Court File No. T-938-22

FEDERAL COURT

BETWEEN:

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

APPLICANTS

and

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

RESPONDENTS

MEMORANDUM OF FACT AND LAW OF THE RESPONDENT, EQUINOR CANADA LTD.

December 13, 2022

OSLER, HOSKIN & HARCOURT LLP
Suite 2700, Brookfield Place
225 – 6th Avenue SW
Calgary, AB T2P 1N2

Maureen Killoran, KC / Sean Sutherland /
John McCammon
Tel: 403-260-7007/403-355-7458/403-260-7055
Fax: 403-260-7024
Email: mkilloran@osler.com /
ssutherland@osler.com / jmccammon@osler.com

Counsel for the Respondent, Equinor Canada Ltd.

TO: **James Gunvaldsen Klaassen**
Joshua Ginsberg
Ian Miron
Anna McIntosh
Solicitors for the Applicants
Ecojustice
520 – 1801 Hollis Street
Halifax, NS B3J 3N4
Tel: (902) 417-1700 ext. 642 and/or
Tel: (613) 562-5800 ext. 3399
Fax: (902) 417-1701
Email: jgunvaldsenklaassen@ecojustice.ca / jginsberg@ecojustice.ca / imiron@ecojustice.ca / amcintosh@ecojustice.ca

AND TO: **Mark Freeman**
Dayna Anderson
Solicitor to the Respondents, Minister of Environment and Climate Change and the Attorney General of Canada
Department of Justice Canada
Atlantic Regional Office
Suite 1400, 5251 Duke Street
Halifax, NS B3J 1P3
Tel: (902) 402-7853
Email: mark.freeman@justice.gc.ca / dayna.anderson@justice.gc.ca

PART I. STATEMENT OF FACTS

A. Overview of Equinor's Position

1. The Applicants ask this Court to set aside the Minister of Environment and Climate Change Canada's ("**Minister**") decision that the Bay du Nord Development Project (the "**Project**") will not cause significant adverse environmental effects.

2. Proposed by Equinor Canada Ltd. ("**Equinor**"), the Project is an offshore oil extraction and production project located approximately 500 kilometres east of St. John's, Newfoundland and Labrador ("**NL**"). If the Minister's decision is upheld and the Project is permitted to proceed, it will bring substantial benefits to NL and Canada, including billions of dollars in government revenue, 11,000 person-years of employment, and millions of dollars in research and development.

3. The Minister issued his decision following a multi-year environmental assessment ("**EA**") in which the Applicants and other interested stakeholders (for and against the Project) were afforded multiple opportunities to make submissions. Central to the Minister's decision was a robust assessment of Project-related greenhouse gas ("**GHG**") emissions, leading to a ground-breaking, enforceable condition that the Project must achieve net-zero GHG emissions by 2050. This condition aligns with Equinor's company-wide commitment to do the same.

4. In challenging the Minister's decision, the Applicants do not take issue with the Project itself but, instead, raise two issues outside the scope of the Project, the control of Equinor and, in many respects, the legislative authority of Parliament:

(a) downstream GHG emissions generated by the ultimate end uses of Project oil; and,

(b) marine transshipment of oil and subsequent transport from the Project to markets (together, "**Marine Transshipment**").

5. The Impact Assessment Agency of Canada (the "**Agency**"), which completed the EA on which the Minister relied, decided not to assess downstream GHG emissions and Marine Transshipment.

6. As a threshold matter, the Applicants should be time barred from challenging the Agency's decisions to exclude downstream GHG emissions and Marine Transshipment from the EA. The Applicants failed to raise these issues during the scoping phase of the EA. Instead, they delayed two years before raising them; yet they now complain that the Minister did not provide them reasons for an issue decided long before they raised it. This alone is reason to dismiss the Applicants' arguments.

7. Even if this Court were to consider the merits of these arguments, the Applicants have failed to discharge their burden to establish that the Minister's decision is unreasonable.

8. Regarding downstream GHG emissions, regulators and courts—including the Federal Court of Appeal ("**FCA**")—have routinely rejected their inclusion in project EAs. This is consistent with Parliament's policy decision to regulate such emissions separately from project EAs. Indeed, in a project EA, it is impossible to identify ultimate downstream uses, the regulations that may apply to those emissions, mitigation measures, and justification.

9. Regarding Marine Transshipment, the Applicants' entire case is based on their misplaced reliance on a single authority that is readily distinguishable. Contrary to the Applicants' argument, the Agency's scoping decision reasonably included elements of marine shipping within Equinor's control and Parliament's legislative authority and is aligned with applicable precedent in its exclusion of Marine Transshipment.

10. Regarding the issues of Aboriginal consultation raised by Mi'gmawe'l Tplu'taqnn Inc. ("**MTI**"), Equinor adopts the submissions of the Attorney General of Canada ("**AGC**").

11. Accordingly, Equinor requests this Court dismiss the application for judicial review.

B. Facts

(i) The Proponent and the Project

12. Equinor is a Canadian corporation. It is an indirect subsidiary of Equinor ASA, which is 67 percent owned by the State of Norway. Equinor holds a 65 percent interest in the Project and its partner, BP Canada Energy Group ULC holds the remaining 35 percent interest.[1]

13. Equinor strives to be the world's most carbon-efficient oil and gas producer and works systematically to reduce emissions. However, Equinor recognizes that oil and gas will be a significant part of the energy mix for decades to come. The Project is important in meeting future demand for energy sustainably, with low carbon dioxide intensity. This will assist in addressing provincial, Canadian and global emissions reduction goals.[2]

14. The Project involves developing two offshore Significant Discovery Licenses (the "**Core BdN Development**"). The Core BdN Development has an estimated recoverable resource of approximately 300 million barrels of crude oil. It is located within the Flemish Pass Basin, approximately 500 kilometres east of St. John's, and is part of a larger project area composed of Exploration Licenses held by Equinor ("**Project Area**"). The entire Project Area lies beyond Canada's Exclusive Economic Zone ("**EEZ**").[3]

15. Crude oil produced from the Project will be offloaded to shuttle tankers on which it will be shipped to an existing transshipment facility or directly to market using international shipping lanes.[4]

(ii) The Project Description

16. Equinor commenced the regulatory process for the Project when it submitted a "**Project Description**" to the Agency's predecessor (each and together, the "**Agency**") in June 2018. The

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[1] Affidavit #1 of Stephanie Curran, made September 23, 2022 ("**Curran Affidavit #1**") at paras. 9–10 **[Record of the Respondent, Equinor Canada Ltd. ("ECR"), Tab 1, p. 15]**.

[2] Curran Affidavit #1 at para. 11, Ex. 2, s. 2.2.1 **[ECR, Tab 1, pp. 15–16, 52–53]**.

[3] Curran Affidavit #1 at paras. 13–14, 20, Ex. 2 **[ECR, Tab 1, pp. 16–17, 19, 46–48]**; Affidavit of Gretchen Fitzgerald, made August 10, 2022 ("**Fitzgerald Affidavit**"), Ex. GF-2 **[Applicants' Record ("AR"), Tab 3, p. 86]**.

[4] Fitzgerald Affidavit, Ex. GF-2, s 2.2.1.5 **[AR, Tab 3, p. 100]**.

Project Description described, while noting the conceptual stage of Project planning,[5] the scope of the Project, including: (i) the entire lifecycle of the Core BdN Development; (ii) proposed Project activities; and, (iii) potential future development.[6]

17. The Project Description identified included and excluded marine shipping activities, and provided reasons for same. Specifically, the Project Description described:

(a) the marine shipping included in the scope of the Project: "the offloading of crude to shuttle tankers and their movement and hook-up/disconnect with the Project safety zone" ("**Safety Zone Shipping**"); and,

(b) the marine shipping excluded from the scope of the Project: "[t]he transhipment of crude" (Marine Transshipment).[7]

18. Accordingly, the boundary between included and excluded marine shipping activities occurs "[o]nce the shuttle tanker leaves the Project safety zone".[8] The Project safety zone extends 500 m from all subsea Project infrastructure (*i.e.*, the outer edge of the floating production unit for storage and offshore offloading anchor pattern), covering an approximately 30 square kilometre area.[9]

19. The Project includes Safety Zone Shipping and excludes Marine Transshipment because:

(a) tankers are owned by third parties, and therefore, outside of the Project safety zone Equinor ceases care and control of the tankers; and,

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[5] Fitzgerald Affidavit, Ex. GF-2, s 2.2 **[AR, Tab 3, p. 89]**.

[6] Curran Affidavit #1 at paras 17–23 **[ECR, Tab 1, pp. 18–20]**; Fitzgerald Affidavit, Ex. GF-2, ss. 2.2, 2.2.1 **[AR, Tab 3, pp. 88–89, 92]**.

[7] Fitzgerald Affidavit, Ex. GF-2, s. 2.2.1.5 **[AR, Tab 3, p. 100]**.

[8] Fitzgerald Affidavit, Ex. GF-2, s. 2.2.1.5 **[AR, Tab 3, p. 100]**.

[9] *Newfoundland Offshore Petroleum Drilling and Production Regulations*, SOR/2009-316, s. 71; Certified Tribunal Record, Document 2(d) ("**EA Report**"), s. 4.5.2 **[AR, Tab 8, p. 1733].**

(b) outside of the Project safety zone, the tankers will use existing international and Canadian shipping lanes, are subject to International Maritime Organization requirements and the regulations of their flag states.[10]

20. Distinct from marine shipping, the Project Description also described the scope of various vessel logistical activities that are included in the scope of the Project ("**Support Vessel Transport**"). These vessels travel to and from a "supply base" in NL to support the Project in various ways but are not intended to ship oil to markets.[11]

21. Later in June 2018, the Agency invited public comment on the Project Description, including a request to "identify environmental effects that are not listed in the project description".[12] Equinor also invited comment directly from Indigenous groups.[13] Neither Sierra Club Canada Foundation ("**Sierra Club**") nor Équiterre commented. While MTI provided comments, it expressed no concerns over downstream GHG emissions or Marine Transshipment.[14]

(iii) Equinor's Engagement with MTI

22. Concurrent with filing the Project Description, Equinor commenced engagement with Indigenous groups, including MTI. This engagement continued during the EA process. Equinor's Indigenous engagement has focused on facilitating two-way dialogue, information-gathering, addressing concerns, and laying the foundations for future engagement.[15]

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[10] Fitzgerald Affidavit, Ex. GF-2, s 2.2.1.5 **[AR, Tab 3, p. 100]**.

[11] Fitzgerald Affidavit, Ex. GF-2, s. 2.2.1.7 **[AR, Tab 3, pp. 102–103]**.

[12] Affidavit of Michael Atkinson, made September 23, 2022, Ex. A, document 1 **[Record of the Respondent, the Attorney General of Canada ("CR"), Tab 1, pp. 43–47]**; Curran Affidavit #1, Ex. 4 **[ECR, Tab 1, p. 147]**.

[13] Curran Affidavit #2 at paras. 36–39, Ex. 9, 10 **[ECR, Tab 2, pp. 1462, 1672–1681]**.

[14] Affidavit of Marcy Cloud, made August 18, 2022 ("**Cloud Affidavit**"), Ex. MC-2 [**AR, Tab 5, pp. 1347–1348**].

[15] Affidavit #2 of Stephanie Curran, made September 23, 2022 ("**Curran Affidavit #2**") at paras. 4, 11, Ex. 1 **[ECR, Tab 2, pp. 1455–1456, 1485–1488]**.

23. Equinor's direct engagement with MTI spanned several months of emails, phone calls, monthly update meetings, a face-to-face meeting, and one workshop.[16] During that time, MTI did not raise any issues with Equinor regarding downstream GHG emissions or Marine Transshipment.

24. Ultimately, Equinor and MTI agreed that further engagement would occur through the EA process.[17] Equinor will continue its engagement with MTI throughout the lifecycle of the Project.[18]

(iv) The EA Process

25. After reviewing the Project Description, the Agency determined that the Project required an EA under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 ("**CEAA 2012**") and notified the public of same.

26. Over the course of the roughly four-year EA process, the Agency provided opportunities for persons and groups to share their views. The Agency specifically invited comments on: (i) the draft Environment Impact Statement ("**EIS**") Guidelines ("**EIS Guidelines**"); (ii) the EIS; and, (iii) the draft EA report ("**EA Report**") and potential EA conditions ("**Draft Conditions**").[19]

27. Équiterre did not participate at all in the EA process. Sierra Club submitted comments only on the EIS.[20]

(v) EIS Guidelines

28. In August 2018, the Agency issued a draft of the EIS Guidelines for public comment.[21] The EIS Guidelines define "the scope of the environmental assessment" and "the nature, scope

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[16] Curran Affidavit #2 at para. 21, Ex. 3 and 6 **[ECR, Tab 2, pp. 1459, 1650–1652, 1664–1665]**.

[17] Curran Affidavit #2 at para. 73, Ex. 3 **[ECR, Tab 2, p. 1470, 1652]**.

[18] Curran Affidavit #2 at para. 4 **[ECR, Tab 2, p. 1455]**; Decision Statement **[AR, Tab 2, p. 32, 35, 37–38]**.

[19] EA Report **[AR, Tab 8, pp. 1677–1678]**.

[20] Fitzgerald Affidavit at paras. 19, 26 **[AR, Tab 3, pp. 51, 54]**; Affidavit of Marc-André Viau, made August 10, 2022 ("**Viau Affidavit**") at para. 13 **[AR, Tab 4, p. 852]**.

[21] Curran Affidavit #1 at para. 26, Ex. 7 **[ECR, Tab 1, pp. 20, 220]**.

and extent of the information required" by the Agency for the preparation of the EIS to be assessed under CEAA 2012.[22] Among other things, the EIS Guidelines: (i) identify the scope of the "designated project" to be assessed; (ii) establish the parameters of the EA; and, (iii) identify several Valued Components ("**VC**")—defined as "environmental biophysical or human features that may be impacted by the project"—that the EIS must address.[23]

29. Nowhere in the draft EIS Guidelines does the Agency suggest or imply that Marine Transshipment or downstream GHG emissions will be assessed in the EA process. To the contrary, under the heading "Scope of the Environmental Assessment", the draft EIS Guidelines state that, based on the Project Description, the "designated project" includes:

(a) "[c]rude oil shipping including movement, hook-up/disconnect and offloading of crude oil to shuttle tankers within the Project safety zone" (*i.e.*, Safety Zone Shipping); and,

(b) "[t]he loading, refuelling and operation of marine support vessels (*i.e.*, for re-supply and transfer of materials, fuel, and equipment and on-site safety during the life of the Project) and transport between the supply base and the project area" (*i.e.*, Support Vessel Transport).[24]

30. Regarding downstream GHG emissions, the suggested VCs for the Project in the draft EIS Guidelines include "air quality and greenhouse gas emissions", which are defined to include "an estimate of the direct greenhouse gas emissions associated with all phases of the project (*i.e.*, including drilling, flaring, production, and marine and helicopter transportation) as well as any mitigation measures proposed to minimize greenhouse gas emissions".[25]

31. None of the Applicants requested that downstream GHG emissions nor Marine Transshipment be added to the EIS Guidelines. Indeed, neither Sierra Club nor Équiterre

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[22] Fitzgerald Affidavit, Ex. GF-6 **[AR, Tab 3, p. 194].**

[23] Fitzgerald Affidavit, Ex. GF-6 **[AR, Tab 3, p. 194–199, 216–224]**.

[24] Curran Affidavit #1, Ex. 7 **[ECR, Tab 1, pp. 227–228]**.

[25] Curran Affidavit #1, Ex. 7 **[ECR, Tab 1, pp. 261–262]**.

submitted comments. While MTI provided submissions, it limited its comments to other, unrelated issues.[26]

32. Following the public comment period, the Agency issued the final EIS Guidelines. While the final EIS Guidelines include several changes from the earlier draft, they continue to exclude Marine Transshipment and downstream GHG emissions from the EA.[27]

(vi) Memorandum of Understanding

33. Pursuant to a Memorandum of Understanding ("**MOU**") agreed to between the Agency and the Canada-Newfoundland and Labrador Offshore Petroleum Board in February 2019, the Project was assessed under an integrated EA and regulatory review that satisfied the requirements of CEAA 2012 and the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*.[28]

(vii) Development of the EIS

34. In February 2019, Equinor submitted a draft EIS to the Agency. Over the next 18 months, the Agency, the Board and federal departments completed a technical review of the EIS, following which they: (i) issued information requirements ("**IRs**") to Equinor; (ii) hosted a workshop to clarify key issues; and, (iii) held additional meetings with Equinor to discuss key issues.[29]

(viii) The EIS

35. In July 2020, Equinor submitted the EIS to the Agency. The EIS assessed each of the VCs set out in the final EIS Guidelines.[30]

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[26] Cloud Affidavit, Ex. MC-3 **[AR, Tab 5, pp. 1349–1351]**.

[27] Fitzgerald Affidavit, Ex. GF-6 **[AR, Tab 3, pp. 208–212]**.

[28] SC 1987, c 3; Curran Affidavit #1 at para. 47, Ex. 21 **[ECR, Tab 1, pp. 28, 555]**.

[29] Curran Affidavit #1 at para. 34, Ex. 17 **[ECR, Tab 1, pp. 24, 304]**.

[30] Curran Affidavit #1 at paras. 38–46 **[ECR, Tab 1, pp. 25–28]**; Fitzgerald Affidavit, Ex. GF-8, EIS Excerpts (Table of Contents, Appendix B) **[ECR, Tab 3, pp. 2344–2391, 2394–2450]**.

36. Regarding marine shipping, the EIS described the required aspects of Safety Zone Shipping in the EIS,[31] while (again) noting that Marine Transshipment is not included in the scope of the Project.[32] The EIS also noted the uncertainty in the destinations of Project oil at this early stage of Project planning.[33] Further, the EIS considered and modelled various spill scenarios, including a spill from Safety Zone Shipping (offloading of crude oil to shuttle tanker) and Support Vessel Transport (a vessel-to-vessel collision in the vessel traffic route).[34]

37. Equinor satisfied all requirements that pertained to air quality and GHG emissions without specifically labelling the component as a VC, and explained this methodology in the EIS to the Agency's satisfaction.[35] The EIS estimated that annual GHG emissions from the Project would represent 2.4 percent or less of NL's emissions and 0.04 percent or less of the national GHG emissions reported by Environment and Climate Change Canada ("**ECCC**") for the year 2016.[36] Equinor also committed to achieving net-zero GHG emissions from the Project by 2050.[37]

38. Further, as a result of its engagement with MTI, Equinor made several commitments ("**Commitments**") in its EIS on issues such as: (i) potential impacts to marine mammals, fish or migratory birds; (ii) environmental monitoring; (iii) subsea infrastructure; (iv) hydrocarbon and water discharge; (v) emergency preparedness and planning; and, (vi) ongoing engagement.[38]

39. In August 2020, the Agency hosted two Virtual Information and Engagement Sessions on the EIS: one for the general public and another for Indigenous groups, which MTI attended.[39]

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[31] *E.g.*, Curran Affidavit #1, Ex. 2 **[ECR, Tab 1, pp. 77–78, 88–90]**.

[32] Curran Affidavit #1, Ex. 2 **[ECR, Tab 1, p. 47]**.

[33] Curran Affidavit #1, Ex. 2 **[ECR, Tab 1, pp. 47, 90]**.

[34] Fitzgerald Affidavit, Ex. GF-8.5 **[AR, Tab 3, pp. 347–352]**; Curran Affidavit #1, Ex. 20 **[ECR, Tab 1, pp. 446–553]**.

[35] Curran Affidavit #1 at paras. 40–46 **[ECR, Tab 1, pp. 25–28]**; Fitzgerald Affidavit, Ex. GF-8.2, GF-8.3 **[AR, Tab 3, pp. 282–283, 287–328**].

[36] Curran Affidavit #1 at para. 43 **[ECR, Tab 1, p. 27]**; Fitzgerald Affidavit, Ex. GF-8.3 **[AR, Tab 3, p. 328**].

[37] EA Report, s. 4.7.4 **[AR, Tab 8, p. 1759]**.

[38] Curran Affidavit #2 at para. 24, Ex. 5 **[ECR, Tab 2, pp. 1459–1460, 1658–1662]**.

40. The Indigenous session involved presentations by the Agency and Equinor, followed by questions and discussions. In response to questions from MTI regarding marine shipping, Equinor reminded participants that vessel-to-vessel collisions and other oil spill scenarios within the Project Safety Zone are considered in the EIS, and that the destination of Project oil may be an existing transshipment facility in NL or direct to market. Equinor further confirmed that the Project does not include Marine Transshipment.[40] Transport Canada ("**TC**") explained that a generally applicable preparedness and response regime under the *Canada Shipping Act, 2001* applies to Marine Transshipment.[41] Further, TC advised that it had completed studies and reported on oil spill risks for the south coast of NL, providing hyperlinks for participants to access the reports.[42]

41. The Agency invited the public to comment on the EIS. Sierra Club and MTI submitted comments.[43] Équiterre did not.

42. MTI's comments came in the form of a third-party report that raised—for the first time, and over two years after being provided with the Project Description and the EIS Guidelines—a concern over the absence of Marine Transshipment from the scope of the Project.[44] None of MTI's prior comments submitted to the Agency had mentioned Marine Transshipment,[45] nor had MTI raised it as a concern in its direct engagement with Equinor.[46] Sierra Club's comments centred around climate change and GHG emissions downstream from the Project, including emissions from Marine Transshipment, which it raised for the first time.[47]

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[39] Curran Affidavit #1 at para. 52 **[ECR, Tab 1, p. 29]**; Cloud Affidavit at para. 19 **[ECR, Tab 5, p. 19]**.

[40] Curran Affidavit #2 at para. 101 **[ECR, Tab 2, p. 1475]**; Curran Affidavit #1, Ex. 27 **[ECR, Tab 1, pp. 921–922]**; Cloud Affidavit, Ex. MC-11, p. 1435 **[AR, Tab 5].**

[41] SC 2001, c 26; Curran Affidavit #1, Ex. 27 **[ECR, Tab 1, pp. 921–922]**.

[42] Curran Affidavit #1, Ex. 27, 30, 31 **[ECR, Tab 1, pp. 921–922, 966–1008, 1010–1040]**.

[43] Fitzgerald Affidavit, Ex. GF-10 **[AR, Tab 3, pp. 368–382]**; Cloud Affidavit, Ex. MC-14 **[AR, Tab 5, pp. 1449–1500]**.

[44] Cloud Affidavit, Ex. MC-14, ss. 4.3.1, 4.4.1 **[AR, Tab 5, pp. 1468, 1471]**.

[45] Cloud Affidavit, Ex. MC-2, MC-3, MC-6 **[AR, Tab 5, pp. 1347–48, 1350–1351, 1404–1407]**.

[46] See *e.g.*, Curran Affidavit #2, Ex. 16 **[ECR, Tab 2, pp. 1702–1707].**

[47] Fitzgerald Affidavit, Ex. GF-10 **[AR, Tab 3, p. 374]**.

43. Equinor offered MTI further meetings to discuss the EIS and requested further questions or comments, but MTI did not respond to Equinor's offers or requests.[48]

44. Following engagement and consultation on the EIS, the Agency issued additional IRs to Equinor, to which Equinor responded.[49]

(ix) Environmental Assessment Report

45. On August 9, 2021, the Agency issued a draft EA Report and Draft Conditions for review and comment by the public and Indigenous groups.[50]

46. Neither Sierra Club nor Équiterre commented. MTI again submitted comments in the form of a third-party report, repeating its complaint about the omission of Marine Transshipment.[51]

47. On April 6, 2022, the Agency issued the EA Report, which set out the main findings and conclusions regarding its EA. Among other things, the Agency concluded that: (i) the Project is not likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures; and, (ii) Equinor's project planning and design incorporates measures to mitigate any adverse effects of its Project.[52]

48. With respect to air quality and GHG emissions, the Agency's conclusions included:

(a) Project GHG emissions could be up to approximately 30 percent less compared to other offshore production projects in the area; and,

(b) taking into account the implementation of mitigation measures, the Project is not likely to cause significant adverse environmental effects on air quality or as a result of GHG emissions.[53]

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[48] Curran Affidavit #2 at paras. 102–104, Ex. 40, 41 **[ECR, Tab 2, pp. 1476, 2324, 2327]**.

[49] Curran Affidavit #1, Ex. 34 **[ECR, Tab 1, pp. 1051–1146]**.

[50] Curran Affidavit #1, Ex. 36, 37, 38 **[ECR, Tab 1, pp. 1150–1385, 1387–1406, 1408–1410]**.

[51] Cloud Affidavit, Ex. MC-16 **[AR, Tab 5, pp. 1551]**.

[52] EA Report **[AR, Tab 8, pp. 1651, 1805]**.

49. The EA Report shows that the Agency assessed both Safety Zone Shipping and Support Vessel Transport and identified relevant mitigation measures and follow-up program requirements for consideration by the Minister in establishing conditions as part of the decision statement for the Project, if the Project were ultimately permitted to proceed.[54]

(x) The Minister's Decision

50. On April 6, 2022, the Agency posted the Minister's decision regarding the EA (the "**Decision Statement**") to the Registry. In the Decision Statement, the Minister decided that the Project is not likely to cause significant adverse environmental effects.[55]

51. In issuing the Decision Statement, the Minister relied on a memorandum from the Agency, which contains analysis and recommendations. With respect to GHG emissions, the Agency's memorandum noted that GHG emissions associated with the Project would be more than offset by end of oil production at two existing NL offshore projects for which end of production life is anticipated to occur shortly after the Project is operational in 2028.[56]

52. The Decision Statement includes 137 enforceable conditions on the Project to mitigate potential impacts ("**Conditions**") that require Equinor to, among other things:

(a) incorporate GHG emission reduction measures into the design of the Project, and implement these measures for the duration of the Project (Condition 6.2);

(b) commencing on January 1, 2050, ensure that the Project does not emit greater than 0 kilotonnes of CO_2e per year (Condition 6.4);

(c) implement measures to prevent or reduce the risks of collisions between Project vessels and marine mammals and sea turtles (Condition 3.11); and,

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[53] EA Report **[AR, Tab 8, p. 1759]**.

[54] *E.g.*, EA Report, ss. 4.1.4, 4.2.4, 4.3.4, 4.5.4, 4.6.4, 4.7.4, 5.1.4, 5.2.3 **[AR, Tab 8, pp. 1688–1694, 1705–1710, 1715–1720, 1735–1738, 1750–1754, 1757–1759, 1769–1773, 1777–79].**

[55] Decision Statement **[AR, Tab 2, pp. 20–21]**; CEAA 2012, s. 52.

[56] Certified Tribunal Record, Document 2, Memorandum to Minister **[AR, Tab 8, p. 1602]**.

(d) prepare a spill response plan in consultation with Indigenous groups (Condition 7.7).[57]

PART II. ISSUES

53. Equinor's submissions focus on the following issues:

(a) whether the application should be dismissed because the Applicants delayed two years before raising concerns regarding the exclusion of downstream GHG emissions and Marine Transshipment;

(b) the proper approach to reasonableness review; and,

(c) whether the Minister reasonably relied on the EA Report, even though it did not consider downstream GHG emissions or Marine Transshipment.

54. Equinor adopts and relies on the AGC's submissions regarding: (i) the admissibility and weight of the Applicants' affidavits; and, (ii) the adequacy of Crown consultation of MTI.

PART III. SUBMISSIONS

A. The Application should be Dismissed due to the Applicants' Delay

55. The Applicants argue that the EA was underinclusive because it omitted: (i) downstream GHG emissions; and, (ii) Marine Transshipment. However, when given the opportunity to raise these issues in comment periods on the Project Description and draft EIS Guidelines, none of the Applicants raised the issues they now raise. In fact, the Applicants only raised these issues over two years into the EA, after Equinor filed its EIS (in compliance with the EIS Guidelines). The Applicants' delay is unexplained and inexplicable, and prejudicial to the timely completion of the EA process—a matter of high public interest. The Application should be dismissed on this basis.

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[57] Decision Statement **[AR, Tab 2, pp. 31, 36–38]**. See also Decision Statement, Conditions 3.4, 3.12, 4.3, 4.6, 5.1, 6.5, 7 **[AR, Tab 2, pp. 29–39]**.

56. The Agency set the scope of the EA at the beginning of the EA process when it issued the EIS Guidelines in September 2018, following Indigenous and public consultation. Indeed, scoping the Project and the EA is "Step 1" under the established EA process.[58]

57. The Agency provided two Indigenous and public consultation periods related to the scope of the Project and the EA, being comment periods on: (i) the Project Description; and, (ii) the draft EIS Guidelines.[59] However, none of the Applicants raised the scoping issues they now raise.[60] One Applicant (Équiterre) did not participate at all in the EA process. The other two Applicants waited to raise the issues until two years later, when commenting on the EIS.[61] At that point, the entire EIS had been finalized in accordance with the EIS Guidelines and studies that went into supporting it completed. It was too late to ask the Agency to revisit its scoping decision made two years earlier, on which Equinor relied in preparing the EIS.

58. By failing to raise their concerns at the "at the first opportunity where it is reasonable to expect such a complaint to be made",[62] the Applicants delayed unreasonably. As this Court has found, unreasonable delay is prejudicial to proponents and the public who stand to benefit from approved projects.[63] To allow the Applicants to challenge the Decision Statement

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[58] See Canadian Environmental Assessment Agency ("**CEAA**"), "Operational Policy Statement: Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under CEAA 2012" (November 2015) Appendix 1; CEAA, "Environmental Assessment Process Managed by the Agency" (May 2013).

[59] EA Report, ss. 3.1.2, 3.2.1 **[AR, Tab 8, pp. 1677–1680]**.

[60] See Memorandum of Fact and Law of the Applicants (**"Applicants' MFL"**) at paras. 19, 49, 117 **[AR, Tab 9, pp. 1914, 1923–1924, 1944–1945]**; Cloud Affidavit, Ex. MC-2, MC-3 **[AR, Tab 5, pp. 1347–1348, 1350–1351]**. To the extent the Applicants attempt to bootstrap the record, their affidavits should be given no weight: Cloud Affidavit, paras 5, 10, 11(b) and 20 **[AR, Tab 5, pp. 1298, 1300–1303, 1307]**; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 116 at paras. 34-38 [*Tsleil-Waututh* 2017].

[61] Cloud Affidavit, Ex. MC-14 **[AR, Tab 5, p. 1468];** Fitzgerald Affidavit, Ex. GF-10 **[AR, Tab 3, pp. 374]**.

[62] *Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 371 at paras. 24-25 [*Mohammadian*], aff'd 2001 FCA 191.

[63] *Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418 at para. 51 [*Conseil des innus de Ekuanitshit*], aff'd 2014 FCA 189, leave to appeal refused, 2015 CanLII 10578 (SCC) (5 March 2015).

notwithstanding their delay will only encourage future applicants to remain silent in the face of known problems, which is harmful to both judicial economy and regulatory efficiency.[64]

59. Delay is inherently prejudicial and contrary to the purpose of CEAA 2012. The explicit, legislated purposes of CEAA 2012 include: "ensur[ing] that an environmental assessment is completed in a timely manner".[65] Further, the legislative intent behind CEAA 2012, as expressed by the sponsoring Minister of Natural Resources, is to "mak[e] reviews for major resource projects more predictable and timely" and to establish "a 21st century regulatory system that protects the environment and is efficient, effective and expeditious". Among the criticisms of the prior system was that it was "inefficient, duplicative and unpredictable … complex, slow-moving and wasteful. It subjects major projects to unpredictable and potentially endless delays."[66]

60. By waiting two years and several process steps before raising concerns over scoping of the Project and the EA, the Applicants acted contrary to these purposes.

61. Indeed, through their delay, the Applicants effectively sought to restart the EA process to require the EIS Guidelines (issued two years earlier) be amended, which would require Equinor (and the Agency) to reengage with numerous stakeholders. As this Court has recognized, where scoping of a project is not challenged immediately, the EA process moves forward with studies conducted, meetings held, and serious investments made. To require the preparation of a new EIS, conduct further studies, reengage interested parties and go backwards in the EA process will cause "great cost, inconvenience and delay".[67] Here, Equinor relied on the scope of the EIS Guidelines and undertook considerable time, effort, and expense to produce the EIS in accordance with those guidelines.

62. Similarly, in its consultations with the Agency, MTI was obligated to make its concerns known as early as possible. MTI had every opportunity to raise Marine Transshipment as a concern in its submissions on the Project Description and the EIS Guidelines. MTI was obligated

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[64] *Mohammadian* at para. 25.

[65] CEAA 2012, s. 4(f).

[66] "Bill C-38, *Jobs, Growth and Long-Term Prosperity Act*", 2nd Reading, *House of Commons Debates*, 41-1, Vol. 146 No. 115 (2 May 2012) at pp. 7470-7471 (Hon Joe Oliver).

[67] *Conseil des innus de Ekuanitshit* at para. 52.

to fully avail itself of its opportunities to raise concerns and participate in consultation Canada in a meaningful way.[68] MTI cannot breach its "reciprocal duty" to inform the Agency of its concerns as early as possible, and then later complain that consultation was inadequate.[69]

63. Given the Applicants' delay, it is unsurprising that the Agency did not provide detailed reasons in response to their later concerns.

64. The Applicants have not offered any explanation for their two-year delay, nor a basis for the Minister to provide reasons on an issue that the Applicants were two years late in raising. Accordingly, this Court should exercise its discretion to decline to undertake judicial review.[70]

B. The Proper Approach to Reasonableness Review

65. The Applicants have applied for judicial review of the Decision Statement, not the EA Report. Indeed, it is well established that under CEAA 2012, no judicial review lies in an EA report itself since it serves only to assist the decision-maker (here, the Minister) and is therefore not justiciable.[71] However, it is an error for the Minister to rely on a materially deficient report that falls short of legislated standards.[72]

66. It is settled law that the standard of review on the administrative law issues raised by the Applicants is reasonableness. It is equally settled that, in applying the reasonableness standard in the context of an EA, deference is informed by the scientific and policy nature of scoping determinations, the extent of the EA and the assessment of cumulative effects in light of proposed mitigation measures.[73] The court is not to re-weigh the evidence or form its own view

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[68] *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484 at para. 42

[69] *Canada v Long Plain First Nation*, 2015 FCA 177 at paras. 158-159; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212 at para. 52; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para. 65.

[70] *Makivik Corporation v Canada (Attorney General)*, 2021 FCA 184 at para. 60; *Strickland v Canada (Attorney General)*, 2015 SCC 37, [2015] 2 SCR 713 at paras. 37-38, 43-44.

[71] *Gitxaala Nation v Canada*, 2016 FCA 187 at para. 125; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 at paras. 36, 43 [*Taseko*]; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras. 180, 202 [*Tsleil-Waututh*].

[72] *Taseko* at para. 45; *Tsleil-Waututh* at para. 201.

[73] *Tsleil-Waututh* at paras. 213-218; *Taseko* at paras. 47-48; *Greenpeace Canada v Canada (Attorney General)*, 2016 FCA 114 at paras. 58, 61 citing *Inverhuron & District Ratepayers'*

about the merits of the decision,[74] nor act as an academy of science.[75] Decisions that applied a correctness standard and considered different legislative regimes are irrelevant to the analysis.[76]

67. The central question before this Court is whether the Decision Statement and the justification offered "are acceptable and defensible in light of the governing legislation, the evidence before the Court and the circumstances that bear upon a reasonableness review."[77] This Court's review entails an examination of any written reasons in light of the entire holistic context, including the evidentiary record and the submissions made, with "due sensitivity to the administrative regime".[78] This Court may "look to the reasons provided and anything in the legal backdrop and the record … that can shed light on where the [Minister] was coming from."[79] Further, a "decision should be left in place" if, on review, a court "can discern from the record why the decision was made and the decision is otherwise reasonable".[80]

68. Contrary to the Applicants' submissions, this case is not about the adequacy of reasons. No reasons from the Minister or Agency were required, nor should they have been expected. Indeed, as noted, the Applicants cannot reasonably expect reasons on issues they did not raise when invited to do so at the Project Description or EIS Guidelines stages of the EA process.

69. Further, it is unsurprising that the Minister did not provide such reasons given that, under CEAA 2012, the Minister does not set the scope of the designated project or the EA—the

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Assn v Canada (Minister of The Environment) (2000), 191 FTR 20 (Can FC) aff'd 2001 FCA 203.

[74] *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para. 28 [*Coldwater*]; *Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para. 39.

[75] *Sagkeeng First Nation v Canada (Attorney General)*, 2021 FC 344 at para. 66.

[76] Applicants' MFL at paras. 61, 98, 99 **[AR, Tab 9, pp.1927, 1937–38]**; *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6, rev'ing 2008 FCA 209; *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159.

[77] *Coldwater* at para. 29.

[78] *Canada (Justice) v DV*, 2022 FCA 181 at para. 14 [*D.V.*], citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at paras. 94, 97, 103, 123 [*Vavilov*].

[79] *D.V.* at para. 14; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para. 16 [*Alexion*], citing *Vavilov* at paras. 94, 123.

[80] *Zeifmans LLP v Canada*, 2022 FCA 160 at para. 10, citing *Vavilov* at paras. 120-122.

Agency does, and the Minister is required to rely on the Agency's EA and report.[81] This differs from assessments conducted by: (i) the National Energy Board ("**NEB**"), for which the Minister has broader powers to request a reconsideration; and, (ii) a review panel, for which the Minister sets the scope of factors and may request clarification.[82] In particular, the Minister does not have the authority to decide the scope of the Project or the EA: those are technical matters entrusted to the Agency's expertise.[83] The Minister's role in this statutory scheme is to decide if the "designated project is likely to cause significant adverse environmental effects".[84] Accordingly, it was not for the Minister to go several steps backward in the EA process to provide reasons to support the Agency's scoping decision made years earlier.

70. *Vavilov* notes that where "no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision… the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable."[85]

71. Here, it is readily discernable from the statutory scheme, the record and prior administrative decisions "why the decision was made" and, independent of reasons, why the outcome is reasonable. Both administrative law issues that the Applicants raise are fact-intensive scoping assessments that call for deference.[86] The Applicants hold the onus of establishing that the outcome is unreasonable. They have failed to do so.

C. The Project EA Reasonably Excluded Downstream GHG Emissions

72. Contrary to the Applicants' arguments, regulators and the Federal Courts have repeatedly found—for close to a decade—that downstream GHG emissions need not be considered in

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[81] CEAA 2012, s. 27(1).

[82] CEAA 2012, ss. 19(2)(b), 29-30, 43(1)(f).

[83] See *e.g.*, CEAA 2012, ss. 8, 10, 15, 19(2)(a), 22.

[84] CEAA 2012, s. 52.

[85] *Vavilov* at para. 138.

[86] *Tsleil-Waututh* at para. 391; *Coldwater* at para. 16; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para. 69 [*Forest Ethics*].

project EAs. When challenged on appeal or judicial review, the FCA has repeatedly dismissed such challenges.[87]

73. This reflects the fact that: (i) federal legislation (including CEAA 2012) does not require the assessment of downstream GHG emissions; (ii) downstream GHG emissions are regulated separately, pursuant to regulations targeted at the particular downstream use in the jurisdiction in which they are generated; and, (iii) as a practical matter, a project EA is an ineffective and misplaced process for assessing downstream GHG emissions. When given the opportunity to clarify the matter in recent years, Parliament has chosen to expressly confirm that downstream GHG emissions are not part of the federal EA process.

74. Accordingly, the Minister's reliance on the Agency's decision to exclude downstream GHG emissions from the EA is clearly reasonable based on the statutory and administrative regime, precedent, and the larger context of downstream GHG emissions.

(i) CEAA 2012 does not require the assessment of downstream GHG emissions

75. As the Agency stated in the context of an EA process for a different project (Pacific NorthWest LNG), "[a]t this time, GHG emissions associated with downstream use of the gas are not considered in project EAs."[88] Acting as responsible authority for EAs of interprovincial pipeline projects, the NEB has reached a similar conclusion, repeatedly rejecting arguments for

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[87] See *e.g.*, *Forest Ethics* at paras. 8, 69; NEB, "Hearing Order OH-001-2014 Ruling No. 25" (23 July 2014), [NEB, "Ruling No. 25"], leave to appeal refused, FCA 14-A-55 (16 October 2014) (Appendix A **[ECR, Tab 4, p. 2487]**) [*City of Vancouver*]; NEB, "Hearing Order OH-001-2014 Ruling No 29" (19 August 2014), [NEB, **"**Ruling No. 29"], leave to appeal refused, FCA 14-A-59 (24 October 2014) [*L.D. Danny Harvey*] (Appendix A **[ECR, Tab 4, p. 2488]**); NEB, "Hearing Order OH-001-2014 Ruling No. 30" (19 February 2019), [NEB, "Ruling No. 30"]; NEB, "Hearing Order OH-001-2014 Ruling No. 34" (2 October 2014), [NEB, "Ruling No. 34"], leave to appeal refused, FCA 14-A-62 (23 January 2015), [*Quarmby No. 1*] (Appendix A **[ECR, Tab 4, p. 2490]**), leave to appeal to SCC refused, 2015 CanLII 56682 (SCC) (10 September 2015) [*Quarmby No. 2*]; CEAA, "Environmental Assessment Report for the Pacific NorthWest LNG Project" (September 2016), [CEAA, "Pacific NorthWest EA Report"], p. 265; Minister of the Environment, "Decision Statement for the Pacific NorthWest LNG Project"; NEB, "Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Vol. 1" (2013) at p. 22.

[88] CEAA, "Pacific NorthWest EA Report", p. 265.

the inclusion of downstream GHG emissions under CEAA 2012 or broader "public interest" considerations under the *National Energy Board Act*, R.S.C., 1985, c. N-7 ("**NEB Act**").

76. In particular, the NEB has rejected arguments that subsections 5(1) or 5(2) of CEAA 2012—on which the Applicants rely—require the assessment of downstream GHG emissions.

77. Regarding subsection 5(1), the NEB has found, during the EA of the Trans Mountain Expansion Project ("**TMEP**"), that the "environmental effects" to be considered are limited to the "construction and operation" of the designated project alone, not effects downstream of it. Considering paragraph 5(2)(a) of CEAA 2012, the NEB observed that downstream GHG emissions are not "directly linked or necessarily incidental" to a designated project being environmentally assessed because such projects do "not include downstream use" and are "not tied to, or dependent on, any particular use in any particular destination."[89]

78. The FCA denied the applicants leave to appeal the NEB's TMEP decision, as well as subsequent attempts to reargue the issue.[90]

79. This reasoning aligns with the text, context and purpose of CEAA 2012.

80. While the statutory definition of "designated project" includes "any physical activity that is incidental to those physical activities", in the case of downstream GHG emissions, the "physical activities" being assessed are impossible to identify. The impracticality of doing so has been repeatedly raised regulators and the courts and is critical context for the Agency's decision.

81. Indeed, in *Forest Ethics*, the FCA relied on the following contextual considerations in finding that the NEB reasonably excluded downstream GHG emissions from its broad "public interest" assessment under the NEB Act in the context of the EA of a different pipeline project:

(a) nothing in the NEB Act expressly required the NEB to consider climate change in a broad, general sense that includes upstream and downstream emissions;

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[89] NEB, "Ruling No. 25", pp. 3-5.

[90] See NEB, "Ruling No. 25", leave to appeal dismissed in *City of Vancouver* **[ECR, Tab 4, p. 2487]**; NEB, "Ruling No. 29", leave to appeal dismissed in *L.D. Danny Harvey* **[ECR, Tab 4, p. 2488]**; NEB, "Ruling No. 30"; NEB, "Ruling No. 34", leave to appeal refused in *Quarmby No. 1* **[ECR, Tab 4, p. 2490]**, and *Quarmby No. 2*.

(b) the NEB could reasonably take the view that downstream emissions were not "directly related" to the project under assessment; and,

(c) downstream facilities and activities are regulated by other regulators, not the NEB, and if those activities are affecting climate change and in a manner that requires action, it is for those regulators to act or, more broadly, for Parliament to act.[91]

82. Considering the TMEP, the NEB also analyzed the broader context, pointing out the practical impossibility of assessing mitigation measures for downstream GHG emissions, noting that "determining the adequacy of mitigation for … downstream end use … would be dependent on the particular … downstream use, which cannot be known."[92] The NEB further noted the problem of considering downstream effects without considering downstream benefits. The NEB concluded, as a practical matter, "downstream effects are more effectively assessed and regulated by the jurisdictions where the use occurs" and that "whether from Canada or from elsewhere in the world", oil "will go to where the demand is, whether or not the Project proceeds."[93]

83. Finally, the purpose of CEAA 2012 includes the protection of "components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project".[94] Given that particular downstream uses of Project oil "cannot be known", it is impossible to determine whether the GHG emissions generated from those uses are within the legislative authority of Parliament, and it would be speculative, at best, to consider environmental effects and possible mitigation measures (which Parliament may be unable to enforce). Indeed, downstream uses may not even occur in Canada.

84. The Applicants do not seek to distinguish the preponderance of authority that explicitly rejects the same or similar arguments raised by parties to other proceedings. Instead, the Applicants suggest, without referring to these authorities, that there is a single reasonable result

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[91] *Forest Ethics* at para. 69; *National Energy Board Act*, R.S.C., 1985, c. N-7, s. 52(2)(e).

[92] NEB, "Ruling No. 25" at p. 6.

[93] NEB, "Ruling No. 25" at p. 4.

[94] CEAA 2012, s. 4(a).

in this case—that it was "not open to the Agency, or to the Minister…to exclude downstream emissions".[95] It is clear that courts and regulators have concluded otherwise.

85. Further, the Applicants rely on a single regulatory decision they claim to be supportive of their position.[96] Far from establishing a common administrative "practice", the EA for the Énergie Saguenay LNG Project did not consider downstream emissions.[97] The Agency briefly mentioned downstream GHG emissions only to respond to the proponent's submission.[98]

86. Here, the Minister reasonably relied on the Agency's EA of the direct GHG emissions of the Project. Even if the Applicants are correct that the EA could have included downstream GHG emissions, they fail to show it was unreasonable for the Agency to decline to do so in light of the considerable regulatory and judicial precedent that supports the Agency's determination.

(ii) Parliament Confirmed that EAs need not assess Downstream GHG Emissions

87. Given the recent opportunity to clarify legislative intent as to whether downstream GHGs should be included in the EA of a project, Parliament declined to do so and instead clarified that downstream GHG emissions should not be part of the assessment.

88. In 2019, Parliament replaced CEAA 2012 with the *Impact Assessment Act* ("***IAA***")—legislation expressly intended to broaden the assessment of climate effects.[99] Given the chance to

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[95] Applicants' MFL at para. 52.

[96] See Applicants' MFL at para. 56 **[AR, Tab 9, p. 1926]**. The Applicants also cite, but do not rely on, the NEB's inclusion of downstream GHG emissions in the Energy East Pipeline EA. However, the NEB found that downstream GHG emissions were "not part of the 'designated project[s]' … and cannot be considered incidental activities under the CEAA 2012." The Energy East EA never took place, and it remains unclear how downstream GHGs could feasibly be assessed: Viau Affidavit, Ex. MAV-7 **[AR, Tab 4, pp. 931–951].**

[97] Viau Affidavit, Ex. MAV-10 **[AR, Tab 4, pp. 1035–1036, 1203]**; CEAA, "Guidelines for the Preparation of an Environmental Impact Statement, Saguenay Energy Project" (March 14, 2016), p. 4.

[98] Viau Affidavit, Ex. MAV-10 **[AR, Tab 4, pp. 1035–1036]**.

[99] *IAA,* S.C. 2019, c. 28, s. 1, Preamble, s. 63(e); Government of Canada "Strategic Assessment of Climate Change" (revised October 2020), [Government of Canada, "SACC"]; Rod Northey, Liane Langstaff & Anna Côté, *A Guide to Canada's Impact Assessment Act*, 2020 Edition (Toronto: LexisNexis Canada, 2020), Overview, Part C, s. 8 (Appendix A [**ECR, pp. 2522–2524]**); *Reference re Impact Assessment Act*, 2022 ABCA 165 at para. 103 [*Reference re IAA*].

clarify and expand, Parliament declined to include downstream emissions in the new process.[100] ECCC subsequently confirmed downstream emissions are not assessed under the *IAA*.[101]

89. Given this legislative context, it was eminently reasonable for the Minister to rely on an EA that excluded an assessment of downstream GHG emissions.

(iii) The Minister and Agency Reasonably Considered Cumulative Effects

90. The Applicants argue that the Agency did not properly consider GHG emissions as a VC and, further, that the EA Report did not include consideration of the cumulative effects of GHG emissions.[102] The Applicants' arguments should be rejected as a matter form over substance.

91. First, although the EIS did not consider GHG emissions as a specific, individual VC, Equinor fully explained its approach to the assessment of GHG emissions and their effects,[103] and, in any event, the Agency appropriately considered air quality and GHG emissions as a VC.[104]

92. Second, the EIS and the EA Report acknowledge the GHG emissions are necessarily cumulative by their nature.[105] Accordingly, a separate cumulative effects analysis was not required.

93. The Decision Statement reasonably addressed direct air quality and GHGs, and imposed relevant Conditions, including the unprecedented requirement for net-zero emissions by 2050.[106]

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[100] See *Reference re IAA* at para. 103.

[101] See Government of Canada "SACC" at "3. Quantification of GHG emissions from a project".

[102] See Applicants' MFL at paras. 72, 75 **[AR, Tab 9, pp. 1930–1931]**.

[103] Curran Affidavit #1 at paras. 40-46 **[ECR, Tab 1, pp. 25–28]**; Fitzgerald Affidavit, Ex. GF-8.2 and GF-8.3 **[AR, Tab 3, pp. 282–283, 287–330**].

[104] See *e.g.*, EA Report, Table 1 and ss. 4.7.2, 4.7.4 **[AR, Tab 8, pp. 1663, 1756-1759]**.

[105] Curran Affidavit #1 at paras. 45–46 **[ECR, Tab 1, pp. 27–28]**; Fitzgerald Affidavit, Ex. GF-8.3 **[AR, Tab 3, pp. 326–327]**, GF-8 **[ECR, Tab 3, pp. 2448–2450]**; EA Report **[AR, Tab 8, p. 1759].**

[106] Decision Statement, s. 6 **[AR, Tab 2, pp 36-37].**

94. The Applicants fail to show a reviewable error in the Decision Statement in relation to downstream GHG emissions, which aligns with precedent, the text, context and purpose of CEAA 2012, and was within the range of permissible outcomes justified on the facts and law.

D. The Project EA Reasonably Excluded Marine Transshipment

95. The Applicants' marine shipping argument is based on: (i) a faulty factual premise that marine shipping was entirely excluded from the EA; and, (ii) a faulty legal premise that *Tsleil-Waututh* is a binding "precedent" regarding Marine Transshipment. Contrary to the Applicants' argument: (i) the Agency reasonably limited its assessment of marine shipping to Safety Zone Shipping (along with Support Vessel Transport), excluding only Marine Transshipment; and, (ii) *Tsleil-Waututh* does not require Marine Transshipment be assessed and, in fact, the NEB scoped out similarly situated activities from the TMEP in the reconsideration that followed *Tsleil-Waututh*, with the FCA declining leave to challenge the issue.

(i) The Agency Reasonably Scoped Marine Shipping

96. As a threshold matter, *Tsleil-Waututh* is not, as the Applicants suggest, a "binding authority that marine shipping must be considered in the Project EA".[107] That the Applicants frame *Tsleil-Waututh* as such reflects their misapplication (and misunderstanding) of both the reasonableness standard of review and the nature of the findings in *Tsleil-Waututh*, which the FCA premised as "a mixed question of fact and law heavily suffused by evidence".[108]

97. The Agency determines the scope of a designated project. As shown by the complexity of the EIS Guidelines, and as recognized by the FCA in *Tsleil-Waututh*, this is a highly technical, factually suffused determination.[109] Deference to the Agency's expertise is required.

98. The Applicants fail to acknowledge that, unlike in *Tsleil-Waututh*, the Agency included some marine shipping (Safety Zone Shipping) in the scope of the EA. The Applicants make no submissions whatsoever as to whether it was reasonable to include only Safety Zone Shipping, along with Support Vessel Transport, as marine activities environmentally assessed.

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[107] Applicants' MFL at para 2 **[AR, Tab 9, p. 1909]**.

[108] *Tsleil-Waututh* at para. 391.

[109] *Tsleil-Waututh* at para. 391; Fitzgerald Affidavit, Ex. GF-6 **[AR, Tab 3, pp. 188–239]**.

Accordingly, the Applicants fail to meet their burden of establishing that the Agency's scoping determination, on which the Minister relied, was unreasonable.

99. As set out in more detail below, even if this Court were to further consider the Applicants' argument notwithstanding this faulty factual premise, it was reasonable for the Minister to rely on the Agency's determination to exclude Marine Transshipment from the EA.

(ii) Tsleil-Waututh is Distinguishable

100. This is a very different case from *Tsleil-Waututh*. There, the NEB excluded all marine shipping from the "designated project" to be assessed under CEAA 2012. The FCA concluded that the NEB erred by: (i) failing to consider the Agency's guidelines and policy criteria to determine whether marine shipping was "incidental" to the TMEP (the "**Incidental Criteria**");[110] (ii) seeming to rely solely on an irrelevant factor—namely, that other federal departments (not the NEB) have regulatory authority over marine shipping; and, (iii) imposing conditions related to marine shipping, which was inconsistent with the project scope.

101. The Agency made no such errors in this case.

102. First, as noted, the EA does not exclude all aspects of marine shipping.[111]

103. Second, Equinor provided information responsive to the Incidental Criteria:[112]

Incidental Criteria	**Project Description**
(i) the nature of the proposed activities and whether they are subordinate or complementary to the designated project	"Crude oil will be offloaded to shuttle tankers. […] Crude oil will be shipped via these shuttle tankers to an existing transshipment facility or directly to market using international shipping lanes. […] The Project includes the offloading of crude to shuttle tankers and their movement and hook-up/disconnect within the Project safety zone."

[110] *Tsleil-Waututh* at para. 403; Agency, "Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012" (March 2015), s. 2.0, [Agency, "Project Description Guide"].

[111] Fitzgerald Affidavit, Ex. GF-6 **[AR, Tab 3, p. 256]**.

[112] Fitzgerald Affidavit, Ex. GF-2 **[AR, Tab 3, p. 100]**; Curran Affidavit #1 at para. 22, Ex. 5, **[ECR, Tab 1, pp. 19–20, 177]**; Agency, "Project Description Guide", s. 2.0.

(ii) whether the activity is within the care and control of the proponent *(iii) if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to "direct or influence" the carrying out of the activity* *(iv) whether the activity is solely for the benefit of the proponent or is available for other proponents as well*	"Once the shuttle tanker leaves the Project safety zone, it is under the responsibility of the third-party owners of the shuttle tankers, outside the care and control of Equinor Canada, Husky Energy and/or the Project."
(v) the federal and/or provincial regulatory requirements for the activity.	"If travelling within Canada's Exclusive Economic Zone (EEZ), shuttle tankers are required to have arrangements with a Canadian marine response organization in the event of a spill." "The shuttle tankers would be subject to international maritime requirements (i.e., International Maritime Organization [IMO]) and must adhere to the regulatory framework of the IMO and those of its flag state."

104. The Agency considered and accepted Equinor's Project Description, stating in its EIS Guidelines that "[b]ased on this project description, the Agency has determined that an EA is required under CEAA 2012 and will include the following project components and activities […]", none of which included Marine Transshipment.[113]

105. Third, far from being analogous to the marine shipping that was ultimately assessed in relation to the TMEP, the Marine Transshipment of Project oil is in the area that the NEB expressly declined to include in its reconsideration of the TMEP following *Tsleil-Waututh* (the

[113] Fitzgerald Affidavit, Ex. GF-6, s. 3.1 **[AR, Tab 3, p. 196]**; Curran Affidavit #1 at para. 37 **[ECR, Tab 1, p. 24–25]**. The Applicants argue that certain paragraphs of the Curran Affidavits (#1 and #2) amount to "bootstrapping": Applicants' MFL at fn 175 **[AR, Tab 9, p. 1941]**. This argument has no merit. Those paragraphs merely describe, summarize and quote from documents on the record. It is well established that affidavits may explain and summarize in an effort to assist and orient the Court: *Tsleil-Waututh* 2017 at para. 28.

"**TMEP Scope Reconsideration**").[114] In reaching this conclusion, the NEB recognized the jurisdictional limits, and limitations, in the marine environment, on which Equinor relies.

106. In particular, the NEB noted that:

(a) other EAs considered marine shipping only to a maximum geographical extent of the territorial sea limit;[115] no prior EAs considered project-related marine shipping outside of the territorial sea;[116]

(b) it is not practical or feasible to evaluate marine shipping in the EEZ, which it described as a "a vast area of ocean", with specific destinations uncertain;[117] and,

(c) beyond the territorial sea, Parliament's authority is materially reduced; in particular, under the *Oceans Act*, Canada has limited rights and jurisdiction within the EEZ that must be exercised in a manner consistent with generally accepted international rules and standards.[118]

107. When environmental NGOs sought to challenge the TMEP Scope Reconsideration in the FCA, seeking an expanded scope, the Court denied leave.[119]

108. In contrast to the TMEP Scope Reconsideration, which considered the 12 nautical mile territorial sea as the maximum feasible area in which to assess marine shipping, the Project lies far beyond the territorial sea, approximately 500 kilometres from the coast of Canada and beyond the EEZ. The destinations of Project oil are unknown; therefore, it is speculative whether tankers traveling to or from the Project would enter Canada's EEZ, and more indeterminate still whether tankers would travel the hundreds of kilometres toward NL into Canada's territorial sea.

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[114] National Energy Board, "Reasons for decision dated 12 October 2018", Appendix 1 to Letter dated 12 October 2018 [NEB, "TMEP Scope Reconsideration"].

[115] Canada's territorial sea is defined as 12 nautical miles from the low-water line along the coast: *Oceans Act*, SC 1996, c 31, s. 4.

[116] NEB, "TMEP Scope Reconsideration", pp. 16, 18.

[117] NEB, "TMEP Scope Reconsideration", pp. 15-16.

[118] NEB, "TMEP Scope Reconsideration", pp. 8, 15.

[119] *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224 at paras. 43, 45, regarding City of Vancouver Notice of Motion, 19-A-44 **[ECR, Tab 4, pp. 2511–19]**.

109. When deciding on the scope of the Project to be assessed, the Agency understood the regulatory framework governing marine shipping, including Parliament's limited legislative jurisdiction outside of Canadian waters, and TC's limited regulatory authority (which includes the loading and unloading of oil to and from tankers in Canadian waters and the EEZ, but not carriage of oil beyond the EEZ).[120] Indeed, the purpose of CEAA 2012 is to "protect the components of the environment that are within the legislative authority of Parliament",[121] not those that lie beyond it and that are subject to international rules.

110. Finally, in *Tsleil-Waututh*, the FCA noted that the proponent had made commitments and the NEB imposed conditions related to marine shipping that had been excluded from the scope of the "designated project". The Court therefore found this was an unreasonable inconsistency in the NEB's determination to exclude marine shipping.[122]

111. The Decision Statement in this case discloses no such flaw: it follows the scope of the EA. The Minister imposed no Conditions related to Marine Transshipment, nor did Equinor make any such commitments.[123] Consistent with the EA, the Decision Statement does, however, include several Conditions regarding Safety Zone Shipping and Support Vessel Transport.[124]

112. Accordingly, the unique facts of this case, and the different legal regime applicable to those facts, not only serve to distinguish it from *Tsleil-Waututh*, but demonstrate the reasonableness of the decision, in light of the relevant legal and factual constraints.[125]

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[120] See *e.g.*, EA Report, ss. 4.1.4, 4.2.2, 4.2.4, 4.7.1, 4.7.4, 7 **[AR, Tab 8, pp. 1692, 1701, 1708, 1754, 1758, 1807–1808]**; Curran Affidavit #1, Ex. 27 **[ECR, Tab 1, pp. 921–922];** Fitzgerald Affidavit, Ex. GF-2 **[AR, Tab 3, p. 83]**. See also *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*, S.C. 1987, c. 3, ss. 2 ("offshore area"), 137.

[121] CEAA 2012, s. 4(1)(a).

[122] *Tsleil-Waututh* at paras. 405-408.

[123] Curran Affidavit #2, Ex. 5 **[ECR, Tab 2, p. 1658–1662]**; Decision Statement **[AR, Tab 2, pp. 20–41]**.

[124] See note 57, *supra*.

[125] *Alexion* at para. 58, citing *Vavilov* at para. 131.

E. Remedy

113. The Applicants ask this Court to quash the Decision Statement. Such a result would be disproportionate, draconian and unjust. The Applicants did not respect the CEAA 2012 framework, and failed to raise their concerns at reasonable stages provided in the "normal process" of the EA under CEAA 2012, all to the prejudice of Equinor and the people of NL who stand to benefit from the Project. Accordingly, it is appropriate for this Court to decline to grant a remedy in this case.[126]

114. If this Court were to grant a remedy, it would be proper for this Court to issue a declaration regarding the specific errors in the Decision Statement and retain supervisory jurisdiction to efficiently assess whether the defects are cured. Alternatively, if this Court quashes the Decision Statement, it would be appropriate to remit limited, tightly defined issues, to be addressed in a brief and efficient process.[127]

115. Several courts have declined to quash resource project approvals where doing so would cause undue harm to the proponent or the public. A more proportionate remedy is to issue a declaration, plus any additional relief (such as supervisory jurisdiction)[128] that is necessary to address outstanding issues before potentially irreversible adverse impacts occur.[129]

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[126] *Strickland v Canada (Attorney General)* at paras. 43-44, 49; *Makivik Corporation v Canada (Attorney General)* at para. 60.

[127] *Tsleil-Waututh* at para. 772; *Ignace v Canada (Attorney General)*, 2019 FCA 266 at para. 11.

[128] *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para. 257; *Platinex v Kitchenuhmaykoosib Inninuwug First Nation & AG Ontario* (2007), 157 ACWS (3d) 460 at paras. 185-188 (Ont Sup Ct J). See also *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3.

[129] *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at paras. 132-133; *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 at paras. 139-153; *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 at paras. 76-83, aff'd on this ground 2011 BCCA 247 at paras. 166-167 (per Finch C.J.), 169 (per Hinkson J.), leave to appeal dismissed 2012 CanLII 8361 (SCC) (23 February 2012); *Halalt First Nation v British Columbia (Environment)*, 2011 BCSC 945 at paras. 747-753, rev'd on other grounds, 2012 BCCA 472; *Blaney et al v British Columbia (The Minister of Agriculture Food and Fisheries) et al*, 2005 BCSC 283 at paras. 117-138. See also: *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139 at paras. 251-260, additional reasons 2008 BCSC 1620.

116. Here, any adverse effects of the alleged deficiencies in the EA only arise during Project operations (Marine Transshipment) or later when Project oil is ultimately used (downstream GHG emissions). Accordingly, there is no practical need to quash the Decision Statement, with Project operations years away from commencing.[130]

PART IV. ORDERS SOUGHT

117. Equinor respectfully requests that this Honourable Court dismiss the application for judicial review, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Calgary, Alberta, on December 13, 2022.

Maureen Killoran, KC / Sean Sutherland / John McCammon
Osler, Hoskin & Harcourt LLP
Counsel for the Respondent, Equinor Canada Ltd.

[130] EA Report, ss. 2.2.1–2.2.5 **[AR, Tab 8, pp. 1668–1671]**.

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