

Court File Number: T-938-22

FEDERAL COURT**BETWEEN:**

**SIERRA CLUB CANADA FOUNDATION, and ÉQUITERRE and
M'GMAWE'L TPLU'TAQNN INC.**

Applicants

- and -

**MINISTER OF ENVIRONMENT AND CLIMATE CHANGE,
THE ATTORNEY GENERAL OF CANADA, and EQUINOR CANADA LTD.**

Respondents

**RESPONDENTS' MEMORANDUM OF FACT AND LAW
ON BEHALF OF THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
AND THE ATTORNEY GENERAL OF CANADA**

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PART I – STATEMENT OF FACTS

A. Overview

1. Canada has made numerous commitments to strengthen its response to climate change, including a plan to set Canada on a path to achieve a prosperous net-zero emissions future. The Bay du Nord Development Project (Project) requires further regulatory assessment and approvals before it can be built and operated. However, from an environmental assessment (EA) perspective, Canada has determined that the Project can be a responsible part of its net-zero emissions plan.

2. The Impact Assessment Agency of Canada (Agency) conducted a thorough and science-based EA process over four years, integrated with a meaningful Crown consultation process, including consultations with the Applicant Mi'Gmawe'l Tplu'taqnn Inc (MTI). The Agency determined that any potential impacts to rights held by the groups represented by MTI, who are located approximately 1300 km from the Project area, would be through impacts to migratory species that pass through the Project area and are then harvested or fished within MTI's traditional territory. The Agency engaged in meaningful discussions with MTI, adequately accommodated potential impacts to their rights and fully briefed the Minister of Environment and Climate Change (the Minister) on the outcome of these consultations.

3. In making his Decision, the Minister took into account the Agency's EA Report and the Agency's Report on the Adequacy of Crown Consultation and Accommodation (Consultation Report). The Minister decided that the Project: is not likely to cause significant adverse environmental effects; that the consultation process undertaken by the Agency was consistent with the honour of the Crown; and that the concerns and interests of Indigenous groups, including those represented by MTI, are appropriately accommodated by the Project conditions. These conditions include requirements to reduce greenhouse gas (GHG) emissions; measures to protect fish and fish habitat, migratory birds, species at risk, air quality, human health and Indigenous peoples' use of resources; and a requirement that the Project achieve net-zero GHGs by 2050.

4. There was no statutory obligation for the Agency to assess downstream GHG emissions. Such emissions are more effectively regulated by the jurisdiction in which the oil will be used. Similarly, there was no statutory obligation for the Agency to assess the marine transshipment of oil (as defined below). Transport Canada already regulates the loading and unloading of oil from

vessels in Canadian waters and Canada's exclusive economic zone (EEZ). Maritime shipping is fully regulated by the International Maritime Organization (IMO) within and beyond Canada's EEZ. On these two issues, the Attorney General of Canada (Attorney General) adopts the submissions of the Respondent Equinor Canada Ltd. (the Proponent or Equinor).

5. All aspects of the Minister's decision-making process, including the Agency's expert EA and the Agency's consultations and extensive accommodations, were carried out in a manner that fully met the substantive and procedural requirements imposed by statute and the Constitution. The Applicants have not established that the Minister's Decision or underlying EA Report is legally flawed, nor have they shown why the results of this exhaustive and thorough environmental review and consultation process should be quashed. The Application should be dismissed.

B. Facts

1) The Environmental Assessment and Consultation Processes

a) Overview

6. The Attorney General adopts and relies on the Statement of Facts in paragraphs 12 to 52 of Equinor's Memorandum of Fact and Law. In addition, the Attorney General highlights the following facts.

7. Equinor proposes to build and operate the Project, located approximately 500 km off the Newfoundland coast in the Atlantic Ocean. From June 2018 to September 2021, the Agency¹ carried out an EA process pursuant to the *Canadian Environmental Assessment Act, 2012*,² together with an integrated Crown consultation process.³

8. The Agency served as the Crown consultation coordinator to facilitate a whole of government approach to consultation.⁴ The Agency conducted the EA in consultation with the

¹ Formerly the Canadian Environmental Assessment Agency.

² *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [[CEAA 2012](#)].

³ Affidavit of Michael Atkinson, affirmed September 23, 2022 [[Atkinson Affidavit](#)] at paras 4-8 (Record of the Respondent, Attorney General of Canada [[AGCR](#)], Tab 1 at pp 4-5).

⁴ Report on the Adequacy of Crown Consultation and Accommodation [[Consultation Report](#)] at p 5 (Application Record of the Applicants [[AR](#)], Tab 8, CT-2(e) at p AR-1890).

Canada-Newfoundland and Labrador Offshore Petroleum Board (the Board), Fisheries and Oceans Canada (DFO), Environment and Climate Change Canada (ECCC), Health Canada, Natural Resources Canada, Transport Canada (TC), Parks Canada, and the Department of National Defence.⁵

9. Throughout the EA, the Agency consulted with 42 Indigenous groups, including MTI.⁶ In the EA and consultation process, MTI represented eight Mi'gmaq communities in New Brunswick with an Aboriginal right to fish for food, social and ceremonial purposes, as well as the treaty right to hunt, fish and gather towards earning a moderate livelihood.⁷

10. The Agency provided Indigenous groups with multiple opportunities to learn about the Project and its potential environmental effects, evaluate the Project in relation to their potential or established Aboriginal or treaty rights, communicate their concerns to Canada, and discuss possible mitigation and accommodation measures.⁸ The Agency invited public review and comment, and Crown consultations, on four separate stages of the EA process:⁹

<u>Event</u>	<u>Dates of Comment Period</u>	<u>Duration</u>
Project Description	June 25, 2018- July 16, 2018	21 days
Draft EIS Guidelines	August 9, 2018-September 10, 2018	32 days
EIS	July 30, 2020-September 13, 2020	45 days
Draft EA Report and Potential Conditions	August 9, 2021-September 8, 2021	30 days

11. To support MTI's participation in the EA and integrated consultations, the Agency allocated \$49,581 in federal funding to MTI.¹⁰ To support public review in the EA by the applicant

⁵ Environmental Assessment Report [**EA Report**] at p ii (AR, Tab 8, CT-2(d) at p AR-1650).

⁶ Consultation Report at p 5 (AR, Tab 8, CT-2(e) at p AR-1890).

⁷ *Ibid* at p 6 (AR, Tab 8, CT-2(e) at p AR-1891).

⁸ Atkinson Affidavit at para 32 (AGCR, Tab 1 at pp 10-11).

⁹ *Ibid* at para 33 (AGCR, Tab 1 at p 11).

¹⁰ *Ibid* at para 31 and Exhibit B (AGCR, Tab 1 at pp 11 and 611-613).

Sierra Club Canada Foundation (Sierra), the Agency allocated them \$12,295.¹¹ Sierra participated in the EA to a limited extent, while Équiterre did not participate at all.¹²

b) Project Description

12. On June 13, 2018, the Proponent submitted a Project Description for the Project, triggering the Agency's obligation to consider whether an EA was required.¹³ On June 25, 2018, the Agency commenced engagement with 42 Indigenous groups by posting a public notice and reaching out directly to Indigenous groups, including MTI, to request comments on the Summary of the Project Description.¹⁴ The Summary stated that the Project includes “the offloading of crude to shuttle tankers and their movement and hook-up/disconnect within the Project safety zone”, but does not include “(t)he transshipment of crude...” (Marine Transshipment).¹⁵

13. MTI responded on July 13, 2018:¹⁶ raising concerns with potential impacts to its members' traditional fishing and harvesting rights and on commercial fisheries;¹⁷ noting that culturally significant species may be affected by the Project, including Atlantic salmon, North American right whale and Atlantic bluefin tuna, which migrate throughout MTI's territory and utilize the offshore waters of Newfoundland; submitting that an EA should be conducted; and stating that Mi'gmaq Indigenous knowledge (IK) should be included in all Project phases. MTI did not raise any concerns about Equinor's exclusion of the Marine Transshipment of crude from the Project Description.¹⁸

14. On August 9, 2018, the Agency determined that an EA was required under *CEAA 2012*.¹⁹

¹¹ Affidavit of Gretchen Fitzgerald, affirmed August 10, 2022 [**Fitzgerald Affidavit**] at para 14 and Exhibit GF-5 (AR, Tab 3 at pp AR-0049 and AR-0184-86).

¹² Affidavit of Marc-André Viau, affirmed August 10, 2022 [**Viau Affidavit**] at para 13 (AR, Tab 4 at p AR-0852).

¹³ EA Report at p 1 (AR, Tab 8, CT-2(d) at p AR-1661).

¹⁴ Atkinson Affidavit at para 34 and Exhibit A, Doc Nos 1 and 1a (AGCR, Tab 1 at pp 11, 43-47).

¹⁵ Affidavit #1 of Stephanie Curran, affirmed September 23, 2022 [**Curran Affidavit #1**], Exhibit 5 at p 19 (Record of the Respondent, Equinor Canada Ltd [**ECR**], Tab 1 at p 177).

¹⁶ Atkinson Affidavit at para 39 and Exhibit A, Doc No 3 and 3a (AGCR, Tab 1 at pp 12, 51-54).

¹⁷ *Ibid* at paras 38-39 and Exhibit A, Doc Nos 2, 3, and 3a (AGCR, Tab 1 at pp 12, 48, 51-54).

¹⁸ *Ibid*, Exhibit A, Doc No 3a (AGCR, Tab 1 at p 53).

¹⁹ EA Report at p 1 (AR, Tab 8, CT-2(d) at p AR-1661).

c) Draft Environmental Impact Statement (EIS) Guidelines

15. On August 9, 2018, the Agency posted a Notice of Commencement for the Project EA and made draft EIS Guidelines available on the Agency's website for comment.²⁰ The EIS guidelines identify the scope of the Project and the minimum information requirements for the Proponent's EIS.²¹

16. Also on August 9, 2018, the Agency directly notified MTI about the commencement of the EA and requested their input on the draft EIS Guidelines.²² The draft EIS Guidelines described the Project in the same manner as did the Proponent. Section 3.1 said the Project included "Crude oil shipping including movement, hook-up/disconnect and offloading of crude oil to shuttle tankers within the Project safety zone."²³

17. On September 11, 2018, MTI submitted comments to the Agency on the draft EIS Guidelines. Again, MTI raised no concerns about the scope of the Project, including the exclusion of the Marine Transshipment of oil. Rather, MTI's comments sought changes or clarifications to: section 2.3 (Engagement with Indigenous groups); section 3.2 (Factors to be considered); section 4.2.2 (Community knowledge and Indigenous knowledge); section 5 (Engagement with Indigenous Groups and Concerns Raised); and section 7.1.8 (Indigenous Peoples).²⁴

18. On September 26, 2018, the Agency issued the final "Guidelines for the Preparation of an Environmental Impact Statement to the Proponent" (EIS Guidelines).²⁵ In this final version of the EIS Guidelines, the Agency excluded the Marine Transshipment of oil from the scope of the Project,

²⁰ Atkinson Affidavit at para 40 (AGCR, Tab 1 at p 13).

²¹ Curran Affidavit #1, Exhibit 7 (ECR, Tab 1 at pp 220-271).

²² Atkinson Affidavit at para 41 and Exhibit A, Doc Nos 4 and 4a (AGCR, Tab 1 at pp 13 and 55-58).

²³ Curran Affidavit #1, Exhibit 7 at p 4 (ECR, Tab 1 at p 228).

²⁴ Atkinson Affidavit at para 42 and Exhibit A, Doc Nos 6 and 6a (AGCR, Tab 1 at pp 13 and 61-63).

²⁵ Fitzgerald Affidavit at para 15 and Exhibit GF-6 (AR, Tab 3, GF-6 at pp AR-0049 and AR-0188-0239).

as they had in the draft.²⁶ However, the Agency included changes to section 2.3 (Engagement with Indigenous groups) and 4.2.2 (Community Knowledge and Indigenous Knowledge).²⁷

d) Depth of Consultation Assessment

19. On October 3, 2018, the Agency sent MTI the results of the Agency's preliminary depth of consultation assessment; a draft consultation work plan, outlining the Agency's planned consultation approach for engaging with communities represented by MTI; and information about Indigenous funding under the Agency's Participant Funding Program.²⁸ The Agency invited MTI to apply.²⁹

20. The Agency preliminarily determined that the depth of the Crown's duty to consult with the communities represented by MTI was on the low range of the consultation spectrum, based on the following: the First Nations represented by MTI have a right to fish for a moderate livelihood flowing from the Peace and Friendship Treaties, and an Aboriginal right to fish for food, social and ceremonial purposes; some populations of Atlantic salmon have been assessed as endangered, and may migrate from spawning rivers in New Brunswick to the vicinity of the proposed Project location; the Project is located approximately 1300 km east of New Brunswick; potential impacts to rights include potential routine Project effects on Atlantic salmon and potential effects on Atlantic salmon in the unlikely event of a large spill blowout; and, based on information in the Project description and the Agency's analysis, there is a low likelihood of interaction between the Project, under normal operations, and the potential or established Aboriginal or treaty rights of the communities represented by MTI.³⁰

21. The Agency's proposed consultation work plan included: integrating consultation into the EA; working with MTI to identify the Project's potential environmental effects and any adverse

²⁶ *Ibid*, Exhibit GF-6 at p 4 (AR, Tab 3, GF-6 at p AR-0196).

²⁷ Curran Affidavit #1, Exhibit 7 at pp 3 and 7-8 (ECR, Tab 1 at pp 227 and 231-232); Fitzgerald Affidavit, Exhibit GF-6 at pp 3 and 7-8 (AR at Tab 3, GF-6, pp AR-0195 and AR-0199-200).

²⁸ Atkinson Affidavit, Exhibit A, Doc Nos 7 and 7a (AGCR, Tab 1 at pp 64-75).

²⁹ *Ibid* at para 47 and Exhibit A, Doc Nos 7 and 7a (AGCR, Tab 1 at pp 15-16 and 64-75).

³⁰ *Ibid* at para 48 and Exhibit A, Doc No 7a (AGCR, Tab 1 at pp 16, 65 and 68).

Project impacts on potential or established Aboriginal or treaty rights; and ensuring that options to avoid, mitigate or accommodate adverse impacts on MTI were considered.³¹

22. On November 15, 2018, MTI submitted comments on the Agency's preliminary depth of consultation assessment.³² MTI provided additional information on their asserted and established rights and title, emphasizing potential Project impacts to their rights and interests respecting Atlantic salmon. MTI disagreed with the Agency's analysis that there is a low likelihood of interaction between the Project and Mi'gmaq rights, stating that there is a possibility that environmental disturbances could have a disproportionate impact on the salmon population and that a large spill or blowout could cause irreversible damage to Atlantic salmon and Mi'gmaq fishery rights.³³

23. The Agency responded on January 11, 2019, stating that its view of the depth of consultation owed on the Project remained unchanged, at the low level of the spectrum.³⁴

e) Review of Proponent's Draft EIS

24. On February 12, 2019, the Agency received the Proponent's draft EIS. This was not posted for public comment. Instead, the Agency (together with the Board, TC, ECCC and other federal authorities) internally reviewed the EIS and issued information requests (IRs) to the Proponent. The Agency required the Proponent to update the EIS prior to sharing it with Indigenous groups, in part to reduce the workload placed on Indigenous groups in Project-related consultations.³⁵

25. On August 14, 2019, the Agency wrote to MTI, advising that the *Impact Assessment Act*, SC 2019, c 28, s 1 (IAA) would come into force on August 28, 2019. Under the IAA's transitional provisions, the Project's EA would continue in accordance with *CEAA 2012*.³⁶

³¹ *Ibid*, Exhibit A, Doc No 7a (AGCR, Tab 1 at pp 65-75).

³² *Ibid* at para 50 and Exhibit A, Doc Nos 9 and 9a (AGCR, Tab 1 at pp 17 and 76-81).

³³ *Ibid*, Exhibit A, Doc No 9a (AGCR, Tab 1 at pp 78-81).

³⁴ *Ibid* at para 51 and Exhibit A, Doc No 11_30 (AGCR, Tab 1 at pp 17 and 87-88).

³⁵ *Ibid* at paras 55 and 59, and Exhibit A, Doc Nos 34 and 34a (AGCR, Tab 1 at pp 19, 20 and 241-244).

³⁶ *Ibid* at para 53 and Exhibit A, Doc No 20_9 (AGCR, Tab 1 at pp 18 and 134-135).

26. On November 15, 2019, the Proponent provided responses to the Agency's IRs.³⁷ On February 13, 2020, the Agency posted a list of key outstanding issues for the Proponent to address in its EIS.³⁸

f) Review of Proponent's EIS

27. The Proponent provided its updated and final EIS to the Agency on July 10, 2020.³⁹ On July 30, 2020, the Agency posted the EIS, the Proponent's Summary of the EIS, the Agency's IRs and the Proponent's responses to the IRs to the EA registry.⁴⁰ The Agency directly invited MTI to review and comment on the EIS.⁴¹ The Agency also offered to meet with MTI, to listen and document their views on how the Project may adversely affect their rights and to hear suggestions for avoidance, mitigation, and accommodation. MTI did not request a meeting.⁴²

28. On August 4, 2020, the Agency received a letter from MTI expressing their concerns with the EIS process, and in particular that they had not been afforded the opportunity to review a draft of the EIS.⁴³

29. On August 12, 2020, the Agency convened an information and engagement session with Indigenous groups, including MTI. The purpose of the session was to hear from Indigenous groups regarding potential environmental effects of the Project, adverse impacts of the Project on potential or established Aboriginal or treaty rights, and options for avoiding, mitigating or accommodating adverse impacts.⁴⁴

30. During the session, and in response to a question about potential spills during Marine Transshipment, Equinor explained that a vessel-to-vessel collision scenario within the Project safety zone was assessed as part of the EIS, but not outside the Project safety zone. Equinor noted that Canada had done an assessment of risks associated with transporting oil and oil products on

³⁷ Curran Affidavit #1 at para 48 (ECR, Tab 1 at p 28).

³⁸ *Ibid* at para 49 (ECR, Tab 1 at p 28).

³⁹ *Ibid* at para 36 (ECR, Tab 1 at p 24).

⁴⁰ Atkinson Affidavit at para 56 (AGCR, Tab 1 at p 19).

⁴¹ *Ibid* at paras 56-57 and Exhibit A, Doc Nos 29-29c (AGCR, Tab 1 at pp 19 and 181-186).

⁴² *Ibid* at para 58 and Exhibit A, Doc No 29c (AGCR, Tab 1 at pp 19-20 and 184-186).

⁴³ *Ibid* at para 59 and Exhibit A, Doc No 30 (AGCR, Tab 1 at pp 20 and 187-188).

⁴⁴ *Ibid* at paras 60-63 and Exhibit A, Doc No 31d (AGCR, Tab 1 at pp 20-21 and 226-228).

the east coast, which was referenced in the EIS. TC explained it is the lead regulatory agency that manages Canada's Marine Oil Spill Preparedness and Response regime under the *Canada Shipping Act, 2001*. Following the session, the Agency provided additional information to Indigenous groups, including MTI, on tanker risk assessments by TC, noting that TC has continued to enhance Canada's marine safety and security system since those documents were published through initiatives such as the Oceans Protection Plan.⁴⁵

31. Also during the session, Indigenous groups asked about the end destination of the oil produced by the Project. Equinor explained that there are two options: it may be transported to an existing transshipment facility in Newfoundland (but not for processing), or direct to market. Equinor confirmed that regardless of where the oil is shipped, transportation of oil is not considered part of the Project.⁴⁶

32. The Agency responded to MTI's August 4, 2020 letter on August 13, 2020, explaining that the Agency and other federal authorities had conducted a technical review of Equinor's draft EIS and required additional information from the Proponent, with the goal of having an EIS that was sufficient for public and Indigenous comment. The Agency noted their hope that the early review would assist in reducing the workload burden on Indigenous groups including MTI, a concern that had been expressed to the Agency in the past.⁴⁷

33. On September 17, 2020, MTI provided to the Agency a technical review and assessment of the EIS.⁴⁸ The technical review explained MTI's concern that the Proponent had not integrated the 2018 "Mi'gmawe'l Tplu'taqnn Incorporated Indigenous Knowledge Study for the Eastern Newfoundland Offshore Exploration Drilling Project and the Flemish Pass Exploration Drilling Project" (the MTI IK Study) into the EIS.⁴⁹ MTI also made recommendations respecting the

⁴⁵ *Ibid* at paras 60-63 and Exhibit A, Doc Nos 31-31d and 33 (AGCR, Tab 1 at pp 20-21 and 189-228 and 232-240).

⁴⁶ *Ibid* at paras 60-63 and Exhibit A, Doc Nos 31-31d and 33 (AGCR, Tab 1 at pp 20-21 and 189-228 and 232-240).

⁴⁷ *Ibid* at para 59 and Exhibit A, Doc Nos 34-34a (AGCR, Tab 1 at pp 20 and 241-244).

⁴⁸ *Ibid* at para 64 and Exhibit A, Doc Nos 35-35b (AGCR, Tab 1 at pp 21 and 245-297).

⁴⁹ *Ibid*, Exhibit A, Doc No 35b at p 13 (AGCR, Tab 1 at p 261).

assessment of effects and impacts of supply vessels,⁵⁰ and a recommendation to assess the impacts of oil tankers in Canadian waters by modelling of oil tanker accidents and malfunctions from the Project area to onshore facilities.⁵¹

34. The Agency considered MTI's technical review in its preparation of additional IRs.⁵² On October 26, 2020, the Agency sent further IRs to the Proponent, based in part on MTI's comments.⁵³ The Agency sought further information on: how Indigenous groups' perspectives were integrated into or contributed to decisions regarding the Project, its effects and potential mitigation measures;⁵⁴ and what IK was obtained and incorporated into the EIS.⁵⁵ The Agency did not seek additional information on matters raised by MTI which the Agency assessed as falling outside the scope of the Project.

35. On December 9, 2020, Equinor provided an IR response with an updated account of all concerns raised by MTI and how they were addressed in the EIS.⁵⁶ This response was posted on the EA registry for review by Indigenous groups and the public. With respect to MTI's concerns about potential effects on Atlantic salmon, Equinor reiterated their conclusion that the potential for interactions with the relevant salmon populations and the Project are limited, and while the Project may result in limited localized interactions with individual salmon, it is not predicted to have overall ecological or population-level effects, and will not result in a detectable decline in overall abundance or changes in spatial and temporal distribution.⁵⁷ Further, Equinor stated the Project will have no residual effects upon the exercise of Aboriginal or treaty fishing rights, but may have residual adverse effects on commercial-communal fisheries which are predicted to be 'not significant'.⁵⁸

⁵⁰ *Ibid*, Exhibit A, Doc No 35b at p 14 (AGCR, Tab 1 at p 262).

⁵¹ *Ibid*, Exhibit A, Doc No 35b at pp 17 and 35-36 (AGCR, Tab 1 at pp 265 and 283-284).

⁵² *Ibid* at paras 67-68 (AGCR, Tab 1 at p 22).

⁵³ Curran Affidavit #1, Exhibit 33 (ECR, Tab 1 at pp 1047-49).

⁵⁴ *Ibid*, Exhibit 33, IR-2 (ECR, Tab 1 at pp 1048-49).

⁵⁵ *Ibid*, Exhibit 33, IR-3 (ECR, Tab 1 at p 1049).

⁵⁶ *Ibid*, Exhibit 34 at pp 44-49 (ECR, Tab 1 at pp 1095-1100).

⁵⁷ *Ibid*, Exhibit 34 at p 45 (ECR, Tab 1 at p 1096).

⁵⁸ *Ibid*, Exhibit 34 at pp 48-49 (ECR, Tab 1 at pp 1099-1100).

36. Equinor explained that the primary sources of IK used for the EIS included the MTI IK Study. Equinor stated they had also engaged an academic researcher to provide expertise on Indigenous resource use in Atlantic Canada, to supplement publicly available IK. Equinor explained that the IK informed the basis of the effects assessment, which evolved from a more general approach in previous projects to a specific species of cultural importance approach for the Project. For example, the IK led to a species-specific assessment of fish. This included Atlantic salmon, swordfish, Atlantic bluefin tuna and North Atlantic right whale, with the EIS concluding there would not be a significant effect on fish and fish habitat, including on those species of cultural importance to MTI.⁵⁹

g) Draft Environmental Assessment Report and Potential Conditions

37. On August 9, 2021, the Agency released its draft Environmental Assessment Report (Draft EA Report) and potential conditions, inviting Indigenous groups, including MTI, to review and provide comments.⁶⁰

38. On September 14, 2021, the Agency received MTI's comments.⁶¹ MTI shared their concerns that: Indigenous groups did not have the opportunity to review and comment on the draft EIS, or the draft EA Report and draft conditions in advance of the public comment period;⁶² the review timelines and funding were inadequate;⁶³ MTI did not have sufficient funding or engagement to review the Project under its Mi'gmaq Rights Impact Assessment Framework;⁶⁴ and Equinor did not properly consider and integrate the MTI IK Study into the EIS, such that the Project's impacts were minimized.⁶⁵

39. MTI sought the following as accommodations: (1) that the EIS, baseline studies, the EA Report and mitigation/monitoring plans accurately reflect consideration of the MTI IK Study; (2) that MTI and Anqotum Fisheries Resource Centre be engaged to design and conduct a research

⁵⁹ *Ibid*, Exhibit 34 at pp 87-94 (ECR, Tab 1 at pp 1138-1145).

⁶⁰ Atkinson Affidavit at para 70 and Exhibit A, Doc Nos 38-38a (AGCR, Tab 1 at pp 23 and 311-313).

⁶¹ *Ibid* at para 72 (AGCR, Tab 1 at p 23).

⁶² *Ibid*, Exhibit A, Doc No 40b at pp 10-11 (AGCR, Tab 1 at pp 329-330).

⁶³ *Ibid*, Exhibit A, Doc No 40b at p 11 (AGCR, Tab 1 at p 330).

⁶⁴ *Ibid*, Exhibit A, Doc No 40b at pp 14-15 (AGCR, Tab 1 at pp 333-334).

⁶⁵ *Ibid*, Exhibit A, Doc No 40b at p 16 (AGCR, Tab 1 at p 335).

project focused on species of cultural importance to MTI related to use and existence in the Project area; (3) that a forum and process be established whereby MTI can meet with Equinor and Canada to discuss issues and follow-up program decision-making, including the provision of capacity funding to MTI to support their participation; (4) the development of a plan for enhanced and ongoing engagement and consultation with MTI through the life of the Project, including the submission of an annual report to MTI; and (5) the development of agreements to support MTI's participation in monitoring activities throughout the life of the Project, include training and employment of Mi'gmaq First Nation of New Brunswick environmental and cultural monitors, and involvement in emergency preparedness planning and notification/consultation in the event of a significant accident or malfunction. MTI also included a recommendation that the Agency require additional spill modelling and risk assessment regarding marine tanker traffic in Canadian waters on route to shore facilities.⁶⁶

h) Memorandum to the Minister

40. It is not the Agency's practice to give any external groups advance notice of a Ministerial decision.⁶⁷ However, on December 7, 2021 and March 4, 2022, the Agency notified MTI that the time had been extended for the Minister to issue a Decision Statement regarding the EA Report.⁶⁸

41. On April 1, 2022, the Agency submitted a memorandum to the Minister seeking his decision in accordance with *CEAA 2012*.⁶⁹ The memorandum included as an attachment the Agency's finalized EA Report (the EA Report). In the EA Report, the Agency found that, taking into account the implementation of key mitigation, monitoring and follow-up program measures recommended by the Agency, the Project is not likely to cause significant adverse environmental effects as defined under *CEAA 2012*.⁷⁰

⁶⁶ *Ibid*, Exhibit A, Doc No 40b at pp 18 and 22 (AGCR, Tab 1 at pp 337 and 341).

⁶⁷ *Ibid* at para 91 (AGCR, Tab 1 at p 31).

⁶⁸ *Ibid* at paras 88-89 and Exhibit A, Doc Nos 41 and 42 (AGCR, Tab 1 at pp 30-31 and 361-362 and 363-364).

⁶⁹ Memorandum to Minister, April 6, 2022 (AR, Tab 8, CT-2 at pp AR-1596-1604).

⁷⁰ EA Report at pp 145 and 153-171 (AR, Tab 8, CT-2(d) at pp AR-1805 and AR-1813-34).

42. The memorandum also included the Agency's conclusions that the Project's routine activities may result in low impacts to Aboriginal or treaty rights of Indigenous groups that harvest migratory species that may move through the Project area (which would include MTI); that a major subsea release incident, though unlikely, could seriously impact Indigenous groups' Aboriginal or treaty rights; but that many of the mitigation and follow-up measures set out in Appendix B of the Agency's EA Report would serve to minimize or avoid Project-specific impacts to Aboriginal or treaty rights.⁷¹

43. The memorandum also attached the Consultation Report, in which the Agency described the Crown consultation efforts carried out as part of the EA. The Agency reported that the Project's potential adverse impacts on Aboriginal or treaty rights had been fully examined and that the Agency sought to identify responsive mitigation and/or accommodation measures. The Agency explained that the federal Crown sought to appropriately avoid, mitigate and accommodate the Project's potential adverse impacts on the continued exercise of potential or established Aboriginal or treaty rights, through the measures set out in the Consultation Report and the EA Report. The Agency concluded that the Crown's consultations had been procedurally and substantively adequate.⁷²

44. Finally, the memorandum included a draft Decision Statement, which included the conditions required to implement the key mitigation, monitoring and follow-up program measures recommended by the Agency in Appendix B of the EA Report.⁷³ These proposed conditions included measures related to: (1) the continued incorporation of IK in follow-up measures and monitoring plans; (2) ongoing research respecting Atlantic salmon; (3) a number of required follow-up programs; (4) continued engagement with Indigenous groups and annual public reporting; and (5) monitoring and spill response programs requiring Indigenous engagement.⁷⁴

⁷¹ Memorandum to Minister, April 6, 2022 at pp 5-6 (AR, Tab 8, CT-2 at pp AR-1600-01).

⁷² Consultation Report at pp 20-22 (AR, Tab 8, CT-2(e) at pp AR-1905-07).

⁷³ Decision Statement (AR, Tab 2 at pp AR-0020-41).

⁷⁴ See for example Decision Statement, conditions 2.3-2.14, 3.6-3.7, 3.13-3.14, 5.1, 7.7 and 7.10-7.11 (AR, Tab 2 at pp AR-0025-28, AR-0029-32, AR-0035-36 and AR-0038-39).

2) The Minister's Decision

45. On April 6, 2022, following receipt of the EA Report, and considering comments received from the Indigenous groups consulted and members of the public incorporated therein, the Minister issued his Decision Statement (the Decision).⁷⁵ The Minister agreed with the Agency's conclusion that, taking into account the implementation of key mitigation and follow-up program measures, the Project is not likely to cause significant adverse environmental effects as defined under *CEAA 2012*. Further, the Minister established all of the conditions recommended by the Agency to implement key mitigation, monitoring and follow-up program measures.⁷⁶

46. Also on April 6, 2022, the Minister wrote to Indigenous groups, including MTI, to notify them of the Decision.⁷⁷ The Minister explained that, taking into account the implementation of the mitigation measures outlined in the Agency's EA Report that incorporate the views provided by Indigenous groups and the public, the Project is not likely to cause significant adverse environmental effects. The Minister also provided links to the Decision and the Agency's final EA Report.⁷⁸

47. On May 6, 2022, the Agency wrote and invited MTI to meet to discuss how the Agency had considered MTI's comments in the final EA report. MTI did not respond to this letter, nor did MTI request a meeting with the Agency.⁷⁹

48. Although the Project has received approval under *CEAA 2012*, the Project cannot proceed without authorization from the Board under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*.⁸⁰ The Project may also require authorizations by federal authorities under the *Fisheries Act*, the *Species at Risk Act*, the *Canadian Environmental Protection Act, 1999*, the *Canadian Navigable Waters Act*, and the *Radiocommunication Act*.⁸¹

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Letter from the Minister to MTI, April 6, 2022 (AR, Tab 8, CT-2(c) at pp AR-1628-29).

⁷⁸ Atkinson Affidavit at para 90 and Exhibit A, Doc Nos 43-43b (AGCR, Tab 1 at pp 31 and 365-605).

⁷⁹ *Ibid* at para 92 (AGCR, Tab 1 at p 31).

⁸⁰ [*Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*](#), SC 1987, c 3; EA Report at p 1 (AR, Tab 8, CT-2(d) at p AR-1661).

⁸¹ EA Report at p 1 (AR, Tab 8, CT-2(d) at p AR-1661).

PART II – POINTS IN ISSUE

49. The points in issue are:

- a) Preliminary Issue: Is a portion of the Applicants' evidence inadmissible such that it should be given no weight?
- b) Reasonableness of the Minister's Decision: Did *CEAA 2012* require that the Agency assess the impacts of downstream GHGs and the Marine Transshipment of crude outside the Project safety zone, for the purpose of informing the Minister's Decision?
- c) Duty to Consult:
 - (i) Did the Agency correctly identify the depth of the Crown's duty to consult with MTI?
 - (ii) Regardless of the correctness of the depth assessment, did the Crown adequately discharge its duty to MTI by consulting and accommodating at a deeper level?

PART III – SUBMISSIONS

A. Preliminary Issue –The Applicants Reference Inadmissible Evidence

50. The Applicants rely on some evidence that was not before the Agency or the Minister and that is inadmissible as extrinsic evidence,⁸² or that is opinion or argument.⁸³ The Court should exercise its discretion by giving no weight or probative value to this evidence, listed in the footnote below.⁸⁴

⁸² [*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at 19-20.](#)

⁸³ [*Abi-Mansour v Canada \(Attorney General\)*, 2015 FC 882 at 30; *Federal Courts Rules*, SOR/98-106, Rule 81\(1\).](#)

⁸⁴ Fitzgerald Affidavit, Exhibits GF-21 to GF-26 (AR, Tab 3 at pp AR-0766-95); Viau Affidavit, Exhibits MAV-11 to MAV-19 (AR, Tab 4 at pp AR-1247-94).

B. Reasonableness of Minister's Significance Decision

51. The Attorney General adopts and relies upon Equinor's submissions respecting the reasonableness of the Minister's Decision at paragraphs 65 to 112 of their Memorandum of Fact and Law, including the applicable standard of review and the reasonableness of excluding from the EA an assessment of downstream GHG emissions and the Marine Transshipment of oil outside the Project safety zone.

C. Crown Consultation

1) Legal Principles Regarding the Duty to Consult

52. The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown. The duty has a constitutional dimension, grounded in the honour of the Crown and section 35 of the *Constitution Act, 1982*.⁸⁵ Once triggered, the Crown's obligation to consult requires that a meaningful consultation process be carried out in good faith. This requires an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted. The duty is reciprocal and good faith participation is required on both sides.⁸⁶

53. The degree of consultation required in any case falls along a spectrum ranging from limited to deep, depending on the strength of the Indigenous claim and the seriousness of the potential impact on the right. Each case must be considered individually and flexibly, as the depth of consultation that is required may change as the consultation process advances.⁸⁷

54. For consultation to be reasonable, it must consist of a meaningful two-way dialogue.⁸⁸ The Crown possesses a discretion about how it structures a consultation process and how it meets its

⁸⁵ *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at 19 [*Clyde River*].

⁸⁶ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at 2 and 60 [*Chippewas*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at 42 [*Haida*].

⁸⁷ *Clyde River*, *supra* note 85 at 20.

⁸⁸ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at 564 [*Tsleil-Waututh*].

consultation obligations, provided that the Crown makes reasonable efforts to inform and consult.⁸⁹

55. Consultation and accommodation are not about resolving claims beyond a proposed project's scope, but are limited to addressing adverse impacts flowing from the specific proposal at issue.⁹⁰ The Supreme Court of Canada has recognized that project conditions requiring ongoing consultation between a proponent and Indigenous groups can be considered accommodation measures.⁹¹ Due to the life-cycle nature of regulatory projects, ongoing accommodations should not be prejudged by the Court. Furthermore, the Agency can impose conditions that ensure ongoing consultation between proponents and Indigenous groups.⁹² The Crown's ability to accommodate groups does not stop once a project is approved.

56. Meaningful consultation and accommodation can be carried out partially or wholly within the regulatory process. The Agency can play a central role in fulfilling the Crown's duty, as it has the procedural powers necessary to implement consultation, the technical expertise to assess what forms of accommodation might be available, and the remedial powers to accommodate affected rights.⁹³

57. The honour of the Crown requires a meaningful consultation process, but not a particular substantive result. Consultation does not require that an Indigenous group obtain the outcome they sought.⁹⁴ The question is whether the process "viewed as a whole, accommodates the collective

⁸⁹ *Ibid* at para 516.

⁹⁰ *Chippewas*, *supra* note 86 at 41; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 53.

⁹¹ *Chippewas*, *ibid* at para 60.

⁹² *Ibid* at para 60.

⁹³ *Clyde River*, *supra* note 85 at 22 and 30-34; *Chippewas*, *ibid* at 1, 9, 31 and 48; *Tsleil-Waututh*, *supra* note 88 at 490-493; *CEAA 2012*, *supra* note 2, s 53.

⁹⁴ *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at 79 and 83 [*Ktunaxa*]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at 51-54, leave to appeal to SCC dismissed, 39111 (July 2, 2020) [*Coldwater*].

aboriginal right in question”.⁹⁵ So long as reasonable efforts are made to inform and to consult, such efforts will suffice.⁹⁶

2) Depth of Consultation

a) Applicable Standard of Review

58. Whether the Agency appropriately identified the existence and scope of the Crown’s duty to consult with MTI is a question of law, reviewable on the correctness standard.⁹⁷ However, findings of fact upon which this determination was made should be afforded deference and reviewed on a standard of reasonableness.⁹⁸

b) The Agency Reasonably Assessed the Facts and Correctly Identified the Depth of the Crown’s Duty to MTI

59. The scope of the Crown’s duty to consult is proportionate to two factors: the strength of the community’s claim to rights in the affected area and the seriousness of the impact upon those rights.⁹⁹ At one end of the spectrum lie cases where, for example, the potential for an infringement of rights is minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.¹⁰⁰ A peripheral claim may attract only a duty of notice.¹⁰¹

60. The Agency determined at the outset of the Project assessment that the Crown owed a duty to consult MTI in respect of the Minister’s contemplated decision under *CEAA 2012*.¹⁰² The Agency assessed – on both a preliminary basis and throughout the EA process¹⁰³ – the depth of

⁹⁵ *Haida*, *supra* note 86 at 62.

⁹⁶ *Haida*, *ibid* at 62 (quoting *R v Nikal*, [1996] 1 SCR 1013 at 110).

⁹⁷ *Haida*, *ibid* at 61-63; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 55; *Coldwater*, *supra* note 94 at 27; *Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148 at 46-47 [*Yellowknives*].

⁹⁸ *Haida*, *ibid* at 61; *Attawapiskat First Nation v Ontario*, 2022 ONSC 1196 at 45 [*Attawapiskat*].

⁹⁹ *Haida*, *ibid* at 39.

¹⁰⁰ *Ibid* at 43.

¹⁰¹ *Ibid* at 37.

¹⁰² Atkinson Affidavit at paras 17-28 (AGCR, Tab 1 at pp 7-10); EA Report at p 8 (AR, Tab 8, CT-2(d) at p AR-1668).

¹⁰³ Consultation Report at p 8 (AR, Tab 8, CT-2(e) at p AR-1893).

consultation required.¹⁰⁴ In doing so, the Agency considered the nature and extent of the potential or established Aboriginal or treaty rights of the Mi'gmaq First Nation communities represented by MTI, noting they have an Aboriginal right to fish for food, social and ceremonial purposes, as well as the treaty right to hunt, fish and gather towards earning a moderate livelihood.¹⁰⁵

61. The Agency also considered how the Project's potential environmental effects might impact these rights. The only pathways for potential Project impacts to rights would be through impacts to migratory species that passed through the Project area and are then harvested or fished within MTI's traditional territory. MTI has no potential or established rights or traditional territory in the Project area, and routine Project-related activities would occur 640 to 2000 km from Indigenous communities and their traditional territory.¹⁰⁶

62. For routine Project operations, the Agency concluded that the Project is not likely to cause significant adverse environmental effects, including on fish and fish habitat, and therefore impacts to MTI's rights would be minimal.¹⁰⁷ While there could be more significant impacts to rights in event of a worst-case scenario accident, the Agency considered that the probability of such an event is low.¹⁰⁸ These findings of fact by the Agency should be afforded deference.¹⁰⁹

63. This is the type of claim discussed in *Haida*, where the potential for an infringement of rights is minor. Based on the low level of potential impacts and the unlikelihood of such impacts to the rights held by the groups represented by MTI, the Agency determined that the depth of consultation was low on the spectrum.¹¹⁰

¹⁰⁴ Atkinson Affidavit at para 27 (AGCR, Tab 1 at p 9).

¹⁰⁵ Consultation Report, p 6, AR at Tab 8, CT-2(e), p AR-1891.

¹⁰⁶ Atkinson Affidavit at paras 22-23 (AGCR, Tab 1 at pp 8); Consultation Report at pp 7-8 (AR, Tab 8, CT-2(e) at pp AR-1892-93).

¹⁰⁷ Consultation Report at p 8 (AR, Tab 8, CT-2(e) at p AR-1893); EA Report at p 93 (AR, Tab 8, CT-2(d) at p AR-1753).

¹⁰⁸ Consultation Report at pp 15-18 (AR, Tab 8, CT-2(e) at pp AR-1900-03); Atkinson Affidavit at para 26 (AGCR, Tab 1 at p 9).

¹⁰⁹ *Haida*, *supra* note 86 at [61](#).

¹¹⁰ Atkinson Affidavit at para 26 (AGCR, Tab 1 at p 9).

64. The jurisprudence supports the Agency's assessment. In *Mikisew*, the project at issue involved construction of a winter road along the boundary of the reserve, which would directly affect the hunting and trapping activities of the First Nation's members protected under Treaty 8. Those impacts were higher than the "low impacts"¹¹¹ assessed in this case, yet the Crown's consultation obligation was determined to be on the low end of the spectrum.¹¹²

65. In *Ahousaht Indian Band v Canada (Minister of Fisheries & Oceans)*, consultation was on the low end of the spectrum because, as is the case here, the Crown activity was unlikely to result in an alteration of the fisheries or a high risk of non-compensable damage.¹¹³ In *Michipicoten First Nation v Ontario (Minister of Natural Resources and Forests)*, a low level of consultation applied, in part because there was no evidence that the First Nation actually exercised rights over the project lands, even where a portion of the project land was within the claimant's traditional territory.¹¹⁴ In this case, there is similarly no exercise of treaty rights in the Project area. The Project area is far from the traditional territory of any Indigenous group and routine Project effects (and consequent impacts to MTI's rights) are predicted to be minimal.

66. The Agency properly assessed the depth of consultation required as being lower than was required in *Clyde River* and *Tsleil-Waututh*. In both of those cases, the Crown conceded that it owed a deep duty to consult on account of the high risk of adverse project impacts to potential and established Aboriginal and treaty rights.¹¹⁵

67. Even if the Agency was incorrect in its depth assessment, any error was remedied through the Crown consultation process itself.¹¹⁶ As discussed below, the Agency's process had many of

¹¹¹ Memorandum to Minister, April 6, 2022 at pp 5-6 (AR, Tab 8, CT-2 at p AR-1600-01).

¹¹² *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at [3](#) and [64](#) [*Mikisew*]. See also *Attawapiskat*, *supra* note 98 at [86](#) (mineral exploration on treaty land at the low end of the spectrum because of the limited nature, geographical scope and duration of the Project, including that the activities are temporary in nature and require clean up following completion).

¹¹³ *Ahousaht Indian Band v Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212 at [45](#).

¹¹⁴ *Michipicoten First Nation v Ontario (Minister of Natural Resources and Forests)*, 2016 ONSC 6899 at [81](#) and [84](#).

¹¹⁵ *Clyde River*, *supra* note 85 at [43-44](#); *Tsleil-Waututh*, *supra* note 88 at [758](#).

¹¹⁶ See for example *Gitxaala Nation v Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336 [*Gitxaala 2012*] at [54](#).

the hallmarks of a much deeper process and included extensive accommodation measures in the form of Project conditions.¹¹⁷

3) The Crown Fully Discharged its Duty to Consult with MTI

a) Applicable Standard of Review

68. Whether the Agency's consultation process was sufficient to meet the Crown's duty to consult is reviewed on the standard of reasonableness.¹¹⁸ The question is not whether the Minister could have or should have come to a different conclusion, or whether the consultation process could have been longer or better.¹¹⁹ Instead, the focus is on the *process* of meaningful consultation and accommodation.¹²⁰ The Minister's decision that the Crown had met its consultation obligations is entitled to considerable deference,¹²¹ particularly since the duty to consult imposes no duty upon the Crown to reach agreement,¹²² does not require perfection,¹²³ and can be addressed through ongoing and future processes.¹²⁴

69. It was open to the Minister to conclude, on the basis of the record before him, including the memorandum, the EA Report and the Consultation Report, that the consultation conducted with MTI was adequate.¹²⁵

¹¹⁷ *Coldwater*, *supra* note 94 at [41](#) and [58](#).

¹¹⁸ *Haida*, *supra* note 86 at [61-63](#); *Coldwater*, *ibid* at [24-27](#); *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para [31](#); *Yellowknives*, *supra* note 97 at [46-47](#).

¹¹⁹ *Coldwater*, *ibid* at [29](#).

¹²⁰ *Ktunaxa*, *supra* note 94 at [77](#); *Gitxaala Nation v Canada*, 2016 FCA 187 at [185](#) [*Gitxaala 2016*]; *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at [140](#) and [150](#); *Haida*, *supra* note 86 at [62-63](#); *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58 at para 65, leave to appeal to SCC dismissed, [37510](#) (29 June 2017).

¹²¹ *Ktunaxa*, *ibid* at [77](#); *Haida*, *ibid* at [62](#).

¹²² *Haida*, *ibid* at [10](#).

¹²³ *Tsleil-Waututh*, *supra* note 88 at [508](#); *Haida*, *ibid* at [62](#); *Gitxaala 2016*, *supra* note 120 at [182-185](#); *Ktunaxa*, *supra* note 94 at [104](#); *Coldwater*, *supra* note 94 at [54](#), [77](#) and [189](#).

¹²⁴ *Chippewas*, *supra* note 86 at [60](#); *Gitxaala 2012*, *supra* note 116 at [54](#); *Haida*, *ibid* at [51](#).

¹²⁵ *Coldwater*, *supra* note 94 at [189](#).

b) The Agency consulted at a deeper level

70. Although the Agency assessed the Crown's duty to MTI at the lower end of the spectrum, the consultation process nonetheless included many hallmarks of a much deeper process, including the opportunity to make submissions for consideration, formal participation in the decision-making process, the provision of written reasons to show that Indigenous concerns were considered and to reveal the impact they had on the Decision, and the imposition of conditions on the Project Proponent to mitigate potential impacts to rights, and require the ongoing participation of Indigenous groups.¹²⁶

71. Four formal comment periods were available to MTI.¹²⁷ For each period, the Agency sent a notification and request for comments to MTI.¹²⁸ The Agency reviewed and analyzed all of MTI's comments and submissions for the purpose of their analysis and EA Report, including MTI's submissions on the Draft EA Report which were received following the close of the public comment period.¹²⁹

72. The Agency allocated \$49,581 in participant funding to MTI to assist with their participation in the consultation process and EA.¹³⁰ The Agency offered to meet individually with MTI in July 2020, but MTI did not request a meeting.¹³¹

73. In August 2020, the Agency held an information and engagement session with Indigenous groups including MTI, and the Proponent, to discuss the Project and its potential impacts.¹³² Following that session, the Agency provided additional information on tanker risk assessments by

¹²⁶ Atkinson Affidavit at para 33 and Exhibit A, Doc Nos 34a, 38a and 43a (AGCR, Tab 1 at pp 11, 242-244, 312-313, 366-367); Decision Statement (AR, Tab 2 at pp AR-0020-41); EA Report (AR, Tab 8, CT-2(d) at pp AR-1648-1885; *Coldwater*, *ibid* at [41](#) and [58](#).

¹²⁷ Atkinson Affidavit at para 33 (AGCR, Tab 1 at p 11).

¹²⁸ *Ibid* at paras 34, 37, 41, 57 and 70, and Exhibit A, Doc Nos 1-1a, 4-4a, 29-29c and 38-38a (AGCR, Tab 1 at pp 11, 12, 13, 19, 23 and 43-47, 55-58, 181-186 and 311-313).

¹²⁹ *Ibid*, Exhibit A, Doc Nos 39 and 40 (AGCR, Tab 1 at pp 314-315 and 316-360); Consultation Report at p 21 (AR, Tab 8, CT-2(e) at p AR-1906).

¹³⁰ Consultation Report at p 10 (AR, Tab 8, CT-2(e) at p AR-1895).

¹³¹ Atkinson Affidavit at para 58 (AGCR, Tab 1 at pp 19-20).

¹³² *Ibid* at paras 60-63, and Exhibit A, Doc Nos 31-31d and 33 (AGCR, Tab 1 at pp 20-21, 189-228 and 232-240).

TC.¹³³ The Agency emphasized that it would accept comments from MTI at any time, including after the end of public comment periods, and in fact did accept comments from MTI following the end of a public comment period.¹³⁴

74. While MTI has focussed on the possibility of deep impacts to rights in the event of a worst-case-scenario spill, a regulatory body is capable of satisfying the Crown's duty to consult regarding risks, effects and potential impacts to rights from oil spills. This is done through the regulatory process itself and the subsequent imposition of conditions.¹³⁵

75. The Agency's process in this case was close to that of the National Energy Board (NEB) in *Chippewas of the Thames*. While there were no formal hearings in this case, the basic structure and information requirements were essentially the same. Much like the Chippewas of the Thames, MTI was provided with: early notice of the Project; the opportunity to engage with the Proponent and provide its IK, which the Proponent was required to incorporate; participant funding; the opportunity to provide information on their asserted and established Aboriginal and treaty rights; and the opportunity to participate in the EA process and related consultations, including the opportunity to review and comment on the Project Description, the Agency's draft EIS Guidelines, the Proponent's EIS and answers to IRs, and the Agency's draft EA Report and draft conditions.

76. Following the Minister's Decision, the Minister wrote to MTI, and the Agency sent a follow up letter inviting a discussion on how MTI's comments were considered in the EA Report. MTI did not respond or request a meeting.¹³⁶

77. Ultimately, the Agency sought to understand and respond to all concerns and issues raised by MTI, in a meaningful manner. The Agency evaluated all of the issues raised by MTI in its assessment of potential impacts to rights. The Agency considered IK provided for the Project, and sought to identify mitigation/accommodation measures to address concerns raised by MTI and other Indigenous groups. The Agency also drafted potential conditions for review, to ensure that

¹³³ *Ibid* at paras 60-63 and Exhibit A, Doc No 33 at p 5 (AGCR, Tab 1 at pp 20-21 and 236); Curran Affidavit #1, Exhibits 30-32 (ECR, Tab 1 at pp 966-1043).

¹³⁴ Atkinson Affidavit, Exhibit A, Doc No 34a at p 3 (AGCR, Tab 1 at p 244).

¹³⁵ *Chippewas*, *supra* note 86 at [47-57](#).

¹³⁶ Atkinson Affidavit at para 92 (AGCR, Tab 1 at p 31).

key mitigation measures would be implemented, including those responding to issues raised by MTI. Finally, the Agency noted that additional federal permits or authorizations will be considered in the future regulatory phase, following the EA, which may require additional Crown consultation.¹³⁷ This process was both procedurally and substantively adequate to discharge the honour of the Crown.

c) The Agency reasonably consulted on the scope of the marine shipping assessment

78. The Agency reasonably consulted with MTI regarding the scope of the Project, by seeking comments on both the Project Description and the draft EIS Guidelines. Indigenous groups have a responsibility to put forth information necessary for the Crown to address their concerns, such as information about the potential impacts asserted.¹³⁸ But here, MTI raised no concerns with the manner in which marine shipping was scoped in the draft EIS Guidelines.¹³⁹

79. The Agency determined that some aspects of marine shipping are incidental to the Project, being support and supply vessels (to and from the coast) and the marine transportation of crude within the Project safety zone (including offloading).¹⁴⁰ These aspects of shipping were reasonably considered as part of the EIS Guidelines, the EA Report, and the Decision.

80. The Agency discussed its scoping of marine shipping into the Project directly with MTI and other groups during the August 12, 2020 session.¹⁴¹ TC explained how it regulates marine shipping under the *Canada Shipping Act, 2001*, including the loading and unloading of oil. The Agency subsequently provided links to TC's study entitled "Environmental Oil Spill Risk Assessment Project – Newfoundland", and TC's subsequent assessment of proposals related to oil spill risk for the south coast of Newfoundland.¹⁴² The study involved summarizing all data, expert

¹³⁷ Consultation Report at pp 21-22 (AR, Tab 8, CT-2(e) at pp AR-1906-07).

¹³⁸ *Mikisew*, *supra* note 112 at [65](#).

¹³⁹ Atkinson Affidavit at para 42 and Exhibit A, Doc Nos 3a, 6 and 6a (AGCR, Tab 1 at pp 13, 53-54 and 61-63).

¹⁴⁰ Fitzgerald Affidavit, Exhibit GF-6 (AR, Tab 3, GF-6 at p AR-0196).

¹⁴¹ Atkinson Affidavit, Exhibit A, Doc No 33 (AGCR, Tab 1 at p 232-240); Curran Affidavit #1 at paras 52-56 (ECR, Tab 1 at pp 29-30); Curran Affidavit #2 at paras 96-101 (ECR, Tab 2 at pp -1474-1475).

¹⁴² Atkinson Affidavit, Exhibit A, Doc No 33 at p 5 (AGCR, Tab 1 at p 236); Curran Affidavit #1, para 55 and Exhibits 30-32 (ECR at Tab 1, pp 29-30 and 965-1008, 1041-45).

advice, and analysis gathered over the course of a one-year study of the oil spill risks for the south coast of Newfoundland. Its objective was to assess the risks of oil pollution in Canadian waters off the south coast of Newfoundland due to marine traffic in the area. The study approach included both of the key elements of risk: the probability of an oil spill occurring and the consequences of a spill should it occur.¹⁴³

81. During the session, the Agency also noted that TC has continued to enhance Canada's marine safety and security system since the study was published, through initiatives such as the Oceans Protection Plan.¹⁴⁴ At the end of the session, the Agency offered to have further discussions with MTI to discuss any aspects of the EIS. The Agency followed up with MTI via email on August 24, 2020, again offering to meet. However, MTI did not request any additional meetings with the Agency, to discuss the Marine Transshipment of oil or otherwise.¹⁴⁵

82. The Agency fully considered MTI's concerns respecting the scope of marine shipping, understood them and sought to address them.¹⁴⁶ The Agency engaged in a direct discussion with MTI on the issue, and provided additional information to MTI on how the risks associated with Marine Transshipment are regulated by TC. The Agency also considered the international marine shipping requirements that would apply to the Marine Transshipment of oil.¹⁴⁷ While the Applicants contend that the Agency did not provide written reasons explaining its scoping of marine shipping in the Project, the question is not whether the consultation could have been 'better'. The fact remains that the Agency fully engaged with MTI on this issue, discussed it, understood it, and provided a meaningful response.

d) The Agency reasonably incorporated MTI IK into the EA process

83. MTI's concern regarding IK is characterized differently in the Applicants' Memorandum of Fact and Law than how it was communicated to the Agency during the consultations. MTI's

¹⁴³ Curran Affidavit #1, Exhibit 30 at pp 1-2 (ECR, Tab 1 at pp 972-73).

¹⁴⁴ Atkinson Affidavit, Exhibit A, Doc No 33 at pp 5-6 (AGCR, Tab 1 at pp 236-237).

¹⁴⁵ *Ibid*, Exhibit A, Doc No 33 at p 7 (AGCR, Tab 1 at p 238); Curran Affidavit #1, Exhibit 32 (ECR at Tab 1, pp 1041-45); EA Report at p 185 (AR, Tab 8, CT-2(d) at p AR-1845).

¹⁴⁶ Atkinson Affidavit at para 67 (AGCR, Tab 1 at p 22).

¹⁴⁷ See for example EA Report at pp 32, 41, 48, 94, 98 and 147-148 (AR, Tab 8, CT-2(d) at pp AR-1692, AR-1701, AR-1708, AR-1754, AR-1758 and AR-1807-08).

concern, as expressed to the Agency, was not that an additional IK study was required to adequately inform the EA process. Rather, it was that the Proponent had not adequately integrated the existing MTI IK Study into the EIS.¹⁴⁸

84. When MTI raised this concern, the Agency responded by sending a further IR to the Proponent,¹⁴⁹ seeking additional information on how Indigenous groups' perspectives were integrated into or contributed to decisions regarding the Project, its effects and potential mitigation measures;¹⁵⁰ and on what IK was obtained and incorporated into the EIS.¹⁵¹

85. In their response on December 9, 2020, which was posted on the EA Registry for public and Indigenous review, the Proponent noted that a primary source of IK used for the EIS was the MTI IK Study, as well as publicly available IK and information provided to the Proponent in the course of face-to-face meetings and workshops. As noted above, Equinor also engaged an academic researcher to supplement the IK. Equinor stated that this IK informed the basis of the effects assessment, and in particular, a species-specific assessment of Atlantic salmon, swordfish, Atlantic bluefin tuna and right whales.¹⁵²

86. While MTI was not satisfied by the Proponent's response, it cannot be said that the Agency failed to engage on this issue. To the contrary, the Agency went to additional lengths to ensure that MTI's IK was included and considered as part of the EIS. This was reasonable and in keeping with the honour of the Crown.

e) The Agency accommodated at a deeper level

87. The Agency carefully considered MTI's concerns about potential impacts to their rights due to the quantity, quality, and/or health of fishery resources, including potential information gaps. While the Agency concluded that potential environmental effects on any species of cultural

¹⁴⁸ Atkinson Affidavit, Exhibit A, Doc Nos 35b at pp 13 and 27, 40a at p 1, and 40b at pp 15-17 (AGCR, Tab 1 at pp 261, 275, 317, and 334-336).

¹⁴⁹ Curran Affidavit #1, Exhibit 33 (ECR, Tab 1 at pp 1047-49).

¹⁵⁰ *Ibid*, Exhibit 33 at IR-2 (ECR, Tab 1 at p 1048-49).

¹⁵¹ *Ibid*, Exhibit 33 at IR-3 (ECR, Tab 1 at p 1049).

¹⁵² *Ibid*, Exhibit 34 at pp 87-94 (ECR, Tab 1, pp 1138-45).

importance are unlikely (including Atlantic salmon),¹⁵³ it nonetheless set out detailed conditions to reduce the likelihood of any potential impacts and accommodate these concerns. Taking into account these proposed mitigation measures, the Agency concluded that there would be no interruption in the practice of fishing rights.¹⁵⁴ These conditions, which serve as accommodations,¹⁵⁵ include:

2.2: Proponent must act in manner consistent with recovery strategies and action plans for listed species at risk.

2.3 to 2.4: Directions on how Proponent is to consult with Indigenous groups.

2.6 to 2.9.5: Directions on how Proponent is to carry out follow up requirements.

3.1 to 3.12: Measures to protect fish and fish habitat, including marine mammals.

3.13: Proponent to develop follow-up requirements to verify the accuracy of predictions made during the EA regarding fish and fish habitat, including marine mammals, and to determine the effectiveness of mitigation measures.

3.14: Proponent must participate in research programs in the Eastern Canadian offshore areas pertaining to the presence of Atlantic salmon and the behavior, presence, distribution, and important habitat areas of cetaceans, and provide annual updates to the Board and Indigenous groups.

5.1: In consultation with Indigenous groups and others, Proponent to develop and implement a Fisheries Communication Plan to protect Indigenous and commercial fisheries.

5.2 to 5.4: Further measures to protect Indigenous and commercial fisheries.

7.7: Proponent must prepare a spill response plan in consultation with Indigenous groups.¹⁵⁶

88. The Agency also fully considered MTI's concerns about potential impacts to rights through effects of potential spills and blowouts on Atlantic salmon and other migratory species. The Agency acknowledged that a major spill or blowout event could have more serious impacts to

¹⁵³ EA Report at pp 31 and 93 (AR, Tab 8, CT-2(d) at pp AR-1691 and AR-1753).

¹⁵⁴ *Ibid* at p 94 (AR, Tab 8, CT-2(d) at p AR-1754).

¹⁵⁵ *Chippewas*, *supra* note 86 at [51](#) and [57](#).

¹⁵⁶ Decision Statement at pp 6-8, 10-13, 16-17 and 19 (AR, Tab 2 at pp AR-0025-27, AR-0029-32, AR-0035-36 and AR-0038).

rights.¹⁵⁷ In taking a precautionary approach, the Agency concluded that potential effects on fish and fish habitat, and other species, in a worst-case scenario under worst-case conditions, could result in both individual and population level effects and corresponding impacts to rights. However, the Agency also concluded that the probability of a major event occurring is very low and thus, these adverse effects are unlikely to occur.¹⁵⁸ With the implementation of the Agency's proposed mitigation measures, including risk reduction measures and compensation requirements, the Agency concluded that the potential effects of a worst-case scenario are unlikely to occur.¹⁵⁹ These conditions/accommodations include:

2.3 to 2.4: Directions on how Proponent is to consult with Indigenous groups.

2.6 to 2.9.5: Directions on how Proponent is to carry out follow up requirements.

7.1: Measures to prevent accidents and malfunctions, and to mitigate any adverse environmental effects from accidents and malfunctions that do occur.

7.2: Proponent must develop and implement, in consultation with the Board and ECCC, a Physical Environment Monitoring Program, for acceptance by the Board.

7.3: Proponent must prepare plan to avoid collisions within Project area, for acceptance by the Board.

7.4: Proponent must prepare an Ice Management Plan to avoid collisions with icebergs, for acceptance by the Board.

7.5: Proponent must prepare and submit to the Board well control strategies, including measures for well capping, options to reduce response time, and measures to quickly disconnect MODUs, FPSOs and shuttle tankers in the event of emergency or extreme weather.

7.6: Proponent must develop, implement, and submit to the Board, information on capping stack(s) and drilling rigs capable of drilling a relief well in the Project area.

7.7: Proponent must prepare a Spill Response Plan in consultation with Indigenous groups.

7.8: Proponent must conduct Spill Response Plan exercises and make improvements.

7.9: Proponent must review and update Spill Response Plan annually.

¹⁵⁷ EA Report at p 94 (AR, Tab 8, CT-2(d) at p AR-1754).

¹⁵⁸ EA Report at p 113 (AR, Tab 8, CT-2(d) at p AR-1773).

¹⁵⁹ Consultation Report at p 18 (AR, Tab 8, CT-2(e) at p AR-1903).

7.10: In the event of a spill, Proponent must immediately implement Spill Response Plan, notify the Board, relevant authorities, Indigenous groups and commercial fishers and implement environmental monitoring which may include: testing and analysis of seafood; measuring contamination including a human health risk assessment; monitoring marine mammals, sea turtles and birds; and monitoring benthic organisms and habitats.

7.11: In the event of a spill, Proponent must undertake Spill Impact Mitigation Assessment to minimize environmental consequences, for review by the Board.

7.12: Proponent must provide Indigenous groups with results of Spill Response Plan exercises and updates to Spill Response Plan.

7.13: In event of uncontrolled subsea release, Proponent must begin immediate mobilization of subsea containment and capping equipment, and drilling installation.

7.14: If drilling is anticipated in water depths less than 500 meters, Proponent must undertake further analysis to confirm safe deployment and operation of capping stack technology, for acceptance by the Board.

7.15: In the event of an accident or malfunction, Proponent must comply with the *Accords Acts, Canada-Newfoundland and Labrador Offshore Financial Requirement Regulations and Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity*.

7.16: Proponent must report annually to the Board on effectiveness of operative procedures and cessation of work thresholds.¹⁶⁰

89. The Agency also fully considered concerns raised by MTI and others regarding the effects of Project related vessels/increased vessel traffic on migratory species and any resulting impacts on rights. The Agency considered: the effects of light and sound from Project-related vessels and other sources;¹⁶¹ the effects of marine mammal strikes;¹⁶² the potential for vessel spills;¹⁶³ and the regulatory system governing vessels.¹⁶⁴ The Agency concluded that potential impacts to rights

¹⁶⁰ Decision Statement at pp 6-8 and 18-21 (AR, Tab 2 at pp AR-0025-27 and AR-0037-40).

¹⁶¹ See for example EA Report at pp 30-31, 45-47, 55-60, 69, 198-201, 206-207 and 213 (AR, Tab 8, CT-2(d) at pp AR-1690-91, AR-1705-07, AR-1715-20, AR-1729, AR-1858-61, AR-1866-67 and AR-1873).

¹⁶² See for example *ibid* at pp 48, 138 and 212-214 (AR, Tab 8, CT-2(d) at pp AR-1708, AR-1798 and AR-1872-74).

¹⁶³ See for example *ibid* at pp 104-106, 109-111 and 213 (AR, Tab 8, CT-2(d) at pp AR-1764-66, AR-1769-71 and AR-1873).

¹⁶⁴ See for example *ibid* at pp 32, 41, 48, 94, 98 and 147-148 (AR, Tab 8, CT-2(d) at pp AR-1692, AR-1701, AR-1708, AR-1754, AR-1758 and AR-1807-08).

from routine Project operations, including Project-related vessel traffic, are low;¹⁶⁵ and potential impacts from accidents or malfunctions are unlikely.¹⁶⁶ The Agency developed mitigation measures to avoid effects and resulting impacts on rights. Taking into account the proposed mitigation measures, the Agency concluded that there would be no interruption in the practice of rights.¹⁶⁷ These mitigation measures and conditions, which serve as accommodations,¹⁶⁸ include:

2.2: Proponent must act in manner consistent with recovery strategies and action plans for listed species at risk.

2.3 to 2.4: Directions on how Proponent is to consult with Indigenous groups.

2.6 to 2.9.5: Directions on how Proponent is to carry out follow up requirements.

3.4: Proponent must treat all discharges into the marine environment from Project vessels in accordance with the *Canada Shipping Act, 2001*, the *Ballast Water Control and Management Regulations*, the IMO's *International Convention for the Prevention of Pollution from Ships* and any other legislative requirements.

3.11: Proponent must implement measures to prevent or reduce risks of collisions between Designated Project vessels and marine mammals and sea turtles, including: requiring Project vessels to use established shipping lanes, where they exist; and requiring all Project vessels, including supply and standby vessels, to reduce speed to 7 knots when a marine mammal or sea turtle is observed or reported within 400 metres of a vessel.

3.13: Proponent to develop follow-up requirements to verify the accuracy of predictions made during the EA regarding fish and fish habitat, including marine mammals, and to determine the effectiveness of mitigation measures.

6.5: Proponent shall comply with air quality emissions limits and limits on sulphur concentrations in diesel fuel for Project vessels in accordance with the *Marine Shipping Act, 2001*, the *Multi-Sector Air Pollutants Regulations* and the *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)* under the *Canadian Environmental Protection Act, 1999*, the IMO's *International Convention for the Prevention of Pollution from Ships* and any other legislative requirements.

¹⁶⁵ Consultation Report at p 5 (AR, Tab 8, CT-2(e) at p AR-1890).

¹⁶⁶ EA Report at p 145 (AR, Tab 8, CT-2(d) at p AR-1805).

¹⁶⁷ EA Report at p 94 (AR, Tab 8, CT-2(d) at p AR-1754).

¹⁶⁸ *Chippewas*, *supra* note 86 at [57](#).

7.7: Proponent must prepare a Spill Response Plan in consultation with Indigenous groups.¹⁶⁹

90. Regarding MTI's concerns about the Project's potential contribution to climate change and GHG emissions, the Agency noted that: the Project's actual emissions will be influenced by the final design and selection of equipment; the Proponent will provide updated emission estimates to the Board and ECCC at the development application phase; the Proponent has committed to mitigation measures to reduce or avoid quantities of air contaminants and GHGs released into the atmosphere from the Project; and stringent emission controls defined by the International Convention for the Prevention of Pollution from Ships (MARPOL) would apply to vessels in transit.¹⁷⁰ The Agency further noted that Canada has committed to net zero emissions by 2050 and to reducing GHGs by 40-45 percent below 2005 levels by 2030; Canada will cap emissions from its oil and gas sector at a pace and scale needed to reach net zero emissions by 2050; and the Proponent has committed to reach net-zero emissions by 2050.¹⁷¹ The Agency concluded that the residual volume of GHGs would be moderate, but concentrations would remain within regulatory limits and objectives.¹⁷² To mitigate and accommodate for these potential effects and any corresponding impacts to rights, the Agency proposed the following mitigation measures and conditions:

2.1: In meeting conditions, Proponent's actions shall: be considered in a careful and precautionary manner; promote sustainable development; be informed by best information and knowledge available, including community and Indigenous traditional knowledge; be based on methods and models recognized by standard-setting bodies; be undertaken by qualified individuals; and have applied the best available economically and technically feasible technologies.

6.1: Proponent shall not release into the atmosphere gas produced from the wells associated with the Project, with the exception of gas released following its use as fuel or through non-routine or safety flaring.

6.2: Proponent shall: identify and incorporate GHG and air emission reduction measures into Project design; implement these measures for the duration of the Project; modify

¹⁶⁹ Decision Statement at pp 6-8, 10, 12-13 and 18-19 (AR, Tab 2 at pp AR-0025-27, AR-0029, AR-0031-32 and AR-0037-38).

¹⁷⁰ Consultation Report at p 19 (AR, Tab 8, CT-2(e) at p AR-1904); EA Report at p 97 (AR, Tab 8, CT-2(d) at p AR-1757).

¹⁷¹ EA Report at pp 97-98 (AR, Tab 8, CT-2(d) at pp AR-1757-58).

¹⁷² EA Report at p 99 (AR, Tab 8, CT-2(d) at p 1759).

these measures as necessary throughout the Project; and submit these measures, together with an updated quantification of GHG and air emissions estimates, to ECCC and the Board prior to conducting any Project activities.

6.3: Proponent shall identify and implement, in consultation with Board and ECCC, prior to each dry dock inspection of FPSO, any modified or addition GHG and air emission reduction measures.

6.4: Commencing January 1, 2050, Proponent shall ensure that the Project does not emit greater than 0 kilotonnes of carbon dioxide equivalents per year, as calculated in ECCC's *Strategic Assessment of Climate Change* and any associated guidance documents published by the Government of Canada.

6.5: Proponent shall comply with air quality emissions limits and limits on sulphur concentrations in diesel fuel for Project vessels in accordance with legislative requirements.¹⁷³

91. Finally, the Agency carefully considered MTI's interest in Indigenous monitoring and follow-up, identifying requirements for post-EA engagement of Indigenous groups with a focus on the areas with the highest potential for Project interaction (communal-commercial fishing that overlaps with Project areas, spill response and research initiatives).¹⁷⁴ Taking into consideration these opportunities, the Agency concluded that Indigenous groups would be provided with appropriate mechanisms to participate in the design of follow-up programs and monitoring activities.¹⁷⁵ These conditions/accommodations include:

2.1: In meeting conditions, Proponent's actions shall: be considered in a careful and precautionary manner; promote sustainable development; be informed by best information and knowledge available, including community and Indigenous traditional knowledge; be based on methods and models recognized by standard-setting bodies; be undertaken by qualified individuals; and have applied the best available economically and technically feasible technologies.

2.3 to 2.4: Directions on how Proponent is to consult with Indigenous groups.

2.6 to 2.9.5: Directions on how Proponent is to carry out follow up requirements.

2.13: Proponent must publish information, and notify the Board and Indigenous groups of publication availability.

¹⁷³ Decision Statement at pp 6 and 17-18 (AR, Tab 2 at pp AR-0025 and AR-0036-37).

¹⁷⁴ Consultation Report at pp 19-20 (AR, Tab 8, CT-2(e) at pp AR-1904-05).

¹⁷⁵ Consultation Report at p 20 (AR, Tab 8, CT-2(e) at p AR-1905).

2.17: Proponent must submit to the Agency any changes to the designated Project, including the results of consultation with Indigenous groups and relevant authorities on the proposed changes, environmental effects and modified or additional mitigation measures and follow up requirements.

3.12: Proponent must notify the Board, Canadian Coast Guard and Indigenous groups of any collisions of Project vessels with marine mammals or sea turtles.

3.13.3: Proponent must develop and implement, in consultation with DFO, Board, and Indigenous groups, follow-up requirements to verify the accuracy of the EA as it pertains to the effects of underwater sound emissions on fish, including marine mammals, taking into account all Project sound sources.

3.14: Proponent must participate in research programs in the Eastern Canadian offshore areas pertaining to the presence of Atlantic salmon and the behavior, presence, distribution, and important habitat areas of cetaceans, and provide annual updates to the Board and Indigenous groups.

4.7: Proponent shall participate in research and monitoring programs for effects of light on migratory birds, and provide updates to Indigenous groups.

5.1: In consultation with Indigenous groups and others, Proponent to develop and implement a Fisheries Communication Plan to protect Indigenous and commercial fisheries.

5.2: Proponent to develop and implement a decommissioning and abandonment plan, in consultation with Indigenous or commercial fisheries with fishing licences that overlap with the designated Project area, identified in consultation with DFO.

7.7: Proponent must prepare a Spill Response Plan in consultation with Indigenous groups.

7.12: Proponent must provide Indigenous groups with results of Spill Response Plan exercises and updates to Spill Response Plan.¹⁷⁶

f) Conclusion on Consultation

92. The Agency's integrated EA and consultation processes were sufficient to satisfy the Crown's consultation obligations, including with regard to the potential adverse impacts of accidents and malfunctions.¹⁷⁷ The Agency's ongoing role, and that of the Board if the Project

¹⁷⁶ Decision Statement at pp 6-9, 12-13, 15-17 and 19-20 (AR, Tab 2 at pp AR-0025-28, AR-0031-32, AR-0034-36 and AR-0038-39).

¹⁷⁷ *Chippewas*, *supra* note 86 at [47](#) and [51](#).

proceeds, permits them to oversee long-term compliance with Project conditions, and to make changes, if necessary, to address potential impacts.¹⁷⁸

93. The consultations and accommodations with MTI were reasonable and meaningful. Although the Agency assessed the depth of the duty to be at the lower end of the spectrum, the consultation record reveals that the opportunities for consultation and accommodation measures provided are akin to ones at deeper level of the spectrum. The record demonstrates reasonable efforts on the part of the Agency to inform and consult MTI, including the provision of substantial participant funding. The Agency aimed to address each concern raised by MTI, and to maintain a two-way dialogue. The Agency offered to meet one-on-one with MTI multiple times, yet MTI did not request any such meetings.

94. The consultation process consisted of activities and accommodations that are hallmarks of deeper consultation, including the opportunity for MTI to make submissions for consideration, MTI's formal participation in the EA process, and the provision of written reasons through the EA Report and the Minister's Decision.¹⁷⁹ Ultimately, the Minister imposed considerable accommodation measures by establishing Project conditions to ensure that all potential impacts to potential or established Aboriginal or treaty rights would be avoided or mitigated.¹⁸⁰

95. There can be no doubt that the Minister considered whether the Agency's consultation and proposed accommodation measures were adequate and in keeping with the honour of the Crown. The memorandum to the Minister and Consultation Report explicitly addressed the adequacy of consultations, and how potential impacts to rights were accommodated. The Minister's Decision, which established all of the Agency's recommended mitigation and accommodation measures as conditions, states:

I am satisfied that the consultation process undertaken is consistent with the honour of the Crown and, with the conditions I have established, that the concerns and interests of Indigenous groups are appropriately accommodated for the purpose of issuing this Decision Statement.¹⁸¹

¹⁷⁸ *Clyde River*, *supra* note 85 at [34](#); *Chippewas*, *ibid* at [5](#), [48](#), [51](#), [57](#) and [60](#).

¹⁷⁹ *Haida*, *supra* note 86 at [44](#); *Chippewas*, *ibid* at [51](#).

¹⁸⁰ Decision Statement (AR, Tab 2); *Chippewas*, *ibid* at [51](#).

¹⁸¹ Decision Statement at p 2 (AR, Tab 2 at p AR-0021).

96. The Minister reasonably reached this conclusion in respect of all Crown-Indigenous consultations that took place in the course of the EA, based on the thorough reports before him. For the reasons set out above, this conclusion was justified in relation to the specific consultation and accommodation involving MTI.


97. In the circumstances, the Minister's Decision was entirely reasonable. The Minister properly relied on the Agency's EA Report in making his Decision, as required by *CEAA 2012*.¹⁸² The EA Report contained no material deficiency and was fully compliant with *CEAA 2012*. Further, the Minister properly relied on the Agency's consultations and proposed accommodations, which were in keeping with the honour of the Crown. The Minister established all of the Agency's recommended conditions as accommodation measures, and clearly articulated his conclusion that the consultation process was adequate to address potential Project impacts on Aboriginal and treaty rights, taking into account those conditions. The Application should be dismissed.

PART IV – ORDER SOUGHT AND SUBMISSIONS CONCERNING COSTS


98. The Attorney General asks that the Application be dismissed, with party-and-party costs assessed in accordance with column III of the table to Tariff B of the *Federal Courts Rules*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this 13th day of December, 2022, in the City of Winnipeg, in the Province of Manitoba and in the City of Halifax, in the Province of Nova Scotia.



Dayna Anderson



Mark Freeman

on behalf of the Respondent, Minister of Environment and Climate Change and the Attorney General of Canada

¹⁸² [CEAA 2012](#), *supra* note 2, s [52](#).

PART V – LIST OF AUTHORITIES

APPENDIX “A” – STATUTES AND REGULATIONS

Tab	Legislation
1.	<i>Canada Shipping Act, 2001</i> , SC 2001, c 26
2.	<i>Canada–Newfoundland and Labrador Atlantic Accord Implementation Act</i> , SC 1987, c 3
3.	<i>Canadian Environmental Assessment Act, 2012</i> , SC 2012, c 19, s 52
4.	<i>Canadian Environmental Protection Act, 1999</i> , SC 1999, c 33
5.	<i>Canadian Navigable Waters Act</i> , RSC, 1985, c N-22
6.	<i>Constitution Act</i> , 1982, being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c 11
7.	<i>Federal Courts Rules</i> , SOR/98-106
8.	<i>Fisheries Act</i> , RSC, 1985, c F-14
9.	<i>Impact Assessment Act</i> , SC 2019, c 28, s 1
10.	<i>Radiocommunication Act</i> , RSC, 1985, c R-2
11.	<i>Species at Risk Act</i> , SC 2002, c 29

APPENDIX “B” – BOOK OF AUTHORITIES

Tab	Case Law
12.	<i>Abi-Mansour v Canada (Attorney General)</i> , 2015 FC 882
13.	<i>Ahousaht Indian Band v Canada (Minister of Fisheries & Oceans)</i> , 2008 FCA 212
14.	<i>Association of Universities & Colleges of Canada v Canadian Copyright Licensing Agency</i> , 2012 FCA 22
15.	<i>Attawapiskat First Nation v Ontario</i> , 2022 ONSC 1196 (CanLII)
16.	<i>Canada (Minister of Citizenship and Immigration) v Vavilov</i> , 2019 SCC 65

Tab	Case Law
17.	<i>Chippewas of the Thames First Nation v Enbridge Pipelines Inc.</i> , 2017 SCC 41
18.	<i>Clyde River (Hamlet) v Petroleum Geo-Services Inc.</i> , 2017 SCC 40
19.	<i>Coldwater First Nation v Canada (Attorney General)</i> , 2020 FCA 34, leave to appeal to SCC dismissed, 39111 (July 2, 2020)
20.	<i>Gitxaala Nation v Canada (Minister of Transport)</i> , 2012 FC 1336
21.	<i>Gitxaala Nation v Canada</i> , 2016 FCA 187
22.	<i>Haida Nation v British Columbia (Minister of Forests)</i> , 2004 SCC 73
23.	<i>Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)</i> , 2017 SCC 54
24.	<i>Michipicoten First Nation v Ontario (Minister of Natural Resources and Forests)</i> , 2016 ONSC 6899 (CanLII)
25.	<i>Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)</i> , 2005 SCC 69
26.	<i>Nunatukavut Community Council Inc v Canada (Attorney General)</i> , 2015 FC 981
27.	<i>Prophet River First Nation v British Columbia (Environment)</i> , 2017 BCCA 58 (CanLII), leave to appeal to SCC refused, 37510 (29 June 2017)
28.	<i>R v Nikal</i> , [1996] 1 SCR 1013
29.	<i>Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council</i> , 2010 SCC 43
30.	<i>Squamish First Nation v Canada (Fisheries and Oceans)</i> , 2019 FCA 216
31.	<i>Tsleil-Waututh Nation v Canada (Attorney General)</i> , 2018 FCA 153
32.	<i>Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)</i> , 2015 FCA 148