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 APPLICANTS

November 14, 2022

James Gunvaldsen Klaassen,
Joshua Ginsberg, Ian Miron and
Anna McIntosh
Ecojustice
520-1801 Hollis St.
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

Counsel for the Applicants

OVERVIEW

1. On April 6, 2022 the Respondent Minister of Environment and Climate Change (**Minister**) approved the environmental assessment (**EA**) of the Bay du Nord Development Project (**Project**), and concluded that the Project is not likely to cause significant adverse environmental effects. This Application challenges the Minister's April 6, 2022 Decision approving the Project EA (**Decision**), made pursuant to ss 27(1), 52(1), 53 and 54 of the *Canadian Environmental Assessment Act, 2012*[1] (***CEAA 2012*** or ***Act***).

2. The Minister's Decision gave EA approval for the production of at least 300 million barrels of oil, and possibly much more, at a floating offshore oil and gas production facility approximately 500 km east of St. John's NL, as well as the transportation of produced oil by tanker. The Applicant Mi'gmawe'l Tplu'taqnn Incorporated (**MTI**) advised Canada's representatives that oil tankers carrying oil from the Project would pass through Atlantic salmon migration routes and the fishing grounds of MTI's member New Brunswick Mi'gmaq communities and would threaten their constitutionally protected fishing rights. Canada's representatives and the Minister ignored and refused to consider these concerns. The Minister's Decision failed to uphold the Honour of the Crown and was made in breach of the Crown's constitutional obligations to MTI's member communities. The Decision is invalid as it was made in the absence of any consultation and accommodation of MTI on issues fundamental to MTI's member communities, and contrary to binding authority that marine shipping must be considered in the Project EA.

3. Moreover, the Minister lacked the jurisdiction to make the Decision, and acted unreasonably, as his Decision and the Project EA Report (**Report**) prepared by the Impact Assessment Agency of Canada[2] (**Agency**) failed to take into account downstream greenhouse gas (**GHG**) emissions. Downstream emissions result from transportation and end uses of the Project's oil and are by far the largest source of the Project's GHG emissions. During the EA, the Applicants and others submitted that the Project will cause, at a minimum, approximately 129 megatonnes of downstream emissions. They presented evidence that the Project's vast lifecycle

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[1] ***Canadian Environmental Assessment Act, 2012***, SC 2012, c 19 ["***CEAA 2012***" or "***Act***"], ss 27(1), 52(1), 53 & 54. As discussed below, *CEAA 2012* governs this Project and EA, despite its repeal in August 2019.

[2] Prior to August 2019 the Agency's full title was the Canadian Environmental Assessment Agency.

emissions are inconsistent with global climate commitments. The Minister's Decision was unreasonable as it breached the requirements of *CEAA 2012* and ignored all submissions presented regarding downstream emissions and the cumulative contributions of such emissions to dangerous climate change. Similarly, the Minister also acted unreasonably and contrary to *CEAA 2012* by failing to consider the adverse effects and risks presented by marine shipping of oil produced by the Project.

4. The Minister's unreasonable refusal to consider significant issues within the Project EA runs contrary to *CEAA 2012*'s focus on the precautionary principle[3] and the requirement to interpret environmental legislation liberally and generously. Only by failing to consult and accommodate MTI's member communities, and by ignoring Project downstream emissions and marine shipping, could the Minister attempt to sidestep the Project's adverse environmental effects. In so doing he failed to recognize the fundamental principles underlying environmental assessment. As expressed by the Court of Appeal of Newfoundland and Labrador:

> …environmental assessment is not a frill engrafted on the development process, nor should it be regarded as an administrative hurdle to be gotten over in the march towards economic development. Rather, it is an integral part of economic development.[4]

PART I: STATEMENT OF FACTS

The Parties

5. The Applicants Sierra Club Canada Foundation (**Sierra Club**) and Équiterre are environmental non-profit organizations that engage in public education and advocacy regarding matters relating to oil and gas development and climate change. They assert that the Minister unlawfully failed to consider downstream GHG emissions as well as impacts from the shipping and transportation of oil in making the Decision. Sierra Club participated in the Project EA.

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[3] ***CEAA 2012***, s 4(2).

[4] ***Northern Harvest Smolt Ltd. v Salmonid Association of Eastern Newfoundland***, 2021 NLCA 26 at paras 24–25 [statement was made in the context of provincial EA legislation and not *CEAA 2012*].

Équiterre engaged in advocacy and communications to the Minister regarding the Project outside the formal assessment process.[5]

6. The Applicant MTI is a not-for-profit organization that represented eight Mi'gmaq communities in New Brunswick in the Bay du Nord EA: Amlamgog (Fort Folly) First Nation, Natoaganeg (Eel Ground) First Nation, Oinpegitjoig (Pabineau) First Nation, Esgenoôpetitj (Burnt Church) First Nation, Tjipõgtõtjg (Buctouche) First Nation, L'nui Menikuk (Indian Island) First Nation, Ugpi'ganjig (Eel River Bar) First Nation and Metepenagiag Mi'kmaq Nation. The Minister and Agency failed to consult and accommodate these Mi'gmaq communities during the EA, specifically regarding the shipment and transportation of oil.[6]

7. The Respondent Minister made the Decision under review, and is responsible for the administration of the *Act*, and for all Indigenous consultations conducted by the Agency regarding the Project. The Respondent Attorney General of Canada is responsible for the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada.[7] Further or in the alternative, the Attorney General of Canada is named as Respondent pursuant to Rule 303(2).

8. The Respondent Equinor Canada Ltd. (**Equinor**) is the Project's proponent.

Climate Change and Downstream Emissions

9. Climate change is an "existential threat" facing Canada and the world, as recognized by the Supreme Court of Canada.[8] It is "caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future".[9]

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[5] The **Affidavit of Gretchen Fitzgerald** affirmed August 10, 2022 ["**Fitzgerald Affidavit**"] (Applicants' Record ["**AR**"] Tab 3) and **Affidavit of Marc-André Viau** affirmed August 10, 2022 ["**Viau Affidavit**"] (AR Tab 4) detail, respectively, Sierra Club and Équiterre's history of engagement on oil and gas and climate change related issues, and the activities both of these parties engaged in relating to the Project leading up to the Decision.

[6] The **Affidavit of Chief George Ginnish** affirmed August 18, 2022 ["**Ginnish Affidavit**"] (AR Tab 6) and the **Affidavit of Marcy Cloud** affirmed August 18, 2022 ["**Cloud Affidavit**"] (AR Tab 5) review, respectively, the history and rights of the Mi'gmaq communities that MTI represented in the Project EA and consultations, and MTI's engagement in the consultation and EA process.

[7] ***Department of Justice Act,*** RSC 1985, c J-2, s 5(d); ***Federal Courts Act***, RSC 1985, c F-7, s 18(1)(b).

[8] ***References re Greenhouse Gas Pollution Pricing Act,*** 2021 SCC 11 ["***References re GGPPA***"] at para 171.

[9] ***References re GGPPA*** at para 2.

10. Under the *Paris Agreement*, 194 countries and the European Union have agreed to limit the increase in global average temperature to "*well below* 2°C above pre-industrial levels" (emphasis added) and make efforts made to limit temperature increase to 1.5°C (the **Paris target**).[10] Canada ratified the *Paris Agreement* in 2016.[11]

11. Countries have so far been taking insufficient action to meet the Paris target. In February 2022, the Intergovernmental Panel on Climate Change (**IPCC**) released a Summary for Policymakers – a document whose wording is negotiated and approved by governments from around the world – which included a stark warning that any further delay "will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all".[12]

12. Fossil fuels are a main contributor to climate change.[13] The largest portion of GHG emissions from fossil fuel projects are "downstream emissions" – these are emissions that occur after fossil fuel production, including during the combustion of fossil fuels for energy. According to submissions provided to the Agency during the Bay du Nord EA, downstream emissions account for 90% of a project's lifecycle emissions, or can increase a project's total GHG emissions by up to 10 times.[14]

13. Participants also noted during the Bay du Nord EA process that prominent international bodies, including the International Energy Agency (**IEA**) and UN Environment, have called on countries to limit their fossil fuel production so as not to cause downstream emissions that will lead to gross overshoot of the Paris target. In 2021, the IEA released a landmark report concluding that there can be no new oil, gas or coal development if the world is to reach net zero emissions by 2050 and have a chance of meeting the Paris target.[15] In 2019, UN Environment cautioned that approval of new fossil fuel infrastructure "locks in" oil and gas use, and modeled that global oil production in 2040 will be 43% more than is consistent with a 2°C pathway.[16]

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[10] ***References re GGPPA*** at para 13; ***Paris Agreement***, 12 Dec 2015, UN Doc FCCC/CP/2015/10/Add.1, art 2.
[11] ***References re GGPPA*** at para 13.
[12] **Fitzgerald Affidavit**, Exhibit GF-30 (AR-0845 at SPM.D.5.3, Tab 3).
[13] **Fitzgerald Affidavit**, Exhibit GF-19 (AR-0738, Tab 3); ***Syncrude Canada Ltd. v Canada (Attorney General)***, 2016 FCA 160 ["***Syncrude***"] at paras 9 and 45.
[14] **Fitzgerald Affidavit**, Exhibits GF-13 and GF-22 (AR-0433, 0434 and 0774, Tab 3).
[15] **Fitzgerald Affidavit**, Exhibit GF-20 (AR-0756 and AR-0763, Tab 3).
[16] **Fitzgerald Affidavit**, Exhibit GF-9 (AR-0365, Tab 3).

The Bay du Nord Project and Approval

14. The Project proposes offshore oil production in the Flemish Pass Basin of the northwest Atlantic Ocean, about 500 km east of St. John's, Newfoundland and Labrador.[17] It has a production lifetime of up to 30 years, until 2055 or later.[18] According to Equinor's 2018 Project Description, the Project has a production capacity of 300 million barrels of crude oil, based on development of the Bay du Nord and Baccalieu discoveries.[19] However, Equinor has also sought and received approval for unspecified "future development" in an area 10 times larger than the "core" Project area,[20] which could greatly increase the Project oil production.

15. On April 6, 2022, the Minister made the Decision, pursuant to ss 27(1) and 52(1) of the *Act*, that the Project was not likely to cause significant adverse environmental effects under ss 5(1) and 5(2) of the *Act*.[21] The Decision approved the EA of the Project, subject to the conditions stated in the Decision Statement and the proponent obtaining additional authorizations and permits required under certain other federal legislation.[22]

Lack of Consideration of Downstream Emissions During the EA

16. The Agency commenced the EA under *CEAA 2012* for Bay du Nord on August 9, 2018.[23] A month later, it published the final Environmental Impact Statement (**EIS**) Guidelines for the Project,[24] which identified the information that Equinor needed to provide in its EIS. The EIS Guidelines did not require Equinor to provide an estimate of the total crude oil the Project would produce, or an estimate of the Project's downstream emissions. They did require Equinor to conduct a cumulative effects assessment for GHG emissions.[25]

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[17] **Final Environmental Assessment Report [EA Report]** (AR-1650, Tab 8).
[18] **Fitzgerald Affidavit**, Exhibit GF-2 (AR-0092 and 0107, Tab 3).
[19] **Fitzgerald Affidavit**, Exhibit GF-2 (AR-0086, Tab 3).
[20] **Final EA Report** (AR-1667, 1669 and 1689, Tab 8).
[21] **Decision Statement** (AR-0020 to 0041, Tab 2).
[22] **Fitzgerald Affidavit**, para 35 (AR-0059, Tab 3); **Decision Statement** (AR-0021, Tab 2).
[23] **Fitzgerald Affidavit**, Exhibit GF-3 (AR-0178, Tab 3).
[24] **Fitzgerald Affidavit**, Exhibit GF-6 (AR-0188, Tab 3).
[25] **Fitzgerald Affidavit**, Exhibit GF-6 (AR-0235 and 0236, Tab 3).

17. On July 30, 2020, Equinor's EIS was publicly released.[26] The EIS lacked crucial information relevant to the assessment of downstream emissions. This document contained no total production estimate for the Project – neither the initial 300 million barrels estimate, nor any other estimate, appeared in its 2,000+ pages or appendices.[27] The EIS also contained no estimate of the downstream emissions that would result from transporting oil,[28] or burning oil for energy.[29]

18. Although required by the EIS Guidelines, the EIS's chapter on cumulative environmental effects did not include an analysis for GHG emissions.[30] The limited information on cumulative GHG emissions provided elsewhere in the EIS focused on the regional and national context in 2016,[31] without providing forward-looking information regarding the cumulative effects of approving the Project in a global context where any new fossil fuel production – from now until 2055 which is the projected end date of production – places the Paris target at risk.[32]

19. Numerous EA participants including Sierra Club, Première Nation des Innus de Nutashkuan, World Wildlife Fund-Canada (**WWF-Canada**) and NunatuKavut Community Council raised concerns about these gaps during the public consultation period on the EIS.[33]

20. The Agency released the draft EA report for Bay du Nord on August 9, 2021.[34] The draft report estimated that Bay du Nord would produce 177,770 to 309,407 tonnes of carbon dioxide equivalent emissions ("**CO2e**") per year, which would have been 0.04% of Canada's total emissions in 2018.[35] On this basis, limited only to direct Project emissions, it concluded that "the Project is not likely to cause significant adverse environmental effects on air quality or as a result

[26] **Fitzgerald Affidavit**, Exhibits GF-7 (AR-0241, Tab 3) and GF-8 (provided on USB key; see AR-0245, Tab 3).
[27] **Fitzgerald Affidavit**, para 17 (AR-0050, Tab 3).
[28] **Fitzgerald Affidavit**, para 20 and Exhibit GF-10 (AR-0051 and 0374, Tab 3).
[29] **Fitzgerald Affidavit**, para 22, Exhibits GF-11 and GF-13 (AR-0053, 0394 and 0433, Tab 3).
[30] **Fitzgerald Affidavit**, paras 20(i) and 22, Exhibits GF-10 and GF-14 (AR-0051, 0053, 0370, and 0464, Tab 3).
[31] **Affidavit #1 of Stephanie Curran** affirmed September 23, 2022 ["**Curran Affidavit #1**"], para 43 (Equinor's Record); **Fitzgerald Affidavit**, Exhibits GF-8 and GF-8.3 (AR-0246, 0320 and 0328, Tab 3).
[32] **Fitzgerald Affidavit**, Exhibits GF-9 and GF-13 (AR-0365 and 0434, Tab 3).
[33] **Fitzgerald Affidavit**, paras 20 and 22 and Exhibits GF-9 to GF-14 (AR-0051 to 0053, Tab 3 generally).
[34] **Fitzgerald Affidavit**, para 23 and Exhibit GF-16 (AR-0053 and 0469, Tab 3).
[35] **Fitzgerald Affidavit**, Exhibit GF-16 (AR-0578, Tab 3).

of greenhouse gas emissions."[36] The draft report contained no production estimate by which downstream emissions could be calculated, and did not address downstream emissions at all.

21. During the public consultation on the draft report, WWF-Canada reiterated that the analysis had failed to consider downstream emissions, which can increase a project's total GHG emissions by up to ten times.[37] It estimated that the downstream emissions for Bay du Nord (specifically, for the 300 million barrels originally proposed) would be 129 million tonnes of CO2e.[38] WWF-Canada drew attention to the IEA's finding that there can be no new fossil fuel development if the world is to reach net zero emissions by 2050,[39] and noted the importance of cumulatively assessing the impacts of Bay du Nord's GHG emissions in a global context.[40]

22. In March 2022, following news that the Project's production could be as high as 1 billion or more barrels of oil,[41] much higher than the original 300 million barrel estimate, the Applicants Sierra Club and Équiterre wrote to the Minister seeking consideration of the climate implications of this increased estimate, and expressing concerns about the lack of consideration of downstream emissions in the EA.[42] Their letter stated the Project's lifecycle emissions would be equivalent to adding 7-10 million fossil fuel cars to the road, or building 8-10 new coal power plants.[43]

23. The Agency's final EA Report and the Minister's Decision were released on April 6, 2022.[44] The Report reiterated the GHG direct emissions estimate from the draft report and the conclusion that the Project is not likely to cause significant adverse environmental effects as a result of GHG emissions.[45] Like the draft report, the final Report also lacked a production estimate and did not consider downstream emissions.[46] The Report also excluded any GHG

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[36] **Fitzgerald Affidavit**, Exhibit GF-16 (AR-0579, Tab 3).
[37] **Fitzgerald Affidavit**, Exhibit GF-20 (AR-0763, Tab 3).
[38] **Fitzgerald Affidavit**, Exhibit GF-20 (AR-0757, Tab 3).
[39] **Fitzgerald Affidavit**, Exhibit GF-20 (AR-0756 and 0763, Tab 3).
[40] **Fitzgerald Affidavit**, Exhibit GF-20 (AR-0756 to 0758, Tab 3).
[41] **Fitzgerald Affidavit**, paras 28 and 30 (AR-0055 to 0057, Tab 3).
[42] **Fitzgerald Affidavit**, Exhibit GF-22 (AR-771, Tab 3).
[43] **Fitzgerald Affidavit**, Exhibit GF-18 (AR-0773, Tab 3).
[44] **Fitzgerald Affidavit**, paras 35–36 (AR-0059, Tab 3); **Final EA Report** (AR-1648, Tab 8); **Decision Statement** (AR-0020, Tab 2).
[45] **Final EA Report** (AR-1757 and 1759, Tab 8).
[46] **Fitzgerald Affidavit**, paras 36–37 (AR-0059 to 0060, Tab 3).

emissions (direct or downstream emissions) from its assessment of cumulative environmental effects.[47] The Minister's Decision approved the Project on condition that direct emissions be net zero (0 kt CO2e/year) by 2050.[48] No conditions were placed on the Project's downstream emissions.

Failure to include marine shipping of oil in the EA and failure to consult affected Indigenous people

24. The Mi'gmaq are Indigenous peoples whose Territory, known as Mi'gmaq'i, encompasses the lands and waters of what is currently known as Nova Scotia, Prince Edward Island, New Brunswick, southern and western Newfoundland, the Gaspé area of Quebec, Anticosti Island, the Magdalen Islands, and sections of the Northeastern United States. The Mi'gmaq entered into Treaties of Peace and Friendship with the Crown, and continue to exercise Aboriginal and Treaty rights, including the rights to hunt, fish and gather, up to the present day. The Mi'gmaq have never ceded their Aboriginal Title of ownership and stewardship over the lands and waters of New Brunswick to the Crown.[49]

25. The Applicant MTI is currently negotiating the implementation of Mi'gmaq Aboriginal and Treaty rights through intergovernmental discussions, including a Rights Implementation Agreement ("**RIA**") on fisheries. The RIA is intended to implement the Treaty right to fish for a moderative livelihood, variably referred to by Canadian authorities as the right to fish 'commercially'. The Mi'gmaq Treaty rights to fish, while judicially recognized, have not yet been fully implemented by agreement or delineated by the courts.[50] However, the Mi'gmaq Aboriginal right to fish is clear and protected by s 35 of the *Constitution Act, 1982*. The distinction between Treaty and Aboriginal rights to fish is currently the subject of negotiations between MTI and the Crown. The Project entails potential adverse impacts on established Aboriginal rights to fish, whether characterized as Treaty or Aboriginal, and warrants deep consultation with MTI.

[47] **Final EA Report**, s 5.3 (AR-1779, Tab 8).
[48] **Decision Statement**, s 6.4 (AR-0037, Tab 2).
[49] **Ginnish Affidavit**, paras 7–10 (AR-1565 to 1566, Tab 6).
[50] **Ginnish Affidavit**, paras 11–14 and 18 (AR-1566 to 1568, Tab 6).

26. Mi'gmaq fisheries extend from the shores of New Brunswick through the Gulf of St. Lawrence, and to the waters surrounding the island of Newfoundland. These fisheries intersect with the Project area, as well as what has so far been identified as the shipping route for crude oil from the Project to a facility located on Placentia Bay, NL. The fish species harvested by the Mi'gmaq also migrate between the Project area and MTI territory.[51]

27. The Mi'gmaq have a special spiritual and cultural connection to the Atlantic Salmon, considered as their brothers. However, Atlantic Salmon are endangered. In large parts of Mi'gmaq territory, spawning streams are under various severe threats. The Project would increase shipping of crude oil by 78 trips per year. MTI communities are concerned that shipping impacts from the Project will exacerbate the declining condition of Atlantic salmon, and other culturally important species.[52]

28. MTI submitted comments at every stage of the EA process, including on Equinor's EIS and the draft EA report. MTI requested studies of impacts on fish not only within the immediate Project area, but also as a result of the transportation of crude oil from the Project through fishing grounds and through the migratory routes of species. Throughout, MTI raised issues with respect to the adequacy of consultation and made requests related to impacts on marine life, including with respect to shipping impacts.[53]

29. The Agency served as the "Crown consultation coordinator" for the purposes of the EA, and the ultimate responsibility for discharge of the duty to consult and accommodate remains with the Minister and federal Crown.[54] The Agency took the position that the level of consultation owed to MTI communities was "low."[55] MTI never agreed with this assessment and asserted through the process that it was owed a higher duty.[56]

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[51] **Ginnish Affidavit**, paras 17–20 and Exhibit GG-3 (AR-1567 to 1569 and 1583, Tab 6); **Cloud Affidavit**, para 10 and Exhibit MC-2 (AR-1300 and 1347, Tab 5).
[52] **Ginnish Affidavit**, paras 18–21 (AR-1568 to 1569, Tab 6); **Cloud Affidavit**, para 13 and Exhibit MC-6 (AR-1304 and 1405, Tab 5).
[53] **Ginnish Affidavit**, paras 21–23 (AR-1569, Tab 6); **Cloud Affidavit**, paras 5, 10, 13 and following and Exhibits MC-2 and MC-6 (AR-1298, 1300, 1304, 1346 and 1403, Tab 5).
[54] **Ginnish Affidavit**, Exhibit GG-5 (AR-1568, Tab 6); ***Haida Nation v British Columbia (Minister of Forests)***, 2004 SCC 73 ["***Haida***"] at para 53.
[55] **Adequacy of Consultation Report for the Bay du Nord Development Project**, [**Consultation Report**] AR-0499, Tab 8, 2(e) Annex II.
[56] **Ginnish Affidavit**, para 24 (AR-1570, Tab 6); **Cloud Affidavit**, paras 11(b), 11(d), 13, 36 and Exhibit MC-6 (AR-1302 to 1304, 1314 and 1403, Tab 5).

30. Contrary to MTI's repeated requests,[57] neither the EIS nor the Agency's Report for the Project considered the effects of marine shipping of oil. To the extent that either document references "project vessels," it is limited to activities that take place within the Project Safety Zone, which does not include marine shipping outside the immediate area of the Project facility, and does not include much of the area of concern to MTI.[58] In the final EA Report, the Agency indicated that shipment of oil was "outside the scope of the project."[59] The EA Report did not include any modelling around the potential spill trajectories if a tanker were to spill along any of its routes within Canadian waters.

31. The Agency further failed to engage MTI in important steps in the assessment process, such as the development of the EIS and associated meetings between the Agency and proponent. MTI had no opportunity to participate in this part of the assessment process, and no opportunity to influence the approach to scoping before the EIS was finalized.[60] Finally, the Agency knowingly did not receive all relevant Indigenous knowledge MTI wished to contribute, having been informed that MTI was unable to do so without additional resources. Instead, the Agency relied on a 2018 Indigenous Knowledge Study from a different project, which was relevant but not sufficient.[61]

[57] **Ginnish Affidavit**, paras 21–23 (AR-1569 Tab 6); **Cloud Affidavit**, paras 5, 10–11(b), 21–22, 25, 27, 32 and Exhibits MC-2 and MC-14 (AR-1298, 1300 to 1302, 1307 to 1310, 1312, 1346 and 1448, Tab 5).
[58] **Fitzgerald Affidavit**, Exhibit GF-2 (AR-0257, Tab 3).
[59] **Ginnish Affidavit**, para 23 and Exhibit GG-4 (AR-1569 and 1585, Tab 6).
[60] **Ginnish Affidavit**, para 24 (AR-1570, Tab 6); **Cloud Affidavit**, para 16 (AR-1305, Tab 5).
[61] **Ginnish Affidavit**, para 24 (AR-1570, Tab 6); **Cloud Affidavit**, paras 11, 14–15 and Exhibit MC-4 (AR-1301, 1305 and 1352, Tab 5).

PART II: ISSUES

32. This application raises the following issues:

1. The Decision was unreasonable as the Minister relied on a materially deficient EA report and failed, without justification, to consider the impacts of downstream emissions and marine shipping.

2. The Decision is invalid as the Crown failed to properly consult and accommodate MTI's member communities in respect of the Project, as the Crown:

    a. incorrectly excluded marine shipping from the scope of consultation with MTI;

    b. erred in law in determining that the content of the duty to consult MTI was low; and

    c. unreasonably failed to meaningfully and adequately consult and accommodate MTI given the impact on the rights of the New Brunswick Mi'gmaq communities.

PART III: LAW AND ARGUMENT

1. The Decision was unreasonable as the Minister relied on a materially deficient EA Report and failed, without justification, to consider the impacts of downstream emissions and marine shipping

33. The standard of review on this issue is reasonableness.[62] The Decision was unreasonable: it was neither based on an internally coherent rationale nor justified in relation to the relevant factual and legal constraints.[63]

34. The Minister unreasonably decided that the Project was unlikely to cause significant adverse environmental effects. In making the Decision, the Minister failed to consider and weigh the significance of environmental effects of downstream GHG emissions and marine shipping related to the Project. Instead, he relied on a materially flawed Report that failed to consider and

[62] ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 [***Vavilov***] at paras 10, 16–17, and 23.
[63] ***Vavilov*** at paras 99, 102, 105.

weigh the significance of those effects. In coming to his Decision, the Minister limited his review to the Report itself and did not assess whether the Report met the *Act*'s requirements.

35. As a result, the Decision is untenable in relation to the governing statutory framework, other common law, the principles of statutory interpretation, the evidence and submissions before the Minister, and the Minister's past decisions. Nor did the Minister offer a sufficient reasoned explanation in support of the Decision.[64]

a. The *Act*'s statutory framework

36. The Supreme Court of Canada has recognized that federal environmental assessment is "a planning tool that is now generally regarded as an integral component of sound decision-making." Its basic concepts are "(1) early identification and evaluation of all potential environmental consequences of a proposed undertaking" and "(2) decision-making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation."[65]

37. The *Act* establishes a comprehensive federal EA process that, by virtue of transitional provisions, continued to apply to the Project even after the *Act*'s repeal.[66]

38. Consistent with the Supreme Court's characterization, the *Act* aims, among other things, to protect the environment by assessing the effects of potentially harmful projects in a careful and precautionary manner.[67] It also aims "to encourage federal authorities to take actions that promote sustainable development," meaning "development that meets the needs of the present, without compromising the ability of future generations to meet their own needs."[68] To accomplish this goal, the *Act* required the Minister and the Agency to exercise their powers "in a manner that protects the environment and human health and applies the precautionary principle."[69] The precautionary principle requires regulators to err on the side of caution where

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[64] ***Vavilov*** at paras 102–104; ***Alexion Pharmaceuticals Inc v Canada (Attorney General)***, 2021 FCA 157 ["***Alexion***"] at paras 10, 12.
[65] ***Friends of the Oldman River Society v Canada (Minister of Transport)***, [1992] 1 SCR 3 at p. 71.
[66] ***Impact Assessment Act***, SC 2019, c 28, s 1, s 181(1).
[67] ***CEAA 2012***, s 4(1)(a)–(b).
[68] ***CEAA 2012***, s 2(1) definition of "sustainable development", s 4(1)(h).
[69] ***CEAA 2012***, s 4(2).

there is a threat of serious or irreversible damage, even where the precise impact of a given measure is unclear.[70]

39. Under the *Act*, the Agency was the responsible authority for the Project. In that capacity, the Agency was required to ensure that the EA was conducted and that an EA report was prepared.[71]

40. Following the completion of the EA, the Minister had to decide whether the Project was likely to cause significant adverse environmental effects referred to in s 5(1) or (2) of the *Act*, taking into account the EA Report prepared by the Agency and the implementation of any mitigation measures he considered appropriate.[72] Had he decided that the Project was likely to cause significant adverse environmental effects, it would have been referred to the Governor in Council for a decision regarding whether those effects were justified in the circumstances.[73] In this case, the Minister decided that the Project was not likely to cause significant adverse environmental effects. His Decision was therefore a final approval, with conditions, of the Project under the *Act*, subject to the proponent obtaining permits and authorizations under other federal statutes.

41. Before the Minister could exercise his discretion under s 52(1), he had to first take into account the report with respect to the EA of the Project.[74] To satisfy this constraint, any such report must meet the standards set out in the *Act*; a report that is materially flawed will deprive the Minister of the jurisdiction to make a decision under s 52(1).[75]

b. The *Act* prescribes standards for EA reports

42. The Agency had to take into account prescribed factors in conducting its assessment of the Project. Among other factors, the Agency was required to take into account the Project's environmental effects, including any cumulative environmental effects likely to result from the Project in combination with other physical activities, the significance of those effects, and any

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[70] ***114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),*** 2001 SCC 40 at para 31.
[71] ***CEAA 2012***, ss 15(d), 22.
[72] ***CEAA 2012***, ss 27(1) and 52(1).
[73] ***CEAA 2012***, ss 52(2) and (4).
[74] ***CEAA 2012***, s 27(1).
[75] ***Tsleil-Waututh Nation v Canada,*** 2018 FCA 153 [***Tsleil-Waututh***] at para 201; ***Taseko Mines Limited v Canada (Environment)***, 2019 FCA 319 at paras 43, 45.

comments from the public received in accordance with the *Act*.[76] The Agency had to determine the scope of the first two factors.[77]

43. Consistent with the Agency's duty to act in a manner that protects the environment and human health and applies the precautionary principle, and with the *Act*'s goal of ensuring that designated projects are considered in a careful and precautionary manner, the *Act* required the Agency to consider these factors not only for the Project itself, but for any physical activities incidental to it.[78]

44. The *Act* also defines environmental effects broadly.[79] The environmental effects in relation to the Project that the Agency had to take into account included:

a. any change, including local changes, that may be caused to prescribed components of the environment within federal jurisdiction, such as fish and fish habitat, aquatic species, and migratory birds;

b. any change that may be caused on federal lands, in a province outside of Newfoundland and Labrador or outside of Canada; and

c. with respect to "aboriginal peoples," any effect occurring within Canada of any change that may be caused to the environment on health and socio-economic conditions, physical and cultural heritage, or the current use of lands and resources for traditional purposes.[80]

45. Because the Project cannot proceed without additional federal permits, the Agency also had to take into account changes that may be caused to the environment and that are "directly linked or necessarily incidental" to the exercise of those permitting powers, including under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, the *Fisheries Act* and the *Species at Risk Act*.[81]

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[76] ***CEAA 2012***, ss 19(1)(a)–(c).
[77] ***CEAA 2012***, s 19(2).
[78] ***CEAA 2012*****,** ss 2(1) "designated project", 4(2).
[79] ***CEAA 2012***, ss 4(1)(b), 4(2).
[80] ***CEAA 2012***, s 5(1).
[81] ***CEAA 2012***, s 5(2); **Decision Statement** (AR-0021, Tab 2).

46. At a minimum, the Report had to give "some consideration" to each of these factors.[82] This requirement reflects the basic purpose of an EA report: to provide the Minister with the evidentiary basis needed to make a decision.[83] The Report, however, did not do so. It gave no consideration to the environmental effects of Project-related downstream GHG emissions and marine shipping.

c. The Report fell short of the *Act*'s standards by failing to consider the environmental effects of downstream GHG emissions

47. Although the Report assessed the Project's individual direct greenhouse gas emissions, it did not consider or assess the significance of the environmental effects of the much greater Project-related downstream GHG emissions or the cumulative effects of such emissions, contrary to the *Act*'s the requirements in ss 5(1), 5(2), 19(1)(a), and 19(1)(b). The Agency also made no explicit scoping decision with respect to downstream emissions under s 19(2). In excluding downstream emissions, the Agency and the Minister failed to interpret the *Act* in a manner consistent with the text, context, and purpose of these provisions. Instead, they appeared to rely on an inferior interpretation without making any attempt to discern the *Act's* meaning and legislative intent and without providing justification. [84]

48. GHG emissions – whether direct or downstream – cause serious environmental effects, including cumulative effects. The effects of those emissions manifest as climate change, which the Supreme Court has recognized as "an existential challenge…a threat of the highest order to the country, and indeed to the world."[85] The Federal Court of Appeal has accepted that GHGs are "harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power."[86]

49. During the EA, Sierra Club and other participants provided evidence to the Agency on the Project's downstream emissions, and the environmental effects of GHG emissions-caused

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[82] ***Ontario Power Generation Inc v Greenpeace Canada***, 2015 FCA 186 ["***Ontario Power Generation***"] at para 130.
[83] ***Greenpeace Canada v Canada (Attorney General)***, 2014 FC 463 at para 235 (rev'd on other grounds 2015 FCA 186); ***Pembina Institute for Appropriate Development v Canada (Attorney General)***, 2008 FC 302 at paras 73, 78.
[84] ***Vavilov*** at paras 115–124.
[85] ***References re GGPPA*** at para 167.
[86] ***Syncrude*** at para 62.

climate change in Canada around the world. This evidence noted, among other things, that downstream emissions would constitute about 90% of the Project's lifecycle GHG emissions, and that international bodies are warning against new fossil fuels project approvals because of the lifecycle GHG emissions of such projects.[87]

50. The Agency also had evidence before it summarizing the serious and harmful effects of GHG emissions, including an IPCC Summary for Policymakers from February 2022. That report indicated that scientists around the world agree with "high confidence" that "[h]uman-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people", including on ecosystem function, food and water security, health and social stability.[88]

51. Although the Agency acknowledged these submissions,[89] the Report gave them no consideration, contrary to s 19(1)(c) of the *Act*. Contrary to *Vavilov*'s direction that a decision-maker must take into account the evidence and submissions before it[90] and provide reasons that explain in a transparent and intelligible manner how it grappled with the issues presented to it,[91] neither the Report nor the Decision explain why downstream emissions were not considered.

52. Given the accepted reality of the serious harms of climate change, the evidence before the Agency, past practice and policy as discussed below, and the *Act*'s objectives of promoting sustainable development that does not compromise the needs of future generations and ensuring that EA decisions are made "in a manner that protects the environment and human health and applies the precautionary principle," it was not open to the Agency, or to the Minister, to interpret the *Act* in a manner that allowed them to exclude downstream emissions from the Report or the Decision.[92]

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[87] **Fitzgerald Affidavit**, Exhibits GF-9, GF-13 and GF-20 (AR-0365, 0433, 0434, 0756 and 0763, Tab 3).
[88] **Fitzgerald Affidavit**, Exhibit GF-30 (AR-0817 and 0818 to 0821, Tab 3).
[89] **Final EA Report** (AR-1682, Tab 3).
[90] ***Vavilov*** at paras 125–128.
[91] ***Vavilov*** at paras 14, 103, 127–128; ***Alexion***, 2021 FCA 157 at para 12.
[92] ***CEAA 2012***, ss 2(1) "sustainable development," 4(1)(a)–(b), (h), 4(2).

i. The Report failed to consider downstream emissions as local, extra-provincial and international effects

53. The Agency accepted that direct GHG emissions could cause changes to the environment outside Canada, and assessed them under s 5(1)(b)(iii) of the *Act*.[93] However, despite the evidence and submissions of the public on this point, the Agency did not consider whether downstream emissions could similarly cause local, extra-provincial and international changes to the environment under this subsection. Downstream emissions, just like direct emissions, cause serious local, extra-provincial and international impacts, and should have been considered in the assessment of environmental effects under s 5(1). The climate is agnostic to whether GHG emissions caused by the Project are emitted in Canada or elsewhere: "the harmful effects of GHGs are, by their very nature, not confined by borders."[94]

54. The local effects of GHG emissions, regardless of direct or downstream, on matters mentioned in s 5(1) such as federal lands and changes affecting Indigenous peoples, were recognized by the Supreme Court of Canada in *References re GGPPA*:

> …it is well-established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life. [95]

55. The Supreme Court also recognized that GHG emissions cause serious extra-provincial and international impacts, concluding that it is an "uncontested fact" that the effects of GHG emissions on climate change, and corresponding environmental and social harms, are felt "extraprovincially, across Canada and around the world".[96] The Court repeatedly noted the "serious", "grave" and "grievous" extraprovincial harm caused by GHG emissions.[97]

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[93] **Final EA Report** (AR-1663, Tab 3).
[94] ***References re GGPPA*** at para 12.
[95] ***References re GGPPA*** at para 187.
[96] ***References re GGPPA*** at para 187.
[97] ***References re GGPPA***, see e.g., paras 4, 187 and 195.

56. By failing to consider downstream emissions, the Agency also departed from previous assessments under the *Act*.[98] For example, in the EA for the proposed Énergie Saguenay LNG project, the Agency considered downstream emissions in addition to direct emissions when assessing extra-provincial and international effects under ss 5(1)(b)(ii) and (iii).[99] With respect to downstream emissions, the Agency concluded that the proponent had not demonstrated that the project would replace higher-emitting sources, and referred to the IEA's 2021 finding that "countries must now forgo allowing the development of new oil and gas sites…to achieve net zero emissions by 2050, and limit global warming to +1.5 degrees Celsius."[100] The Governor in Council ultimately rejected Énergie Saguenay.[101]

57. While other reports prepared under the *Act* or under different statutory frameworks did not consider downstream emissions, *Vavilov* still required the Agency and Minister to turn their minds to which of these past practices to follow and offer reasons for their decisions.[102] They did not do so.

ii. The Report failed to consider downstream emissions as directly linked or necessarily incidental effects

58. Similarly, the failure to consider downstream emissions conflicts with s 5(2) of the *Act*, which requires the Agency to consider changes that are "directly linked or necessarily incidental" to federal permitting and authorizing of the Project, where those changes have not already been considered under s 5(1).

59. The Agency and Minister were tasked with discerning the meaning and legislative intent of this provision when considering whether downstream emissions should be assessed. They did not do so, even though a reasonable interpretation of the *Act* would have required them to consider downstream emissions under s 5(2).

60. In the *CEAA 2012* EA for the New Prosperity Gold-Copper Mine, the Review Panel interpreted directly linked effects as "effects that are the direct and proximate result of a federal

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[98] **Viau Affidavit**, Exhibits MAV-7 and MAV-10 (AR-0931, 0951, 1035 to 1036, Tab 4).
[99] **Viau Affidavit**, Exhibit MAV-10 (AR-1000, 1228, Tab 4) and s 5.1 (AR-1030ff, 1035, 1036, Tab 4).
[100] **Viau Affidavit**, Exhibit MAV-10 (AR-1035 to 1036, Tab 4).
[101] **Viau Affidavit**, Exhibit MAV-9 (AR-0973 to 0974, Tab 4).
[102] ***Vavilov***, at paras 129–132; ***Turner v Canada (Attorney General)***, 2022 FCA 192 at paras 4–8.

decision", and necessarily incidental effects as "other effects that are substantially linked to a federal decision although they may be secondary or indirect effects".[103]

61. In *Sumas*, the Federal Court of Appeal interpreted the term "directly linked" while reviewing the lawfulness of the National Energy Board's consideration of the environmental effects of a U.S. power plant in deciding whether to approve a Canada-U.S. international power line ("IPL"). It confirmed the Board's interpretation of this term, which was as follows:

> The Board considers that the Power Plant and the IPL are interlinked. Without the Power Plant there would be no need for the IPL. If the IPL were not built, the Power Plant might not proceed. The IPL would have no other function than to transmit all of the electrical output of the Power Plant. The two undertakings would in fact be components of a single enterprise.[104]

62. Downstream emissions are "directly linked" to federal decisions to grant Project authorizations or permits because they are the direct and proximate result of those decisions. For example, without a work authorization issued by the Canada-Newfoundland and Labrador Offshore Petroleum Board under the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act*, Equinor could not produce crude oil via the Project.[105] The Project's entire purpose is to produce crude oil to be burned, inevitably causing GHG emissions.[106]

63. "Necessarily incidental" has been interpreted to mean necessarily "associated with or arising out of"[107] and, as noted by the New Prosperity Review Panel, may include secondary or indirect effects. Downstream emissions are necessarily incidental, because the burning of crude oil is a necessary result of oil production from the Project.

64. Courts around the world have treated downstream emissions as directly linked or necessarily incidental to the authorization of fossil fuel extraction. For example, in *Gray*, the

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[103] *Report of the Federal Review Panel – New Prosperity Gold-Copper Mine Project*, (Ottawa: CEAA, October 2013) at 21 (top of page); Martin Olszynski, "Federal Court of Appeal Quashes Trans Mountain Pipeline Approval: The Good, the Bad, and the Ugly" (6 September 2018), online (blog): *ABlawg* at p 7.

[104] ***Sumas Energy 2 Inc v Canada (National Energy Board),*** 2005 FCA 377 at para 18. See also ***Quebec (Attorney General) v Canada (Attorney General),*** [1994] 1 SCR 159 [***Quebec (AG)***] at paras 56–62.

[105] ***Canada-Newfoundland and Labrador Atlantic Accord Implementation Act,*** SC 1987, c 3, ss 137, 138(1)(b); ***CEAA 2012***, ss 2(1) "federal authority" para (d), Schedule 1 para 2.

[106] **Final EA Report** (AR-1650, Tab 8).

[107] ***Canadian National Ry Co v Harris***, [1946] SCR 352, 1946 CanLII 43 (SCC) at 386.

New South Wales Land and Environmental Court held that there is "a real and sufficient link" and "a sufficiently proximate link" between extracting fossil fuels and downstream emissions:

> …. between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A.[108]

65. In the United States, district and appellate courts have held that downstream emissions should be assessed as indirect impacts.[109] In *Sierra Club*, the D.C. Circuit Court of Appeals held that the downstream emissions from burning natural gas were an indirect effect of authorizing a pipeline, and that the federal regulator had breached its obligation to quantify, discuss the significance of, and conduct a cumulative effects analysis for this effect.[110] Downstream emissions were a necessary – and not only reasonably foreseeable – effect, as the project's "entire purpose" was to facilitate the burning of natural gas for energy.[111] The federal approval was described as a "legally relevant cause" of downstream emissions.[112]

iii. The Report failed to consider downstream emissions in its assessment of cumulative effects

66. As a further statutory constraint on the exercise of the discretion to approve the EA of a Project, the *Act* requires the Agency to consider the Project's cumulative effects in its Report.[113] In this case, the Agency scoped this requirement to include a consideration of the cumulative effects of GHG emissions and required Equinor to provide information about such effects in its

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[108] ***Gray v The Minister for Planning and Ors***, [2006] NSWLEC 720 at paras 97, 100 (Australia). See also ***Gloucester Resources Limited v Minister for Planning*** (2019), [2019] NSWLEC 7 (Australia) [**Gloucester Resources**], which found a "causal link" between a proposed coal project's GHG emissions and the effects of climate change in Australia and elsewhere (at paras 522, 524–525).

[109] Michael Burger & Jessica Wentz, "Evaluating the Effects of Fossil Fuel Supply Projects on Greenhouse Gas Emissions and Climate Change Under NEPA" (2020) 44 Wm & Mary Envtl L & Pol'y Rev 423 at 457–459.

[110] ***Sierra Club v Federal Energy Regulatory Commission***, 867 F (3d) 1357 (DC Cir 2017) [***Sierra Club***] at 1371-1372, 1374 (DC Cir 2017).

[111] ***Sierra Club*** at paras 1371-1372.

[112] ***Sierra Club*** at para 1373.

[113] ***CEAA 2012***, s 19(1)(a).

EIS.[114] The concept of cumulative effects assessment is important for GHG emissions "precisely because GHGs combine incrementally from a variety of sources, and no one source in isolation seems important".[115] As the Supreme Court of Canada has recognized, "climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources".[116]

67. The Agency scoped cumulative assessment requirements in its EIS Guidelines for the EA as well as its policies, referenced within those Guidelines. According to the EIS Guidelines and Agency policy, cumulative effects assessments for Bay du Nord required a multi-step process that involved, as a first step, the clear identification and justification of spatial and temporal boundaries for the cumulative effects assessment for each "valued component" (**VC**).[117]

68. The EIS Guidelines did not define a spatial boundary for the cumulative assessment of GHGs, but did require Equinor to describe GHG emissions "in a regional, provincial, national or international context if applicable".[118] Both the EIS Guidelines and the EA Report stipulated that the temporal boundaries for cumulative effects assessments spanned all phases of the Project through to decommissioning (scheduled for approximately 2058).[119]

69. However, and contrary to the EIS Guidelines, the Report failed to contain a cumulative effects assessment for downstream emissions. Indeed, the Report contains no cumulative effects assessment for any of the Project's GHG emissions, whether direct or downstream, despite labelling GHG emissions as a VC.[120]

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[114] **Fitzgerald Affidavit,** Exhibit GF-6 (AR-0235 to 0236, Tab 3). The relevant Agency guidance documents are cited in the **Final EA Report** (AR-1779, Tab 8), and are as follows: Operational Policy Statement (March 2015): https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/assessing-cumulative-environmental-effects-under-canadian-environmental-assessment-act-2012.html ["**Operational Policy Statement**"] and Interim Technical Guidance (March 2018): https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/assessing-cumulative-environmental-effects-ceaa2012.html. See also Final **EA Report** (AR-1663, Tab 8) (GHGs designated a VC).

[115] Toby Kruger, "The *Canadian Environmental Assessment Act* and Global Climate Change: Rethinking Significance" (2009) 47:1 Alta L Rev 161 at 173–174; see also ***References re GGPPA***, *supra* at para 189.

[116] ***References re GGPPA*****,** *supra* at para 189, citing ***Gloucester Resources*** at para 516.

[117] **Fitzgerald Affidavit**, Exhibit GF-6 (AR-0236, Tab 3). See also **Operational Policy Statement**, *supra*.

[118] **Fitzgerald Affidavit**, Exhibit GF-6 (AR-0229, Tab 3).

[119] **Fitzgerald Affidavit**, Exhibit GF-6 (AR-0198, Tab 3); **Final EA Report** (AR-1668 and 1779, Tab 8).

[120] **Final EA Report** (AR-1663, Tab 8).

70. The Report's section on cumulative environmental effects (Section 5.3) wholly omitted GHG emissions. Nowhere else in the Report were the cumulative effects assessment requirements scoped for this EA as required by the *Act* and Agency policy – including identifying spatial and temporal boundaries, and assessing cumulative effects within those boundaries – followed for GHG emissions. The closest the Report came to a cumulative effects assessment was via statements in the assessment of the Project's individual effects that direct emissions, not including downstream emissions, would constitute about 2.4% of Newfoundland and Labrador's emissions or 0.04% of Canada's emissions in 2016/2018.[121] In its memorandum to the Minister, the Agency further explained that the Project's direct emissions were expected to be offset by declines in production from other offshore fields.[122]

71. Neither statement qualifies as a cumulative effects assessment, as scoped by the Agency, because neither takes into account the relevant spatial horizon (international, given the global nature of GHGs) and temporal scope (at least until 2058, to reflect the project lifetime and temporal boundaries set for the EA). They also fail to recognize, assess or mitigate the effects of GHG emissions in Canada and globally.

72. The Report's failure to conduct a cumulative effects assessment for downstream emissions, and indeed any GHG emissions, is inconsistent with the "some consideration" threshold set out by the Federal Court of Appeal in *Ontario Power Generation*.[123]

73. In *Grand Riverkeeper*, Justice Near found that contrary to the applicants' assertion, the Panel had conducted a cumulative effects assessment because the Panel dealt with cumulative effects in various parts of their report and twice requested further information on cumulative effects from the proponent.[124] Here, the Report is entirely devoid of a cumulative effects assessment for GHGs. No relevant further information was requested from the proponent.[125]

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[121] **Final EA Report** (AR-1756 to 1757, Tab 8). The reference year for Newfoundland and Labrador emissions is 2016: **Fitzgerald Affidavit**, Exhibit GF-8.3 (AR-0328, Tab 3). The EA Report is unclear regarding whether the reference year for Canada's emissions is 2016 or 2018.

[122] **Memorandum to Minister from Impact Assessment Agency** (AR-1596, Tab 8) [**Memo to Minister**].

[123] ***Ontario Power Generation*** at para 130; see also ***Friends of the West Country Assn v Canada (Minister of Fisheries and Oceans)***, [2000] 2 FC 263, 1999 CanLII 9379 (FCA) at para 26.

[124] ***Grand Riverkeeper, Labrador Inc v Canada (Attorney General),*** 2012 FC 1520 at para 64.

[125] **Curran Affidavit #1**, para 58 and Exhibit 33 (Equinor's Record).

74. Neither the Report nor the Decision provide a rationale for the failure to include a cumulative effects assessment for GHG emissions, including downstream emissions. In so doing, the Report and Decision fail to grapple with submissions from participants that specifically raised this concern during the EA process, and also depart in an unjustified manner from the Agency's standards and policy for the EA.[126]

75. While Equinor asserted it satisfied requirements placed upon it to assess GHG emissions without specifically treating GHGs as a VC,[127] the Agency does not explain whether it accepted this assertion or offer any rationale for doing so in the absence of a cumulative effects assessment. Even if the Agency did accept Equinor's assertion, that assertion is conclusory and lacks the justification, transparency and intelligibility required by *Vavilov*.[128] The Agency's – and ultimately the Minister's - failure to consider and address the statutory constraint in s 19(1)(a) of the *Act* further renders the Report invalid and the Decision unreasonable.

iv. The Report failed to consider the significance of downstream emissions

76. Because it failed to consider the environmental effects of Project-related downstream emissions, the Report could not meet the additional requirement to assess the significance of those effects as required under s 19(1)(b) of the *Act*. Nor could it assess whether the Project as a whole was likely to cause significant adverse environmental effects.

77. The EA was required to examine whether the Project is likely to cause significant adverse environmental effects, taking into consideration the implementation of technically and economically feasible mitigation measures.[129] This examination needed to consider both the project-specific environmental effects and the cumulative effects reviewed during the EA.[130]

78. Assessing the significance of effects is one of the most important roles of the Report, as it informs the Minister's decision under s 52 of the *Act* about whether the Project is likely to cause

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[126] **Fitzgerald Affidavit**, paras 20 and 24 (AR-0051 and 0054, Tab 3); ***Vavilov*** at paras 130–131.
[127] **Curran Affidavit #1**, paras 40–41 (Equinor's Record); **Fitzgerald Affidavit**, Exhibit GF-8.2 (AR-0282 to 0283, Tab 3).
[128] ***Vavilov*** at para 99; ***Alexion*** at para 12; ***Safe Food Matters Inc v Canada (Attorney General)***, 2022 FCA 19 at para 54.
[129] ***Maloney v Garneau***, 2018 FC 188 ["***Maloney***"] at Appendix II, section 4.0 (Impact Assessment Agency of Canada, *Determining Whether a Designated Project is Likely to Cause Significant Adverse Environmental Effects under CEAA 2012 – Operational Policy Statement* (November 2015)); see also ***CEAA 2012***, s 19(1)(a), (b) and (d).
[130] ***Maloney***, Operational Policy Statement at Appendix II, section 4.0 ***CEAA 2012***, s 19(1)(b).

significant adverse environmental effects, and the Governor in Council's decision regarding whether those effects are justified in the circumstances, should that decision occur. *Vavilov's* requirements of justification, transparency and intelligibility therefore take on "heightened importance" with respect to this assessment.[131]

79. In *Pembina*, the applicants successfully challenged an EA Report on the grounds that it did not provide cogent rationale for the conclusion that the adverse effects of the Project's GHG emissions would be insignificant.[132] This Court explained the importance of the Report providing "clear and cogent articulation" of its reasoning as follows:

> …given that the Report is to serve as an objective basis for a final decision, the Panel must, in my opinion, explain in a general way why the potential environmental effects, either with or without the implementation of mitigation measures, will be insignificant. (…)
>
> By its silence, the Panel short circuits the two step decision making process envisioned by the CEAA which calls for an informed decision by a responsible authority. For the decision to be informed it must be nourished by a robust understanding of Project effects.[133]

80. In the present case, the Report concluded that the Project "is not likely to cause significant adverse environmental effects…as a result of GHG emissions", taking into account mitigation measures. The reasons provided are that (1) direct Project GHG emissions will be within regulatory limits and objectives, and (2) such emissions could be 30% less than other Newfoundland and Labrador offshore projects. The Report recommended one substantial mitigation measure for GHG emissions – that the Project be required to achieve net zero direct emissions, starting in 2050.[134]

81. This analysis is fundamentally flawed because it did not consider the effects of the Project's downstream emissions, including cumulative effects of the Project's GHG emissions, or explain how its downstream emissions and cumulative effects can be considered insignificant. Moreover, the line of reasoning is impossible to follow, given that federal regulatory limits and

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[131] ***Greenpeace Canada v Canada (AG)***, 2014 FC 463 at para 272 (rev'd on other grounds 2015 FCA 186).
[132] ***Pembina Institute for Appropriate Development v Canada (AG)***, 2008 FC 302 [***Pembina***].
[133] ***Pembina*** at paras 73, 78 and 79.
[134] **Final EA Report** (AR-1759, Tab 8).

the Project's emissions compared to other projects do not ensure the Project will not contribute to disastrous climate change. Indeed, that is the purpose of the EA.

82. Additionally, the requirement that the Project achieve net zero emissions by 2050 is manifestly incapable of rendering Project GHG emissions insignificant, as it does not apply to downstream emissions and does not impose any defined emissions reduction requirement until 2050, when the Paris target may be well out of reach.

83. During the comment period on the draft EA report, WWF-Canada expressed serious and detailed concerns about the proposed conclusion that the Project is not likely to cause significant adverse environmental effects. WWF-Canada's comments included the following:

> The BdN project would result in the production of millions of barrels of oil for decades to come, which simply cannot be reconciled with the urgent and critically important need to reduce greenhouse gas (GHG) emissions immediately and drastically in Canada and around the world. (…)
>
> It goes without saying that the emissions of every new fossil fuel project on earth are relatively small compared with national or global emissions. It is the cumulative emissions of all these combined projects that is having such a devastating impact. (…)
>
> In another landmark report this year, the International Energy Agency (IEA) concluded that there can be **no new oil, gas or coal development if the world is to reach net zero emissions by 2050**. Canada has made a commitment to reaching this goal yet continues to approve new fossil fuel expansion projects. Carbon emissions from the full production of currently operating oil and gas fields and coal mines across the world will lead to global temperature rise beyond 1.5°C and make it impossible to meet global obligations under the Paris Agreement. (…)
>
> The… EA report comes in the wake of a record-smashing heat wave in western North America that caused hundreds of heat-related deaths in B.C. alone and the deaths of up to 1 billion marine animals. (…)
>
> …the…[Agency] has nonetheless concluded that the project's emissions are not likely to cause significant environmental effects. In so doing, the Agency has ignored outright the IPCC's and the IEA's core messages - that every additional tonne of carbon dioxide emitted in the future will have a profound impact both on humanity and the natural world.[135]

[135] **Fitzgerald Affidavit**, Exhibit GF-20 (AR-0756 to 0757, Tab 3).

84. WWF-Canada also specifically estimated the Project's downstream emissions at 129 MT (based on presumed 300 million barrels of production).[136]

85. The Report failed entirely to engage with these submissions, or address the question of whether the Project's 129 MT of downstream emissions or the cumulative effects of the Project's GHG emissions in the context of dangerous climate change are likely to cause significant adverse environmental effects. All this is directly contrary to the requirements of *Vavilov* and s 19(1)(c) of the *Act*.[137]

86. In light of the foregoing constraints, the Report's failure to consider or assess the significance of downstream GHG emissions was neither justified nor justifiable. None of these gaps are addressed in the Minister's reasons or elsewhere in the record before the Minister.[138] This unjustified failure rendered the Report materially deficient and deprived the Minister of both the necessary information and jurisdiction to make the Decision under review.

d. In excluding marine shipping from the EA, the Agency failed to comply with its statutory obligation to *scope* and *assess* the project

87. The Agency has a statutory obligation under *CEAA 2012* to (1) accurately scope the Project and (2) assess the adverse environmental effects of all activities that are within the scope of the Project. In this case, the Agency unreasonably breached its statutory mandate by refusing to assess marine shipping, an activity "incidental" to the Project within the meaning of s 2(1) of *CEAA 2012*. The Agency's failure to accurately scope the Project resulted in a further breach of its statutory duties: neglecting to assess the adverse effects of marine shipping under ss 5 and 19 of the *Act*. The Agency's failure to properly scope and assess the Project renders its Report fatally flawed. It was unreasonable for the Minister to rely on the deficient Report.

i. The Agency improperly excluded marine shipping from the Project for the purposes of the EA

88. The definition of "designated project" contained in *CEAA 2012* "truly frames the scope of the [Agency's] analysis".[139] Included within the statutory definition of "designated project" at

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[136] **Fitzgerald Affidavit**, Exhibit GF-20 (AR-0757, Tab 3).
[137] ***Vavilov*** at paras 14, 125–128.
[138] **Decision Statement** (AR Tab 2); **Memo to Minister** (AR-1596, Tab 8).
[139] ***Tsleil-Waututh*** at para 393.

s 2(1) is any physical activity "incidental" to the designated project.[140] The definition requires the Agency to consider which activities are "incidental," and to conduct an EA that includes those incidental activities.

89. The Agency's failure in this case to scope and assess marine shipping in accordance with *CEAA 2012* is highly analogous to the Federal Court of Appeal's decision in *Tsleil-Waututh Nation v Canada* (***Tsleil-Waututh***), quashing the approval of a project because the EA had omitted to consider marine shipping as an "incidental activity."[141]

90. *Tsleil-Waututh* concerned a decision of the National Energy Board (**NEB**) to exclude marine shipping from the scope of its EA of the Trans Mountain Pipeline Expansion Project (**Trans Mountain project**). The NEB argued that, because it did not have regulatory oversight over marine vessel traffic, it could not assess its effects under *CEAA 2012*.[142] The Federal Court of Appeal disagreed. The Court found that marine shipping was *at least an element* of the project and as such, the NEB was obligated to explain its scoping decision and grapple with the relevant criteria.[143]

91. The same reasoning applies to the present case. It is clear from Equinor's description of the Project as an "offshore oil and gas development project" that marine shipping is *at least an element* of the designated Project.[144] Yet, nowhere does the Agency explain its decision to exclude marine shipping. As in *Tsleil-Waututh,* the Agency's reasons "do not well-explain its scoping decision, do not grapple with the relevant criteria and appear to be based on a rationale that is not supported by the statutory scheme."[145] A consideration of those criteria shows that marine shipping was an element of the Project to be considered in the EA.

92. In determining that marine shipping was an activity "incidental" to the Trans Mountain project, the Federal Court of Appeal relied on the Agency's "Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012" (the **Guide**).[146]

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[140] ***CEAA 2012***, at s 2(1), definition of "designated project"
[141] ***Tsleil-Waututh*** at para 409.
[142] ***Tsleil-Waututh*** at para 398.
[143] ***Tsleil-Waututh*** at paras 396–402.
[144] **Fitzgerald Affidavit**, Exhibit GF-2 (AR-0108, Tab 3).
[145] ***Tsleil-Waututh*** at para 409.
[146] Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012, (last modified: June 7, 2016) [**Guide**].

The Guide includes several criteria for proponents to consider in assessing whether an activity is "incidental" to the designated project. While the criteria do not constitute a legal test, the Federal Court of Appeal found them helpful in concluding that marine shipping was an "incidental" activity to the Trans Mountain project.[147] And, while the Guide cannot bind the Agency, the Agency must justify any departure from it.[148] The criteria are:

i. the nature of the proposed activities and whether they are subordinate or complementary to the designated project;

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; and,

v. the federal and/or provincial regulatory requirements for the activity.[149]

93. In *Tsleil-Waututh*, the Federal Court of Appeal found that the NEB did not advert to or grapple with these criteria. Had the NEB done so, it would have discovered that marine shipping was incidental to the designated project and should have been assessed under s 19 of *CEAA 2012*. The Court arrived at this conclusion after considering just two of the five criteria set out in the Guide: the complementary nature of marine shipping to the designated project, and the proponent's ability to "direct or influence" the carrying out of marine shipping activities.[150]

94. In the present case, the Agency similarly failed to grapple with the above criteria. No reasons were offered for this scoping decision until the final EA Report, which made only the bare conclusory assertions that "the Proponent explained that shipment and transportation of oil [sic] was outside the scope of the Project" and that Transport Canada is the lead regulatory agency for marine oil spill response. [151] Even if these assertions could be viewed as reasons for a

[147] ***Tsleil-Waututh*** at para 403.
[148] ***Alexion*** at para 58.
[149] **Guide**, at s 2.4, also see ***Tsleil-Waututh*** at para 403.
[150] ***Tsleil-Waututh*** at paras 403–410.
[151] **Final EA Report**, (AR-1845, Tab 8).

scoping decision (which is doubtful), they are circular and "fail to reveal a rational chain of analysis," or any analysis at all, falling short of the criteria for a reasoned explanation required by *Vavilov,*[152] and *Tsleil-Waututh.*

95. First, marine shipping is more than simply "complementary" to the designated Project, it is essential. The oil produced by the proposed offshore production facility must be transported off the facility using marine vessels. There is no other way to transport the oil off the facility. In fact, the EA Report acknowledges that the purpose of the Project "is to extract, produce, and *transport* offshore oil and gas resources to market"[153] [emphasis added].

96. Second, like Trans Mountain, Equinor also does not exert direct control over the transhipment of oil but has the ability to "direct or influence" the carrying out of marine shipping through contractual agreements with third-party tanker companies.[154] Equinor can also prevent vessels that fail to meet its "marine-vessel vetting requirements" from loading at its facilities.[155]

97. These factors were sufficient for the Federal Court of Appeal to find that marine shipping was incidental to the Trans Mountain project and was therefore required to be included within the scope of the project.[156] This finding applies equally to the present case. In failing to turn its mind to this question and consider and grapple with these criteria, the Agency similarly breached its statutory obligation to scope the Project.

98. In his *Guide to the Canadian Environmental Assessment Act* Rodney Northey explains that the term "incidental," while not defined in *CEAA 2012*, should be understood with reference to plain definitions of the term (such as activities that are "liable to happen") used by courts interpreting the *Act's* predecessor legislation.[157] Northey refers to a Supreme Court decision regarding licenses to export electrical power, *Quebec (AG) v Canada (AG)*, in which the Court determined that environmental effects of future generating facilities must be considered in the EA even though they would have been built in any event, since they were required to "serve the

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[152] ***Alexion*** at para 12.
[153] **Final EA Report**, (AR-1650 (top para), Tab 8).
[154] ***Tsleil-Waututh*** at paras 405–407.
[155] **Fitzgerald Affidavit,** Exhibit GF-2 (AR-0103 (2d para), Tab 3).
[156] ***Tsleil-Waututh*** at paras 403–409.
[157] Rodney Northey, ***Guide to the Canadian Environmental Assessment Act,*** 2018 ed (Toronto, LexisNexis Canada, 2018) [**Northey**] at pp 114–123 (Not available on-line – attached as Appendix A to this memorandum).

demands" of the export contract.[158] In other words, activities that serve the needs of a designated project, in whole or in part, are related to that project and must be considered within the scope of the project under *CEAA 2012*, even where they have an independent existence.[159] Marine shipping is such an activity: it serves the project's need to transport oil off the facility.

99. In this case, marine shipping does not merely "serve the demands" of the Project in a passive manner, as generating stations did in *Quebec (AG)*. Here, the Project actively increases the amount of shipping, with all its attendant impacts and risks, and the increase in shipping to transport oil from the offshore extraction facility is part of the Project proposal.[160] As the Supreme Court found in another case under the previous legislation, *MiningWatch v Canada*,[161] federal authorities are not afforded the discretion to narrow the scope of EAs below what is contained in the project description. Rather, the Court held that federal authorities are required to assess the project "as proposed".[162] Since Equinor's proposal includes and *requires* marine shipping activities, the Agency was required to scope the Project accordingly and did not have the discretion to ignore this component of the Project.

100. It follows that, in excluding marine shipping from the EA, the Agency unreasonably ignored its statutory mandate to scope the Project within the "specific constraints imposed by the governing legislative scheme" and produced a deficient Report that was inconsistent with the "text, context and purpose" of *CEAA 2012*.[163] In relying on the deficient Report, the Minister failed to meet a mandatory condition precedent for making the Decision under s 27(1).[164] In light of the relevant constraints, the Decision was not a reasonable exercise of the Minister's power and must be set aside.

101. To the extent the Agency relied on Transport Canada's position as the "lead regulatory agency" to exclude marine shipping from the EA, that reliance was unreasonable. There is no authority for the Agency to exclude an incidental activity from a designated project on the basis

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[158] ***Quebec (AG)*** at paras 56–62.
[159] **Northey** at page 117 (Appendix A).
[160] **Ginnish Affidavit**, para 18 and Exhibit GG-2 (AR-1569, Tab 6)
[161] ***MiningWatch v Canada (Fisheries and Oceans),*** 2010 SCC 2 [***MiningWatch***].
[162] ***MiningWatch*** at paras 39–42; Following this decision, Parliament amended the ***Canadian Environmental Assessment Act***, SC 1992 c 37 to include s 15.1. There is no comparable authority in *CEAA 2012*.
[163] ***Vavilov*** at paras 108 and 118.
[164] ***Vavilov*** at para 101.

that another agency or ministry regulates that activity. Excluding marine shipping from the scope of the EA for this reason is also inconsistent with the purposes of *CEAA 2012* enumerated in s 4(1), which include protecting components of the environment that are "within the legislative authority of Parliament" and ensuring that designated projects are "considered in a careful and precautionary manner to avoid significant adverse environmental effects."[165]

102. It was also unreasonable to exclude marine shipping because Transport Canada had previously conducted a Risk Assessment on shipping in 2010.[166] The Risk Assessment does not change the fact that marine shipping is a physical activity incidental to the Project. All activities incidental to the designated project must be scoped within the EA.[167] Further, even if the 2010 Risk Assessment was relevant to scoping requirements under *CEAA 2012*, which it is not, it is outdated,[168] and cannot, and was never intended to, substitute for an EA.[169]

ii. As a result of the unlawful scoping, the Agency failed to assess effects of marine shipping

103. Had the Project been defined to include marine shipping, the Agency would have been required to consider, and make findings, in respect of the factors enumerated in s 19(1) of the *Act*. In the present case, these include:

i. the environmental effects of marine shipping, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project, and any cumulative effects likely to result from the designated project in combination with other physical activities that have or will be carried out, including GHG emissions from marine shipping vessels and their effects on climate change;

ii. the significance of these effects;

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[165] ***Tsleil-Waututh,*** at paras 401–402; also see ***CEAA 2012***, s 4(1)(a)–(b).

[166] **Curran Affidavit #1**, Exhibit 30 (Equinor's Record).

[167] ***CEAA 2012***, s 2(1) definition of "designated project".

[168] **Curran Affidavit #1**, Exhibit 30 (Equinor's Record) [The Environmental Oil Spill Risk Assessment Project-Newfoundland was conducted in 2010 for the purpose of assessing and quantifying "the risk facing the south coast of Newfoundland over the next 10 years by the transportation of oil". Thus, the assessment is already outdated and will be long outdated by the time the project is operational].

[169] **Cloud Affidavit**, para 21 states that "a participant from Transport Canada at the meeting, Jason Flanagan, told me that Transport Canada "understood some of the shipping was considered under the Project EA", and that they "needed clarity from Equinor." (AR-1307, Tab 5).

iii. mitigation measures that are technically and economically feasible that would mitigate any significant adverse effects of marine shipping; and,

iv. alternative means of carrying out the designated project that are technically and economically feasible. This would include alternate shipping routes.[170]

104. In unlawfully excluding marine shipping from the scope of the Project despite it being an "incidental" activity, the Agency failed to assess any of these mandatory factors and therefore failed to provide the Minister with a "report" that would confer jurisdiction on the Minister to make a decision under ss 27(1) and 52(1) of the *Act.*

105. In *Tsleil-Waututh*, there was at least some consideration of the adverse impacts of marine shipping under the *National Energy Board Act* contained in the EA.[171] Even so, the Court found that the NEB had failed to assess these factors and therefore failed to provide the Minister with a 'report'. In the present case, the EA Report is devoid of any assessment whatsoever. Thus, the deficiency in the Agency's Report is even more pronounced. The Minister's reliance on the Report was unreasonable and must invalidate his Decision.

2. The Decision is invalid as the Crown failed to properly consult and accommodate MTI's member communities in respect of the Project

Standard of review regarding the duty to consult

106. The existence, scope and content of the duty to consult are all constitutional questions under s 35 of the *Constitution Act, 1982* and are reviewable on the correctness standard.[172] The adequacy of consultation is assessed on a reasonableness standard.[173]

107. In the present case, the standard of review is correctness regarding the Minister's failure to include marine shipping within the scope of consultation regarding the Project, and reasonableness regarding whether any consultation that did occur was meaningful and adequate.

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[170] ***CEAA 2012***, s 19(1).
[171] ***Tsleil-Waututh*** at para 410.
[172] ***Vavilov*** at para 55**;** ***Ermineskin Cree Nation v Canada (Environment and Climate Change)***, 2021 FC 758 at paras 82–83; ***Interlake Reserves Tribal Council Inc. et al. v. Manitoba*** 2022 MBQB 131 at para 72.
[173] ***Coldwater First Nation v Canada (Attorney General)***, 2020 FCA 34 at para 27.

a. The Minister's approval of the Project is invalid as the Crown erred in law by excluding marine shipping from consultation with MTI

108. No consultation of any kind was conducted with respect to marine shipping of oil and gas produced by the Project, even though it will transit toxic substances through the New Brunswick Mi'gmaq fishing grounds. The concerns of the New Brunswick Mi'gmaq regarding marine shipping were ignored and were never evaluated, discussed or accommodated, and the honour of the Crown was not upheld. Marine shipping was treated, without any consultation, consideration or analysis on the part of the Crown, as having been scoped out of the EA and consultation process. This was an error of law under *CEAA 2012*, and also a failure of the Crown's duty to consult the New Brunswick Mi'gmaq communities represented by MTI.

109. MTI, as representative, expressly advised the Crown of its concerns regarding the impacts of marine shipping on its communities' Aboriginal and Treaty fishing rights, protected by s 35 of the *Constitution Act, 1982*, and sought to have marine shipping included in the consultation process. The duty to consult is triggered when the Crown has knowledge of an Aboriginal right or title claim and contemplates conduct that might adversely affecting those Indigenous interests.[174] The statutory requirements of *CEAA 2012* and the Crown's knowledge of the Project's potential impacts on New Brunswick Mi'gmaq Treaty and Aboriginal fishing rights were sufficient to require the Crown to consult with MTI with respect to marine shipping.

110. Beyond the Agency's bare conclusory assertions regarding marine shipping discussed above, nothing in the record before the Court shows that the Minister, or any Crown representative, put their minds to the question of whether MTI should be consulted in relation to the impacts of marine shipping on their Aboriginal rights, even though MTI expressly requested consultation on this issue.[175] In fact, MTI's requests for consultation on this matter were refused

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[174] ***Haida*** at para 35.

[175] While Equinor's **Curran Affidavit #1**, paras 22, 37, 48 and 62 and **Curran Affidavit #2**, paras 80 and 84, (Equinor's Record), suggests an explanation as to why Equinor did not provide an analysis of marine shipping impacts in its EIS, the Certified Tribunal Record is silent on why marine shipping was absent from consultation and the EA. Any attempt by Canada to rely on Equinor's statements would be to inappropriately offer further reasons to bootstrap its decisions long after the Decision was made. See: ***Stemijon Investments Ltd. v Canada (AG)***, 2011 FCA 299, paras 40-42.

or ignored.[176] Instead of consulting, the Agency's final EA Report simply defers to the proponent's erroneous view that marine shipping was outside the scope of the Project.[177]

b. The Crown and Minister incorrectly determined the content of the duty to consult MTI to be low, when the duty fell within the high end of the spectrum

111. The content of the Crown's duty to consult Indigenous peoples varies along a spectrum ranging from low to high. To determine its obligations in a particular case, the Crown must assess what will uphold the honour of the Crown and effect reconciliation. The Crown's consultation obligations lie at the low end of the spectrum only in cases where the Indigenous group has a weak claim to Aboriginal title or a limited Aboriginal right, or where the risk of infringement of Aboriginal title or rights is minor.[178] Contrary to the views of the Agency,[179] none of these are true in the case of MTI.

112. A high degree of consultation, also known as deep consultation, is owed where, as here, a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high.[180] All of these factors are present with respect to MTI and the danger to their communities' established fishing rights flowing from the Project: The Mi'gmaq communities represented by MTI during the Bay du Nord EA process have judicially recognized and affirmed Aboriginal rights and did not cede their Aboriginal title to the Crown through the Treaties of Peace and Friendship.[181] The Mi'gmaq Aboriginal rights include a right to fish for food, social and ceremonial purposes[182] as well as a right to fish for a 'moderate livelihood' under the Treaties of Peace and Friendship.[183] In addition to established Aboriginal rights and constitutionally

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[176] **Cloud Affidavit**, para 11(b) and Exhibits MC-3 and MC-14 (AR-1302, 1349 and 1448, Tab 5).
[177] **Ginnish Affidavit**, para 23 and Exhibit GG-4 (AR-1569 and 1585, Tab 6).
[178] ***Haida*** at paras 43–45; ***Dene Tha' First Nation v Canada (Minister of Environment)***, 2006 FC 1354 at para 87; ***Nunatsiavut v Canada (AG)***, 2015 FC 492 ["***Nunatsiavut***"] at para 159.
[179] **Consultation Report**, AR-0499, Tab 8, 2(e) Annex II.
[180] ***Haida*** at para 44; ***Clyde River (Hamlet) v Petroleum Geo-Services Inc***, 2017 SCC 40 ["***Clyde River***"] at para 43; ***Nunatsiavut*** at para 159; ***Dene Tha' First Nation v British Columbia (Minister of Energy and Mines)***, 2013 BCSC 977 at para 116; ***Adam v Canada (Environment)***, 2014 FC 1185 at para 68; ***Squamish Nation v BC (Community, Sport and Cultural Development)***, 2014 BCSC 991 ["***Squamish***"] at para 154.
[181] **Ginnish Affidavit**, paras 7–10 (AR-1565 to 1566, Tab 6).
[182] **Ginnish Affidavit**, para 17 (AR-1567, Tab 6).
[183] **Cloud Affidavit**, Exhibit MC-5 (AR-1395, Tab 5); ***R v Marshall***, [1999] 3 SCR 456 at paras 7, 59.

protected treaties, MTI's member communities have a particularly significant cultural and spiritual relationship with Atlantic salmon, a species which is already under severe strain.[184]

113. Loss or diminution of a species of such importance to Indigenous peoples cannot be compensated in damages. In *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, the Supreme Court held that the Crown owed the Inuit applicants deep consultation, in part due to their "*established treaty rights* to hunt and harvest marine mammals" which were "extremely important to the appellants for their economic, cultural, and spiritual well-being" [emphasis in original].[185] In *Tsleil-Waututh,* where a First Nation asserted Aboriginal title to the land and "freestanding stewardship, harvesting and cultural rights," as MTI does here, the Crown assessed its duty to consult "on the deeper end of the consultation spectrum."[186] The Honour of the Crown required that MTI be treated no differently.

114. Atlantic salmon frequent the immediate Project area and migrate within the identified crude oil shipping routes and Mi'gmaq'i, the unceded territory of MTI's member communities whose fishing grounds are threatened by the Bay du Nord Project. MTI was and remains concerned about the risks the Project poses to Atlantic salmon, which are endangered and could be extirpated or rendered extinct by additional environmental threats. The loss of Atlantic salmon, a culturally and spiritually significant species to the Mi'gmaq, would irreparably harm the New Brunswick Mi'gmaq communities' Aboriginal fishing rights as well as their cultural and spiritual integrity.[187] In the circumstances, the level of consultation owed to MTI was high, and necessitated deeper consultation and accommodation, particularly with respect to the issue of shipping impacts to salmon and fishing rights.

c. The Crown and Minister unreasonably failed to adequately consult and accommodate MTI

115. By incorrectly scoping the assessment to exclude the impact of marine oil shipping on Mi'gmaq rights, the Crown fell far below the legal standard for reasonable consultation and accommodation. In *Tsleil-Waututh*, the Federal Court of Appeal discussed the relevant legal

[184] **Ginnish Affidavit**, para 19 (AR-1568, Tab 6).
[185] ***Clyde River*** at para 43 [emphasis in original].
[186] ***Tsleil-Waututh*** at para 20.
[187] **Ginnish Affidavit**, paras 7–10, 17, 19, 21 and Exhibit GG-3 (AR-1565 to 1569 and 1583, Tab 6); **Cloud Affidavit**, para 13 and Exhibit MC-6 (AR-1304 and 1405, Tab 5).

principles to be considered when deciding whether Canada failed to meet its duty to consult the Indigenous applicants. The Court in that case noted, citing *Haida*, that "[t]he common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised […] through a meaningful process of consultation", and that the duty to consult must ultimately maintain the honour of the Crown and effect reconciliation.[188] Consultation is not meaningful when impacted Indigenous peoples are limited to merely 'blowing off steam' while the Crown proceeds unilaterally and "excludes from the outset any form of accommodation".[189] In this case, the Agency and Minister did not uphold the honour of the Crown nor advance reconciliation with the New Brunswick Mi'gmaq communities.

i. The Crown and Minister failed to consult MTI regarding the crucial issue of potential impacts of marine shipping

116. Where the content of the duty to consult lies at the high end of the spectrum, as in the present case, the Crown may be obligated to formally integrate Indigenous peoples into the decision-making process and provide written reasons to demonstrate that their concerns were considered and to reveal the impact they had on the decision.[190] In this case, the Crown did none of these things with respect to marine shipping and gave it no consideration at all, failing to meet even the minimal obligations they would owe if a lower level of consultation had been required.[191]

117. At all stages of the EA, MTI advised the Agency of its concern regarding the potential impacts on its Treaty and Aboriginal rights regarding Atlantic salmon and several other culturally significant marine species, arising from marine shipping of oil from the Project site.[192] MTI provided comments on the draft EIS Guidelines, requesting that the issue of impacts to Aboriginal and Treaty rights be included as a factor to be considered in the EIS.[193] Following the release of the EIS, MTI advised that the EIS did not reflect its concerns regarding marine

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[188] ***Tsleil-Waututh,*** at para 496.
[189] ***Tsleil-Waututh,*** at para 499.
[190] ***Haida*** at para 44; ***Clyde River*** at para 47; ***Chippewas of the Thames First Nation v Enbridge Pipelines Inc***, 2017 SCC 41 ["***Chippewas***"] at para 47; ***Squamish*** at para 154.
[191] ***Haida*** at para 43; ***Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)***, 2005 SCC 69 at para 34; ***Squamish,*** at para 154.
[192] **Cloud Affidavit**, para 10 and throughout, and Exhibit MC-5 (AR-1298—1315 and 1395, Tab 5).
[193] **Cloud Affidavit**, para 11(b) and Exhibit MC-3 (AR-1302 and 1349, Tab 5).

shipping and that shipping impacts must be included in the assessment.[194] After reviewing the draft EA report, MTI again reiterated its concerns about the absence of any assessment of shipping impacts and requested further studies.[195] Instead of demonstrating that MTI's concerns were considered in its reasons, the Agency summarily rebuffed MTI, stating in the Report (incorrectly and without explanation or analysis) that crude oil shipping was "outside the scope" of the Bay du Nord Project.[196] The Minister likewise failed to address or correct this omission in his Decision.

118. Exacerbating the failure to consult on the critical issue of shipping impacts, the Crown and Minister further failed to engage with MTI with respect to the development of the EIS. The Agency failed to notify MTI of the draft EIS, and allowed MTI to comment only after it was finalized, which negated any opportunity for MTI to meaningfully engage in and influence the EIS process. MTI raised these concerns with the Agency but they were neither addressed nor remedied.[197] The Crown and Minister therefore failed to satisfy even the most basic and minimal requirements of the duty to consult. Their wholesale omission to engage with MTI on its repeated expressions of concern regarding shipping of crude oil from the Bay du Nord extraction site cannot be upheld as reasonable.

ii. The Crown and Minister failed to consult in accordance with MTI protocols, including with respect to Indigenous knowledge

119. The Crown and Minister further failed to properly consult with respect to the collection of, and respectful attention to, relevant Indigenous knowledge. Respect for such knowledge is a critical part of any legitimate consultation process, and failure to adequately address concerns about the absence or misuse of Indigenous knowledge can be fatal.[198] The Agency was empowered to consider "Aboriginal traditional knowledge" under *CEAA 2012*,[199], and the Proponent was obligated, under the EIS Guidelines, to incorporate Indigenous knowledge

[194] **Cloud Affidavit**, para 27 and Exhibit MC-14 (AR-1310, 1448 to 1450, 1468, 1471, 1486 and 1489 Tab 5).
[195] **Cloud Affidavit**, paras 30 to 33 and Exhibit MC-16 (AR-1311 to 1313, 1544 and 1551 Tab 5).
[196] **Ginnish Affidavit**, Exhibit GG-4 (AR-1585, Tab 6).
[197] **Cloud Affidavit**, paras 16–18, Exhibits MC-9 and MC-10 (AR-1305 to 1306, 1422 and 1425, Tab 5).
[198] ***Tsleil-Waututh,*** at paras 688–727.
[199] ***CEAA 2012***, s 19(3).

acquired by engaging with Indigenous groups.[200] As occurred in *Tsleil-Waututh,* in the present case the Agency failed to engage meaningfully with MTI's concerns that critical Indigenous knowledge was missing.

120. The Proponent and Agency relied exclusively on a 2018 Indigenous Knowledge Study that MTI advised was neither adequate nor specific to the Project. MTI provided this pre-existing study in an attempt to incorporate some Mi'gmaq knowledge into the EA process to mitigate its lack of funding and capacity, while maintaining the need for a study tailored to the Project conducted in accordance with the New Brunswick Mi'gmaq Indigenous Knowledge Study Guidelines.[201] The absence of a project-specific Indigenous knowledge study made it impossible for MTI, and in turn for the EA, to asses project-specific impacts on rights and to design appropriate accommodation measures for the project.[202] The Crown and Minister did not engage with these concerns on any level, contrary to their obligations to allow MTI to formally participate in the decision-making process and to provide MTI with written reasons to show that its concerns were considered and influenced the ultimate decision.[203]

121. The complete failure to consult MTI on the impacts of marine shipping, despite MTI's repeated requests to the Crown for consultation on this issue of critical importance to MTI's communities and the obvious links between marine shipping and the Project, and the failure to incorporate necessary Indigenous knowledge, was contrary to the Honour of the Crown and the Crown's duties under s 35 of the *Constitution Act, 1982,* contrary to law and unreasonable. The Applicants accordingly ask this Court to set aside the Decision approving the Project under *CEAA 2012*.

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[200] **Fitzgerald Affidavit**, Exhibit GF-6, s 4.2.2 (AR-0199 to 0200, Tab 3).
[201] **Cloud Affidavit**, para 26 and Exhibit MC-15 (AR-1309 and 1501, Tab 5).
[202] **Ginnish Affidavit**, para 25 (AR-1570, Tab 6); **Cloud Affidavit**, para 26 (AR-1309, Tab 5).
[203] ***Haida,*** at para 44; ***Clyde River*** at para 47; ***Chippewas,*** at para 47; ***Squamish,*** at para 154.

PART IV: RELIEF SOUGHT

122. The Applicants request the following Orders:

i. A declaration that the Decision is *ultra vires* and beyond the jurisdiction of the Minister, and therefore invalid, as it did not comply with the condition precedent in s 27(1) of the *CEAA 2012*;

ii. A declaration that the Decision was unreasonable as it did not comply with the requirements of *CEAA 2012* to consider the impacts of downstream emissions and marine shipping within the EA of the Bay du Nord Development Project;

iii. A declaration that the Decision was made contrary to s 35 of the *Constitution Act, 1982*, and therefore invalid, due to the Crown's failure to consult and accommodate the Applicant MTI on behalf of its Mi'gmaq communities;

iv. An order quashing the Decision;

v. An order that each party shall bear its own costs, regardless of the outcome of the application; and

vi. Such further and other relief as may be requested and that this Honourable Court may see fit to order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Halifax this 14th day of November, 2022

<original signed by James Gunvaldsen Klaassen>
James Gunvaldsen Klaassen,
Joshua Ginsberg, Ian Miron and Anna McIntosh
Counsel for the Applicants

TO: The Registrar
Federal Court of Canada
Halifax Local Office
Suite 1720 - 1801 Hollis Street, 17th Floor
Halifax, NS B3J 3N4

AND TO: MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and the ATTORNEY GENERAL OF CANADA
Mark Freeman
Department of Justice Canada

Atlantic Regional Office
5251 Duke Street, Suite 1400
Halifax, NS B3J 1P3
Tel: (902) 426-5761
Email: mark.freeman@justice.gc.ca

AND TO: Equinor Canada Ltd
Maureen Killoran, QC, Sean Sutherland
and John McCammon
Osler, Hoskin & Harcourt LLP
Suite 2700, Brookfield Place
225 – 6th Avenue SW
Calgary, AB T2P 1N2
Email: mkilloran@osler.com
ssutherland@osler.com
jmccammon@osler.com
kmarier@osler.com
jwalker@osler.com

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Appendix A

Rodney Northey, *Guide to the Canadian Environmental Assessment Act*, 2018 ed (Toronto, LexisNexis Canada, 2018) – This text is not available on-line and the relevant excerpts are attached here.

2018 Edition

Guide to the Canadian Environmental Assessment Act

Rod Northey, M.A., LL.M.

Gowling (WLG Canada) LLP

LexisNexis®

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Toll-Free Phone: 1-800-668-6481 • Toll-Free Fax: 1-800-461-3275
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COMMENTARY

Legislatively, the CEAA/12 focus on physical activities appears to broaden the application of federal EA compared to CEAA/92.[8] As set out above, CEAA/92 triggered EA for proposed "undertakings" related to "physical works": it did not apply to physical works themselves. CEAA/92 also applied to physical activities not relating to a physical work; however, this application was severely scoped by the requirement that such activities needed to be designated on Inclusion List Regulations. These regulations did not simply list designated physical activities; instead, they limited the scope of physical activities to those activities that were connected to specific regulatory approvals. CEAA/12 contains no similar legal restriction or regulations. Therefore, its focus on physical activities means that federal EA will apply to a broad variety of physical activities that were not part of CEAA/92.

The case law provides several precedents for applying federal EA to physical activities, with and without reference to physical works. The *LIA* excerpts are relevant not simply because they focus on activities and not just works, but also because they conclude that an EA should include any proposed activities contemplated by a proponent that may cause an adverse effect, not simply those activities that further the purpose or function of a specific project.

2) Meaning of "incidental"

Case law and panels provide numerous examples of terms used to connect various proposed actions to a "project" triggering EA. CEAA/12 introduces the term "incidental" to the terms of federal EA. The cases below are grouped for their reference to the various terms that appear relevant to interpreting CEAA/12.

(i) Project includes subsidiary or ancillary physical works

CEAA/92: *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1999] F.C.J. No. 1515, [2000] 2 F.C. 263 (F.C.A.)

¶20 The words "in relation to" are used in the definition of "project" in section 2 and in subsection 15(3) instead of the word "of". However, if the word "of" was used, the environmental assessment would be limited to the construction, operation, modification, decommissioning or abandonment of the physical work itself. Where a physical work is being constructed, there may be ancillary construction – for example, something as major as a coffer dam required to hold back water where the construction of a bridge required work on a river bed, or of a lesser order, such as the construction of temporary living quarters for construction workers. The words "in relation to" in context here do

[8] This point about CEAA/92 is meant to speak to the legislation alone, not the legislation and the present regulations. When legislation and regulations are combined, CEAA/12 clearly has narrower application than CEAA/92.

not contemplate any other construction, operation, modification, decommissioning, abandonment or other undertakings that has any conceivable connection to the project as scoped. Rather the words refer to construction, operation, modification, decommissioning, abandonment or other undertakings that pertain to the life cycle of the physical work itself or that are subsidiary or ancillary to the physical work that is the focus of the project as scoped.

(ii) Project includes accessory physical works

1996 Express Pipeline Project at 4

¶The scope of the Express Pipeline Project was determined by the Minister, in consultation with the Board, under section 15 of the CEAA. The scope of the Project was set out in an attachment to a letter from the Minister to the Board dated 13 September 1995 (Appendix III).

The principal project is the Project applied for by Express. Accessory physical works consist of the construction and operation of power supply facilities for the terminal and stations; access roads; and any upstream facilities that would need to be constructed to enable the principal project to proceed. "Accessory physical works" and "upstream facilities" were interpreted by the Panel in a ruling (Appendix IV) on 17 January 1996 based on the relevant sections of the CEAA. The Panel concluded that accessory physical works in the context of the Minister's correspondence, are physical works, more minor in nature than the principal project, that are in addition to the principal project and assist in its construction or operation. Upstream facilities were found to be, in the context of accessory physical works, any new upstream physical works that are required to be built to make possible the commencement of operation of the principal project. They would be minor in nature and be interdependent with it.

1996 Express Pipelines (NEB Ruling on Motion, 17 January 1996, found within the Panel Report at 186-7)

¶In the Panel's view, the use of the heading "Accessory Physical Works" must first be considered.

¶"Accessory", when used as an adjective, has been defined to mean "additional", "subordinate", "contributing", "subservient", or "of inferior importance or rank".

¶In the Panel's view, "accessory physical works", in this context, are physical works more minor in nature than the principal project, that are in addition to the principal project and assist in its construction or operation.

¶The Panel also notes that the first two types of accessory physical works are clearly within this interpretation; that is, the power supply facilities needed to operate the Hardisty Terminal, the stations, and the access roads required to construct and operate the Express pipeline.

¶The Panel considered the last component of "accessory physical works", "any upstream facilities that would need to be constructed to enable the principal

project to proceed" in the context of the aforementioned heading, "Accessory Physical Works", and the two identified accessory physical works.

¶In the Panel's view, the important words to be considered in this definition of the third type of accessory physical works are "need", "to enable", and "to proceed".

¶In the Panel's view, the word "need" in this context means "necessary" or "required to be constructed".

¶There must be a close interdependent relationship between the accessory facility and the principal project. The words "to enable" are used in the sense of "making possible or effective".

¶Lastly, the words "to proceed" mean "to go forward" or "to commence operation".

¶Therefore, the Panel is of the view that any "upstream facilities that would need to be constructed to enable the principal project to proceed" should be interpreted to mean any new upstream physical works (not activities) that are required to be built to make possible the commencement of operation of the principal project. These upstream facilities will be minor or subservient in nature to the principal project and be interdependent with it.

¶The Act does not contemplate, and the Minister cannot have intended, that any upstream facilities that may ever be constructed during the life of the pipeline and related to the oil that may eventually move on it should be within the scope of the project subject to assessment.

¶The Panel is of the view that her intention was to limit the accessory physical works to be considered within the scope of the project to those that are known and identifiable and that are required for the principal project to commence physical operation, not those that will be required in the future for its long-term economic health.

¶It follows that in light of the use of the word "upstream" in the description of the third type of accessory physical works, the Panel considers it clear that the Minister did not intend to include any downstream facilities within the scope of the project.

(iii) Ancillary activity triggering EA does not also trigger EA of main activity

EARPGO: *Canadian Parks and Wilderness Society v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] F.C.J. No. 1568, [1996] 1 F.C. 832 at 2 of 17 (F.C.)

¶These were applications for a declaration that Westmin Resources Limited be required to obtain a land use permit, pursuant to the *Territorial Land Use Regulations*, before engaging in exploratory mining activities on its claims site in the Yukon and an order quashing the decision to grant a permit to "walk" a bulldozer into the site. Westmin applied for a permit to drive a bulldozer across undeveloped federal lands to its mining claim site straddling the Bonnet Plume River, which had been nominated as a Canadian heritage river. The bulldozer

was to be used to build an airstrip, to facilitate the establishment of a camp and exploratory work on the mineral claims. Neither the Canadian Parks and Wilderness Society nor the Gwich'in Tribal Council were consulted before a land use permit was issued. The environmental screening report considered the effects of driving the bulldozer to the claim site, but not the activities in which the bulldozer would be engaged once it arrived.

...

¶(2) The issue of the adequacy of the EARP Review was somewhat moot since the bulldozer has completed its work and been removed from the site. The argument that directly related impacts must be considered as well as those flowing from the activity for which a permit was required had to be rejected. There was no necessary connection between the two activities herein. The bulldozer neither had to be used to facilitate exploratory activities nor did it have to be "walked" in. Nor could the argument that the cumulative effects must be considered be accepted. The cumulative effects doctrine was designed to ensure that the full impact of an activity is not minimized by dividing a proposal into several different applications and seeking to have the environmental impacts of each assessed without regard to the others. This case did not involve an attempt to circumvent an effective review process by having the project evaluated piecemeal. It was simply a situation where an ancillary aspect of a developmental activity was subject to review because a government issued permit was required, while the main activity was not.

The screening report did not consider the fact that the Bonnet Plume had been nominated and accepted as a heritage river candidate, a relevant factor which should have been considered. The lack of notice to the Canadian Parks and Wilderness Society and the Gwich'in Tribal Council was also relevant, but an order declaring the permit invalid would not be meaningful because the bulldozers have already done their work and been removed.

(iv) Facilities related if construction of one serves the needs of the other, in whole or part

***Quebec (Attorney-General) v. Canada (National Energy Board)*, [1994] S.C.J. No. 13 at paras. 56-58, 62, [1994] 1 S.C.R. 159 (S.C.C.)**

¶56 I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. ...

...

¶57 ... [S]uch a task is particularly difficult in this case, given the Board's finding that, although existing facilities were not sufficient to service the contracts, the new facilities contemplated would have to be built in any event to supply increasing domestic needs. The approval of the application for the

licences would therefore simply have the effect of accelerating construction of these facilities, and the environmental effects of the acceleration alone were found not to be significant. Nevertheless, in my opinion, the Board did not err in giving some weight to the environmental effects of the construction of the planned facilities. To say that such effects cannot be considered unless the Board finds that, but for the export contracts, the facilities would not be constructed, is to create a situation in which the construction of a generating facility may be contemplated solely for the purpose of fulfilling the demands of a number of export contracts, but because no one export contract can be said to be the cause of the facility's construction, its environmental effects will never be considered.

¶58 A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

¶62 ... If in applying this Act [*National Energy Board Act*] the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects.

(v) Undertakings are related if one undertaking is linked or interdependent with other undertaking such that one has no independent utility from the other

***Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [1998] F.C.J. No. 976 at paras. 31-37, 28 C.E.L.R. (N.S.) 97 at 112-115 (F.C.T.D.), affd [1999] F.C.J. No. 1515, [2000] 2 F.C. 263 (F.C.A.)**

¶31 Bridges are singularly useless structures when taken in abstract. They serve no useful purpose but to facilitate getting from someplace to someplace else over an impediment, usually water, that separates the places. In American jurisprudence, the independent utility of a proposed work or project appears to constitute a critical factor in determining its scope. It appears to have crystallized in what has come to be known as the "independent utility test".

¶32 In Thomas v. Peterson, the Court had before it an application to enjoin construction of a timber road in a former national forest, a roadless area, a situation not dissimilar to that before me when it is considered that the bridges constituting the projects here under review were to form integral parts of a forestry road. ...

¶33 Judge Sneed continued at page 759:

> We conclude, therefore, that the road construction and the contemplated timber sales are inextricably intertwined, and that they are "connected actions" within the meaning of the CEQ regulations.
>
> ...

> ... The same principle is embodied in standards that we have established for determining when a highway may be segmented for purposes of NEPA. In Daly v. Volpe . . . we held that the environmental impacts of a single highway segment may be evaluated separately from those of the rest of the highway only if the segment has "independent utility".

¶34 While this concept of "independent utility" has apparently not been directly reflected in judicial authority from Canadian courts dealing with environmental assessment issues, it is at least implicitly reflected in the following passage from the reasons of Mr. Justice Iacobucci on behalf of the Court in Quebec (Attorney General) v. Canada (National Energy Board):

> I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's view is emphasized by the detailed regulatory process that has been created. ...

The independent utility concept or principle is much more directly reflected in a publication entitled the Canadian Environmental Assessment Act: Responsible Authorities' Guide prepared by the Canadian Environmental Assessment Agency (the "Guide"). ...

The guide interprets the legal framework established by the Act and provides guidance to responsible authorities (RAs) for conducting environmental assessments (EAs) of projects in compliance with the Act. It is designed for those within federal departments and agencies who are required to plan, manage, conduct, review, or otherwise participate in federal environmental assessments.

...

¶36 At page 18, under the heading "The principal project/accessory test", the Guide continues:

> The Act does not provide direction to RAs in determining which physical works should be included within the scope of a project. To ensure consistency in scope of the project determinations, RAs should consider applying the "principal project/accessory" test. ...
>
> ... To determine what is accessory to the principal project, the RA should apply the following two criteria:
>
> interdependence: If the principal project could not proceed without the undertaking of another physical work or activity, then that other physical work or activity may be considered as a component of the scoped project.
>
> linkage: If the decision to undertake the principal project makes the decision to undertake another physical work or activity inevitable, then that other physical work or activity may be considered as a component of the scoped project.

¶37 The foregoing guidance reflects the "independent utility" principle enunciated in Thomas v. Peterson, supra, particularly in determining the scope

of the project that will form the subject of an environmental assessment. [Notes and emphases omitted]

(vi) Project includes associated activities

See: CEAA/92: *Labrador Inuit Assn. v. Newfoundland (Minister of Environment and Labour)*, [1997] N.J. No. 223, 152 D.L.R. (4th) 50 at paras. 42-44, 57-60 (Nfld. C.A.)

(vii) Land use decision to close airstrips not an undertaking in relation to a physical work

See: CEAA/92: *Bowen v. Canada (Attorney General)*, [1997] F.C.J. No. 1526, [1998] 2 F.C. 395 (F.C.T.D.) at 18 of 26

(viii) Decommissioning of airstrips is an undertaking in relation to a physical work

See: CEAA/92: *Bowen v. Canada (Attorney General)*, [1997] F.C.J. No. 1526, [1998] 2 F.C. 395 (F.C.T.D.) at 18-19 of 26

(ix) Undertakings within long-term hotel plan not related under CEAA/92 where one undertaking does not require construction of other undertakings and does not have common impacts with other undertakings

See: CEAA/92: *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [1999] F.C.J. No. 1422, 175 F.T.R. 122 (F.C.T.D.), affd [2001] F.C.J. No. 18, [2001] 2 F.C. 461 (F.C.A.)

COMMENTARY

CEAA/12 places great attention on the term, "incidental", within this definition. This term is a connecting term in that it sets out the connection between a designated physical activity and other physical activities.

This term differs from the CEAA/92 connecting terms, "in relation to", "in respect of", "relating to".[9] It is instructive to review what occurred in the implementation of CEAA/92 regarding the interpretation of these terms. The

9 Another similar term is "associated". This term was used by an early panel review in PANEL 17 at 17-19 as follows: "In its 1979 report, the Panel requested information on a number of associated projects, one of which was the proposed Dempster Lateral. While this matter was dealt with by the Proponent at the technical hearings in June, 1981, it was a subject of comment by a number of intervenors. The Panel must consider the implications of the connection of the Dempster Lateral, although it does not have a mandate to assess the environmental impact of that project. This connection is of particular significance because at present there are two alternative routes under consideration for that portion of the Dempster Lateral route from Braeburn (60 kilometers [*sic*] north of Whitehorse) to the point of connection with the Alaska Highway Gas Pipeline project."

first point is that, in themselves, these CEAA/92 terms were unconstrained: they encompassed the broadest possible connection between different physical things. In physical terms, a big project could be "related" to a small project, and, equally, a small project could be "related" to a big project. Similarly, one project could be "related" to a nearby project,[10] but equally it could be related to a distant project. The strongest expression of this perspective on these terms was the NEB Supreme Court of Canada case decided under EARPGO, but released during the legislative development of CEAA/92. This case concerned an NEB export licence for electricity leaving Quebec for the United States. The controversy arose because the export licence was tied to a new power line at the Canada-USA border and the NEB sought to examine the environmental effects "upstream" of the power line including the hydroelectric facilities to be constructed in the future to serve the export, among other needs. After the Federal Court of Appeal concluded that any environmental assessment was limited to the effects of the new power line at the border, the Court reversed and concluded that NEB jurisdiction included authority to review the effects of the upstream power generation facilities as they were related to the export.

The second point is that most courts and boards interpreting CEAA/92 did not address the policy expressed by these terms. Instead, virtually all guidance and decision-making on CEAA/92 inserted different terms that advanced a different policy. These alternative terms included "principal", "accessory", "subsidiary", "associated" and "ancillary". The policy advanced by the alternative terms was that the physical work triggering the EA was the *primary* work and any other "undertaking" was legally tied to that work only if it was *secondary* to that work. The benefit of this interpretive policy was to have CEAA/92 avoid the danger identified in the *Oldman*[11] decision whereby federal EA would act as a constitutional "Trojan Horse" such that federal approval of a small work fitting within the meaning of a CEAA/92 project would trigger the federal EA of a bigger project. Instead, by applying some version of a primary/secondary interpretive principle, most CEAA/92 decision-makers ensured that limited federal approvals would not trigger federal EAs of major projects.

The third point is that there were two notable exceptions to this consensus on CEAA/92. The first exception was the judgment of Gibson J. in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*.[12] Justice

10 See, for example, an early panel view on how proximity made one project an "integral part" of the EA of another project: see PANEL 14 at 46-47, where the panel provided: "The gas production facilities would be operated by Panarctic Oils Ltd., rather than the Arctic Pilot Project consortium. It was the Panel's view, nevertheless, that the Drake Point facilities should be considered as an integral part of the environmental assessment review of the Arctic Pilot Project. Accordingly, the scope of the review was identified by the Panel in its Guidelines for the Completion of the Environmental Assessment for the Arctic Pilot Project (September 1979) to include the gas wells, gas gathering and ancillary facilities associated with the Drake Point fields."

11 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3 (S.C.C.).

12 [1998] F.C.J. No. 976, 28 C.E.L.R. (N.S.) 97 at 112-15 (F.C.T.D.), affd [1999] F.C.J. No. 1515, [2000] 2 F.C. 263 (F.C.A.).

Gibson endorsed the test of "independent utility" from U.S. jurisprudence on federal EA. The key point to this test is that it had no primary/secondary foundation; instead, its foundation was whether actions were "connected", based on terms from U.S. EA regulations. He also referred to guidance from the Canadian Environmental Assessment Agency ("Agency") that advocated a principal/accessory test, but also advanced two further policy tests that departed from the primary/secondary scheme. These tests asked whether there was "interdependence" or "linkage". Importantly, the Federal Court of Appeal expressly overruled Gibson J. on this topic, finding that neither the U.S. "independent utility" test nor the Agency guidance was "helpful" to interpret CEAA/92. Further, this court concluded that: (1) the term "in relation to" should be replaced by the term, "of"; and (2) the words "in relation to" encompassed undertakings that were "subsidiary or ancillary" to the physical work that is the focus of the project: see paras. 20-22 (F.C.J.). This 1999 case thus implemented a primary/secondary test.

This 1999 test ruled CEAA/92 jurisprudence for more than 10 years. In 2010, however, the Supreme Court of Canada overruled a key aspect of this test in *MiningWatch*.[13] In this case, contrary to the policy behind all of the primary/secondary decision-making, the Court concluded that: (1) the requirement for a *Fisheries Act* authorization for part of a mining project triggered EA of the entire mining project; and (2) there was no federal discretion to scope the project down from the mining development as a whole to solely the works that required the fisheries habitat authorization.

Following these exceptions, however, Canada amended CEAA/92 later in 2010 to overrule the second aspect of the *MiningWatch* case such that the federal Minister of the Environment obtained discretion through a new section 15.1 to limit the scope of a project to "one or more components of the project".[14]

CEAA/12 proposes a new path. It has explicitly replaced the broad, open-ended terms of CEAA/92 (*e.g.*, "in relation to"). At the same time, it has introduced a new term. It is not clear whether or how far the new terminology advances the primary/secondary distinction. In English, the new term is "incidental".[15] Importantly, the English term has no precedent in CEAA/92 decision-making. In non-legal English, the term "incidental" has two relevant and not identical meanings.[16] The first is that of something that has "a minor role in relation to a more important thing" – this is clearly aligned with a primary/secondary scheme. However, the second meaning of "incidental" refers to something "liable to happen". This meaning is more open-ended than the first. Equally, it does not clearly fit within the primary/secondary scheme. Instead, it resembles the terms used by the Supreme Court of Canada in the 1994 *NEB* case

13 *MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] S.C.J. No. 2, [2010] 1 S.C.R. 6 (S.C.C.).

14 S.C. 2010, c. 12, s. 2155.

15 In French, the new term is "accessoires".

16 See, for example, the *Concise Canadian Oxford Dictionary*, 2d ed., at 674.

and also the concepts of "interdependence" and "linkage" referenced by Gibson J. in *Sunpine* from Agency policy guidance on CEAA/92.

These different meanings for the new CEAA/12 terminology make relevant the array of decisions excerpted above from EARPGO and CEAA/92 on this topic.

2.1.3 INTERPRETATION ISSUES RELATED TO DEFINING THE PROJECT

Summary of Principles

1) Federal EA purposes require triggering entire project as proposed.
2) Broad interpretation of the application of the CEAA/92 is mandated when provisions are read together with its preamble and purposes.

Principles

1) Federal EA purposes require triggering entire project as proposed

***MiningWatch Canada v. Canada (Fisheries and Oceans)*, [2010] S.C.J. No. 2, [2010] 1 S.C.R. 6 at paras. 40-42 (S.C.C.)**

¶40 ... The Act assumes that the proponent will represent the entirety of the proposed project in relation to a physical work. However, as noted by the government, a proponent could engage in "project-splitting" by representing part of a project as the whole, or proposing several parts of a project as independent projects in order to circumvent additional assessment obligations. Where the RA or Minister decides to combine projects or to enlarge the scope under s. 15(2) or (3), it is conceivable that the project as proposed by the proponent might have only required a screening. However, when the RA or Minister considers all matters in relation to the project as proposed, the resulting scope places the project in the CSL. Where this occurs, the project would be subject to a comprehensive study.

¶41 I should note that while, for federal environmental assessment purposes, a project will include the entire project as proposed, the RAs can, and should, minimize duplication by using the coordination mechanisms provided for in the Act. In particular, federal and provincial governments can adopt mutually agreeable terms for coordinating environmental assessments (s. 58(1)(c) and (d)). Full use of this authority would serve to reduce unnecessary, costly and inefficient duplication. Cooperation and coordination are the procedures expressed in the CEAA (see s. 12(4)).

¶42 In the present case, the federal environmental assessment should have been conducted for the project as proposed by Red Chris. The proposed project was described in the CSL. Therefore, the requirements of s. 21 applied. The RAs were free to use any and all federal-provincial coordination tools available, but they were still required to comply with the provisions of the CEAA pertaining to