.

[43] *Friends* para 139.

[44] *Ibid.* para 62.

[45] Federal Environmental Assessment and Review Office

[46] Public Works Canada manual, p. 9.

[47] *Friends* para 148.

that both were mitigable. The Court found no fault in the process of determining significance nor did it fault the SCI's findings.

Significance was also discussed in relation to the environment by the Supreme Court of Canada in *Ontario* v. *Canadian Pacific Ltd.*[48] in the context of s. 13 of Ontario's *Environmental Protection Act.*[49] The Court stated was that it was evident that

> ...the release of a contaminant which poses only a trivial or minimal threat to the environment is not prohibited by s. 13(1). Instead, the potential impact of a contaminant must have some significance in order for s. 13(1) to be breached.[...] Therefore, a citizen may not be convicted under s. 13(1)(a) of the E.P.A. for releasing a contaminant which could have only a minimal impact on a "use" of the natural environment.[50]

The Court stated that the *de minimis* principle showed "that s. 13(1)(a) does not attach penal consequences to trivial or minimal impairments of the natural environment, nor to the impairment of a use of the natural environment, which is merely conceivable or imaginable. *A degree of significance, consistent with the objective of environmental protection, must be found in relation to both the impairment, and the use which is impaired.*"[51] [Emphasis added.]

Following *Canadian Pacific* on the meaning of "significance" was the Federal Court of Appeal's decision in *Alberta Wilderness Assn.* v. *Express Pipelines Ltd.*[52] A review panel under the *Canadian Environmental Assessment Act*[53] had assessed a proposed underground crude oil pipeline and an application was made for a judicial review of the panel's report. The Court stated that:

> No information about the probable future effects of a project can ever be complete or exclude possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did, a high degree of expertise in environmental matters. In addition, the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

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[48](1995) 125 D.L.R. (4th) 385, 183 N.R. 325, 99 C.C.C. (3d) 97, 17 C.E.L.R. (N.S.) 129 (S.C.C.) para 10. [Hereinafter *Canadian Pacific*]

[49]R.S.O. 1980, c. 141.

[50]*Supra* note 5 at para 64.

[51]*Supra* note 5 at para 65.

[52][1996] F.C.J. No. 1016 [Hereinafter *Express Pipelines*].

[53]S.C. 1992

The most recent discussion of the meaning of "significance of environmental effects" was by Justice Campbell of the Federal Court Trial Division in *Alberta Wilderness Association* v. *Cardinal River Coals Ltd.*[54] (*Cheviot*). Justice Campbell cited section 16 of the *CEAA* which requires that the environmental effects of the project be considered and that findings be made on the significance of those effects. Justice Campbell stated: "In my opinion the [panel] is first required to define and describe the environmental effects, and then to make a finding respecting the weight to be placed on each effect, or in the words of the provision, to consider the "significance" of each effect."[55] Justice Campbell found that in ascribing weight to an environmental effect, that mitigation of the effect is an important factor. In relation to the use of "significance" in s. 16(1)(d) Justice Campbell was of the opinion that:

> ...if a defined and described environmental effect is considered "adverse" and "significant", that is substantial, then mitigation of this effect by practical means is important to consider. Once considered, the conclusion reached then becomes a feature of the environmental effect, about which a decision can be made respecting the weight to be placed on it in the governmental decision making process.[56]

In relation to assessing the "significance" of an environmental effect, the effect must first be defined and described and then weighed to determine its significance, as in the *Cheviot* case. One of the factors involved in weighing an effect is the ability to mitigate its results. According to *Express Pipelines,* weighing an effect may prove difficult in practice since people "can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results..."

However it is unlikely, according to *Canadian Pacific,* that an environmental effect "which poses only a trivial or minimal threat to the environment" will be considered significant, at least in terms of imposing a penal sanction for its release. Certainly, an environmental effect significant enough to attract a penal consequence would attract an environmental assessment.

Most helpful in determining how to assess significance was the Court in *Friends of the Island* in which the Court cited the criteria found in the FEARO guide for evaluating the significance of an environmental effect: magnitude, importance, prevalence, remoteness, duration and risks. The 6 criteria for assessment of the significance of an environmental effect could easily be transferred into the *MVRMA* context to be used by the Board. The Board could apply the criteria to each possible effect and evaluate each one to determine

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[54][1999] F.C.J. No. 441.

[55]*Supra* note 12 at para 55

[56]*Ibid.* at para 56.

its magnitude, importance, prevalence, remoteness, duration and the risks associated with it. The evaluation of each effect in this manner would enable the Board to determine whether any adverse effect had significance, requiring that the Board conduct an environmental assessment.