

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240503

Docket: A-10-22

Citation: 2024 FCA 86

**CORAM: BOIVIN J.A.
ROUSSEL J.A.
GOYETTE J.A.**

BETWEEN:

**SIERRA CLUB CANADA FOUNDATION,
WORLD WILDLIFE FUND CANADA and
ECOLOGY ACTION CENTRE**

Appellants

and

**MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
and
THE ATTORNEY GENERAL OF CANADA**

Respondents

and

**LE CONSEIL DES INNU DE
EKUANITSHIT and
THE ATTORNEY GENERAL OF ONTARIO
and
THE ATTORNEY GENERAL OF
NEWFOUNDLAND AND LABRADOR**

Intervenors

Heard at Halifax, Nova Scotia, on March 21, 2023.

Judgment delivered at Ottawa, Ontario, on May 3, 2024.

REASONS FOR JUDGMENT BY:

GOYETTE J.A.

CONCURRED IN BY:

BOIVIN J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

I. Overview

[1] The appellants appeal from a judgment of the Federal Court, which dismissed two applications for judicial review: 2021 FC 1367 [*FC Decision*]. The first application challenged the validity of a report resulting from a regional assessment of offshore oil and gas exploratory drilling, conducted under the *Impact Assessment Act*, S.C. 2019, c. 28 (Act). The second application sought to quash a regulation made under the Act that exempts certain exploratory drilling activities from a number of impact assessment requirements.

[2] After our Court heard this appeal, the Supreme Court of Canada released its decision on the constitutionality of the Act: *Reference re Impact Assessment Act*, 2023 SCC 23 [*IAA Reference*]. The Supreme Court opined that the federal impact assessment scheme, consisting of the Act and its accompanying *Physical Activities Regulations*, S.O.R./2019-285 (Activities Regs), is unconstitutional in part.

[3] For the following reasons, which take into account the *IAA Reference*, I would dismiss the appeal.

II. Background

A. *Legislative Background*

[4] The *IAA Reference* provides a thorough analysis of the federal impact assessment scheme found in the Act and the Activities Regs. The following summary highlights the provisions relevant to this appeal. Unless otherwise stated, all legislative references are to the Act. For ease of reference, the relevant legislative provisions are reproduced in the annex of these reasons.

[5] The Act and the Activities Regs form part of a regulatory scheme for assessing and safeguarding against the adverse effects of physical activities on the environment, or on health, social or economic conditions and their ensuing consequences. Other stated purposes of this scheme include (1) fostering sustainability; (2) ensuring respect for the rights of Indigenous peoples; (3) establishing a fair, predictable, and efficient impact assessment process that creates opportunities for sustainable economic development; (4) ensuring that decisions are based on science, Indigenous knowledge, and other sources of evidence; and (5) assessing cumulative effects within a region: see Preamble, section 6.

(1) Designated Projects

[6] One way of safeguarding against the adverse effects of physical activities is the identification of “designated projects” either in the Activities Regs or in ministerial orders: see section 2, subsection 9(1), and paragraph 109(b). If a proponent wishes to carry out a designated project, but the project may cause one of the effects listed under subsection 7(1), a project-

specific impact assessment may be required: subsections 7(1) and (3). Offshore exploratory drilling is one type of designated project listed in the Activities Regs: section 2 of the Activities Regs and section 34 of the Activities Regs' Schedule. The impact assessment process for designated projects contains three main phases: the planning phase, the impact assessment phase, and the decision-making phase. I will briefly explain each phase.

(a) *Planning Phase*

[7] After the proponent of a designated project has provided the required information to the Impact Assessment Agency of Canada (Agency), the Agency decides whether the project requires an impact assessment: sections 10–16. An affirmative decision triggers the impact assessment process: *IAA Reference* at paras. 38–41.

(b) *Impact Assessment Phase*

[8] Either the Agency or a review panel carries on the assessment. The assessment considers the proposed project's potential environmental, health, social, and economic impacts, including the project's benefits: sections 18, 22, 41, 42. The Agency or review panel uses the gathered information to develop an impact assessment report: sections 28, 51; *IAA Reference* at paras. 42–45.

(c) *Decision-Making Phase*

[9] The decision maker can be either the Minister of the Environment (Minister) or the Governor in Council (Governor). The Governor becomes the decision maker when a review

panel conducts the assessment or when the Minister refers the decision to the Governor: sections 60–62. The decision maker, after considering the impact assessment report, determines whether “the adverse effects within federal jurisdiction—and the adverse direct or incidental effects—that are indicated in the report are [...] in the public interest”: paragraphs 60(1)(a) and (b). If so, the Minister establishes conditions that he considers appropriate with which the proponent of the designated project must comply: section 64; *IAA Reference* at para. 46.

(2) Regional Assessment Mechanism

[10] In the case of multiple designated projects that are or will possibly be carried out in the same area, the Act provides for a regional assessment mechanism that may result in these projects being exempted from project-specific impact assessments. This regional assessment mechanism, like the scheme governing designated projects, contains three phases: planning, assessment, and decision-making.

(a) *Planning Phase*

[11] Sections 92 and 93 allow the Minister, alone or together with the government of a province, to appoint a committee or ask the Agency to conduct a regional assessment. The Minister must establish the committee’s terms of reference and appoint one or more persons as members of the committee: subsection 96(1).

(b) *Assessment Phase*

[12] Once a committee is appointed, the following rules are relevant to the conduct of the regional assessment:

- The committee must take into account any scientific information and Indigenous knowledge provided with respect to the assessment (subsection 97(2));
- The committee must ensure that the information it uses when conducting the assessment is made available to the public (section 98);
- The committee must ensure that the public is provided with an opportunity to participate meaningfully in the assessment (section 99); and
- Upon completing the assessment, the Committee must provide a report to the Minister. The report must demonstrate how the Indigenous knowledge provided was taken into account and used in the regional assessment (section 102).

(c) *Decision-Making Phase*

[13] After considering a regional assessment, the Minister may make a regulation to exempt physical activities in a specified area from undergoing project-specific assessments if those projects meet the conditions prescribed in the regulation: paragraph 112(1)(a.2), subsection 112(2), and section 112.1 of the Act.

[14] The Minister opted for this regional assessment mechanism in the case at bar, which involves offshore exploratory drilling activities in a defined area east of Newfoundland and Labrador (Study Area).

B. *Factual Background*

[15] The facts in this appeal can be neatly summarized according to the three phases of the regional assessment.

(1) Planning Phase

[16] In March 2019, the Government of Canada, the Province of Newfoundland and Labrador, and the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) signed an Agreement (Agreement) to conduct a *Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador* (Regional Assessment): Agreement, Appeal Book at 123–137.

[17] The Agreement defined the Regional Assessment as a “study or assessment of the effects of existing or future physical activities carried out in a region”, and prescribed the factors to be considered in the assessment: Agreement, definition of “Regional Assessment” and Appendix A, Appeal Book, at 124, 131, 132.

[18] The Agreement established a five-member committee (Committee) to conduct the Regional Assessment: Agreement, definition of “Committee” and clause 3.1, Appeal Book, at

125. The Committee's Terms of Reference, listed in the Agreement, outlined the Committee's mandate, the conduct of the Regional Assessment, and the contents of the report the Committee had to provide the Minister upon completing the assessment: Agreement, clauses 4.14 and 4.15, and Appendices A and D, Appeal Book, at 126, 131–132, 135–137.

[19] As the Agreement stipulated, the Committee was supported by a "Task Team", comprised of technical staff, which came from the Agency, the C-NLOPB, and government departments: Agreement, clauses 4.1–4.8, Appeal Book, at 125–126; Affidavit of Stephen B. Chapman, Appeal Book, at 1481, at para. 34. The Committee was also supported and advised by a technical advisory group (TAG). The TAG's members included the appellants, relevant government departments and agencies, Indigenous groups, and industry and stakeholder organisations, among others: Agreement, clauses 4.9–4.13, Appeal Book, at 126; Affidavit of Stephen B. Chapman, Appeal Book, 1481, at para. 34.

(2) Assessment Phase

[20] Indigenous groups were consulted in accordance with a formal three-phase consultation approach: Regional Assessment Report, section 2.2.4, Appeal Book, at 169–172.

[21] The Committee worked on the Regional Assessment from the spring of 2019 to May 2020, when it finalized the Geographic Information System tool (GIS). The GIS contains technical information in support of the Regional Assessment: *FC Decision* at para. 13.

[22] During that period, the Committee held numerous meetings, including (1) a series of initial planning and issue-scoping meetings (May 2019); (2) TAG sessions on various themes, such as the development of the GIS (May 2019), Indigenous knowledge (September 2019), and literature reviews related to the potential environmental effects of offshore exploratory drilling (October 2019); and (3) workshops to discuss and seek input on the Committee's draft recommendations prior to the release of its draft report (December 2019).

[23] The appellants actively participated in the Regional Assessment process. The intervener, le Conseil des Innu de Ekuanitshit (Conseil des Innu) participated in the activities involving Indigenous issues: *FC Decision* at paras. 4–13.

[24] Except for certain documents, the Committee posted, on the Agency's online registry, the information it used to develop the Regional Assessment and the comments it received: Affidavit of Stephen B. Chapman, Appeal Book, at 1488, at paras. 67–68.

[25] On January 23, 2020, the Committee released its draft report to the public—including the appellants—with a 30-day period to review and comment. The appellants and the Conseil des Innu provided their comments: *FC Decision* at para. 13; Affidavit of Gretchen Fitzgerald, Appeal Book, at 875–876, at para. 23; Affidavit of Sigrid Kuehnemund, Appeal Book, at 1082, at para. 32; Affidavit of Keith Edward MacMaster, Appeal Book, at 1355–1357, at para. 37; Response to draft report from the Conseil des Innu dated February 21, 2020, Appeal Book, at 2437.

[26] The Committee presented its final report (Report) to the Minister on February 29, 2020 and released the Report to the public on March 4, 2020: *FC Decision* at para. 13.

(3) Decision-Making Phase

[27] On the day the Report was published, the Agency released a *Discussion Paper on a Ministerial Regulatory Proposal to Designate Offshore Exploratory Drilling East of Newfoundland and Labrador for Exclusion under the Impact Assessment Act* (Discussion Paper on Regulatory Proposal): Affidavit of Stephen B. Chapman, Appeal Book, at 1500–1501, at para. 122; Discussion Paper on Regulatory Proposal, Appeal Book, at 1023–1049.

[28] The public had until April 30, 2020 to provide comments on the proposed regulation: Affidavit of Stephen B. Chapman, Appeal Book, at 1501, at para. 125. The appellants and the Conseil des Innu provided such comments: Affidavit of Gretchen Fitzgerald, Appeal Book, at 892–893, at paras. 63–64; Affidavit of Sigrid Kuehnemund, Appeal Book, at 1087–1088 at para. 44; Affidavit of Keith Edward MacMaster, Appeal Book, at 1360–1361, at para. 48; Comments on proposed regulation of the Conseil des Innu, Appeal Book, at 2460.

[29] On June 3, 2020, the Minister made the *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)* (Excluded Activities Regs) pursuant to paragraph 112(1)(a.2) and section 112.1 of the Act. The Excluded Activities Regs came into force on June 4, 2020. These regulations exclude certain physical activities from the designated projects listed in section 34 of the schedule to the Activities Regs. Physical activities

are only excluded if they satisfy the conditions in Schedule 2 of the Excluded Activities Regs. Excluded physical activities are therefore exempt from project-specific assessment.

[30] On June 4, 2020, the Agency released two documents. First, the Agency released the Regulatory Impact Analysis Statement (Regulatory Analysis), which analyzes the impacts of the Excluded Activities Regs: Regulatory Analysis, Appeal Book, at 834–865. Second, the Agency released the Minister’s response to the Regional Assessment titled, *Ministerial Response to the Regional Assessment Committee Report for Offshore Exploratory Drilling East of Newfoundland and Labrador* (Ministerial Response). In this response, the Minister said the Regional Assessment “allowed the Government of Canada to collect information that enables a credible, evidence-based exclusion of offshore exploratory wells (in the Regional Assessment-defined Study Area) from undergoing project-specific federal impact assessment.” The Minister added that “[t]his may only occur when a proposed project conforms to the conditions set out in the [Excluded Activities Regs].” The Minister generally accepted all the Committee’s 41 recommendations. The Minister also largely agreed with the Committee’s recommendations to incorporate certain measures into the Excluded Activities Regs as requirements for all future exploratory drilling in the Study Area. Thus, the Minister incorporated these measures into the Excluded Activities Regs, albeit with noted exceptions or additions, which he detailed in the Ministerial Response: Ministerial Response, Appeal Book, at 348–370.

C. *Judicial Background*

(1) Appeal Prior to the *IAA Reference*

[31] The appellants filed two applications for judicial review with the Federal Court: one challenging the Report's validity and another challenging the Excluded Activities Regs' validity. The Federal Court dismissed both applications. First, the Court held that the Report was not amenable to judicial review. Second, the Federal Court found the Excluded Activities Regs reasonable because (1) they were consistent with the Act's purpose, (2) they were within the regulation-making power in the Act, and (3) they met the condition precedent of subsection 112(2), since they were made after the Minister considered a Regional Assessment that was not materially deficient.

[32] The appellants appeal the *FC Decision*. They say the Regional Assessment and the Excluded Activities Regs are the product of a reverse-engineered process because the decision to make these regulations was made before the assessment began. Working backwards, the Committee conducted an unreasonable assessment and denied the appellants procedural fairness. Moreover, the Minister did not address these deficiencies when making the Excluded Activities Regs via his own procedurally deficient process.

[33] This Court heard the appeal on March 21, 2023.

(2) The *IAA Reference*

[34] In the *IAA Reference*, the Supreme Court was asked to determine the constitutional validity of the Act and the Activities Regs. The Court held that the entire Act, except sections 81–91, is *ultra vires* Parliament and therefore invalid; consequently, the Activities Regs are also

invalid. The Court conducted a division of powers analysis to reach this conclusion. This analysis has two steps: characterization and classification.

[35] First, at the characterization step, the Court considered the purpose and effects of the Act to identify its pith and substance. The Court concluded that the Act contains two distinct schemes: *IAA Reference* at para. 109. The first is a “designated projects” scheme, which assesses and regulates designated projects to mitigate or prevent their potential adverse environmental, health, social, and economic impacts. The second scheme, in sections 81–91, directs how federal authorities assess the significant adverse environmental effects of projects that they carry out or finance on federal lands or outside Canada.

[36] Second, at the classification step, the Court considered which head of power the Act’s pith and substance relates to. The second scheme (sections 81–91) was upheld for three reasons: (1) its constitutionality was unchallenged, (2) it resembles the legislation the Supreme Court upheld in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*], and (3) it is severable from the rest of the Act: *IAA Reference* at paras. 207–211. However, the Supreme Court determined that the designated projects scheme, which comprises the balance of the Act, is unconstitutional. Two reasons prohibited the designated projects scheme from being classified under a federal head of power: *IAA Reference* at paras. 131–139. Firstly, truly federal effects do not drive the scheme’s decision-making functions: *IAA Reference* at paras. 141–178. That is, decision makers could blend their assessment of adverse federal effects with other adverse effects that are not federal. Secondly, decision-making is driven by considerations labeled “effects within federal jurisdiction”. Despite this label, these

considerations far exceed federal jurisdiction: *IAA Reference* at paras. 179–203. For these reasons, the Supreme Court ruled that the Act—with the exception of sections 81 to 91—and the Activities Regs exceeded Parliament’s jurisdiction.

(3) Position of the parties following the *IAA Reference*

[37] Following the issuance of the *IAA Reference*, this Court directed the parties to provide written representations on the consequences, if any, of the *IAA Reference* to the present appeal.

(a) *Appellants’ and Conseil des Innu ’s Position*

[38] The appellants and the Conseil des Innu argue that the *IAA Reference* does not affect the issues in this appeal. In their view, the *IAA Reference* addressed different provisions of the Act and dealt with situations involving areas where both provincial and federal governments had jurisdiction. By contrast, the present appeal deals with “federal lands”, which fall within federal jurisdiction. Alternatively, the appellants argue that, if this Court determines that the *IAA Reference* invalidates the provisions dealing with regional assessments (sections 92–103, 112–112.1), then the Excluded Activities Regs lack a valid enabling provision and must be quashed. They add that, even if quashing these regulations renders the issues moot, the Court should nonetheless exercise its discretion to address the administrative law issues in the appeal.

[39] Separately, the appellants filed a notice of constitutional question pursuant to section 57 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. In their notice, the appellants questioned the constitutional validity of the Excluded Activities Regs. The Attorney General of Ontario

(Ontario) and the Attorney General of Newfoundland Labrador (Newfoundland) intervened and filed written submissions in response to the notice of constitutional question.

(b) *Respondents' and Attorney General of Ontario's Position*

[40] In the respondents' view, the *IAA Reference* implicitly supports the conclusion that the Regional Assessment is not amenable to judicial review. Thus, only one issue remains: the validity of the Excluded Activities Regs. However, given the Supreme Court's determination that the designated projects scheme of the Act is unconstitutional, the Excluded Activities Regs can no longer have the intended effect of excluding activities from the designated projects scheme. As a result, there is no need to rule on the constitutionality of the Excluded Activities Regs and the issue of their validity is moot.

[41] Ontario goes a step further than the respondents. Ontario says this Court must declare invalid the Act's impugned portions, the Activities Regs, and the Excluded Activities Regs. The Excluded Activities Regs must be declared invalid because they were made under paragraph 112(1)(a.2) and section 112.1, which are part of the scheme that the *IAA Reference* found unconstitutional. According to Ontario, since the Supreme Court opted not to grant a suspended declaration of invalidity of the Act and the Activities Regs, our Court's declaration of invalidity must have immediate effect.

(c) *Newfoundland and Labrador's Position*

[42] Newfoundland takes the position that the Excluded Activities Regs are *intra vires* Parliament. First, these regulations apply to the continental shelf, an area over which the federal government holds exclusive jurisdiction: *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86 at 97. Second, these regulations are the result of a collaborative effort between the governments of Newfoundland and Labrador and Canada, and their respective agencies. In other words, the Excluded Activities Regs are a product of cooperative federalism, a goal endorsed by the Supreme Court in the *IAA Reference*. It follows that applying the analysis and reasoning of the *IAA Reference* to this particular factual matrix leads to a finding of constitutionality of the Excluded Activities Regs. In the alternative, Newfoundland argues that this appeal calls for a suspended declaration of invalidity.

III. Issues

[43] The appellants raise four issues:

1. Is the Regional Assessment amenable to judicial review?
2. Was the Regional Assessment unreasonable?
3. Was the Regional Assessment procedurally unfair?
4. Was the Minister's decision to make the Excluded Activities Regs unreasonable?

IV. Analysis

A. *Regional Assessment's Amenability to Judicial Review*

[44] The Regional Assessment culminated in the Report, which the appellants challenge. The Federal Court concluded that the Report was not amenable to judicial review: *FC Decision* at para. 32. Before this Court, the parties agree that the question of amenability to judicial review is to be reviewed under the correctness standard. For the following reasons, I am of the view that the Regional Assessment and the Report are not amenable to judicial review.

[45] As described above, the regional assessment mechanism essentially comprises three phases: planning, regional assessment, and decision-making.

[46] The Act does not define the phrase “regional assessment”. The Agreement does. It defines the Regional Assessment as a “study” or “assessment” of the effects of existing or future physical activities carried out in a region. This definition makes clear that the Regional Assessment and its resulting Report are not decisions because they do not affect “legal rights, impose legal obligations, or cause prejudicial effects”: *Sganos v. Canada (Attorney General)*, 2018 FCA 84 at para. 6.

[47] Rather, rights are affected or obligations are imposed when the Minister decides whether to make a regulation that excludes potential projects from project-specific assessments. The Act requires the Minister to consider the Regional Assessment before making such regulation, but the decision to act on the Regional Assessment is made by the Minister, not the Committee: subsection 112(2).

[48] The three-phase regional mechanism mirrors the Act's designated projects scheme, described above. The designated projects scheme involves an assessment phase, during which the Agency or a review panel gathers information to develop a report. The designated projects scheme also involves a decision-making phase during which the Minister or the Governor considers the report and determines whether the project's effects are in the public interest. If the project's effects are in the public interest, the Minister imposes conditions for the designated project to be carried on. The Supreme Court held that the designated projects scheme "establishes an information-gathering process in the service of an ultimate decision-making function": *IAA Reference* at para. 81. Moreover, the Supreme Court emphasized that the assessment phase is clearly distinct from the decision-making phase, and that the two phases have different constitutional implications: *IAA Reference* at paras. 155–161.

[49] Applying the Supreme Court's analysis to the regional assessment mechanism, I find that the Regional Assessment (the assessment phase), while being an "integral component of sound decision-making" (*Oldman River* at 71), does not involve decision-making and carries no legal consequences.

[50] Thus, as determined by the Federal Court, this situation is no different from the ones previously reviewed by this Court and calls for the same conclusion: the Regional Assessment and the Report are not amenable to judicial review: *FC Decision* at paras. 29–30; *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 125 [*Gitxaala*]; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 at para. 202 [*Trans Mountain*]; *Taseko Mines Ltd. v. Canada*

(Environment), 2019 FCA 319 at para. 43 [*Taseko #1*]; *Mikisew Cree First Nation v. Canadian Environmental Assessment Agency*, 2023 FCA 191 at para. 107 [*Mikisew*].

[51] Before this Court, the appellants present three arguments in support of a contrary conclusion.

(1) The Right to Participate Meaningfully Argument

[52] The appellants allege that the public's legal right to participate meaningfully in a regional assessment (paragraph 6(1)(h) and section 99) imposes a corresponding legal obligation on the Committee. If the right to participate meaningfully is denied, and the regional assessment is not subject to judicial review, then the wronged person or entity will have no remedy, a result contrary to the Act: Appellants' Memorandum of Fact and Law at para. 110.

[53] I disagree.

[54] The record shows that the appellants participated in the process and had numerous opportunities to make submissions at in person meetings and in written form. While they may be dissatisfied with the regional assessment, they have not demonstrated that they were denied meaningful participation.

(2) The Purposes of the Act Argument

[55] The appellants argue that requiring affected parties to wait for a decision to challenge the regional assessment's deficiencies would undermine the purposes of the Act, stated in paragraph 6(1)(b.1)—namely, fairness, efficiency, and the predictability of impact assessments: Appellants' Memorandum of Fact and Law at para. 115.

[56] Again, I disagree.

[57] Allowing a party to challenge a regional assessment that may not result in any decision would be a waste a judicial resources and therefore inefficient. In addition, I fail to understand how challenging a regional assessment—a study which may not result in further action—would render the process fair or predictable.

(3) The Legislative Changes Argument

[58] Lastly, the appellants make an argument based on legislative changes. As I understand it, their argument is that the report issued under the Act's predecessor, the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (CEAA), was "final and conclusive" and insulated from judicial review. As such, a report made under the CEAA is different from a report made under the Act; the latter is not insulated from judicial review. The appellants say that the Federal Court's failure to consider these differences led it to improperly rely on the decisions *Gitxaala*, *Trans Mountain*, and *Taseko #1*, which were rendered under the CEAA: Appellants' Memorandum of Fact and Law at paras. 115–119.

[59] I must disagree. If a report issued under the CEEA was, as the appellants say, *more* akin to a “final and conclusive” decision, but was still found not to be amenable to judicial review, then it cannot be that a report made under the Act that is *less* akin to a “final and conclusive” decision could be amenable to judicial review.

(4) Conclusion on Amenability to Judicial Review

[60] The Report is not amenable to judicial review. The same is true for the Regional Assessment, an interim document that simply culminates in the Report. Accordingly, the Federal Court correctly dismissed the appellants’ application for judicial review of the Report.

[61] That said, just because a regional assessment, *standing alone*, is not amenable to judicial review, does not mean it is *always* immune from judicial review. If a regional assessment is materially deficient (unreasonable or procedurally unfair), the resulting regulation may be quashed on the basis that the Minister lacked the legal prerequisite set out in subsection 112(2) to make that regulation: *FC Decision* at paras. 26, 31, citing *Trans Mountain* at para. 201; *Mikisew* at paras. 108–109.

[62] This case raises three remaining issues: the Regional Assessment’s reasonableness, the Regional Assessment’s procedural fairness, and the reasonableness of the Minister’s decision to make the Excluded Activities Regs. However, deciding these issues would serve no useful purpose if the *IAA Reference* entails that the Minister lacked the authorization to make those regulations. Consequently, I must consider whether the *IAA Reference* renders these remaining issues moot.

B. *IAA Reference's Effect on the Remaining Issues' Mootness*

(1) The Doctrine of Mootness

[63] Under the doctrine of mootness, courts may decline to hear a case when its decision will have no practical effects on the rights of the parties. Courts may nevertheless elect to hear a moot case if the circumstances warrant: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353 [*Borowski*]. Thus, the doctrine of mootness involves two steps.

[64] In the first step, a court decides whether the case is moot. A case is moot when no live controversy affects the rights of the parties: *Borowski* at 353–356; *Peckford v. Canada (Attorney General)*, 2023 FCA 219 at para. 9 [*Peckford*].

[65] In the second step of the mootness analysis, the court decides whether to exercise its discretion to hear the case despite mootness. In *Borowski*, the Supreme Court formulated three factors to guide courts' exercise of discretion:

- The presence of an adversarial context;
- The concern for judicial economy; and
- The need for the court to be sensitive to its role as the adjudicative branch in our political framework.

(*Borowski* at 358–363; *Peckford* at para. 10)

(2) Applying the Doctrine of Mootness to this Appeal

[66] As mentioned, the appellants raise three remaining issues: the Regional Assessment's reasonableness, the Regional Assessment's procedural fairness, and the reasonableness of the Minister's decision to make the Excluded Activities Regs. Having reviewed the parties' and interveners' helpful submissions with regard to the *IAA Reference*, I conclude that these issues are moot because the Supreme Court determined that the Act is *ultra vires* Parliament, except a few provisions that do not apply in our case.

[67] In principle, the Supreme Court's answer to a reference is advisory and non-binding; in practice, courts follow these rulings and treat them as judicial decisions: *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 at paras. 151–152; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 40; *Reference Re Certification in the Manitoba Health Sector*, 2019 MBCA 18. These authorities suggest that I must follow the Supreme Court's opinion that the entire Act is unconstitutional except sections 81–91. Although the *IAA Reference* did not specifically address the Act's regional assessment regime, this regime remains invalid because one cannot sever it from the designated projects scheme: *IAA Reference* at para. 210.

[68] Moreover, the Supreme Court has stated that a tribunal must refuse to give effect to unconstitutional legislation: *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 88.

[69] Since a valid regulation cannot be founded on an invalid statute, it stands to reason that the Excluded Activities Regs, like the Activities Regs, are invalid: Elmer A. Driedger,

“Subordinate Legislation” (1960), 38 Can Bar Rev 1 at 7. In the context of this appeal, the *IAA Reference*’s that the Act (except sections 81-91) is unconstitutional entails that the Minister lacked the authorization to make the Excluded Activities Regs: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para. 16; *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at para. 40; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para. 88; *Canada (Citizenship and Immigration) v. Singh*, 2016 FCA 300 at para. 16.

[70] In addition, paragraph 112(1)(a.2) of the Act enables the Minister to make regulations to exclude physical activities that underwent a regional assessment from those designated as “designated projects” in the Activities Regs. Since the Supreme Court determined that the Activities Regs are unconstitutional, there is nothing from which to exclude physical activities anymore even if the factual matrix involves an area over which the federal government holds exclusive jurisdiction. Consequently, the remaining issues are moot under the first step of the *Borowski* analysis.

[71] The next step of the mootness analysis is to determine whether this Court should exercise its discretion to address the remaining issues despite their mootness. The appellants and the respondents acknowledge that there remains an adversarial context between them. While this acknowledgment supports a decision to address the three remaining issues, the following two considerations weigh heavily against it.

(a) *Judicial Economy*

[72] This appeal was not the beginning of the dispute between the appellants, the Committee, and the Minister. This dispute started some five years ago, when the Regional Assessment was being conducted. The factual background, the evidence, and the parties' submissions show that the parties invested tremendous effort and expense in the Regional Assessment and the Excluded Activities Regs.

[73] I cannot overstate the magnitude of the work that the parties and the interveners have put into this appeal and the preceding judicial review application. The judicial expenditures were incurred, and all that remains is for this Court to rule on the three remaining issues. Against this background, the appellants argue that, should this Court refuse to rule on the three remaining issues, they will be forced to pursue a third hearing in the Federal Court if the Minister relies on the Report to re-enact the Excluded Activities Regs in the future.

[74] The problem is that this Court ruling on the three remaining issues would not necessarily eliminate a third hearing or another legal challenge. The Regional Assessment—which culminated in the Report—was relevant to this appeal because subsection 112(2) of the Act provides that the Minister must consider a regional assessment before making a regulation. It was therefore necessary to ensure that the report was not materially deficient, thus engendering the second and third issues raised by the appellants. It is uncertain whether Parliament will retain, in a modified version of the Act, the obligation to consider a regional assessment before making a regulation. This obligation may be accompanied by the need to consider other

elements. In this uncertain context, what good would a ruling on the three remaining issues do? How would ruling on the Regional Assessment's reasonableness or procedural fairness avoid further litigation if the consideration of a regional assessment is no longer a prerequisite of the Act or if it is only one of various prerequisites?

[75] The question about the usefulness of a ruling on the remaining issues remains relevant even if Parliament were to maintain, in a modified version of the Act, the requirement for the Minister to consider a regional assessment prior to making regulations. This is so because nothing guarantees the Minister would consider the Regional Assessment he considered prior to making the Excluded Activities Regs. Were the Minister to consider the Regional Assessment in making future regulations, perhaps a ruling from this Court that the Regional Assessment is reasonable and procedurally fair would be of no avail to the appellants. For instance, the passage of time or contextual changes might support arguments against the reasonableness or procedural fairness of the Regional Assessment that were not made in this appeal, thereby justifying another judicial challenge. Equally, a ruling that the Regional Assessment is unreasonable and was procedurally unfair may be of no assistance to the appellants if the Minister considers an improved version of the Regional Assessment before making future regulations.

[76] It follows that ruling on the three remaining issues may not prevent future litigation. In addition, such a ruling would have no practical effect on the rights of the parties and serve no purpose. Ruling on the reasonableness of the Minister's decision to make these regulations would serve no useful purpose. Similarly, ruling on the Regional Assessment's reasonableness

and procedural fairness would be of limited value because such a ruling would be rendered in a specific context unlikely to be replicated in the future: *Peckford* at para. 31.

(b) *Role of this Court*

[77] Given the Supreme Court's determination in the *IAA Reference*, it is better left to Parliament to decide what should happen next.

V. Conclusion

[78] In light of the above, I would dismiss the appeal. The Federal Court correctly dismissed the appellants' application for judicial review of the Report, and the remaining three issues are moot.

"Nathalie Goyette"

J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Sylvie E. Roussel J.A."

APPENDIX

***Impact Assessment Act, S.C. 2019,
c. 28***

Definitions

2 The following definitions apply in this Act.

...

Designated project means one or more physical activities that

(a) are carried out in Canada or on federal lands; and

(b) are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1).

It includes any physical activity that is incidental to those physical activities, but it does not include a physical activity designated by regulations made under paragraph 112(1)(a.2). (*projet désigné*)

...

effects means, unless the context requires otherwise, changes to the

***Loi sur l'évaluation d'impact,
L.C. 2019, ch. 28***

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

[...]

projet désigné Une ou plusieurs activités concrètes — y compris celles qui leur sont accessoires — exercées au Canada ou sur un territoire domanial et désignées soit par règlement pris en vertu de l'alinéa 109b), soit par arrêté pris par le ministre en vertu du paragraphe 9(1). Sont exclues les activités concrètes désignées par règlement pris en vertu de l'alinéa 112(1)a.2). (*designated projet*)

[...]

effets Sauf indication contraire du contexte, les changements causés à

environment or to health, social or economic conditions and the positive and negative consequences of these changes. (effets)

effects within federal jurisdiction means, with respect to a physical activity or a designated project,

(a) a change to the following components of the environment that are within the legislative authority of Parliament:

(i) *fish and fish habitat*, as defined in subsection 2(1) of the *Fisheries Act*,

(ii) *aquatic species*, as defined in subsection 2(1) of the *Species at Risk Act*,

(iii) *migratory birds*, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and

(iv) any other component of the environment that is set out in Schedule 3;

(b) a change to the environment that would occur

(i) on federal lands,

(ii) in a province other than the one where the physical activity or the designated project is being carried out, or

(iii) outside Canada;

l'environnement ou aux conditions sanitaires, sociales ou économiques et les répercussions positives et négatives de tels changements. (*effects*)

effets relevant d'un domaine de compétence fédérale S'entend, à l'égard d'une activité concrète ou d'un projet désigné, des effets suivants :

a) les changements aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :

(i) les *poissons* et leur *habitat*, au sens du paragraphe 2(1) de la *Loi sur les pêches*,

(ii) les *espèces aquatiques* au sens du paragraphe 2(1) de la *Loi sur les espèces en péril*,

(iii) les *oiseaux migrateurs* au sens du paragraphe 2(1) de la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*,

(iv) toute autre composante de l'environnement mentionnée à l'annexe 3;

b) les changements à l'environnement, selon le cas :

(i) sur le territoire domanial,

(ii) dans une province autre que celle dans laquelle l'activité est exercée ou le projet est réalisé,

(iii) à l'étranger;

(c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on

(i) physical and cultural heritage,

(ii) the current use of lands and resources for traditional purposes, or

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

(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and

(e) any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3. (*effet relevant d'un domaine de compétence fédérale*)

c) s'agissant des peuples autochtones du Canada, les répercussions au Canada des changements à l'environnement, selon le cas :

(i) au patrimoine naturel et au patrimoine culturel,

(ii) à l'usage courant de terres et de ressources à des fins traditionnelles,

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

d) les changements au Canada aux conditions sanitaires, sociales ou économiques des peuples autochtones du Canada;

e) des changements en toute matière sanitaire, sociale ou économique mentionnée à l'annexe 3 qui relèvent de la compétence législative du Parlement. (*effects within federal jurisdiction*)

Purposes

6 (1) The purposes of this Act are

(a) to foster sustainability;

(b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;

Objet

6 (1) La présente loi a pour objet :

a) de favoriser la durabilité;

b) de protéger les composantes de l'environnement et les conditions sanitaires, sociales et économiques qui relèvent de la compétence législative du Parlement contre les effets négatifs importants de tout projet désigné;

(b.1) to establish a fair, predictable and efficient process for conducting impact assessments that enhances Canada's competitiveness, encourages innovation in the carrying out of designated projects and creates opportunities for sustainable economic development;

b.1) de mettre en place un processus d'évaluation d'impact équitable, prévisible et efficace qui accroît la compétitivité du Canada, encourage l'innovation dans la réalisation de projets désignés et crée des possibilités de développement économique durable;

...

[...]

(h) to ensure that opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment;

h) de veiller à ce que le public ait la possibilité de participer de façon significative aux évaluations d'impact, aux évaluations régionales ou aux évaluations stratégiques;

...

[...]

(j) to ensure that an impact assessment takes into account scientific information, Indigenous knowledge and community knowledge;

j) de veiller à ce que les évaluations d'impact prennent en compte l'information scientifique, les connaissances autochtones et les connaissances des collectivités;

...

[...]

(m) to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the consideration of those assessments in impact assessments; and

m) d'encourager l'évaluation des effets cumulatifs d'activités concrètes dans une région, l'évaluation des politiques, plans ou programmes fédéraux ainsi que la prise en compte de ces évaluations dans le cadre des évaluations d'impact;

Proponent

7 (1) Subject to subsection (3), the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in

Promoteur

7 (1) Sous réserve du paragraphe (3), le promoteur d'un projet désigné ne peut prendre de mesure qui se rapporte à la réalisation de tout ou partie du projet et qui peut entraîner les effets suivants :

part, if that act or thing may cause any of the following effects:

(a) a change to the following components of the environment that are within the legislative authority of Parliament:

(i) *fish and fish habitat*, as defined in subsection 2(1) of the *Fisheries Act*,

(ii) *aquatic species*, as defined in subsection 2(1) of the *Species at Risk Act*,

(iii) *migratory birds*, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and

(iv) any other component of the environment that is set out in Schedule 3;

(b) a change to the environment that would occur

(i) on federal lands,

(ii) in a province other than the one in which the act or thing is done, or

(iii) outside Canada;

(c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on

(i) physical and cultural heritage,

a) des changements aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :

(i) les *poissons* et leur *habitat*, au sens du paragraphe 2(1) de la *Loi sur les pêches*,

(ii) les *espèces aquatiques* au sens du paragraphe 2(1) de la *Loi sur les espèces en péril*,

(iii) les *oiseaux migrateurs* au sens du paragraphe 2(1) de la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*,

(iv) toute autre composante de l'environnement mentionnée à l'annexe 3;

b) des changements à l'environnement, selon le cas :

(i) sur le territoire domanial,

(ii) dans une province autre que celle dans laquelle la mesure est prise,

(iii) à l'étranger;

c) s'agissant des peuples autochtones du Canada, les répercussions au Canada des changements à l'environnement, selon le cas :

(i) au patrimoine naturel et au patrimoine culturel,

(ii) the current use of lands and resources for traditional purposes, or

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

(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; or

(e) any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3.

(ii) à l'usage courant de terres et de ressources à des fins traditionnelles,

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

d) des changements au Canada aux conditions sanitaires, sociales ou économiques des peuples autochtones du Canada;

e) des changements en toute matière sanitaire, sociale ou économique mentionnée à l'annexe 3 qui relèvent de la compétence législative du Parlement.

Conditions

(3) The proponent of a designated project may do an act or thing in connection with the carrying out of the designated project, in whole or in part, that may cause any of the effects described in subsection (1) if

(a) the Agency makes a decision under subsection 16(1) that no impact assessment of the designated project is required and posts that decision on the Internet site;

(b) the proponent complies with the conditions included in the decision statement that is issued to the proponent under section 65 with respect to that designated project and is not expired or revoked; or

(c) the Agency permits the proponent to do that act or thing,

Conditions

(3) Le promoteur d'un projet désigné peut prendre une mesure qui se rapporte à la réalisation de tout ou partie du projet et qui peut entraîner les effets prévus au paragraphe (1) dans les cas suivants :

a) l'Agence décide, au titre du paragraphe 16(1), qu'aucune évaluation d'impact du projet n'est requise et affiche sa décision sur le site Internet;

b) le promoteur prend la mesure en conformité avec les conditions qui sont énoncées dans la déclaration qui lui est remise au titre de l'article 65 relativement au projet et celle-ci n'est ni expirée ni révoquée;

c) le promoteur est autorisé par l'Agence à prendre la mesure, sous

subject to any conditions that it establishes, for the purpose of providing to the Agency the information or details that it requires in order to prepare for a possible impact assessment of that designated project or for the purpose of providing to the Agency or a review panel the information or studies that it considers necessary for it to conduct the impact assessment of that designated project.

Decision

16 (1) After posting a copy of the notice on the Internet site under subsection 15(3), the Agency must decide whether an impact assessment of the designated project is required.

Notice of commencement

18 (1) If the Agency decides that an impact assessment of a designated project is required — and the Minister does not approve the substitution of a process under section 31 in respect of the designated project — the Agency must, within 180 days after the day on which it posts a copy of the description of the designated project under subsection 10(2), provide the proponent of that project with

(a) a notice of the commencement of the impact assessment of the project that sets out the information or studies that the Agency requires from the proponent and considers necessary for the

réserve de toute condition qu'elle fixe, pour qu'il puisse lui fournir les renseignements ou les précisions qu'elle exige dans le cadre de la préparation à une évaluation d'impact éventuelle du projet ou qu'il puisse fournir à l'Agence ou à la commission les études ou les renseignements qu'elle estime nécessaires dans le cadre de l'évaluation d'impact.

Décision

16 (1) Après l'affichage sur le site Internet de la copie de l'avis au titre du paragraphe 15(3), l'Agence décide si une évaluation d'impact du projet désigné est requise.

Avis du début de l'évaluation d'impact

18 (1) Si elle décide qu'une évaluation d'impact d'un projet désigné est requise — et que le ministre n'a pas autorisé la substitution visée à l'article 31 à l'égard du projet —, l'Agence fournit au promoteur du projet, dans les cent quatre-vingts jours suivant l'affichage d'une copie de la description du projet en application du paragraphe 10(2), ce qui suit :

a) un avis du début de l'évaluation d'impact dans lequel elle indique les études ou les renseignements qu'elle estime nécessaires à l'évaluation d'impact et qu'elle exige du promoteur;

conduct of the impact assessment; and

(b) any documents that are prescribed by regulations made under paragraph 112(1)(a), including tailored guidelines regarding the information or studies referred to in paragraph (a) and plans for cooperation with other jurisdictions, for engagement and partnership with the Indigenous peoples of Canada, for public participation and for the issuance of permits.

b) les documents visés par règlement pris en vertu de l'alinéa 112(1)a), notamment des lignes directrices individualisées à l'égard des études ou des renseignements visés à l'alinéa a) et des plans pour la coopération avec les autres instances, la mobilisation des peuples autochtones du Canada et le partenariat avec ces derniers, la participation du public et la délivrance de permis.

Factors — impact assessment

22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:

(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including

(i) the effects of malfunctions or accidents that may occur in connection with the designated project,

(ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and

Éléments — évaluation d'impact

22 (1) L'évaluation d'impact d'un projet désigné, qu'elle soit effectuée par l'Agence ou par une commission, prend en compte les éléments suivants :

a) les changements causés à l'environnement ou aux conditions sanitaires, sociales ou économiques et les répercussions positives et négatives de tels changements que la réalisation du projet est susceptible d'entraîner, y compris :

(i) ceux causés par les accidents ou défaillances pouvant en résulter,

(ii) les effets cumulatifs que sa réalisation, combinée à l'exercice d'autres activités concrètes, passées ou futures, est susceptible de causer,

- | | |
|---|---|
| <p>(iii) the result of any interaction between those effects;</p> | <p>(iii) le résultat de toute interaction entre ces effets;</p> |
| <p>(b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;</p> | <p>b) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets négatifs du projet;</p> |
| <p>(c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>;</p> | <p>c) les répercussions que le projet désigné peut avoir sur tout groupe autochtone et les répercussions préjudiciables qu'il peut avoir sur les droits des peuples autochtones du Canada reconnus et confirmés par l'article 35 de la <i>Loi constitutionnelle de 1982</i>;</p> |
| <p>(d) the purpose of and need for the designated project;</p> | <p>d) les raisons d'être et la nécessité du projet;</p> |
| <p>(e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;</p> | <p>e) les solutions de rechange à la réalisation du projet qui sont réalisables sur les plans technique et économique, notamment les meilleures technologies disponibles, et les effets de ces solutions;</p> |
| <p>(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;</p> | <p>f) les solutions de rechange au projet qui sont réalisables sur les plans technique et économique et qui sont directement liées au projet;</p> |
| <p>(g) Indigenous knowledge provided with respect to the designated project;</p> | <p>g) les connaissances autochtones fournies à l'égard du projet;</p> |
| <p>(h) the extent to which the designated project contributes to sustainability;</p> | <p>h) la mesure dans laquelle le projet contribue à la durabilité;</p> |
| <p>(i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability</p> | <p>i) la mesure dans laquelle les effets du projet portent atteinte ou contribuent à la capacité du gouvernement du Canada de</p> |

to meet its environmental obligations and its commitments in respect of climate change;

(j) any change to the designated project that may be caused by the environment;

(k) the requirements of the follow-up program in respect of the designated project;

(l) considerations related to Indigenous cultures raised with respect to the designated project;

(m) community knowledge provided with respect to the designated project;

(n) comments received from the public;

(o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;

(p) any relevant assessment referred to in section 92, 93 or 95;

(q) any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;

(r) any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition jurisdiction in section 2 — that is in respect of a region related to the designated project

respecter ses obligations en matière environnementale et ses engagements à l'égard des changements climatiques;

j) les changements qui pourraient être apportés au projet du fait de l'environnement;

k) les exigences du programme de suivi du projet;

l) les enjeux relatifs aux cultures autochtones soulevés à l'égard du projet;

m) les connaissances des collectivités fournies à l'égard du projet;

n) les observations reçues du public;

o) les observations reçues d'une quelconque instance dans le cadre des consultations tenues en application de l'article 21;

p) toute évaluation pertinente visée aux articles 92, 93 ou 95;

q) toute évaluation des effets du projet effectuée par un corps dirigeant autochtone ou au nom de celui-ci et qui est fournie à l'égard du projet;

r) toute étude effectuée ou tout plan préparé par une quelconque instance — ou un corps dirigeant autochtone non visé aux alinéas f) et g) de la définition de instance à l'article 2 — qui a été fourni à l'égard du projet et qui

and that has been provided with respect to the project;

(s) the intersection of sex and gender with other identity factors; and

(t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.

Review panel's duties

51 (1) A review panel must, in accordance with its terms of reference,

...

(d) prepare a report with respect to the impact assessment that

(i) sets out the effects that, in the opinion of the review panel, are likely to be caused by the carrying out of the designated project,

(ii) indicates which of the effects referred to in subparagraph (i) are adverse effects within federal jurisdiction and which are adverse direct or incidental effects, and specifies the extent to which those effects are significant,

(ii.1) subject to section 119, sets out how the review panel, in determining the effects that are likely to be caused by the carrying out of the designated project, took into account and used any Indigenous knowledge provided with

est relatif à une région ayant un lien avec le projet;

s) l'interaction du sexe et du genre avec d'autres facteurs identitaires;

t) tout autre élément utile à l'évaluation d'impact dont l'Agence peut exiger la prise en compte.

Devoirs de la commission

51 (1) La commission, conformément à son mandat :

[...]

d) établit un rapport de l'évaluation, lequel :

(i) indique les effets que, selon elle, la réalisation du projet est susceptible d'entraîner,

(ii) identifie, parmi ces effets, les effets relevant d'un domaine de compétence fédérale qui sont négatifs ainsi que les effets directs ou accessoires négatifs et précise la mesure dans laquelle ils sont importants,

(ii.1) indique, sous réserve de l'article 119, de quelle manière elle a pris en compte et utilisé — pour déterminer les effets que la réalisation du projet est susceptible d'entraîner — les connaissances autochtones fournies à l'égard du projet,

respect to the designated project,

(iii) sets out a summary of any comments received from the public, and

(iv) sets out the review panel's rationale, conclusions and recommendations, including conclusions and recommendations with respect to any mitigation measures and follow-up program;

(iii) comprend un résumé des observations reçues du public,

(iv) est assorti de sa justification et de ses conclusions et recommandations relativement à l'évaluation, notamment aux mesures d'atténuation et au programme de suivi;

Minister's decision

60 (1) After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment under the process approved under section 31, the Minister must

(a) determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest; or

(b) refer to the Governor in Council the matter of whether the effects referred to in paragraph (a) are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.

Factors — public interest

63 The Minister's determination under paragraph 60(1)(a) in respect

Décision du ministre

60 (1) Après avoir pris en compte le rapport d'évaluation d'impact d'un projet désigné qui lui est présenté en application du paragraphe 28(2) ou au terme de l'évaluation autorisée au titre de l'article 31, le ministre, selon le cas :

a) décide si les effets relevant d'un domaine de compétence fédérale qui sont négatifs — ou les effets directs ou accessoires négatifs — identifiés dans le rapport sont, compte tenu des éléments visés à l'article 63 et de la mesure dans laquelle ces effets sont importants, dans l'intérêt public;

b) renvoie au gouverneur en conseil la question de savoir si les effets visés à l'alinéa a) sont, compte tenu des éléments visés à l'article 63 et de la mesure dans laquelle ces effets sont importants, dans l'intérêt public.

Éléments — intérêt public

63 La décision que le ministre ou le gouverneur en conseil prend à l'égard

of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

- (a) the extent to which the designated project contributes to sustainability;

Conditions — effects within federal jurisdiction

64 (1) If the Minister determines under paragraph 60(1)(a), or the Governor in Council determines under section 62, that the effects that are indicated in the report that the Minister or the Governor in Council, as the case may be, takes into account are in the public interest, the Minister must establish any condition that he or she considers appropriate in relation to the adverse effects within federal jurisdiction with which the proponent of the designated project must comply.

Regional assessments — region entirely on federal lands

92 The Minister may establish a committee — or authorize the Agency — to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is entirely on federal lands.

Committee's mandate and appointment of members

d'un projet désigné au titre de l'alinéa 60(1)a) ou de l'article 62, respectivement, se fonde sur le rapport en cause et les éléments ci-après :

- a) la mesure dans laquelle le projet contribue à la durabilité;

Conditions — effets relevant d'un domaine de compétence fédérale

64 (1) Dans le cas où le ministre décide au titre de l'alinéa 60(1)a), ou le gouverneur en conseil décide au titre de l'article 62, que les effets identifiés dans le rapport qu'il prend en compte sont dans l'intérêt public, le ministre fixe toute condition qu'il estime indiquée que le promoteur du projet désigné est tenu de respecter relativement aux effets relevant d'un domaine de compétence fédérale qui sont négatifs.

Évaluations régionales — territoire domanial

92 Le ministre peut constituer un comité chargé de procéder à l'évaluation des effets d'activités concrètes existantes ou futures exercées dans une région d'un territoire domanial ou autoriser l'Agence à y procéder.

Mandat et nomination des membres — comité

96 (1) If the Minister establishes a committee under section 92 or 95, he or she must establish its terms of reference and appoint as a member of the committee one or more persons.

Committee's or Agency's obligation

97 (2) When conducting an assessment referred to in section 92, 93 or 95, the Agency or committee, as the case may be, must take into account any scientific information and Indigenous knowledge — including the knowledge of Indigenous women — provided with respect to the assessment.

Information available to public

98 Subject to section 119, the Agency, or the committee, must ensure that the information that it uses when conducting an assessment referred to in section 92, 93 or 95 is made available to the public.

Public participation

99 The Agency, or the committee, must ensure that the public is provided with an opportunity to participate meaningfully, in a manner that the Agency or committee, as the case may be, considers appropriate, in any assessment referred to in section 92, 93 or 95 that it conducts.

Report to Minister

102 (1) On completion of the assessment that it conducts, the committee established under section 92 or 95 or under an agreement or arrangement entered into under subparagraph 93(1)(a)(i) or paragraph 93(1)(b) or the Agency, as

96 (1) S'il constitue un comité au titre des articles 92 ou 95, le ministre nomme le ou les membres du comité et fixe le mandat de celui-ci.

Obligation de l'Agence ou du comité

97 (2) Dans le cadre de l'évaluation visée aux articles 92, 93 ou 95, l'Agence ou le comité, selon le cas, prend en compte l'information scientifique et les connaissances autochtones, notamment celles des femmes autochtones, fournies à l'égard de l'évaluation.

Accès aux renseignements

98 Sous réserve de l'article 119, l'Agence ou le comité, selon le cas, veille à ce que le public ait accès aux renseignements qu'il utilise dans le cadre de l'évaluation visée aux articles 92, 93 ou 95.

Participation du public

99 L'Agence ou le comité, selon le cas, veille à ce que le public ait la possibilité de participer de façon significative, selon les modalités que l'Agence ou le comité, selon le cas, estime indiquées, à l'évaluation visée aux articles 92, 93 ou 95 à laquelle il ou elle procède.

Rapport au ministre

102 (1) Au terme de l'évaluation que le comité ou l'Agence effectue, tout comité — constitué au titre des articles 92 ou 95 ou au titre d'un accord conclu en vertu du sous-alinéa 93(1)a(i) ou de l'alinéa 93(1)b) — ou

the case may be, must provide a report to the Minister.

Indigenous knowledge

102 (2) Subject to section 119, the report must set out how the Agency or committee, as the case may be, took into account and used any Indigenous knowledge provided with respect to the assessment.

Regulations — Governor in Council

109 The Governor in Council may make regulations

...

(b) for the purpose of the definition designated project in section 2, designating a physical activity or class of physical activities and specifying which physical activity or class of physical activities may be designated by the Minister under paragraph 112(1)(a.2);

Regulations — Minister

112 (1) The Minister may make regulations

...

(a.2) designating, for the purposes of section 112.1, a physical activity or class of physical activities from among those specified by the Governor in Council under paragraph 109(b), establishing the conditions that must be met for the purposes of the designation and setting out the information that a person or entity — federal authority, government

l'Agence, selon le cas, présente un rapport au ministre

Connaissances autochtones

102 (2) Le rapport indique, sous réserve de l'article 119, de quelle manière l'Agence ou le comité, selon le cas, a pris en compte et utilisé les connaissances autochtones fournies à l'égard de l'évaluation.

Règlement du gouverneur en conseil

109 Le gouverneur en conseil peut, par règlement :

[...]

b) pour l'application de la définition de projet désigné à l'article 2, désigner une activité concrète ou une catégorie d'activités concrètes et préciser quelle activité concrète ou catégorie d'activités concrètes peut être désignée par le ministre en vertu de l'alinéa 112(1)a.2);

Règlement du ministre

112 (1) Le ministre peut, par règlement :

[...]

a.2) désigner, pour l'application de l'article 112.1, une activité concrète ou une catégorie d'activités concrètes parmi celles précisées par le gouverneur en conseil en vertu de l'alinéa 109b), établir les conditions devant être remplies pour la désignation et prévoir quels renseignements la personne ou l'entité — autorité fédérale, gouvernement ou

or body — that is referred to in subsection (3) must provide the Agency in respect of the physical activity that they propose to carry out;

...

Condition

112 (2) The Minister may make a regulation designating a physical activity or class of physical activities under paragraph (1)(a.2) only after considering an assessment referred to in section 92 or 93 that is in relation to that physical activity or class of physical activities.

Physical activity excluded

112.1 A physical activity or class of physical activities that is designated by the Minister under paragraph 112(1)(a.2) is excluded from the physical activities or class of physical activities that is designated by the Governor in Council under paragraph 109(b) if it meets the conditions established by the Minister.

***Physical Activities Regulations,
SOR/2019-285***

Oil, Gas and Other Fossil Fuels

34 The drilling, testing and abandonment, in an area set out in one or more exploration licences issued in accordance with the *Canada Petroleum Resources Act*, the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act* or the *Canada–Nova Scotia Offshore Petroleum*

organisme — visée au paragraphe (3) doit fournir à l'Agence à l'égard de l'activité concrète dont elle propose la réalisation;

[...]

Condition

112 (2) Le ministre ne peut prendre un règlement pour désigner une activité concrète ou une catégorie d'activités concrètes en vertu de l'alinéa (1)a.2) qu'après avoir pris en compte une évaluation visée à l'article 92 ou 93 à l'égard de cette activité concrète ou cette catégorie d'activités concrètes.

Activité concrète exclue

112.1 L'activité concrète ou la catégorie d'activités concrètes désignée par le ministre en vertu de l'alinéa 112(1)a.2) est exclue aux activités concrètes ou aux catégories d'activités concrètes désignées par le gouverneur en conseil en vertu de l'alinéa 109b) si elle remplit les conditions établies par le ministre.

***Règlements sur les activités concrètes,
DORS/2019-285***

Pétrole, gaz et autres combustibles fossiles

34 Le forage, la mise à l'essai et la fermeture de puits d'exploration qui sont situés au large des côtes et qui font partie du premier programme de forage — au sens du paragraphe 1(1) du *Règlement sur le forage et la production de pétrole et de gaz au Canada*, DORS/2009-315, dans une zone visée par un ou plusieurs permis

Resources Accord Implementation Act, of offshore exploratory wells in the first drilling program, as defined in subsection 1(1) of the *Canada Oil and Gas Drilling and Production Regulations*, SOR/2009-315.

de prospection octroyés conformément à la *Loi fédérale sur les hydrocarbures*, à la *Loi de mise en œuvre de l'Accord atlantique Canada — Terre-Neuve-et-Labrador* ou à la *Loi de mise en œuvre de l'Accord Canada — Nouvelle-Écosse sur les hydrocarbures extracôtiers*.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-10-22

STYLE OF CAUSE: SIERRA CLUB CANADA
FOUNDATION, WORLD
WILDLIFE FUND CANADA and
ECOLOGY ACTION CENTRE v.
MINISTER OF ENVIRONMENT
AND CLIMATE CHANGE and
THE ATTORNEY GENERAL OF
CANADA AND LE CONSEIL
DES INNU DE EKUANITSHIT
and THE ATTORNEY GENERAL
OF ONTARIO and THE
ATTORNEY GENERAL OF
NEWFOUNDLAND AND
LABRADOR

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CONCURRED IN BY: BOIVIN J.A.
ROUSSEL J.A.

DATED: MAY 3, 2024

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