Federal Court Cour fédérale

Date: 20230616

Docket: T-938-22

Citation: 2023 FC 849

Ottawa, Ontario, June 16, 2023

PRESENT: The Honourable Mr. Justice Zinn

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

JUDGMENT AND REASONS

Introduction

[1] Under review is the decision of the Minister of Environment and Climate Change [the Minister] approving the environmental assessment report [the Report] of the Bay du Nord Development Project [the Project] of the Impact Assessment Agency of Canada [the Agency] in

accordance with the requirements of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [the CEAA or the Act]. The Minister, after considering the Report and the implementation of mitigation measures considered appropriate, determined that the Project is not likely to cause significant adverse environmental effects referred to in subsection 5(2) of the CEAA [the Decision]. The Minister released his Decision and the Report together on April 6, 2022.

[2] The Applicants' core submission is that the decision is unreasonable because it is based on the Report that fails to consider the impacts of downstream Greenhouse Gas emissions [GHG] and marine shipping of oil from the Project. Additionally, they submit that the Decision is invalid as there was not proper consultation and accommodation with Mi'gmawe'l Tplu'taqnn Incorporated [MTI] members on marine shipping.

[3] It is not the role of this Court to assess whether, from a global perspective given the need to limit GHG emissions, the Minister's decision was wise or in keeping with Canadian policy objectives. It is our role to review whether the Decision meets the test of reasonableness, not whether it is the right decision.

[4] Justice Brown in *Alvarez v. Canada (Citizenship and Immigration)*, 2023 FC 541 at para 24, summarized the direction of the Supreme Court of Canada regarding the proper role of this Court when applying the reasonableness standard:

> The applicable standard of review is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*,

2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[emphasis added by Justice Brown]

The Parties

[5] Sierra Club Canada Foundation [Sierra Club] and Équiterre are environmental non-profit organizations engaged in public education and advocacy regarding matters relating to oil and gas development and climate change. The MTI is a not-for-profit organization representing eight Mi'gmaq communities in New Brunswick.

[6] The Minister is responsible for the administration of the CEAA and made the Decision under review. The 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. Alternatively, he is said to be named as Respondent pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106.

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

The Project

[8] The Project involves the development of two significant discovery licences issued by the Canada-Newfoundland and Labrador Offshore Petroleum Board, into an offshore oil production project located in the Flemish Pass Basin of the northwest Atlantic Ocean. The two significant discovery licenses (Bay du Nord and Baccalieu) comprise the core Bay du Nord development area, which is located about 500 kilometres east of St. John's, Newfoundland and Labrador.

[9] The Project is to extract, produce, and transport the offshore oil and gas resources to market. The Project area is comprised of two temporal components of development: 40 wells within five locations in the core Bay du Nord development area; and up to 20 future wells in undefined locations outside of the core area. Equinor estimates that the Project has a recoverable 300 million barrels of crude oil and an operational life span of approximately 30 years.

[10] The Project will consist of subsea infrastructure, including a mooring system on the seafloor; a floating production storage and offloading installation; and up to two drilling installations designed for year-round operations in deep water. Support vessels, supply vessels, and helicopters will travel between the drilling areas and existing land-based facilities in Newfoundland and Labrador. Produced oil will be transported and offloaded by shuttle tankers to an existing transhipment facility in Whiffen Head on the island of Newfoundland or directly to international markets.

Environmental Assessment Process

[11] On June 13, 2018, Equinor provided the Agency with a description of the Project. The Agency then posted a notice on its Registry indicating that it was considering whether an Environmental Assessment is required for the Project. It posted a summary of the project description provided by Equinor and notice of a 20-day public comment period on the Project and its potential for causing adverse environmental effects.

[12] Relevant to the issues to be analyzed, the Project description provided by Equinor and made available to the public for comment, made no reference to downstream GHG emissions. It

did contain a reference to marine shipping, indicating that crude oil will be shipped from the Project site via shuttle tankers to an existing transhipment facility (at the Port of Whiffen Head, Newfoundland) or directly to market using international shipping lanes. However, the transhipment of crude oil was not included by Equinor in the scope of the Project.

> The Project includes the offloading of crude to shuttle tankers and their movement and hook-up/disconnect within the Project safety zone. The transhipment of crude is not included in the scope of the Project. Equinor recognizes that should an EA be required under CEAA 2012, the scope of the Project will be set by the CEA Agency.

The “Project safety zone” is the area within 500 metres of the outer edge of the floating production unit for storage and offshore offloading anchor pattern.

[13] Neither Sierra Club nor Équiterre commented on the Project description.

[14] In addition to publishing the Project description on its website and seeking comments from the public, the Agency and Equinor reached out to Indigenous groups requesting comments on the Project description.

[15] MTI responded on July 13, 2018, raising concerns of potential impacts on traditional fishing and harvesting rights and on commercial fisheries:

> A number of culturally significant species, including Atlantic salmon, North American right whale, and Atlantic bluefin tuna, which we fish commercially or otherwise rely on for food or other purposes, migrate throughout our territory and utilize the off-shore waters of Newfoundland, and are potentially affected by this project.

[16] As is noted by Equinor, MTI "expressed no concerns over downstream GHG emissions or Marine Transhipment." Indeed, the focus of its brief comments was that the Agency ought to require an Environmental Assessment of the designated Project [and] that the Crown "require Equinor Canada to incorporate the impacts of the project to our Aboriginal and Treaty rights, including our Mi'gmaq Indigenous Knowledge into the development of the Environmental Assessment for this Project."

[17] On August 9, 2018, the Agency determined that an Environmental Assessment was required under the CEAA and it posted a Notice of Commencement for the Project Environmental Assessment and draft Environmental Impact Statement [EIS] Guidelines [Draft EIS Guidelines] available on the Agency's website for comment. The Draft EIS Guidelines identify the scope of the Project and the minimum information requirements for Equinor's EIS.

[18] The scope of the Project was described in the Draft EIS Guidelines as follows:

> On June 13, 2018, Equinor Canada Ltd., the proponent of the Bay du Nord Development Project provided a project description to the Agency. Based on this project description, the Agency has determined that an EA is required under CEAA 2012 and will include the following project components and activities:
>
> - Offshore construction, installation, hook-up and commissioning, operation, and maintenance of a floating production installation and associated subsea infrastructure for crude oil production, storage, export, gas management, water injection and the management of produced water and other wastes and emissions.
> - Drilling of 10 to 30 wells, with a combination of production and injection wells, either drilled using templates (multiple wells drilled in one location) or at individual well locations. Drilling may involve the use of one or more dynamically-positioned mobile offshore drilling units (MODUs), which may

operate concurrently, suitable for drilling throughout the year and under the environmental conditions of the project area.

- Crude oil shipping including movement, hook-up/disconnect and offloading of crude oil to shuttle tankers within the Project safety zone.
- Supporting survey activities specific to the production project under consideration.
- The loading, refuelling and operation of marine support vessels (i.e. for re-supply and transfer of materials, fuel, and equipment and on-site safety during the life of the Project) and transport between the supply base and the project area) and helicopter support (i.e. for crew transport and delivery of light supplies and equipment) including transportation to the project area.
- Decommissioning, including well decommissioning which involves plugging and securing of the wells and removal of infrastructure.
- Potential future development opportunities specific to the production project under consideration including the installation of additional subsea templates and flowlines.

[19] MTI submitted comments to the Agency on the Draft EIS Guidelines. MTI sought changes or clarifications to: section 2.3 (Engagement with Indigenous groups); section 3.2 (Factors to be considered); section 4.2.2 (Community knowledge and Indigenous knowledge); section 5 (Engagement with Indigenous Groups and Concerns Raised); and section 7.1.8 (Indigenous Peoples).

[20] On September 26, 2018, the Agency issued the final “Guidelines for the Preparation of an Environmental Impact Statement to the Proponent” [the final EIS Guidelines]. The scope of the Project in the Final EIS Guidelines read exactly as it had in the Draft EIS Guidelines. The scope

of the Project did not include downstream GHG emissions or marine shipping of crude oil outside the Project safety zone.

[21] Sierra Club responded only to the Draft EIS Guidelines and did so under cover of a letter dated September 13, 2020. In her cover letter, Gretchen Fitzgerald described that its "comments largely focus on GHG emissions associated with the project and oil spill response capacity." Specifically, she states that their comments that "would improve the EIS and Summary document to truly encapsulate these risks to climate and the environment, focussing on the areas of:

- the proponent's approach to evaluating impacts;
- accurately and adequately assessing GHG emissions associated the project;
- potential markets for oil product; and
- oil spill preparedness and proposed response."

[22] The topic of downstream GHG emissions was also described therein:

> The Bay du Nord project would lock in production of fossil fuels for three decades. Canada has committed to meeting and exceeding its 2030 GHG emission targets and to becoming carbon neutral by 2050. Approving the expansion of the oil and gas industry that will contribute to the global production gap and lessen our capacity to meet provincial and federal climate commitments.

[23] On August 12, 2020, the Agency convened an information and engagement session with Indigenous groups. During the session, questions were raised about the shipment of the crude oil from the Project. The notes of the meeting indicate that Equinor responded:

> There are two options: transport to the transshipment facility (not for processing), or transport directly to market. Regardless of where the oil is shipped, the transportation of oil is not considered part of the project.

[24] The summary of that meeting indicates that MTI asked: "Is there information in the EIS on the shipping/transporting of oil and potential spills that could occur during transport?"

[25] Equinor responded:

> A vessel-to-vessel collision scenario was assessed in accidents and malfunctions. There was no consideration of spills occurring from vessels that are outside the safety zone of the Project. The federal government did an assessment of the risks associated with transporting oil and oil products several years ago and the report is mentioned in the EIS.

Transport Canada responded: "Within the exclusive economic zone (EEZ), all shipping is covered under the Canada's Safety and Security' regime and spill response is required." It referenced its Environmental Oil Spill Risk Assessment Project – Newfoundland, the purpose of which was to "assess and quantify the risk facing the south coast of Newfoundland over the next 10 years by the transportation of oil and oil products, either as cargo or as fuel, by commercial vessels."

[26] On September 17, 2020, MTI provided a technical review and assessment of the EIS to the Agency raising a concern about the shipment of the crude oil:

> **Comment 11:** *Section 16.4.3 – Subsurface Blowout Model Results* – It appears that although the EIS includes assessment of vessel traffic for general operations of the Project, it does not include the marine shipping of oil on tankers into Canadian waters. Nor does it include any modelling around the potential spill trajectories if a tanker were to spill along any of its routes within Canadian waters.

> MTI remains very concerned about oil tanker shipping and the potential for accidental release into the aquatic environment to impact fish and fish habitat.
>
> **Recommendation 11:** The EIS should include a robust assessment of the marine shipping by oil tanker from the Project site to shore facilities. Modelling of various potential release sites along these shipping routes would provide a greater understanding of the potential area that may be affected if a ship were to accidentally release on route from the extraction site to onshore facilities.

[27] On October 26, 2020, the Agency sent further information requests to Equinor in part based on MTI's comments. Equinor responded to the requests on December 9, 2020. The response was posted for review by Indigenous groups and the public. None of these requests included the concern raised regarding the shipment of crude oil, presumably because it was not within the scope of the project.

[28] On August 9, 2021, the Agency released its draft Report and potential conditions, inviting comments. On September 14, 2021, MTI responded stating that the review timelines and funding to review and comment on the draft Report were inadequate.

[29] On April 1, 2022, the Agency submitted its final Report to the Minister for decision, which issued on April 6, 2022.

Issues

[30] The Applicants raise two issues:

1. Whether the Minister's Decision is unreasonable as it relies on an environmental assessment report that is materially deficient in that it failed, without justification, to consider the impacts of downstream GHG emissions and marine shipping; and
2. Whether the Minister's Decision is invalid as he 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.

[31] Prior to examining these issues, the Court will deal with two issues raised by the Respondents. First, the Minister objects to some of the documents that the Applicants have included in their Record. Second, Equinor submits that this application for judicial review ought to be dismissed due to the Applicants' delay in raising the issues of downstream GHG emissions and marine shipping.

The Applicants' Evidence

[32] The Minister submits that the Applicants improperly rely on evidence "that was not before the Agency or the Minister and is inadmissible as extrinsic evidence, or that is opinion or

argument." It specifically references the following as inadmissible: Exhibits GF-21 to GF-26 to the Affidavit of Gretchen Fitzgerald, and Exhibits MAV-11 to MAV-19 to the Affidavit of Marc-André Viau.

[33] Exhibits GF-21 and GF-22 are web pages from Sierra Club's website directed to members and the public encouraging them to contact the Minister and others to express opposition to the Project. Exhibits GF-23 and GF-24 deal with a PR campaign run by Sierra Club called Phone Zap, encouraging calls to politicians expressing opposition to the Project. Exhibits GF-25 and GF-26 are from Sierra Club's website and reproduce emails to the Prime Minister and the Minister describing the calls their offices received and reiterating the position Sierra Club takes that the Project should not be approved. I agree with the Respondent that none of these were before the Minister or if they were, they express opinions on the Project as a whole and have no bearing on the issues before the Court.

[34] Exhibits MAV-11 and MAV-12 are web pages from Équiterre's website expressing its opposition to the Project. Exhibit MAV-13 is a reproduction from Équiterre's website of an email sent to the Minister encouraging him not to approve the Project. Exhibit MAV-15 is from Équiterre's website and is a reproduction of an email to Cabinet expressing opposition to the Project. Exhibit MAV-16 is from Équiterre's website encouraging the public to contact the Minister and others to express opposition to the Project. Exhibits MAV-17 to MAV-19 are copies of news articles concerning the Project. I agree with the Respondent that none of these were before the Minister or if they were, they express opinions on the Project as a whole and have no bearing on the issues before the Court.

[35] All of the Exhibits that are objected to are stricken from the record as irrelevant.

Dismissal for Delay

[36] The application for judicial review filed on May 6, 2022, alleges that the Minister's decision is unreasonable because it relies on a Report that is deficient in that its scope fails to include marine shipping and the impacts of downstream GHG emissions.

[37] Equinor asserts that the Applicants are raising these issues for the first time in this application, and did not raise them during the long process leading up to the issuance of the Report by the Agency:

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

[38] The issue of marine shipping was raised specifically by the MTI. At the facilitated discussion of August 12, 2020, a question was asked: "Is there information in the EIS on the shipping/transporting of oil and potential spills that could occur during transport?" Equinor's response was as follows:

> A vessel-to-vessel collision scenario was assessed in accidents and malfunctions. There was no consideration of spills occurring from vessels that are outside the safety zone of the Project. The federal government did an assessment of the risks associated with

> transporting oil and oil products several years ago and the report is mentioned in the EIS.

[39] This was prior to the issuance by the Agency of its Final EIS Guidelines on September 26, 2018, setting out the final position regarding the scope of the Project.

[40] Similarly, Sierra Club, just prior to the Final EIS Guidelines, provided comments stating that its "comments largely focus on GHG emissions associated with the project and oil spill response capacity."

[41] Doubtless, these concerns could have been raised at an earlier date but it is established from the record that they were raised prior to the Agency finalizing the scope of the Project.

[42] Equinor points to and relies on the decision of Justice Scott of this Court in *Conseil des innus de Ekuanitshit v Canada (Procureur général)*, 2013 FC 418; affirmed 2014 FCA 189 [*Ekuanitshit*]. It references this decision in support of its submissions that: "[U]nreasonable delay is prejudicial to proponents and the public who stand to benefit from approved projects" and "where scoping of a project is not challenged immediately, the EA process moves forward with studies conducted, meetings held, and serious investments made [and to] require the preparation of a new EIS, conduct further studies, reengage interested parties and go backwards in the EA process will cause 'great cost, inconvenience and delay'."

[43] I find *Ekuanitshit* of little relevance to the issue raised in the present circumstances. In *Ekuanitshit,* the scoping decision was made by the Minister pursuant to section 15 of the

Canadian Environmental Assessment Act, SC 1992, c 37, on January 8, 2009. The decision under review was made March 16, 2012, and the application for judicial review was filed within the 30-day period provided in the *Federal Courts Act*, RSC 1985, c F-7. Justice Scott held that the Minister's scoping decision was a reviewable decision and that the applicants ought to have brought their application within the mandated time-frame as their attack in the matter before him was effectively aimed at the scoping decision.

[44] Unlike *Ekuanitshit*, the scoping decision here was made by the Agency and it was arguably open to the Minister to reject the Report, including the scoping of the Project, if he was of the view that it was incorrect or too narrow. The Agency's scoping decision appears to be recognized by Equinor to not be justiciable as it "serves only to assist the decision-maker (here, the Minister):" See *Gitxaala Nation v Canada*, 2016 FCA 187 at para 125; *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 at paras 36, 43; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 180, 202 [*Tsleil-Waututh*].

[45] Equinor did not argue that the time specified in the *Federal Courts Act* has not been observed; rather its submission is that the Court should refuse the application because the Applicants are guilty of "undue" delay in raising the present concerns: See Donald J M Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thompson Reuters Canada, 2023) (loose-leaf updated April 2023) at section 3.41. Given the complexity of the Project and the various periods of consultation, and the final scoping decision being that of the Minister in his Decision, I am unable to find that any delay on the Applicants' part is "undue" as required by that test.

[46] This application is timely and will be considered on its merits.

Reasonableness of the Minister's Decision

[47] The Applicants submit that the Minister's Decision is unreasonable as it relies on a Report that is materially deficient in that it failed, without justification, to consider the impacts of downstream GHG emissions and marine shipping.

Downstream GHG Emissions

[48] This issue relates to the creation of GHG emissions downstream from the Project that are created from the crude oil recovered by the Project. It does not relate to the GHG emissions created by the Project itself. The Applicants acknowledge that the Report "assessed the Project's individual direct greenhouse gas emissions" [emphasis in original].

[49] They submit that the Report failed to "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 [*sic*] requirements in ss 5(1), 5(2), 19(1)(a), and 19(1)(b)" [emphasis in original].

[50] The relevant portions of these provisions of the CCEA read as follows:

5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a	**5 (1)** Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un

designated project or a project are	projet désigné ou d'un projet sont les suivants :
(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:	**a)** les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :
(i) fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*,	**(i)** les poissons et leur habitat, au sens du paragraphe 2(1) de la *Loi sur les pêches*,
(ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,	**(ii)** les espèces aquatiques au sens du paragraphe 2(1) de la *Loi sur les espèces en péril*,
(iii) migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and	**(iii)** les oiseaux migrateurs au sens du paragraphe 2(1) de la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*,
(iv) any other component of the environment that is set out in Schedule 2;	**(iv)** toute autre composante de l'environnement mentionnée à l'annexe 2;
(b) a change that may be caused to the environment that would occur	**b)** les changements qui risquent d'être causés à l'environnement, selon le cas :
(i) on federal lands,	**(i)** sur le territoire domanial,
(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or	**(ii)** dans une province autre que celle dans laquelle la mesure est prise, l'activité est exercée ou le projet désigné ou le projet est réalisé,

(iii) outside Canada; and	**(iii)** à l’étranger;
(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on	**c)** s’agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d’être causés à l’environnement, selon le cas :
(i) health and socio-economic conditions,	**(i)** en matière sanitaire et socio-économique,
(ii) physical and cultural heritage,	**(ii)** sur le patrimoine naturel et le patrimoine culturel,
(iii) the current use of lands and resources for traditional purposes, or	**(iii)** sur l’usage courant de terres et de ressources à des fins traditionnelles,
(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.	**(iv)** sur une construction, un emplacement ou une chose d’importance sur le plan historique, archéologique, paléontologique ou architectural.
(2) However, if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:	**(2)** Toutefois, si l’exercice de l’activité ou la réalisation du projet désigné ou du projet exige l’exercice, par une autorité fédérale, d’attributions qui lui sont conférées sous le régime d’une loi fédérale autre que la présente loi, les effets environnementaux comprennent en outre :
(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily	**a)** les changements — autres que ceux visés aux alinéas (1)a) et b) — qui risquent d’être causés à l’environnement et qui sont directement liés ou

incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

nécessairement accessoires aux attributions que l'autorité fédérale doit exercer pour permettre l'exercice en tout ou en partie de l'activité ou la réalisation en tout ou en partie du projet désigné ou du projet;

(b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on

b) les répercussions — autres que celles visées à l'alinéa (1)c) — des changements visés à l'alinéa a), selon le cas :

(i) health and socio-economic conditions,

(i) sur les plans sanitaire et socio-économique,

(ii) physical and cultural heritage, or

(ii) sur le patrimoine naturel et le patrimoine culturel,

(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

(iii) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

…

[…]

19 (1) The environmental assessment of a designated project must take into account the following factors:

19 (1) L'évaluation environnementale d'un projet désigné prend en compte les éléments suivants :

(a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à celle d'autres activités concrètes, passées ou futures, est

from the designated project in combination with other physical activities that have been or will be carried out;	susceptible de causer à l’environnement;
(b) the significance of the effects referred to in paragraph (a);	**b)** l’importance des effets visés à l’alinéa a);
…	[…]

[51] The Report asserts that the Agency complied with section 5 of the CEAA:

> In accordance with Section 5 of CEAA 2012, the Agency assessed potential environmental effects on areas of federal jurisdiction (subsection 5(1)) as well as effects related to changes in the environment that are directly linked or necessarily incidental to federal decisions that may be required for the Project (subsection 5(2)).

[52] The Applicants submit that the Report unreasonably interpreted these statutory provisions because “[d]ownstream 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).”

[53] They point to the comments of the Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 187, 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.”

[54] They also submit that in failing to consider downstream GHG emissions, the Agency departed from “previous assessments” under the CEAA. They point to the environmental assessment of the Énergie Saguenay LNG Project, concerning which they say the following:

> … 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). 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.” The Governor in Council ultimately rejected Énergie Saguenay.

[55] I agree with Equinor that this is a single regulatory decision that can hardly be said to be representative of “previous assessments” done by the Agency. I also agree that the discussion in the Énergie Saguenay LNG Project Report of GHG emissions is brief and was directed to the proponent’s submissions and particularly its claim that the Project would allow the substitution of natural gas for more polluting fossil fuel.

[56] The Applicants also submit that downstream GHG emissions fall within subsection 5(2) as effecting a change caused to the environment and that is “directly linked or necessarily incidental” to the federal permitting and authorizing of the Project.

[57] They point to the environmental assessment for the New Prosperity Gold-Copper Mine where the Review Panel interpreted “directly linked” as meaning those “effects that are the direct and proximate result of a federal decision” and “necessarily incidental” as meaning those “other effects that are substantially linked to a federal decision although they may be secondary or

indirect effects": See Report of the Federal Review Panel – New Prosperity Gold-Copper Mine Project, (Ottawa: CEAA, October 2013) at page 20.

[58] The Applicants also reference *Sumas Energy 2 Inc v Canada (National Energy Board)*, 2005 FCA 377 at para 18, where the Federal Court of Appeal interpreted the phrase "directly linked" when reviewing whether to approve a Canada-US international power line [IPL] and agreed with the National Energy Board's interpretation of this term:

> 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.

[59] The Applicants say that downstream GHG emissions are "directly linked" to federal decisions to grant project authorizations or permits because they are the direct and proximate results of those decisions. They provide as an example that "without a work authorization issued by the Canada-Newfoundland and Labrador Petroleum Board under the Atlantic Accord, Equinor could not produce crude oil via the Project."

[60] Moreover, they argue that downstream GHG emissions are necessarily incidental because the burning of crude oil is a necessary result of oil production from the Project. They cite two international law cases that held that downstream GHG emissions should be assessed as "directly linked or necessarily incidental" to the authorization of fossil fuel extraction: *Gray v The Minister for Planning and Ors*, [2006] NSWLEC 720 at paras 97 and 100 and *Sierra Club v*

Federal Energy Regulatory Commission, 867 F (3d) 1357 (DC Cir 2017) at paras 1371-1372, 1374 (DC Cir 2017).

[61] I am unable to accept this submission. I agree with Equinor that Canadian regulators have repeatedly found that downstream GHG emissions need not be considered in environmental assessments and those decisions have been upheld on appeal or review.

[62] In *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, the National Energy Board held that it would not consider the environmental and socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline. This is in the face of a statutory provision that "requires the Board to 'have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant:' " *National Energy Board Act*, R.S.C., 1985, c. N-7, s 52(2). At paragraph 69, the Federal Court of Appeal found the decision to be reasonable for many reasons including three relevant here.

[63] First, the Federal Court of Appeal observed that like the CEAA "[n]othing in the Act expressly requires the Board to consider larger, general issues such as climate change."

[64] Second, the Federal Court of Appeal observed that it is the Board that determines what is "directly related" to the project:

> Subsection 52(2) of the Act empowers the Board to have regard to considerations that "to it" appear to be "directly related" to the pipeline and "relevant". The words "to it", the imprecise meaning of the words "directly", "related" and "relevant", the privative

> clause in section 23 of the Act, and the highly factual and policy nature of relevancy determinations, taken together, widen the margin of appreciation that this Court should afford the Board in its relevancy determination: *Farwaha*, *supra*, at paragraphs 91–95.

[65] While subsection 5(2) of the CEAA is differently worded, it requires, as a precondition of considering environmental effects, that the changes caused to the environment must be linked to the exercise of a federal authority, other than the Agency, carrying out the required physical activity. Accordingly, the necessary effect is not from the Project *per se*, but from the federal authority's exercise of its power. The Agency must determine if there is such a precondition and is to be given a wide and respectful latitude in making that determination.

[66] Third, the Federal Court of Appeal observed that:

> [I]n applying subsection 52(2) of the Act, the Board could reasonably take the view that larger, more general issues such as climate change are more likely "directly related" to the environmental effects of facilities and activities upstream and downstream from the pipeline, not the pipeline itself.

[67] That is very much the case here. I agree with Equinor that given that particular downstream locations and uses of Project oil are unknown, it would be impossible to determine whether the GHG emissions generated from those uses are within the legislative authority of Parliament. The Project oil may be used all over the world and for numerous purposes. Each of these purposes may elicit different GHG emissions. It is not possible to determine how much of the downstream use, if any, will be within Canada. The Agency would merely be speculating in considering the environmental effects of downstream GHG emissions. Based on this, it is

reasonable for the Agency to exclude downstream GHG emissions as part of the Assessment of the Project.

[68] Having found that there was no unreasonable decision vis-à-vis section 5 of the CEAA, section 19, which is premised on such a finding, is not engaged.

[69] In conclusion, I find that the Applicants have failed to meet their burden of establishing that the Decision under review is unreasonable for failing to consider and include downstream GHG emissions.

Marine Shipping

[70] The Applicants submit that the Agency's failure to scope and assess marine shipping in accordance with the CEAA is analogous to the situation in *Tsleil-Waututh*, where the Federal Court of Appeal quashed the approval of a project because the environmental assessment omitted to consider marine shipping as an incidental activity.

[71] In *Tsleil-Waututh*, the National Energy Board [NEB] excluded marine shipping from the scope of the environmental assessment of the Trans Mountain Pipeline Expansion Project [Trans Mountain]. The NEB argued that because it did not have regulatory oversight over marine vessel traffic, it could not assess its effects under the Act. The Federal Court of Appeal found that marine shipping was at least an element of the project and therefore, the NEB was required to explain its scoping decision and grapple with the relevant criteria: see *Tsleil-Waututh* at paras 396-402.

[72] The Applicants submit that the same reasoning applies to this case. They submit that it is clear from the Project description that marine shipping is an element of the Project and yet the Agency did not explain its decision to exclude marine shipping.

[73] In *Tsleil-Waututh* at para 403, the Federal Court of Appeal used the Agency's "Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012" which provides a set of criteria relevant to the question of whether certain activities should be considered "incidental" to a project. These 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.

[74] The Applicants submit that the Agency in the present case failed to grapple with these criteria and that no reasons were offered for the scoping decision until the final Report. Therein the Agency writes:

> During the public comment period on the EIS, the Agency hosted an information and facilitated discussion session on August 12, 2020, exclusively for Indigenous groups. During this session, the Proponent explained that shipment and transportation of oil was outside the scope of the Project. Transport Canada is the lead regulatory agency that manages and governs Canada's Marine Oil

> Spill Preparedness and Response Regime under the authority of the Canada Shipping Act, 2001 (CSA 2001), which applies to all vessels within Canadian waters.

[75] The Applicants submit that marine shipping is essential to the Project. The oil produced must be transported off the facility using marine vessels. Second, like *Tsleil-Waututh*, Equinor has the ability to direct or influence the carrying out of marine shipping through contractual agreements with third-party tanker companies: see *Tsleil-Waututh* at paras 405-407. They state that these factors are sufficient to find that marine shipping was incidental and therefore should have been included within the scope of the Project.

[76] Contrary to the Applicants' submissions, I agree with the Respondents that the Report and Decision reasonably excluded marine shipping.

[77] First, there was some mention of marine activity in the Assessment: "the Project includes the offloading of crude to shuttle tankers and their movement and hook-up / disconnect within the Project safety zone": see Bay du Nord Development Project Environmental Impact Statement at page 2-2. I agree with the Respondents that unlike *Tsleil-Waututh*, there is some marine shipping referenced in this Assessment, albeit limited to the Project safety zone.

[78] Second, in the present case, the exclusion of marine shipping alone is not sufficient to render the Decision unreasonable. In the Project description, Equinor provided information responding to the identified necessarily incidental criteria. The Agency accepted the Project description and excluded marine shipment as part of the Assessment. The failure to include marine shipping in the Assessment does not mean that it was not considered by the Agency after

being raised. Based on Equinor's information responding to the necessarily incidental criteria, it is evident that there was consideration of marine shipment and the Agency determined that it was not to be included in the Assessment.

[79] The burden on the Applicants in this instance shifts to why, after considering marine shipment within the Project safety zone, exclusion outside the safety zone is unreasonable. The Applicants rely on *Tsleil-Waututh* to demonstrate marine shipment is incidental. However, the maximum marine shipment area that was assessed by the NEB following the *Tsleil-Waututh* decision was the 12 nautical mile territorial sea: see National Energy Board, "Reasons for decision dated 12 October 2018" [Scoping Reconsideration]. In the Scoping Reconsideration, the NEB considered that: no prior assessments considered project-related marine shipping outside of the territorial sea; it is not practical or feasible to evaluate marine shipping in the exclusive economic zone which is a maximum of 200 nautical miles from the baseline; and Parliament's authority is reduced beyond the territorial sea: see Scoping Reconsideration at pages 8, 15-18. Challenges to the NEB's Scoping Reconsideration were denied leave by the Federal Court of Appeal: see *Raincoast Conversation Foundation v Canada (Attorney General)*, 2019 FCA 224 at paras 43 and 45.

[80] Based on the Scoping Reconsideration above and the present case being factually different from *Tsleil-Waututh*, where at para 758 the Crown acknowledged they owed a deeper degree of consultation because of the high risk of adverse project impacts to Aboriginal and treaty rights, I am not persuaded by the Applicants' submissions that it was unreasonable for the Agency to not consider marine shipping. The Project is located 500 kilometres from the coast of

Canada, well beyond the legislative authority of Parliament, and there is uncertainty about the destination of the oil from the Project site. This uncertainty of destination makes it impossible to assess marine shipping.

[81] The Applicants further state that the Agency does not have discretion to narrow the scope of environmental assessments below what is contained in the project description and that they are required to assess the project as proposed: see *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at paras 39-42. Since Equinor's proposal included and required marine shipping activities, the Applicants submit that the Agency was required to scope marine shipping as part of the Project. They argue that by excluding marine shipping from the Assessment, the Agency ignored its statutory mandate and produced a deficient Assessment that was inconsistent with the Act.

[82] As mentioned above, the marine shipping activities that were addressed in Equinor's Project Description were addressed in the scoping of the Project. Accordingly, there was no narrowing of the scope of the Assessment; it was assessed as proposed.

[83] For these reasons, the Applicants have not met their burden of establishing that the Decision regarding the scope of the Project and marine shipping was unreasonable.

Consultation with Indigenous Groups

[84] It is accepted that the Crown had a duty to consult with MTI grounded in the honour of the Crown and section 35 of the *Constitution Act, 1982*: see *Clyde River (Hamlet) v Petroleum*

Geo-Services Inc, 2017 SCC 40 [*Clyde River*] at para 19. The Crown's obligation to consult requires that a meaningful consultation process be carried out in good faith. The degree of consultation falls along a spectrum from limited to deep, depending on the strength of the Indigenous claim and the seriousness of the impact on their rights: see *Clyde River* at para 20.

[85] The Agency served as the Crown consultation coordinator to facilitate a "whole of government" approach to consultation.

[86] Whether the Agency appropriately identified the existence and scope of the Crown's duty to consult with MTI is a question of law and reviewable on a correctness standard: see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 42 [*Haida*]. However, the findings of fact upon which this determination is made is reviewed on a standard of reasonableness: see *Haida* at para 62.

[87] The Applicants submit that a deep or high degree of consultation was owed to them because a strong *prima facie* case for the claim was established, the right and potential infringement was of high significance and the risk of non-compensable damage was high: see *Haida* at para 44. In support, they submit that the communities MTI represents have judicially recognized and affirmed Aboriginal rights and did not cede their Aboriginal title to the Crown through the Treaties of Peace and Friendship. The Aboriginal rights include a right to fish for food, social and ceremonial purposes and a right to fish for a moderate livelihood under the Treaties of Peace and Friendship. They also have a significant cultural and spiritual relationship

with Atlantic Salmon. The Respondents noted the same established Aboriginal and treaty rights when considering the depth of consultation required.

[88] The Respondents submit that they considered that “the only pathways for potential Project impacts to rights would be through impacts to migratory species that passed through the Project area and are then harvested or fished within MTI’s traditional territory.” The Agency concluded that for routine Project operations, significant adverse environmental effects on fish and fish habitat is unlikely, and therefore impacts to MTI’s rights would be minimal. The Agency considered the probability of a worst-case scenario accident to be low. The Respondents submit that the findings of fact by the Agency should be afforded deference: see *Haida* at para 61.

[89] The Respondents submit that “based on the low level of potential impacts and the unlikeliness of such impacts to the rights held by the groups represented by MTI, the Agency determined that the depth of consultation was low on the spectrum.”

[90] *Clyde River* and *Tsleil-Waututh* can be distinguished from the present case because the factual basis for those two cases is different in regards to the level of consultation required. In both cases, the Crown acknowledged they owed a deeper degree of consultation because of the high risk of adverse project impacts to Aboriginal and treaty rights: see *Clyde River* at paras 43-44; *Tsleil-Wautuh* at para 758.

[91] Based on there being no treaty rights in the Project area, the Project area being far from the traditional territory of any MTI group and the predicted impact to Atlantic salmon being minimal, it is my view that the Agency reasonably determined the degree of their duty to consult with the MTI.

[92] Whether the consultation process was sufficient to meet the Crown's duty to consult is reviewed on the standard of reasonableness: see *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, at para 41 and 58. The focus is on meaningful consultation and accommodation: see *Haida* at paras 62 and 63.

[93] The Applicants submit "by incorrectly scoping the assessment to exclude the impact of marine oil shipping on Mi'gmaq rights, the Crown fell below the legal standard for reasonable consultation and accommodation." The Applicants allege that at all stages of the Environmental Assessment process they raised concern regarding the impact of marine shipping on Atlantic salmon. However, these concerns were not considered by the Agency. Moreover, MTI was not notified nor able to comment on Equinor's draft EIS.

[94] The Agency provided: (1) four formal comment periods to the MTI to raise their concerns; (2) funding to MTI to assist with their participation in the consultation process of the Assessment; and (3) information and engagement sessions with MTI and Equinor to discuss the Project and its potential impacts. Moreover, the Agency considered a 2018 Indigenous Knowledge study provided by MTI.

[95] I am not convinced by the Applicants' arguments that by excluding marine shipping from the scoping of the Assessment, the Agency and the Minister fell below the standard of reasonable consultation and accommodation. As shown above, MTI was given numerous opportunities to raise their concerns regarding marine shipping. These concerns were considered in the Agency's responses at the various stages of the Environmental Assessment process and commented on in the final Report, including marine shipping. Moreover, the Assessment includes conditions/accommodations and mitigation measures to mitigate potential impacts to Aboriginal or treaty rights.

[96] The Applicants' submissions are focused on re-evaluating the Agency's consideration given to the comments provided by MTI. This is not the purpose of a judicial review of the duty to consult and accommodate on a reasonableness standard. There is no requirement on the Agency to reach agreement or perfection: see *Haida* at paras 10 and 62; *Coldwater* at paras 54, 77, and 189. The Applicants were provided with numerous opportunities to raise concern and provide comments, which they did. However, neither the Minister nor the Agency were required to agree with the concerns raised by the Applicants. Their obligation was to consider the concerns raised, which they did. Therefore, it was reasonable for the Minister to assess these concerns and then dismiss them.

[97] Accordingly, I am not persuaded that the Crown failed to meet its duty to consult before reaching the Decision under review.

Costs

[98] Both the Responding Parties asked for their costs, if the application was dismissed. The Applicants proposed that each party ought to bear its own costs. I am of the view that a public interest group ought not to be immune from a costs award when an application such as this is refused. The Responding Parties have been put to great expense and time to marshal evidence and make detailed submissions. They are awarded their costs at the mid point of Tariff B.

JUDGMENT in T-938-22

THIS COURT'S JUDGMENT is that this application is dismissed and each of the Responding Parties is entitled to its costs from the Applicants assessed at the midpoint of Tariff B.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-938-22
STYLE OF CAUSE:	SIERRA CLUB CANADA FOUNDATION, ÉQUITERRE AND MI'GMAWE'L TPLU'TAQNN INC v MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, THE ATTORNEY GENERAL OF CANADA, AND EQUINOR CANADA LTD
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 1 AND 2, 2023
JUDGMENT AND REASONS:	ZINN J.
DATED:	JUNE 16, 2023

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